AWARDING OF ATTORNEYS' FEES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

AWARDING OF ATTORNEYS' FEES

OCTOBER 6, 8, AND DECEMBER 3, 1975

Serial No. 64

inted for the use of the Committee on the Judiciary

AWARDING OF ATTORNEYS' FEES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

AWARDING OF ATTORNEYS' FEES

OCTOBER 6, 8, AND DECEMBER 3, 1975

Serial No. 64

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

80-603 WASHINGTON : 1977

COMMITTEE ON THE JUDICIARY

PETER W. RODINO, JR., New Jersey, *Chairman*

JACK BROOKS, Texas
ROBERT W. KASTENMEIER, Wisconsin
DON EDWARDS, California
WILLIAM L. HUNGATE, Missouri
JOHN CONYERS, JR., Michigan
JOSHUA EILBERG, Pennsylvania
WALTER FLOWERS, Alabama
JAMES R. MANN, South Carolina
PAUL S. SARBANES, Maryland
JOHN F. SEIBERLING, Ohio
GEORGE E. DANIELSON, California
ROBERT F. DRINAN, Massachusetts
BARBARA JORDAN, Texas
RAY THORNTON, Arkansas
ELIZABETH HOLTZMAN, New York
EDWARD MEZVINSKY, Iowa
HERMAN BADILLO, New York
ROMANO L. MAZZOLI, Kentucky
EDWARD W. PATTISON, New York
CHRISTOPHER J. DODD, Connecticut
WILLIAM J. HUGHES, New Jersey
MARTIN A. RUSSO, Illinois

EDWARD HUTCHINSON, Michigan
ROBERT McCLORY, Illinois
TOM RAILSBACK, Illinois
CHARLES E. WIGGINS, California
HAMILTON FISH, JR., New York
M. CALDWELL BUTLER, Virginia
WILLIAM S. COHEN, Maine
CARLOS J. MOORHEAD, California
JOHN M. ASHBROOK, Ohio
HENRY J. HYDE, Illinois
THOMAS N. KINDNESS, Ohio

EARL C. DUDLEY, JR., *General Counsel*
GARNER J. CLINE, *Staff Director*
HERBERT FUCHS, *Counsel*
WILLIAM P. SHATTUCK, *Counsel*
ALAN A. PARKER, *Counsel*
JAMES F. FALCO, *Counsel*
MAURICE A. BARBOZA, *Counsel*
THOMAS W. HUTCHISON, *Counsel*
ARTHUR P. ENDRES, JR., *Counsel*
DANIEL L. COHEN, *Counsel*
FRANKLIN G. POLK, *Counsel*
THOMAS E. MOONEY, *Counsel*
ALEXANDER B. COOK, *Counsel*
CONSTANTINE J. GEKAS, *Counsel*
ALAN F. COFFEY, JR., *Counsel*
KENNETH N. KLEE, *Counsel*
RAYMOND V. SMIETANKA, *Counsel*

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

ROBERT W. KASTENMEIER, Wisconsin, *Chairman*

GEORGE E. DANIELSON, California
ROBERT F. DRINAN, Massachusetts
HERMAN BADILLO, New York
EDWARD W. PATTISON, New York

TOM RAILSBACK, Illinois
CHARLES E. WIGGINS, California

HERBERT FUCHS, *Counsel*
BRUCE A. LEHMAN, *Counsel*
GAIL P. HIGGINS, *Counsel*
TIMOTHY A. BOGGS, *Professional Staff Member*
THOMAS E. MOONEY, *Associate Counsel*

CONTENTS

	Page
Hearings held on—	
October 6, 1975	1
October 8, 1975	103
December 3, 1975	175
Witnesses—	
Andrews, Hon. Mark, a Representative in Congress from the State of North Dakota	103
Crane, Hon. Philip M., a Representative in Congress from the State of Illinois	54
Derfner, Armand, Lawyers' Committee for Civil Rights Under Law	81
Prepared statement	81
Derfner, Mary Frances, director, Attorneys' Fees Project, Lawyers' Committee for Civil Rights	81
Prepared statement	86
Ferren, John M., Community Services Department, Hogan & Hartson Washington, D.C	138
Prepared statement	134
Halpern, Charles R., Council for Public Interest Law	122
Prepared statement	117
Hobbs, Charles A., member, Special Committee on Public Interest Practice of the American Bar Association	66
Prepared statement	66
Lee, Rex E., Assistant Attorney General, Civil Division, Department of Justice	175
Marsh, Henry L., III, partner, Hill, Tucker & Marsh, Richmond, Va	152
Prepared statement	149
Mause, Philip J., counsel, Environmental Defense Fund	225
Prepared statement	202
North, William D., general counsel, National Association of Realtors	191
Onek, Joseph H., Center for Law & Social Policy	164
Prepared statement	160
Robertson, Reuben B., III, Public Citizen Litigation Group	164
Prepared statement	162
Schuck, Peter H., Consumers Union of the United States, Inc	164
Prepared statement	157
Seiberling, Hon. John F., a Representative in Congress from the State of Ohio	8
Prepared statement	2
Terris, Bruce J., attorney, Washington, D.C	138
Prepared statement	136
Additional material—	
Alyeska Pipeline Service Co. v. *Wilderness Society et al.*, Supreme Court, No. 73-1977, decided May 12, 1975	10
Bair, Brown, and Kautzmann (attorneys at law), letter dated April 4, 1975, to Mr. and Mrs. Albert E. Klain, Turtle Lake, North Dakota	104
Buggs, John A., Staff Director, U.S. Commission on Civil Rights, letter to Hon. Robert W. Kastenmeier	182
Drinan, Hon. Robert F., a Representative in Congress from the State of Massachusetts, prepared statement	52
Kastenmeier, Hon. Robert W., letter to Rex E. Lee, Assistant Attorney General, Civil Division, Department of Justice	190
Letter from Hon. John F. Seiberling to James D. Fellers, president, American Bar Association, with responses	33
"Must Pay Court Costs: Land Worth $59,280 But Grabingers Net $45,000," from McLean County (North Dakota) Independent, February 1975	106

APPENDIXES

	Page
Appendix 1.—Related bills—	
H.R. 7826 (identical to H.R. 8221)	233
H.R. 7827 (identical to H.R. 8219)	235
H.R. 7828 (identical to H.R. 8220)	236
H.R. 7968 (identical to H.R. 8743)	237
H.R. 7969 (identical to H.R. 8742)	239
H.R. 8368	241
H.R. 9093 (identical to H.R. 4675, H.R. 8378, H.R. 8821)	243
H.R. 9552	244
Appendix 2.—Additional or supplemental statements—	
Crane, Hon. Philip M., supplemental letter and information on H.R. 4675 (H.R. 9093)	245
Supplemental statement of Bruce Terris	254
Symms, Hon. Steven D., statement in support of H.R. 8378 (identical to H.R. 9093)	245
Appendix 3.—Correspondence on the awarding of attorneys' fees in public interest and civil rights cases*—	
Aldrich, William, November 22, 1975	272
AuCoin, Paul, May 21, 1976	268
Baron, Martin, November 5, 1975	278
Brown, Ronald H., director, National Urban League, October 10, 1975	278
Buggs, John, Staff Director, U.S. Commission on Civil Rights, August 4, 1975	258
Clawson, Thomas E., November 13, 1975	268
Day, Robert S., president, Washington State Bar Association, December 4, 1975	279
Foley, Hon. William E., Deputy Director, Administrative Office of U.S. Courts, April 14, 1976	267
Hanley, Robert F., chairman, ABA Section on Litigation, December 3, 1975	280
Huber, Stephen K., the University of Texas at Austin, School of Law, October 10, 1975	295
Huie, W. Stell, president, State Bar of Georgia, December 22, 1975	295
Hollander, Alan Roy, August 22, 1975	295
Jackson, Ronald Edward, Esq., October 14, 1975	296
Joralemon, Patricia, November 15, 1975	272
Krefetz, Elliott, November 20, 1975	278
La Follette, Hon. Douglas, Secretary of State for Wisconsin, November 25, 1975	278
Laycock, H. Douglas, October 11, 1975	276
Mitchell, Clarence M., Leadership Conference on Civil Rights, December 9, 1975	257
Peck, Henry, November 23, 1975	273
Pifer, Alan, president, Carnegie Corporation of New York, December 11, 1975	296
Pillips, John R., October 14, 1975	273
Rezneck, Daniel R., president, D.C. Bar, February 26, 1976	269
Roisman, Florence Wagman, November 3, 1975	258
Sanberg, Harlan, November 10, 1975	273
Schuster, Joseph, M.D., November 24, 1975	273
Appendix 4.—Correspondence on the awarding of attorneys' fees against the Federal Government and in Federal agency proceedings—	
Clemence, R. U., July 14, 1976	327
Davidson, Louis G., chairman, ABA Special Committee on Federal Limitations on Attorneys' Fees, March 18, 1976	297
Fall, J. H., III, Winnetka, Ill., August 24, 1976	328
Fall, Alice F., Winnetka, Ill., August 24, 1976	328
Giery, William G., April 12, 1976	326
Holmes, Frank A., July 20, 1976	327
Lenny, David M., and Joan Claybrook, Public Citizen, April 2, 1976	328

* This selection supplements the correspondence which Mr. Seiberling submitted with his testimony on October 6, 1975.

Page

McBride, Thomas F., Civil Aeronautics Board, March 15, 1976 342
Niles, Marsha P., January 13, 1976 343
Sledd, Herbert D., ABA Special Committee on Federal Limitations on Attorneys' Fees, March 2, 1976 297
Wakley, James T., July 20, 1976 328
Wright, Stuart B., March 9, 1976 343
Appendix 5.—Correspondence on the awarding of attorneys' fees against the Federal Government in Condemnation cases: H.R. 8368—
Axt, Lavern, October 4, 1975 348
Bougush, Monroe, October 4, 1975 348
Ebil, Roger, October 13, 1975 346
Gessele, Edwin R., October 5, 1975 348
Giardino, Cummings M., March 18, 1976 349
Goven, Donald, October 8, 1975 344
Johnson, L. Roger, October 14, 1975 346
Johnson, Vernon M., November 3, 1975 347
Jungroth, James R., October 8, 1975 344
Klain, Albert, October 6, 1975 348
Schlichenmayer, Charles, October 14, 1975 345
Serkland, C. J., October 8, 1975 344
Strobee, Elmer, October 9, 1975 347
Strobel, Melvin, October 9, 1975 344
Vogel, Joseph A., Jr., October 7, 1975 345
Appendix 6.—Federal Statutes Relevant to the Awarding of Attorneys' Fees 349
Appendix 7.—Articles on attorneys' fees, and related subjects—
American Bar Association, Special Committee on Public Interest Practice, *Public Interest Law: Five Years Later, March 1976* 357
Cedar, Philip M., "Defrosting the Alyeska Chill: the Future of Attorneys' Fees Awards in Environmental Litigation," 5 *Environmental Affairs*, pp. 297–332 (Spring 1976) 395
Leed, Roger M., "Development of the Fee-Shifting Doctrine: Aftermath of the *Alyeska* Decision," *Barrister*, pp. 35–37 (Winter 1976) 416
Mannino, Edward F., "Reviewing the 'Private Attorney General' in Public Interest Cases," American Bar Association Consortium on Legal Services and the Public, 2 *Alternatives: Legal Services and the Public*, pp. 3–5 (No. 3, June 1975) 418
Note: "A Giant Step Backwards: *Alyeska Pipeline Service Co.* v. *Wilderness Society* and Its Effect on Public Interest Litigation," 35 *Maryland Law Review*, pp. 675–703 (No. 4, 1976) 378
Richey, Hon. Charles R., "Attorneys' Fees: a Two-Pronged Problem," *Trial Magazine*, pp. 59, 62, 66 (November–December 1975) 422

AWARDING OF ATTORNEYS' FEES

MONDAY, OCTOBER 6, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m. in room 2226 Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Pattison, and Wiggins.

Also present: Gail P. Higgins, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order.

Today, the Subcommittee on Courts, Civil Liberties, and the Administration of Justice will begin a series of hearings on the subject of award of attorneys' fees. Although there are eight separate bills pending in the subcommittee on that issue, the approaches and purposes of the bills vary widely. Today and Wednesday we will hear testimony from directors and sponsors of these bills, as well as from lawyers who are involved in the areas of the law most affected by the bills.

We expect to receive written comment from Government agencies, legal scholars, and interested parties regarding these various bills and anticipate further hearings. Historically, the American court system has refused to award attorneys' fees as a general rule. Exceptions to the general rule are narrow. They include the liability of the party who has acted in bad faith, fee shifting by spreading the cost of litigation to a larger group under a common fund or common benefit theory, and applying specific statutes which allow the awarding of fees.

The Supreme Court recently ruled in the *Alyeska* case on May 12, 1975, that in cases brought under the private attorney general theory, which was often used by public interest groups, attorneys' fees could not be awarded unless a specific statute authorizes it.

Today and Wednesday, we will attempt to focus on whether the need for such legislation exists and how Congress can make access to the courts more meaningful.

I am very pleased to have as our first witness this morning our colleague on the Judiciary Committee who has taken leadership in this field, as well as many others, for which we are very grateful, Congressman John Seiberling.

[The prepared statement of Hon. John Seiberling follows:]

STATEMENT OF HON. JOHN F. SEIBERLING

Mr. Chairman, since these hearings concern circumstances under which it would be appropriate to make one side in a lawsuit pay for the legal expenses of the other side, some people may conclude that the hearings are intended to promote the special interests of lawyers. I believe that the hearings will demonstrate that the awarding of attorneys' fees in appropriate cases represents a significant and fair method for providing effective legal services to large segments of the public. Fee-shifting may be the only way to enable interested citizens to mount an effective challenge against illegal government action or inaction. It may be the only way to permit citizens to obtain judicial enforcement of federal law and of their own rights.

On May 12, 1975, the Supreme Court issued its decision in *Alyeska Pipeline Service Co. v. Wilderness Society*. The Supreme Court ruled that federal courts have no general equitable power to award attorneys' fees unless there was (1) a specific statutory authorization, (2) a "common fund" or "common benefit" situation, or (3) bad faith or vexatious conduct by one of the parties to the lawsuit. *Alyeska* reflects the so-called American Rule against fee-shifting, the Court indicated.

Unfortunately, *Alyeska* contains no discussion or analysis of the merits of the American Rule. Nor is there any discussion of the merits of creating a new exception which would permit the awarding of attorneys' fees to "private attorneys general." Although many of the lower federal courts had concluded that such an exception was justified and that they had the equitable power to order attorneys' fees awards to private attorneys general, the Supreme Court appears to have rejected the notion that the federal courts have any real equitable power to redistribute the costs of litigation under appropriate circumstances in the absence of specific statutory language.

Private attorneys general are citizens and organizations which seek judicial enforcement of federal laws, not so much for themselves individually as for the benefit of the public. This growing body of public interest law is primarily concerned, at this time, with civil rights, environmental protection, consumer protection, and anti-poverty law. Some of the statutes in these particular areas of the law contain provisions for the awarding of attorneys' fees. But *Alyeska* apparently forbids any fee-shifting under some of the most important statutes in these areas which have no such provisions. The National Environmental Policy Act of 1969 is vital for the redress of grievances because it establishes the government's obligations and the public's rights in the environmental area. Although there is a great deal of litigation under NEPA, there is no provision for attorneys' fees awards. A citizen bringing a NEPA suit is not interested in recovering monetary damages, but instead is interested in having the government obey the requirement that it submit environmental impact statements. Another body of law without specific provision for attorneys' fee awards is the earlier civil rights statutes. 42 U.S.C. 1983 is of incalculable importance to people trying to vindicate their civil and constitutional rights.

Mr. Chairman, *Alyeska* jeopardizes the major segment of public interest law which involves statutes without attorneys' fees provisions. Public interest law must be financed by some reasonable means. The foundations, which have funded public interest law to a great degree through "seed money", will not be able to continue indefinitely. The private bar contributes a certain amount of *pro bono publico work*, but that work usually focuses on areas of the law other than those of particular interest to the private attorneys general.

The future effectiveness of many statutes will depend on whether successful plaintiffs can recover attorneys' fees under them. With such an entitlement, potential plaintiffs will be encouraged to bring meritorious cases. Without such an authorization, many potential plaintiffs will be deterred from bringing deserving cases, especially when the primary relief would be equitable, rather than monetary.

There are very few provisions in our Constitution and federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. Mr. Chairman, when a private lawsuit vindicates important public policy and the public receives a substantial benefit, the private litigator should normally be awarded attorneys' fees.

Public interest law involves substantial legal issues which no individual could raise as a practical matter. No individual is likely to undertake extraordinarily expensive litigation if he has only a limited financial stake in the outcome. The opportunity to recover attorneys' fees in successful cases is the appropriate financial incentive. I believe that these public interest cases are useful when they succeed in enforcing the laws, and I believe that we should not let public interest law fade away because we are unwilling to shift the burden of paying attorneys' fees in appropriate cases. As a nation of laws and as a government of laws, we should welcome citizen suits which succeed in enforcing the laws.

Litigation can be extremely costly, and the Congress should not discourage meritorious litigation. In order to have DDT banned as an unsafe pesticide, it took the Environmental Defense Fund and several other organizations over four years of litigation, including five appearances in the Court of Appeals, to get the government to fulfill its statutory obligations. Since the statute (the Federal Insecticide, Fungicide, and Rodenticide Act) contained no attorneys' fees provision, the environmentalist groups—who won every time in the Court of Appeals—received no compensation, despite having performed a valuable public service. These groups will not be able to maintain FIFRA suits in the future, however, because the expense is too great.

I believe that the federal courts should have the authority to award attorneys' fees in any civil case in the interests of justice. Such authority is essential if the courts are to have the power to fashion full and fair relief in all cases.

I also believe that a specific exception to the American Rule should be created to permit the courts to award attorneys' fees to private attorneys general. It may be very difficult to draft a definition of a private attorney general or of public interest law. In deciding whether a party qualifies as a private attorney general, I believe that the courts should examine whether the party's participation in the action has substantially benefited the public, whether the relief granted is primarily equitable in nature, whether the party's economic interest in the outcome is small compared to the cost of effective participation, whether the party has sufficient financial resources to compensate his attorney reasonably, whether denial of the award would likely deter the bringing of meritorious actions of a similar nature in the future, and whether the United States could have obtained substantially similar relief.

In June, I introduced the Federal Courts Attorneys Fees Act (H.R. 7826 and H.R. 8221) to authorize the awards of attorneys' fees in civil actions in the interests of justice. That Act would also make the United States liable for attorneys' fees. I also introduced legislation to authorize or require the awarding of attorneys' fees under the Mineral Leasing Act of 1920 (upon which the Court of Appeals based its decision in *Alyeska*), the National Environmental Policy Act of 1969, the injunction section of the Clayton Act, and certain civil rights statutes, most notably 42 U.S.C. 1983. My bill to amend the Clayton Act has been incorporated into the Antitrust Parens Patriae Act (H.R. 8532), which the Judiciary Committee has reported to the House. I would like to quote several sentences from the report on that bill:

"The antitrust laws clearly reflect the national policy of encouraging private parties . . . to help enforce the antitrust laws. . . . Litigation by 'private attorneys general' for monetary relief and for injunctive relief has frequently proved to be an effective enforcement tool. . . . *Alyeska* creates a significant deterrent to potential plaintiffs bringing and maintaining lawsuits to enjoin antitrust violations. Without the opportunity to recover attorneys' fees in the event of winning their cases, many persons and corporations would be unable to afford or unwilling to bring antitrust injunction cases.

"Indeed, the need for awarding of attorneys' fees in § 16 injunction cases is greater than the need in § 4 treble damage cases. In damage cases, a prevailing plaintiff recovers compensation, at least. In injunction cases, however, without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect. A prevailing plaintiff should not have to bear such an expense."

Mr. Chairman, I have solicited the views of the American Bar Association, the state bar associations, and a number of the most prominent practitioners and law school deans and professors, as well as those views of other interested persons. I would request that these responses be made a part of the hearing record. I am especially grateful to Mary Frances Derfner for her assistance and

for the thoroughness of her response. I am also grateful to the staff of the Council For Public Interest Law for its concern and cooperation.

I will be happy to answer any questions you might have, Mr. Chairman. I would first like to quote what Judge Wright, speaking for the Court of Appeals, concluded in *Alyeska*:

"Acting as private attorneys general, not only have [respondents] ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests. An award of fees would not have unjustly discouraged [petitioner] Alyeska from defending its case in court. And denying fees might well have deterred [respondents] from undertaking the heavy burden of this litigation."

[From the Congressional Record, June 12, 1975]

LEGISLATION TO RESTORE THE EQUITY POWER OF FEDERAL COURTS TO AWARD ATTORNEYS' FEES TO PREVAILING PARTIES

(Mr. Seiberling asked and was given permission to extend his remarks at this point in the Record and to include extraneous matter.)

Mr. SEIBERLING. Mr. Speaker, on May 12, the Supreme Court dealt a severe blow to the equity power of Federal courts by holding in Alyeska Pipeline Service Co. against Wilderness Society that, with only a few very narrow exceptions, the courts have no power to award attorneys' fees to prevailing parties in the absence of specific legislative authority.

Yesterday, I introduced the Federal Courts Attorneys Fees Act of 1975 (H.R. 7826) to overturn Alyeska and to restore to the Federal courts the discretion which I believe is necessary to insure that they can appropriately fashion equitable relief. Unless such legislation is enacted, the Supreme Court will have effectively barred access to the courts to deserving plaintiffs who would not bring suit unless they believed they had a chance to recover attorneys' fees. And private groups and citizens would be unable to file meritorious cases intended to benefit the public by enforcing Federal law.

The "American" rule on shifting attorneys' fees has been that such fees are generally not awarded to prevailing parties. In addition to cases under laws authorizing attorney's fees, the courts have historically awarded fees in compelling cases despite the absence of authorizing legislation. These awards have been viewed as appropriate under the general equity power of the courts. Alyeska makes the American rule too inflexible and unreasonable.

To promote justice, the courts need the flexibility to shift attorneys' fees in appropriate cases. The award of attorneys' fees may make the difference between a just and fair outcome and one which is inequitable. The courts themselves should determine whether the interests of justice would be served in a particular case by the award of attorneys' fees.

England has a statute permitting courts to award attorneys' fees to prevailing parties. The result there is that such awards have become the rule, and fees are denied only where the result would be unjust. In the wake of Alyeska, Congress should thoroughly review the question of whether fee-shifting should be the rule or the exception.

What is most distressing about Alyeska is that it will discourage and effectively preclude the filing of meritorious public interest cases seeking the enforcement of Federal law. These "private attorney general" cases are an integral part of the overall national system to enforce the laws and civil and Constitutional rights. These public interest cases have frequently vindicated important public rights, not simply private causes of actions. Normally, the cases are brought seeking injunctive or other equitable relief, rather than monetary damages. These cases may be the only effective way to enjoin continuing violations of the civil rights and environmental laws. It is precisely these cases which will be doomed if Alyeska is permitted to stand.

No matter how meritorious, these private attorney general cases will not be filed unless the plaintiffs' lawyers have a reasonable expectation of being paid. Thousands of hours of work was required by the attorneys representing the Wilderness Society and the other plaintiffs in Alyeska. But if the only relief the prevailing party can receive in such a case is an injunction, there will be no one to pay for the cases, and they will vanish from the already-short list of ways the

public has available to effectively enforce Federal law and Federal policy. Legislation such as H.R. 7826 is the only way to fully restore the public's right to seek enforcement in the courts. Because our laws are not self-executing, we need to give the public the right of access to the courts to demand enforcement.

In this regard, there are several acts which are frequently used to protect civil and constitutional rights and environmental interests, but which contain no provision for attorneys' fees. Therefore, I have also introduced bills to appropriately amend the Mineral Leasing Act of 1920 (H.R. 7825), the injunction section of the Clayton Act (H.R. 7827), various civil rights laws (H.R. 7828), and the National Environmental Policy Act of 1969 (H.R. 7829). I am sure that many other acts should be amended, and these four bills represent only a partial solution to the problem the Supreme Court has created.

While we can approach the problem piecemeal, however, I think that we must restore the courts' equity power generally to award fees when appropriate in the interests of justice. We cannot legislatively conceive of all the circumstances in which awards would be fair and just. The Supreme Court has said that the courts have no discretion in this regard unless Congress grants such discretion. I believe we should grant that discretion across the board. As a general rule, I think that the courts ought to have discretion to decide the extent to which attorneys' fees are appropriate in a specific case, except where Congress adopts a special policy, as in the damage section of the Clayton Act, which specifies that a reasonable attorney's fee shall be awarded to a prevailing plaintiff.

The general legislation I am introducing today (H.R. 7826) also provides that a reasonable attorney's fee may be awarded against the United States, the same as if it were a private party. As a matter of simple equity, if a party prevails against the United States, it should be entitled to recover attorney's fees where the courts determine such award is in the interests of justice. This is especially true in cases where the private attorney general successfully sues to make the United States enforce the law. An example of this would be a citizens suit under NEPA to make Federal agencies file environmental impact statements as required by NEPA.

A brief review of the facts of Alyeska might be useful. The case was brought by environmentalist groups suing under the Mineral Leasing Act of 1920 and under NEPA, seeking declaratory and injunctive relief against the Secretary of the Interior on the grounds that proposed right-of-way and land use permits relating to the Alaska pipeline did not comply with the provisions of either act. After a hearing, the district court granted a preliminary injunction against issuance of the rights-of-way and permits. Alaska and Alyeska—the consortium of oil companies seeking the permits and rights-of-way—intervened. Thereafter, the Interior Department released an impact statement, whereupon the district court dissolved the preliminary injunction and dismissed the complaint. However, the court of appeals reversed the district court, on the grounds that the pipeline right-of-way violated the Mineral Leasing Act. Congress then passed the Alaska pipeline bill, amending the Mineral Leasing Act, thereby ending the litigation. The court of appeals then ordered the awarding of attorneys' fees to the plaintiffs in the suit against Alyeska.

Judge Wright, speaking for the court of appeals, concluded that:

"Acting as private attorneys general, not only have [respondents] ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests. An award of fees would not have unjustly discouraged [petitioner] Alyeska from defending its case in court. And denying fees might well have deterred [respondents] from undertaking the heavy burden of this litigation."

The court of appeals refused to award attorneys' fees against the United States because of its interpretation of the statute (28 U.S.C. sec. 2412) providing for the assessment of costs against the Government.

The Supreme Court went on to reverse the award of fees against Alyeska. Nowhere in the opinion is there a policy reason why the "American rule" is justifiable or proper or why the courts should not have discretion to award attorneys' fees. The Court simply declined to review the merits of the rule.

Mr. Speaker, I would hope that the appropriate committees, especially the Judiciary Committee, will take action promptly on these bills I am introducing. Until we act, public interest lawsuits in many areas cannot be brought.

Following these remarks is a relevant article by Ronald Goldfarb in yesterday's Washington Post:

"IN THE PUBLIC INTEREST

"(By Ronald Goldfarb)

"In the 1960s, a laudable, growing interest developed in public interest law. Law school curricula reflected an increasing preference in the problems of debtors, tenants, disadvantaged groups, civil rights. (Neophyte lawyers sought jobs in government and foundation-sponsored public interest organizations dealing with equal employment opportunities, environmental issues, consumer's rights. Big, rich law firms expanded and boasted about their "pro bono" programs. The OEO-spawned Neighborhood Legal Services network around the country generated a world of activisit, idealistic, mostly young lawyers who aggressively pursued cases for migrants, old people, Indians, prisoners and other poor and powerless people, those who previously had looked upon the law as something that worked against them.

"Conservative politicians such as Spiro Agnew and Ronald Reagan screamed about how these quixotic, trouble-making upstarts were causing orderly society big problems; an exaggerated image of a public interest law renaissance evolved.

"The renaissance turned out to be a short-lived spurt. A decade later, OEO had been scuttled by a hostile Nixon administration. A new legal services corporation had squeaked through Congress, hobbled by handcuffing qualifications and a board of directors that advocates feared would severely jeopardize its mission. The economic plunge of the last few years caused foundation money that had been available to varied public interest law groups to dry up; many of these organizations had to cut back severely, others disbanded. The IRS is reconsidering the tax exempt status of the remaining litigation-oriented public interest law groups.

"And then the Supreme Court battered the movement with a one-two punch. First, there was an opinion last May, which limited the accessibility of the class action procedure that had proved so crucial to complaining consumers, environmentalists, taxpayers and other groups who alone could not have taken on the vested interests. Then came the Supreme Court's recent decision eliminating the discretionary granting of legal fees after the successful conclusion of a lawsuit resulting in broad social dividends. This decision added a critical blow to the faltering movement.

"The most recent setback—and it is a serious one—is the Supreme Court's 5-2 decision (Justices Douglas and Powell took no part in the case) denying attorney's fees that a lower court had awarded to lawyers who had put in nearly 4,500 hours work for The Wilderness Society, Environmental Defense Fund and Friends of the Earth fighting the government's issuance of pipeline permits in Alaska. In doing so, the court reversed a practice, followed by several Courts of Appeals, of granting attorneys' fees to successful plaintiffs in cases where a broad public interest was served. Numerous courts had made such grants to lawyers on the rationale that they had acted as a "private attorney general," and because the litigation had resulted in a general benefit to the community through recognition of the rights of a substantial group.

"The public policy considerations behind such a rule were clear. Disenfranchised individuals and unrepresented public interests would be discouraged and unserved and important rights would never be vindicated if parties without means had no way to reinburse their counsel. The private attorney general theory ensured the proper functioning of government by encouraging lawyers to bring to court cases with social implications, even though the parties had disparate means.

"The general rule in the United States in that the prevailing party in a civil case may not recover attorney's fees unless the particular statute involved in the case specifically authorizes it, as in anti-trust and EEOC trials. That general rule (only this country and Belgium have this rule) is unfair enough in ordinary cases, and it has been criticized by academicians and others. But, in the extraordinary cases where courts had made exceptions to the rule because of the broad public and social benefits emanating from the lawsuit, the restrictive rule enunciated by the Supreme Court last week is a catastrophe.

"Justice Marshall's dissent noted that federal courts traditionally have exercised their equitable right to grant attorney's fees 'when the interests of justice so require.' But, Justice White (and his colleagues Burger, Blackman, Rehn-

quist and Stewart) adopted a narrow view, that the situations in which courts may make awards of attorney's fees to lawyers in cases involving issues of public interest 'are matter for Congress to determine.'

"Congress has taken the cue. Under the leadership of Sen. John Tunney (D-Calif.), the Senate subcommittee on constitutional rights has conducted hearings on fee-shifting techniques and the needs of public interest lawyers for ways to assure the representation of unrepresented interests. Responding to the Supreme Court's recent fee award case, Sen. Tunney has indicated that he will hold further hearings in the hope of evolving a bill which at least would authorize courts to award attorneys' fees to prevailing plaintiffs in public interest cases. Tunney would go further and award attorneys' fees to the prevailing party in all cases; but he feel that such a 'major, systemic change would be difficult to get through Congress. The first steps is in public interest cases,' he said to me this week. On Friday, Tunney announced that he would submit an amendment to the new voting rights act which would allow courts to award attorneys' fees to plaintiffs in all civil rights cases.

"That Congress will act where the Supreme Court feared to tread remains the hope now of lawyers and clients fighting battles around issues concerning broad social policy. It is more in the American tradition that lawyers' fees in these cases be earned from the offending parties than that the public interest bar be made to depend on the charity of government or foundations, or the part-time extra-curricular, and very compromised indulgences of the big, commercial firms. It is in all our interests that this small but influential bar not be put out of business."

[From the Congressional Record, June 25, 1975]

LEGISLATION TO PROTECT PUBLIC INTEREST LITIGATION BY AUTHORIZING FEDERAL COURTS TO AWARD ATTORNEYS' FEES TO PREVAILING PARTIES

(Mr. Seiberling asked and was given permission to extend his remarks at this point in the Record and to include extraneous matter.)

Mr. SEIBERLING. Mr. Speaker, 20 Members of Congress are joining me today in sponsoring legislation which would overrule a recent Supreme Court decision that seriously restricts and jeopardizes public interest litigation, especially in the areas of civil rights and environmental protection.

This bill, the Federal Courts Attorneys' Fees Act (H.R. 7826), would give the Federal courts the discretion to require that the losing side of a lawsuit pay for the legal expenses of the winning side. In May, the Supreme Court ruled in Alyeska Pipeline Service Co. against Wilderness Society that the courts have no discretion to award such expenses, which are called attorneys' fees, in the absence of specific legislative authority.

Unless Congress enacts this legislation, most meritorious public interest lawsuits are not going to be filed in the courts because public interest litigators cannot survive financially if they cannot recover legal expenses when they win. Typically, these cases attempt to enforce constitutional rights and Federal laws for the benefit of the entire public by means of enjoining continuing violations of the Constitution or laws. Without the possibility of reimbursement if their suit is successful, few individuals or organizations will spend tens of hundreds of thousands of dollars to halt illegal pollution, civil rights violations, or illegal governmental actions. As a practical matter, awarding attorneys' fees to winning litigants is the only way most of these cases will be brought.

Some specific laws permit the awards of attorneys' fees in cases under those laws, but such fees are not specifically authorized by the major statutes providing for civil remedies under the civil rights laws and the environmental protection laws.

Under the Federal Court Attorneys' Fees Act, when the Federal Government loses a civil case, it would be liable for the payment of the winning side's legal expenses whenever the Federal courts felt that such payment would be in the interests of justice. A party successfully suing the United States to make it obey the law should recover attorneys' fees. A series of cases, however, has ruled that the U.S. Government is not liable for the payment of attorneys' fees under current law. The bill would overrule these cases, too.

Mr. Speaker, the text of the Federal Court Attorneys' Fees Act follows:

"By Mr. Seiberling (for himself, Mr. Brown of California, Ms. Burke of California, Ms. Collins of Illinois, Mr. Edgar, Mr. Fraser, Mr. Harrington, Mr. Koch, Mr. Metcalfe, Mr. Moorhead of Pennsylvania, Mr. Mosher, Mr. Moss, Mr. Ottinger, Mr. Rosenthal, Mr. Roybal, Mr. Stark, Mr. Udall, Mr. Waxman, Mr. Won Pat, Mr. Wirth, and Mr. Young of Georgia):

"H.R. 8221

"A bill to amend title 28 of the United States Code to authorize the awarding of attorneys' fees in civil actions before the Federal courts where the interests of justice so require, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the 'Federal Court Attorneys' Fees Act of 1975.'

"SEC. 2. Chapter 128 (respecting fees and costs) of title 28 of the United States Code is amended by adding at the end the following new section:

"'§ 1930. ATTORNEYS' FEES IN CERTAIN CIVIL ACTIONS

"'If in a civil action the court determines the interests of justice so require, the court shall award reasonable attorneys' fees to the prevailing party. The United States shall be liable for such fees the same as a private party'.

"SEC. 2. The table of sections for chapter 123 of title 29 of the United States Code is amended by adding at the end the following new item:

"'1930. Attorneys' fees in certain civil cases'."

TESTIMONY OF THE HONORABLE JOHN F. SEIBERLING, A REPRESENTATIVE IN CONGRESS FROM THE 14TH DISTRICT OF THE STATE OF OHIO

Mr. SEIBERLING. Thank you, Mr. Chairman.

As a once-upon-a-time member of this subcommittee, I am delighted to appear before you as a witness. I would like to ask permission to put my full statement in the record and summarize it briefly, since by a strange coincidence I have to appear before another subcommittee this morning on another bill that I am also authoring.

Mr. KASTENMEIER. Without objection, your statement will be accepted as a part of the record in full. Although your statement is but two pages, you may proceed as you wish.

Mr. SEIBERLING. I thought I would just summarize it and allow a little time if anyone has questions they would like to ask me.

Mr. Chairman, since these hearings do concern circumstances under which it would be appropriate to make one side in a lawsuit pay for the legal expenses of the other side, some people may conclude that the hearings are intended to promote the special interests of lawyers. Perhaps that is so to the extent it promotes the interests of successful lawyers who make the right judgments or who handle a case properly so that they win.

But it certainly is not calculated to promote the interests of lawyers who make the wrong judgment or who make an ineffective presentation or who are on the wrong side of a lawsuit because H.R. 7826 and 8821, the bill I am particularly interested in, would only cover the award of torneys' fees where the judge deems the interest of justice requires and it could be awarded only to the lawyer for the winning side.

As you have already pointed out, Mr. Chairman, earlier this year the Supreme Court ruled in the *Alyeska* case that with only a few exceptions the Federal courts have no inherent power to award at-

torneys' fees in absence of specific statutory authority. With no discussion of the merits of the so-called American rule, the Supreme Court refused to create an exception permitting the awarding of attorneys' fees to so-called private attorneys general. These are citizens and organizations who bring lawsuits to obtain judicial enforcement of Federal laws and of the public interest.

This body of public interest law is primarily concerned at this time with civil rights and environmental protection, consumer protection, and antipoverty law. Some of the statutes in these particular areas of the law contain attorneys' fee provisions, but many of the very important statutes are silent on the subject, and *Alyeska* apparently prohibits fee-shifting in cases brought under those statutes.

For example, the National Environmental Policy Act of 1969 usually called NEPA, and the earlier Civil Rights Acts, especially 42 U.S.C. 1983, which is very much used these days, are vital for the redress of grievances, but they have no provisions authorizing the awards of attorneys' fees. The future effectiveness of these statutes, to name just a few, will depend largely on whether successful plaintiffs will be entitled to recover attorney's fees under specific statutory authorization.

With such an authorization, potential plaintiffs will be encouraged to bring meritorious cases. Without such an authorization, many potential plaintiffs with good cases will be discouraged, especially where there are grounds for equitable relief, rather than monetary damages.

Mr. Chairman, most of the provisions in the Constitution and most of our other Federal laws are not self-executing. Enforcement depends on governmental action and in some cases on private action through the courts. When an important public policy is vindicated through private enforcement and the public receives a substantial benefit, the awarding of attorneys' fees is appropriate because a private citizen has performed a public service. Public interest law involves significant legal issues which no individual will be likely to raise or able to raise as a practical matter. The opportunity to recover attorneys' fees in the event of success in a public interest case is the only financial incentive which makes these lawsuits possible, because few individuals are going to pay huge legal expenses to enforce a law in which they have only a limited financial stake.

I believe the Federal courts should have the authority to award attorneys' fees in any civil case in the interest of justice. This authority is needed if the courts are to be able to fashion appropriate relief in all cases. I also believe that a specific statutory rule should be created to permit attorneys' fees awards to private attorneys general. In deciding whether a party qualifies as a private attorney general, I believe the courts should examine whether the party's participation in the action has substantially benefited the public, whether the relief granted is primarily equitable, whether the party's economic interest in the outcome is small compared to the cost of effective participation, whether the party has sufficient financial resources to compensate his attorney adequately, whether the denial of award would likely deter the bringing of meritorious action of a similar nature in the future, and whether the United States could have obtained substantially similar relief if it had been the plaintiff or the prevailing party. Some of these factors were first suggested by the Council for Public Interest Law.

In June I introduced legislation to authorize the award of attorneys' fees in civil actions in the interests of justice and to make the United States liable for such fees where the Government is the losing party. I also introduced legislation to authorize or require the awarding of attorneys' fees under the Mineral Leasing Act of 1920—amendments to which are now being marked up by the Interior Committee—the National Environmental Policy Act, the injunction section of the Clayton Act, and certain civil rights statutes, particularly 42 U.S.C. 1983. My bill to amend the Clayton Act has been incorporated into H.R. 8532, the Antitrust Parens Patriae Act, which the Judiciary Committee has already reported to the House.

I have solicited the views of the American Bar Association, the legal profession generally, and other interested persons, and I would request that the responses be included in the hearing record at an appropriate place.

If you have any questions, Mr. Chairman or gentlemen, I will be happy to try to answer. I would also request that the text of *Alyeska* be included, along with the remarks of Mr. Justice Marshall at the recent American Bar Association Convention.

Mr. KASTENMEIER. Thank you, Congressman Seiberling.

The committee will accept the correspondence referred to, and we will reproduce it for the record. In some cases, the letters may be from people who themselves will be testifying before the subcommittee.

[The material referred to follows:]

OFFICIAL REPORTS OF THE SUPREME COURT—ORDERS OF APRIL 15 THROUGH MAY 12, 1975, ORDERS OF APRIL 7 THROUGH MAY 12, 1975

ALYSEKA PIPELINE SERVICE CO. *v.* WILDERNESS SOCIETY ET AL.

Certiorari to the United States Court of Appeals for the District of Columbia Circuit

No. 73-1977. Argued January 22, 1975—Decided May 12, 1975

Under the "American rule" that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization, respondents, which had instituted litigaiton to prevent issuance of Government permits required for construction of the trans-Alaska oil pipeline, cannot recover attorneys' fees from petitioner based on the "private attorney general" approach erroneously approved by the Court of Appeals, since only Congress, not the courts, can authorize such an exception to the American rule. Pp. 247-271.

161 U.S. App. D.C. 446, 495 F.2d 1026, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, J.J., joined. BRENNAN, J., *post*, p. 271, and MARSHALL, J., *post*, p. 272, filed dissenting opinions. DOUGLAS and POWELL, JJ., took no part in the consideration or decision of the case.

Robert E. Jordan III argued the cause for petitioner. With him on the brief were *Paul F. Mickey, James H. Pipkin, Jr.*, and *John D. Knodell, Jr.*

Dennis J. Flannery argued the cause for respondents. With him on the brief were *Joseph Onek, John F. Dienelt*, and *Thomas B. Stoel, Jr.**

*Briefs of *amici curiae* urging affirmance were filed by *June Resnick German, Hayes N. Johnson*, and *Nicholas A. Robinson* for the Association of the Bar of the City of New York; by *Armand Derfner, Albert E. Jenner, Jr., Nicholas deB. Katzenbach, Elliot L. Richardson, Bernard G. Segal, Whitney North Seymour, E. Barrett Prettyman, Jr., David S. Tatel, J. Harold Flannery*, and *Paul Dimond* for the Lawyers' Committee for Civil Rights Under Law; by *Jack Greenberg, James M. Nabrit III, Eric Schnapper*, and *Charles Stephen Ralston* for the NAACP Legal Defense and Educational Fund, Inc.; and by *Henry Geller* and *Abraham S. Goldstein* for the Center for Law in the Public Interest.

MR. JUSTICE WHITE delivered the opinion of the Court.

This litigation was initiated by respondents Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth in an attempt to prevent the issuance of permits by the Secretary of the Interior which were required for the construction of the trans-Alaska oil pipeline. The Court of Appeals awarded attorneys' fees to respondents against petitioner Alyeska Pipeline Service Co. based upon the court's equitable powers and the theory that respondents were entitled to fees because they were performing the services of a "private attorney general." Certiorari was granted, 419 U.S. 823 (1974), to determine whether this award of attorney's fees was appropriate. We reverse.

I

A major oil field was discovered in the North Slope of Alaska in 1968.[1] In June 1969, the oil companies constituting the consortium owning Alyeska[2] submitted an application to the Department of the Interior for rights-of-way for a pipeline that would transport oil from the North Slope across land in Alaska owned by the United States,[3] a major part of the transport system which would carry the oil to its ultimate markets in the lower 48 States. A special interdepartmental task force studied the proposal and reported to the President. Federal Task Force on Alaskan Oil Development: A Preliminary Report to the President (1969), in App. 78–89. An amended application was submitted in December 1969, which requested a 54-foot right-of-way, along with applications for "special land use permits" asking for additional space alongside the right-of-way and for the construction of a road along one segment of the pipeline.[4]

Respondents brought this suit in March 1970, and sought declaratory and injunctive relief against the Secretary of the Interior on the grounds that he intended to issue the right-of-way and special land-use permits in violation of § 28 of the Mineral Leasing Act of 1920, 41 Stat. 449, as amended, 30 U.S.C. § 185,[5] and without compliance with the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. § 4321 *et seq.*[6] On the basis of both the Mineral

---

[1] For a discussion and chronology of the events surrounding this litigation, see Dominick & Brody, The Alaska Pipeline: *Wilderness Society* v. *Morton* and the Trans-Alaska Pipeline Authorization Act, 23 Am. U. L. Rev. 337 (1973).

[2] In 1968, Atlantic Richfield Co., Humble Oil & Refining Co., and British Petroleum Corp. formed the Trans-Alaska Pipeline System, and it was this entity which submitted the applications for the permits. Federal Task Force on Alaskan Oil Development: A Preliminary Report to the President (1969), in App. 80; Dominick & Brody, *supra*, n. 1, at 337–338, n. 3. In 1970, the Trans-Alaska Pipeline System was replaced by petitioner Alyeska. Alyeska's stock is owned by ARCO Pipeline Co., Sohio Pipeline Co., Humble Pipeline Co., Mobil Pipeline Co., Phillips Petroleum Co., Amerada Hess Corp., and Union Oil Co. of California. See *id.*, at 338 n. 3; App. 105.

[3] The application requested a primary right-of-way of 54 feet, an additional parallel, adjacent right-of-way for construction purposes of 46 feet, and another right-of-way of 100 feet for a construction road between Prudhoe Bay on the North Slope to the town of Livengood, a distance slightly less than half the length of the proposed pipeline. See *Wilderness Society* v. *Morton*, 156 U.S. App. D. C. 121, 128, 479 F. 2d 842, 849 (1973).

[4] The amended application asked for a single 54-foot right-of-way, a special land-use permit for an additional 11 feet on one side and 35 feet on the other side of the right-of-way and another special land-use permit for a space 200 feet in width between Prudhoe Bay and Livengood. *Id.*, at 128–129, 479 F. 2d, at 849–850; App. 89–98.

[5] Title 30 U.S.C. § 185 provided in pertinent part:

"Rights-of-way through the public lands, including the forest reserves of the United States may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the [prescribed] qualifications . . . to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: . . . *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding."

[6] The Court of Appeals described the heart of respondents' NEPA contention to be that the Secretary did not adequately consider the alternative of a trans-Canada pipeline. 156 U.S. App. D. C., at 166–168, 479 F. 2d, at 887–889.

Leasing Act and the NEPA, the District Court granted a preliminary injunction against issuance of the right-of-way and permits. 325 F.Supp. 422 (DC 1970).

Subsequently the Sate of Alaska and petitioner Alyeska were allowed to intervene.[7] On March 20, 1972, the Interior Department released a six-volume Environmental Impact Statement and a three-volume Economic and Security Analysis.[8] After a period of time set aside for public comment, the Secretary announced that the requested permits would be granted to Alyeska. App. 105–138. Both the Mineral Leasing Act and the NEPA issues were at that point fully briefed and argued before the District Court. That court then decided to dissolve the preliminary injunction, to deny the permanent injunction, and to dismiss the complaint.[9]

Upon appeal, the Court of Appeals for the District of Columbia Circuit reversed, basing its decision solely on the Mineral Leasing Act. 156 U.S. App. D.C. 121, 479 F. 2d 842 (1973) (en banc). Finding that the NEPA issues were very complex and important, that deciding them was not necessary at that time since pipeline construction would be enjoined as a result of the violation of the Mineral Leasing Act, that they involved issues of fact still in dispute, and that it was desirable to expedite its decision as much as possible, the Court of Appeals declined to decide the merits of respondents' NEPA contentions which had been rejected by the District Court.[10] Certiorari was denied here. 411 U.S. 917 (1973).

Congress then enacted legislation which amended the Mineral Leasing Act to allow the granting of the permits sought by Alyeska[11] and declared that no further action under the NEPA was necessary before construction of the pipeline could proceed.[12]

With the merits of the litigation effectively terminated by this legislation, the Court of Apeals turned to the questions involved in respondents' request for an award of attorneys' fees.[13] 161 U.S. App. D. C. 446, 495 F. 2d 1026 (1974) (en banc). Since there was no applicable statutory authorization for such an award, the court proceeded to consider whether the requested fee award fell within any of the exceptions to the general "American rule" that the prevailing party may not recover attorneys' fees as costs or otherwise. The exception for an award against a party who had acted in bad faith was inapposite, since the position taken by the federal and state parties and Alyeska "was manifestly reasonable and assumed in good faith . . . ." *Id.*, at 449, 495 F. 2d, at 1029. Application of the "common benefit" exception which spreads the cost of litigation to those persons benefiting from it would "stretch it totally outside its basic rationale . . . ." *Ibid.*[14] The Court of Appeals nevertheless held that respondents had acted to vindicate "important statutory rights of all citizens . . . ." *Id.*, at 452, 495 F. 2d, at 1032, had ensured that the governmental system functioned properly, and were entitled to attorneys' fees lest the great cost of litigation of this kind, particularly against well-financed defendants such as Alyeska, deter private parties desiring to see the laws protecting the environment properly enforced. Title 28 U.S.C. § 2412[15] was thought to bar taxing attorneys' fees against the United States, and it was also deemed inappropriate to burden the State of Alaska with any part of the

---

[7] The interventions occurred in September 1971, approximately 17 months after the District Court had granted the preliminary injunction preventing issuance of the right-of-way and permits by the Secretary.

[8] The Department of the Interior had released a draft impact statement in January 1971.

[9] The decision is not reported. See *id.*, at 130, 479 F. 2d, at 851

[10] At the same time, the Court of Appeals upheld the grant of certain right-of-way to the State of Alaska. *Id.*, at 158–163, 479 F. 2d, at 879–884. It also considered a challenge to a special land-use permit issued by the Forest Supervisor to Alyeska's predecessor, but did not find the issue ripe for adjudication. *Id.*, at 163–166, 479 F. 2d, at 884–887.

[11] Pub. L. 93–153, Tit. I, § 101.87 Stat. 576, 30 U.S.C. § 185 (1970 ed., Supp. III).

[12] Trans-Alaska Pipeline Authorization Act, Pub. L. 93–153, Tit. II, 87 Stat. 584, 43 U.S.C. § 1651 *et seq.* (1970 ed., Supp. III).

[13] Respondents' bill of costs includes a total of 4,455 hours of attorneys' time spent on the litigation. App. 209–210.

[14] "[T]his litigation may well have provided substantial benefits to particular individuals and, indeed, to every citizen's interest in the proper functioning of our system of government. But imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries . . . ." 161 U.S. App. D.C. at 449, 495 F. 2d, at 1029.

[15] See n. 40, *infra.*

award.[16] But Alyeska, the Court of Appeals held, could fairly be required to pay one-half of the full award to which respondents were entitled for having performed the functions of a private attorney general. Observing that "[t]he fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, the skill demanded by the novelty or complexity of the issues, and the incentive factor," 161 U.S. App. D. C., at 456, 495 F. 2d, at 1036, the Court of Appeals remanded the case to the District Court for assessment of the dollar amount of the award.[17]

II

In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this "American rule"; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party.[18]

During the first years of the federal-court system, Congress provided through legislation that the federal courts were to follow the practice with respect to awarding attorneys' fees of the courts of the States in which the federal courts were located,[19] with the exception of district courts under admiralty and maritime

---

[16] "In the circumstances of this case it would be inappropriate to tax fees against appellee State of Alaska. The Senate voluntarily participated in this suit, in effect to present to the court a different version of the public interest implications of the Trans-Alaska pipeline. Taxing attorneys' fees against Alaska would in our view undermine rather than further the goal of ensuring adequate spokesmen for public interests." 161 U.S. App. D.C., at 456 n. 8, 495 F. 2d, at 1036 n. 8.

[17] The Court of Appeals also directed that "[t]he fee award need not be limited . . . to the amount actually paid or owed by [respondents]. It may well be that counsel serve organizations like [respondents] for compensation below that obtainable in the market because they believe the organizations further a public interest. Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties volunteering to serve as private attorneys general. The attorneys who worked on this case should be reimbursed the reasonable value of their services, despite the absence of any obligation on the part of [respondents] to pay attorneys' fees." *Id.*, at 457, 495 F. 2d, at 1037.

[18] "As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special 'taxing Masters' in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed, even including the amounts that may be recovered for letters drafted on behalf of a client," *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (footnotes omitted). See generally Goodhart, Costs, 38 Yale L. J. 849 (1929); C. McCormick, Law of Damages 234–236 (1935).

[19] The Federal Judiciary Act of Sept. 24, 1789, 1 Stat. 73, touched upon costs in §§ 9, 11–12, 20–23, but as to counsel fees provided specifically only that the United States Attorney in each district "shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be." § 35. Five days later, however, Congress enacted legislation regulating federal-court processes, which provided:

"That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided . . . rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And . . . [in causes of equity and of admiralty and maritime jurisdiction] the rates of fees [shall be] the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such causes." Act of Sept. 29, 1789, § 2, 1 Stat. 93. That legislation was to be in effect only until the end of the next congressional session, § 3, but it was extended twice. See Act of May 26, 1790, c. 13, 1 Stat. 123; Act of Feb. 18, 1791, c. 8, 1 Stat. 191. It was repealed, however, by legislation enacted on May 8, 1792, § 8, 1 Stat. 278.

Prior to the time of that repeal, other legislation had been passed providing for additional compensation for United States Attorneys to cover traveling expenses. Act of Mar. 3, 1791, c. 22, § 1, 1 Stat. 216. That legislation was also repealed by the Act of May 8, 1792, *supra*. The latter enactment substituted a new provision for the compensation of United States Attorneys; they would be entitled to "such fees in each state respectively as are allowed in the supreme courts of the same . . ." plus certain traveling

(Continued)

jurisdiction which were to follow a specific fee schedule.[20] Those statutes, by 1800, had either expired or been repealed.

In 1796, this Court appears to have ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts. In *Arcambel* v. *Wiseman*, 3 Dall. 306, the inclusion of attorneys' fees as damages[21] was overturned on the ground that "[t]he general practice of the *United States* is in opposition [*sic*] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." This Court has consistently adhered to that early holding. See *Day* v. *Woodworth*, 13 How. 363 (1852); *Oelrichs* v. *Spain*, 15 Wall. 211 (1872); *Flanders* v. *Tweed*, 15 Wall. 450 (1873); *Stewart* v. *Sonneborn*, 98 U.S. 187 (1879); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717–718 (1967); *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 126–131 (1974).

The practice after 1799 and until 1853 continued as before, that is, with the federal courts referring to the state rules governing awards of counsel fees, although the express legislative authorization for that practice had expired.[22] By legislation in 1842, Congress did give this Court authority to prescribe the items and amounts of costs which could be taxed in federal courts, but the Court took no action under this statutory mandate.[23] See S. Law, The Jurisdiction and Powers of the United States Courts 271 n. 1 (1852).

In 1853, Congress undertook to standardize the costs allowable in federal litigation. In support of the proposed legislation, it was asserted that there was great diversity in practice among the courts and that losing litigants were being

---

(Continued)

expenses, § 3, 1 Stat. 277. That provision was repealed on February 28, 1799, § 9, 1 Stat. 626. That same statute provided new, specific rates of compensation for United States attorneys. See § 4. See also § 5.

On March 1, 1793, Congress enacted a general provision governing the awarding of costs to prevailing parties in federal courts:

"That there be allowed and taxed in the supreme, circuit and district courts of the United States, in favour of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attornies and counsellors' fees, except in the district courts in cases of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states." § 4, 1 Stat. 333.

This provision was to be in force for one year and then to the end of the next session of Congress, § 5, but it was continued in effect in 1795, Act of Feb. 25, 1795, c. 28, 1 Stat. 419, and again in 1796, Act of Mar. 31, 1796, 1 Stat. 451, for a period of two years and then until the end of the next session of Congress; at that point, it expired.

After 1799 and until 1853, no other congressional legislation dealt with the awarding of attorneys' fees in federal courts except for the Act of 1842, n. 23, *infra*, which gave this Court authority to prescribe taxable attorneys' fees, and for legislation dealing with the compensation for United States district attorneys. See the Act of Mar. 3, 1841, 5 Stat. 427, and the Act of May 18, 1842, 5 Stat. 483. See the summary of the legislation dealing with costs throughout this period, in S. Law, The Jurisdiction and Powers of the United States Courts 255–282 (1852).

[20] By the legislation of September 29, 1789, the federal courts were to follow the state practice with respect to rates of fees under admiralty and maritime jurisdiction. See n. 19, *supra*. The Act of Mar. 1, 1793, § 1, 1 Stat. 332, established set fees for attorneys in the district courts in admiralty and maritime proceedings. As with § 4 of that Act, n. 19, *supra*, this provision had expired by the end of the century. See *The Baltimore*, 8 Wall. 377, 390–392 (1869).

[21] The circuit court had allowed $1,600 in counsel fees under its estimate of damages and $28.89 as costs. Record in *Arcambel* 56.

[22] See 2 T. Street, Federal Equity Practice § 1986, pp. 1188–1189 (1909); Law, *supra*, n. 19, at 279; Costs in Civil Cases, 30 F. Cas. 1058 (No. 18,284) (CCSDNY 1852).

[23] "That, for the purpose of further diminishing the costs and expenses in suits and proceedings in the said courts, the Supreme Court shall have full power and authority, from time to time, to make and prescribe regulations to the said district and circuit courts, as to the taxation and payment of costs in all suits and proceedings therein; and to make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits, to the parties, their attorneys, solicitors, and proctors, to the clerk of the court, to the marshal of the district, and his deputies, and other officers serving process, to witnesses, and to all other persons whose services are usually taxable in bills of costs. And the items so stated in the said table, and none others, shall be taxable or allowed in bills of costs; and they shall be fixed as low as they reasonably can be, with a due regard to the nature of the duties and services which shall be performed by the various officers and persons aforesaid, and shall in no case exceed the costs and expenses now authorized, where the same are provided for by existing laws." Act of Aug. 23, 1842, § 7, 5 Stat. 518.

The brief legislative history of this section indicates that, as its own language states, its purpose was to reduce fee-bills in federal courts. Cong. Globe, 27th Cong., 2d Sess., 723 (1842) (remarks of Sen. Berrien). One of its opponents, Senator Buchanan, said the following:

"If Congress conforms the fee-bills of the courts over which it has control, to the fee-bills of the State courts, that is all that can be expected of it. . . . But the great and main objection was, its transfer of the legislative power of Congress to the Supreme Court." *Ibid.*

unfairly saddled with exorbitant fees for the victor's attorney,[24] The result was a far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts. One of its purposes was to limit allowances for attorneys' fees that were to be charged to the losing parties. Although the Act disclaimed any intention to limit the amount of fees that an attorney and his client might agree upon between themselves, counsel fees collectible from the losing party were expressly limited to the amounts stated in the Act:

"That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, the following and no other compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties." Act of Feb. 26, 1853, 10 Stat. 161.

The Act then proceeds to list specific sums for the services of attorneys, solicitors, and proctors.[25]

The intention of the Act to control the attorneys' fees recoverable by the prevailing party from the loser was repeatedly enforced by this Court. In *The Baltimore*, 8 Wall. 377 (1869), a $500 allowance for counsel was set aside, the Court reviewing the history of costs in the United States courts and concluding:

"Fees and costs, allowed to the officers therein named, are now regulated by the act of the 26th of February, 1853, which provides in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed.

"Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated. They may tax a docket fee of twenty dollars on a final hearing in admiralty, if the libellant recovers fifty dollars, but if he recovers less than fifty dollars, the docket fee of the proctor shall be but ten dollars." *Id.*, at 392 (footnotes omitted).

---

[24] See the remarks of Senator Bradbury, Cong. Globe App., 32d Cong., 2d Sess., 207 (1853):

"There is now no uniform rule either for compensating the ministerial officers of the courts, or for the regulation of the costs in actions between private suitors. One system prevails in one district, and a totally different one in another; and in some cases it would be difficult to ascertain that any attention had been paid to any law whatever designed to regulate such proceedings. . . . It will hence be seen that the compensation of the officers, and the costs taxed in civil suits, is made to depend in a great degree on that allowed in the State courts. There are no two States where the allowance is the same.

"When this system was adopted, it had the semblance of equality, which does not now exist. There were then but sixteen States, in all of which the laws prescribed certain taxable costs to attorneys for the prosecution and defense of suits. In several of the States which have since been added to the Union, no such cost is allowed; and in others the amount is inconsiderable. As the State fee bills are made so far the rule of compensation in the Federal courts, the Senate will perceive that totally different systems of taxation prevail in the different districts. . . . It is not only the officers of the courts, but the suitors also, that are affected by the present unequal, extravagant, and often oppressive system.

"The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases those costs have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed. . . .

"It is correct the evils and remedy the defects of the present system, that the bill has been prepared and passed by the House of Representatives. It attempts to simplify the taxation of fees, by prescribing a limited number of definite items to be allowed. . ." See also H.R. Rep. No. 50, 32d Cong., 1st Sess. (1852); 2 Street, *supra*, n. 22, § 1987, p. 1189.

[25] *Fees of Attorneys, Solicitors, and Proctors.* In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided*, That in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

"In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.

"For seire facias and other proceedings on recognizances, five dollars.

"For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.

"A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal. . . ." 10 Stat. 161–162.

In *Flanders* v. *Tweed*, 15 Wall. 450 (1872), a counsel's fee of $6,000 was included by the jury in the damages award. The Court held the Act forbade such allowances:

"Fees and costs allowed to officers therein named are now regulated by the act of Congress passed for that purpose, which provides in its first section, that, in lieu of the compensation previously allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed. Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed or recovered as cost against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated. They may tax a docket fee of twenty dollars in a trial before a jury, but they are restricted to a charge of ten dollars in cases at law, where judgment is rendered without a jury." *Id.*, at 452–453 (footnote omitted).

See also *In re Paschal*, 10 483, 493–494 (1871).

Although, as will be seen, Congress has made specific provision for attorneys' fees under certain federal statutes, it has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute. The 1853 Act was carried forward in the Revised Statutes of 1874[26] and by the Judicial Code of 1911.[27] Its substance, without any apparent intent to change the controlling rules, was also included in the Revised Code of 1948 as 28 U.S.C. §§ 1920[28] and 1923(a).[29] Under § 1920, a court may tax as costs the

---

[26] "The following and no other compensation shall be taxed and allowed to atorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, exept in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties." Rev. Stat. § 823. For the schedule of fees, see § 824. The schedule remained the same as the one in the 1853 Act, n. 25, *supra*.

[27] Revised Stat. §§ 823 and 824 were not repealed by the Judicial Code of 1911 and hence were to "remain in force with the same effect and to the same extent as if the Act had not been passed." § 297, 36 Stat. 1169. When the Judicial Code was included under Title 28 of the United States Code in 1926, these sections appeared as §§ 571 and 572 with but minor changes in wording, including the deletion from the latter section of the compensation for services rendered in a case which went to the circuit court on appeal or writ of error.

[28] "A judge or clerk of any court of the United States may tax as costs the following: "(5) Docket fees under section 1923 of this title." 28 U.S.C. § 1920 (1946 ed., Supp. II).

[29] "(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

"$20 on trial or final hearing in civil, criminal or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

"$20 in admiralty appeals involving not over $1,000;

"$50 in admiralty appeals involving not over $5,000;

"$100 in admiralty appeals involving more than $5,000;

"$5 on discontinuance of a civil action;

"$5 on motion for judgment and other proceedings on recognizances;

"$2.50 for each deposition admitted in evidence." 28 U.S.C. § 1923(a) (1946 ed., Supp. II).

The 1948 Code does not contain the language used in the 1853 Act and carried on for nearly 100 years that the fees prescribed by the statute "and no other compensation shall be taxed and allowed," but nothing in the 1948 Code indicates a congressional intention to depart from that rule. The Reviser's Note to the new § 1923 states only that the "[s]ection consolidates sections 571, 572, and 578 of title 28, U.S.C., 1940 ed." Section 571 was the provision limiting awards to the fees prescribed by § 572. See n. 27, *supra*. Our conclusion that the 1948 Code did not change the longstanding rule limiting awards of attorneys' fees to the statutorily provided amounts is consistent with our established view that "the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification. Consequently, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that 'no change is to be presumed unless clearly expressed.'" *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 162 (1972) (footnote omitted). As MR. JUSTICE MARSHALL noted for the Court, *id.*, at 162 n. 29, the Senate Report covering the new Code observed that "great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval." S. Rep. No. 1559, 80th Cong., 2d Sess., 2 (1948).

The Reviser's Note to § 1920 explains the shift from the mandatory "shall be taxed" to the discretionary "may be taxed" as made "in view of Rule 54(d) of the Federal Rules of Civil Procedure, providing for allowance of costs to the prevailing party as of course 'unless the court otherwise directs.'" Note following 28 U.S.C. § 1920 (1946 ed., Supp. II).

various items specified, including the "docket fees" under § 1923(a). That section provides that "[a]ttorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows . . . ." Against this background, this Court understandably declared in 1967 that with the exception of the small amounts allowed by § 1023, the rule "has long been that attorney's fees are not ordinarily recoverable . . . ." *Fleischmann Distilling Corp.*, 386 U.S., at 717. Other recent cases have also reaffirmed the general rule that, absent statute or enforceable contract, litigants pay their own attorney's fees. See *F. D. Rich Co.*, 417 U.S., at 128–131; *Hall* v. *Cole*, 412 U.S. 1, 4 (1973).

To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorneys' fee to the prevailing party in excess of the small sums permitted by § 1923. In *Trustees* v. *Greenough*, 105 U.S. 527 (1882), the 1853 Act was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit.[30] That rule has been consistently followed. *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885); *Harrison* v. *Perea*, 168 U.S. 311, 325–326 (1897); *United States* v. *Equitable Trust Co.*, 283 U.S. 738 (1931); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall* v. *Cole*, *supra*; cf. *Hobbs* v. *McLean*, 117 U.S. 567, 581–582 (1886). See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597 (1974). Also, a court may assess attorneys' fees for the "willful disobedience of a court order . . . as part of the fine to be levied on the defendant. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 426–428 (1923)." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*, at 718; or when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." *F. D. Rich Co.*, 417 U.S., at 129 (citing *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962)); cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580 (1946). These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here.[31] The Court of Appeals expressly disclaimed reliance on any of them. See *supra*, at 245.

---

[30] Mr. Justice Bradley, writing for the Court in *Greenough*, said the following of the 1853 Act:

"The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee-bill itself expressly provides that it shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of Feb. 26, 1853, c. 80, 10 Stat. 161; Rev. Stat., sect. 823. And the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund." 105 U.S., at 535–536.

Sprague v. *Ticonic National Bank*, 307 U.S. 161, 165 n. 2 (1939), might be read suggesting that the Court in *Greenough* said that a federal court could tax against the losing party "solicitor and client" costs in excess of the amounts prescribed by the 1853 Act. But any such suggestion is without support either in the opinion in *Greenough*, which was limited to a common-fund rationale, or in the express terms of the statute. Those costs were simply left unregulated by the federal statute; it did not permit taxing the "client-solicitor" costs against the client's adversary. See *The Baltimore*, 8 Wall. 377 (1869); *Flanders* v. *Tweed*, 15 Wall. 450 (1872); 1 R. Foster, Federal Practice §§ 328–330 (1901); A. Conkling, The Organization, Jurisdiction and Practice of the Courts of the United States 456–457 (5th ed. 1870); A. Boyce, A Manual of the Practice in the Circuit Courts 72 (1869) Cf. *United States* v. *One Package of Ready-Made Clothing*, 27 F. Cas. 310, 312 (No. 15,950) (SDNY 1853). MR. JUSTICE MARSHALL'S reliance upon *Sprague* for the proposition that "client-solicitor" costs could be taxed against the client's opponent, see *post*, at 278–279, is thus misplaced and conflicts with any fair reading of *Greenough*, *supra*, and the 1853 Act.

[31] A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." 6 J. Moore, Federal Practice ¶54.77 [2], pp. 1712–1713 (2d ed. 1974) (footnotes omitted). See also 2 S. Speiser, Attorney's Fees §§ 14:3, 14:4 (1973) (hereinafter Speiser); Annotation, Prevailing Party's Right to Recover Counsel Fees in Federal Courts, 8 L. Ed. 2d 894, 900–901. Prior to the decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), this Court held that a state statute requiring an award of attorney's fees

(Continued)

Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorneys' fees; but neither has it retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors.[32] Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.[33] These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves. Under the antitrust laws, for instance, allowance of attorneys' fees to a plaintiff awarded treble damages is mandatory.[34] I patent litigation, in contrast, "[t]he court in *exceptional* cases *may* award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285 (emphasis added). Under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a–3(b),[35] the prevailing party is entitled to attorneys'

(Continued)

should be applied in a case removed from the state courts to the federal courts: "[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts." *People of Sioux County* v. *National Surety Co.*, 276 U.S. 238, 243 (1928). The limitations on the awards of attorneys' fees by federal courts deriving from the 1853 Act were found not to bar the award. *Id.*, at 243–244. We see nothing after Erie requiring a departure from this result. See *Hanna* v. *Plumer*, 380 U.S. 460, 467–468 (1965). The same would clearly hold for a judicially created rule, although the question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule. See 1 Speiser §§ 12:3, 12:4.

[32] See nn. 26–29, *supra*.

[33] See Amendments to Freedom of Information Act, Pub. L. 93–502, § 1 (b)(2), 88 Stat. 1561 (amending 5 U. S. C. § 552(a)); Packers and Stockyards Act, 42 Stat. 166, 7 U. S. C. § 210(f); Perishable Agricultural Commodities Act, 46 Stat. 535, 7 U. S. C. § 499g(b); Bankruptcy Act, 11 U. S. C. §§ 104 (a)(1), 641–644; Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15; Unfair Competition Act, 39 Stat. 798, 15 U. S. C. § 72; Securities Act of 1933, 48 Stat. 82, as amended, 48 Stat. 907, 15 U. S. C. § 77k(e); Trust Indenture Act, 53 Stat. 1176, 15 U. S. C. § 77www(a); Securities Exchange Act of 1934, 48 Stat. 890, 897, as amended, 15 U. S. C. §§ 78i(e), 78r(a); Truth in Lending Act, 82 Stat. 157, 15 U. S. C. § 1640(a); Motor Vehicle Information and Cost Savings Act, Tit. IV, § 409(a)(2), 86 Stat. 963, 15 U. S. C. § 1989(a)(2) (1970 ed., Supp. II); 17 U. S. C. § 116 (copyrights); Organized Crime Control Act of 1970, 18 U. S. C. § 1964(c); Education Amendments of 1972, § 718, 86 Stat. 369, 20 U. S. C. § 1617 (1970 ed., Supp. II); Norris-LaGuardia Act, § 7(e), 47 Stat. 71, 29 U. S. C. § 107(e); Fair Labor Standards Act, § 16(b), 52 Stat. 1069, as amended, 29 U. S. C. § 216(b); Longshoremen's and Harbor Workers' Compensation Act, § 28, 44 Stat. 1438, as amended, 86 Stat. 1259, 33 U. S. C. § 928 (1970 ed., Supp. II); Federal Water Pollution Control Act, § 505(d), as added, 86 Stat. 888, 33 U. S. C. § 1365(d) (1970 ed., Supp. II); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(g)(4), 33 U. S. C. § 1415(g)(4) (1970 ed., Supp. II); 35 U. S. C. § 285 (patent infringement); Servicemen's Readjustment Act, 38 U. S. C. § 1822(b); Clean Air Act, § 304(d), as added, 84 Stat. 1706, 42 U. S. C. § 1857h–2(d); Civil Rights Act of 1964, Tit. II, § 204(b), 78 Stat. 244, 42 U. S. C. § 2000a–3(b), and Tit. VII, § 706(k), 78 Stat. 261, 42 U. S. C. § 2000e–5(k); Fair Housing Act of 1968, § 812(c), 82 Stat. 88, 42 U. S. C. § 3612(c); Noise Control Act of 1972, § 12(d), 86 Stat. 1244, 42 U. S. C. § 4911 (d) (1970 ed., Supp. II); Railway Labor Act, § 3, 44 Stat. 578, as amended, 48 Stat. 1192, as amended, 45 U. S. C. § 153(p); The Merchant Marine Act of 1936, § 810, 49 Stat. 2015, 46 U. S. C. § 1227; Communications Act of 1934, § 206, 48 Stat. 1072, 47 U. S. C. § 206; Interstate Commerce Act, §§ 8, 16(2), 24 Stat. 382, 384, 49 U. S. C. §§ 8, 16(2), and § 308(b), as added, 54 Stat. 940, as amended, 49 U. S. C. § 908(b); Fed. Rules Civ. Proc. 37(a) and (c). See generally 1 Speiser §§ 12:61–12:71; Annotation, *supra*, n. 31, at 922–942.

[34] Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and *shall recover* threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15 (emphasis added).

Other statutes which are mandatory in terms of awarding attorneys' fees include the Fair Labor Standards Act, 29 U. S. C. § 216(b); the Truth in Lending Act, 15 U. S. C. § 1640(a); and the Merchant Marine Act of 1936, 46 U. S. C. § 1227.

[35] "In any action commenced pursuant to this subchapter, 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, and the United States shall be liable for costs the same as a private person."

Other statutory examples of discretion in awarding attorneys' fees are the Securities Act of 1933, 15 U. S. C. § 77k(e); the Trust Indenture Act, 15 U. S. C. § 77www(a); the Securities Exchange Act of 1934, 15 U. S. C. §§ 78i(e), 78r(a); the Civil Rights Act of 1964, Tit. VII, 42 U. S. C. § 2000e–5(k); the Clean Air Act, 42 U. S. C. § 1857h–2(d); the Noise Control Act of 1972, 42 U. S. C. § 4911(d) (1970 ed., Supp. II).

fees, at the discretion of the court, but we have held that Congress intended that the award should be made to the successful plaintiff absent exceptional circumstances. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See also *Northcross* v. *Board of Education of the Memphis City Schools*, 412 U.S. 427 (1973). Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.[36]

It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee shifting in connection with treble-damages awards under the antitrust laws is a prime example: cf. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 265–266 (1972); and we have noted that Title II of the Civil Rights Act of 1964 was intended "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Newman*, *supra*, at 402 (footnote omitted). But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former. If the statutory limitation of right-of-way widths involved in this case is a matter of the gravest importance, it would appear that a wide range of statutes would arguably satisfy the criterion of public importance and justify an award of attorneys' fees to the private litigant. And, if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C. § 1983 seeking to vindicate *constitutional* rights? Moreover, should courts, if they were to embark on the course urged by respondents, opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff?[37] Should awards be discretionary or

---

[36] Quite apart from the specific authorizations of fee shifting in particular statutes, Congress has recently confronted the question of the general availability of legal services to persons economically unable to retain a private attorney. See the Legal Services Corporation Act of 1974, Pub. L. 93–355, 88 Stat. 378, 42 U. S. C. A. § 2996 *et seq.* (Supp. 1975). Section 1006(f), 42 U. S. C. A. § 2996e(f) (Supp. 1975), addresses one type of fee shifting: "If an action is commenced by the Corporation or by a recipient and a final order is entered in favor of the defendant and against the Corporation or a recipient's plaintiff, the court may, upon motion by the defendant and upon a finding by the court that the action was commenced or pursued for the sole purpose of harassment of the defendant or that the Corporation or a recipient's plaintiff maliciously abused legal process, enter an order (which shall be appealable before being made final) awarding reasonable costs and legal fees incurred by the defendant in defense of the action, except when in contravention of a State law, a rule of court, or a statute of general applicability. Any such costs and fees shall be directly paid by the Corporation."

On the other hand, remarks made during the debates on this legislation indicate that there was no intent to restrict the plaintiff's recovery of attorneys' fees in actions commenced by the Corporation or its recipient where under the circumstances other plaintiffs would be awarded such fees. 120 Cong. Rec. H3956 (May 16, 1974) (Rep. Meeds); *id.*, at H3963 (Rep. Steiger); *id.*, at S12934 (July 18, 1974) (Sen. Cranston); *id.*, at S12950 (Sen. Mondale); *id.*, at S12953 (Sen. Kennedy). Thus, if other plaintiffs might recover on the private-attorney-general theory, so might the Corporation. Congress itself, of course, has provided for counsel fees under various statutes on a private-attorney-general basis; and we find nothing in these remarks indicating any congressional approval of judicially created private-attorney-general fee awards.

[37] Congress in its specific statutory authorizations of fee shifting has in some instances provided that either party could be given such an award depending upon the outcome of the litigation and the court's discretion, see, *e. g.*, 35 U. S. C. § 285 (patent infringement); Civil Rights Act of 1964, 42 U. S. C. §§ 2000a–3(b), 2000e–5(k), while in others it has specified that only one of the litigants can be awarded fees. See, *e. g.*, the antitrust laws, 15 U. S. C. § 15; Fair Labor Standards Act, 29 U. S. C. § 216(b).

mandatory?[38] Would there be a presumption operating for or against them in the ordinary case? See *Newman, supra.*[39]

As exemplified by this case itself, it is also evident that the rational application of the private-attorney-general rule would immediately collide with the express provision of 28 U.S.C. § 2412.[40] Except as otherwise provided by statute,

---

[38] Congress has specifically provided in the statutes allowing awards of fees whether such awards are mandatory under particular conditions or whether the court's discretion governs. See nn. 34 and 35, *supra.*

[39] Mr. JUSTICE MARSHALL, *post,* at 284–285, after concluding that the federal courts have equitable power which can be used to create and implement a private-attorney-general rule, attempts to solve the problems of manageability which such a rule would necessarily raise. To do so, however, he emasculates the theory. Instead of a straightforward award of attorneys' fees to the winning plaintiff who undertakes to enforce statutes embodying important public policies, as the Court of Appeals proposed, Mr. JUSTICE MARSHALL would tax attorneys' fees in favor of the private attorney general only when the award could be said to impose the burden on those who benefit from the enforcement of the law. The theory that he would adopt is not the private-attorney-general rule, but rather an expanded version of the common-fund approach to the awarding of attorneys' fees. When Congress has provided for allowance of attorneys' fees for the private attorney general, it has imposed no such common-fund conditions upon the award. The dissenting opinion not only errs in finding authority in the courts to award attorneys' fees, without legislative guidance, to those plaintiffs the courts are willing to recognize as private attorneys general, but also disserves that basis for fee shifting by imposing a limiting condition characteristic of other justifications.

That condition ill suits litigation in which the purported benefits accrue to the general public. In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs. The Court of Appeals, very familiar with the litigation and the parties after dealing with the merits of the suit, concluded that "imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries . . . ." 161 U. S. App. D. C., at 449, 495 F. 2d, at 1029. MR. JUSTICE MARSHALL would apparently hold that factual assessment clearly wrong. See *post,* at 288.

If one accepts, as MR. JUSTICE MARSHALL appears to do, the limitations of 28 U. S. C. § 2412, which in the absence of authority under other statutes forbids an award of attorneys' fees against the United States or any agency or official of the United States, see nn. 40 and 42, *infra,* it becomes extremely difficult to predict when his version of the private-attorney-general basis for allowing fees would produce an award against a private party in litigation involving the enforcement of a federal statute such as that involved in this case—all in contrast to the typical result under those federal statutes which themselves provide for private actions and for an award of attorneys' fees to the successful private plaintiff as, for example, under the antitrust laws. There remains the private plaintiff whose suit to enforce federal or state law is pressed against defendants who include the State or one or more of its agencies or officers as, for instance, the typical suit under 42 U. S. C. § 1983. Even here Eleventh Amendment hurdles must be overcome, see n. 44, *infra,* and if they are not, there may be few remaining defendants who would satisfy the dissenting opinion's description of the litigant who may be saddled with his opponent's attorneys' fees.

We add that in the three-part test suggested by MR. JUSTICE MARSHALL, *post,* at 284–285, for administering a judicially created private-attorney-general rule, the only criterion which purports to enable a court to determine which statutes should be enforced by application of the rule is the first: "the important right being protected is one actually or necessarily shared by the general public or some class thereof . . ." Absent some judicially manageable standard for gauging "importance," that criterion would apply to all substantive congressional legislation providing for rights and duties generally applicable, that is, to virtually all congressional output. That result would solve the problem of courts selectively applying the rule in accordance with their own particular substantive-law preferences and priorities, but its breadth requires more justification than MR. JUSTICE MARSHALL provides by citing this Court's common-fund and common-benefit cases.

MR. JUSTICE MARSHALL's application of his suggested rule to this case, however, demonstrates the problems raised by courts generally assaying the public benefits which particular litigation has produced. The conclusion of the dissenting opinion is that "[t]here is hardly room for doubt" that respondents' litigation has protected an "important right . . . actually or necessarily shared by the general public or some class thereof . . . ." *Post,* at 285. Whether that conclusion is correct or not, it would appear at the very least that, as in any instance if conflicting public-policy views, there is room for doubt on each side. The opinions below are evidence of that fact. See 161 U. S. App. D. C., at 452–456, 495 F. 2d, at 1032–1036 (majority opinion); *id.,* at 459–461, 495 F. 2d, at 1039–1041 (MacKinnon, J., dissenting); *id.,* at 462–464, 495 F. 2d, at 1042–1044 (Wilkey, J., dissenting). It is that unavoidable doubt which calls for specific authority from Congress before courts apply a private-attorney-general rule in awarding attorneys' fees.

[40] "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States."

that section permits costs to be taxed against the United States, "but not including the fees and expenses of attorneys," in any civil action brought by or against the United States or any agency or official of the United States acting in an official capacity. If, as respondents argue, one of the main functions of a private attorney general is to call public officials to account and to insist that they enforce the law, it would follow in such cases that attorneys' fees should be awarded against the Government or the officials themselves. Indeed, that very claim was asserted in this case.[41] But § 2412 on its face, and in light of its legislative history, generally bars such awards,[42] which, if allowable at all, must be expressly provided for by statute, as, for example, under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a–3(b).[43]

We need labor the matter no further. It appears to us that the rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney-general approach when such judicial rule will operate only against private parties and not against the Government.[44]

We do not purport to assess the merits or demerits of the "American rule" with respect to the allowance of attorneys' fees. It has been criticized in recent

---

[41] See *supra*, at 246.

[42] The Act of Mar. 3, 1887, which provided for the bringing of suits against the United States, covered the awarding of costs against the Government in the following section: "If the Government of the United States shall put in issue the right of the plaintiff to recover the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court." § 15, 24 Stat. 508.

The same section was included in the Judicial Code of 1911. § 152, 36 Stat. 1138. In 1946, the Federal Tort Claims Act provided: "Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees." § 410(a), 60 Stat. 844. The 1948 Code provided in 28 U.S.C. § 2412(a) (1946 ed., Supp. II) that "[t]he United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." The Reviser observed that § 2412(a) "is new. It follows the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law." Noting that many statutes exempt the United States from liability for fees and costs, the Reviser concluded that "[a] uniform rule, embodied in this section, will make such specific exceptions unnecessary." In 1966, § 2412 was amended to its present form. 80 Stat. 308. The Senate Report on the proposed bill stated that "[t]he costs referred to in the section do not include fees and expenses of attorneys." S. Rep. No. 1329, 89th Cong., 2d Sess., 3 (1966). See also H.R. Rep. No. 1535, 89th Cong., 2d Sess., 2, 3 (1966). The Attorney General, in transmitting the proposal for legislation which led to the amendment, said that "[t]he bill makes it clear that the fees and expenses of attorneys . . . may not be taxed against the United States." *Id.*, at 4. See *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, — U.S. App. D.C. —, 499 F. 2d 1095 (1974), cert. denied, 420 U.S. 962 (1975).

Without departing from this pattern, the Federal Tort Claims Act of 1946 in addition limited the fees which courts could allow and which attorneys could charge their clients and provided that the fees were "to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant." § 422, 60 Stat. 846. See also § 410(a). Section 422 was maintained in the 1948 Code as 28 U.S.C. § 2678 (1946 ed., Supp. II), and the percentage limitations were raised in 1966. 80 Stat. 307.

[43] See n. 35, *supra*. See also Amendments to Freedom of Information Act, Pub. L. 93–502, § 1(b)(2), 88 Stat. 1561 (amending 5 U.S.C. § 552(a)).

[44] Although an award against the United States is foreclosed by 28 U.S.C. § 2412 in the absence of other statutory authorization, an award against a state government would raise a question with respect to its permissibility under the Eleventh Amendment, a question on which the lower courts are divided. Compare *Souza* v. *Travisono*, — F. 2d — (CA1 1975); *Class* v. *Norton*, 505 F. 2d 123 (CA2 1974); *Jordan* v. *Fusari*, 496 F. 2d 646 (CA2 1974); *Gates* v. *Collier*, 489 F. 2d 298 (CA5 1973), petition for rehearing en banc granted, 500 F. 2d 1382 (CA5 1974); *Brandenburger* v. *Thompson*, 494 F. 2d 885 (CA9 1974); *Sims* v. *Amos*, 340 F. Supp. 691 (MD Ala.), aff'd summarily, 409 U.S. 942 (1972), with *Jordan* v. *Gilligan*, 500 F. 2d 701 (CA6 1974); *Taylor* v. *Perini*, 503 F. 2d 899 (CA6 1974); *Named Individual Members* v. *Texas Highway Dept.*, 496 F. 2d 1017 (CA5 1974); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (CA3 1974). In this case, the Court of Appeals did not rely upon the Eleventh Amendment in declining to award fees against Alaska, see n. 16, *supra*, and therefore we have no occasion to address this question.

years,[45] and courts have been urged to find exceptions to it.[46] It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.[47]

The decision below must therefore be reversed.

So ordered.

Mr. JUSTICE DOUGLAS and Mr. JUSTICE POWELL took no part in the consideration or decision of this case.

Mr. JUSTICE BRENNAN, dissenting.

I agree with Mr. JUSTICE MARSHALL that federal equity courts have the power to award attorneys' fees on a private-attorney-general rationale. Moreover, for the reasons stated by Judge Wright in the Court of Appeals, I would hold that this case was a proper one for the exercise of that power. As Judge Wright concluded:

"Acting as private attorneys general, not only have [respondents] ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests. An award of fees would not have unjustly discouraged [petitioner] Alyeska from defending its case in court. And denying fees might well have deterred [respondents] from undertaking the heavy burden of this litigation." 161 U. S. App. D. C. 446, 456, 495 F. 2d 1026, 1036.

Mr. JUSTICE MARSHALL, dissenting.

In reversing the award of attorneys' fees to the respondent environmentalist groups, the Court today disavows the well-established power of federal equity courts to award attorneys' fees when the interests of justice so require. While under the traditional American rule the courts ordinarily refrain from allowing attorneys' fees, we have recognized several judicial exceptions to that rule for classes of cases in which equity seemed to favor fee shifting. See *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939); *Mills* v. *Electric Auto-Lite Co.*, 396

---

[45] See, *e.g.*, McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services, 40 Ford. L. Rev. 761 (1972); Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation? 49 Iowa L. Rev. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Comment, Court Awarded Attorney's Fees and Equal Access to the Court, 122 U. Pa. L. Rev. 636, 649–655 (1974); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967). See also 1 Speiser § 12.8; Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Studies 399, 437–438 (1973).

[46] In recent years, some lower federal courts, erroneously, we think, have employed the private-attorney-general approach to award attorneys' fees. See *e.g.*, *Souza* v. *Travisono*, *supra*; *Hoitt* v. *Vitek*, 495 F. 2d 219 (CA1 1974); *Knight* v. *Auciello*, 453 F. 2d 852 (CA1 1972); *Cornist* v. *Richland Parish School Board*, 495 F. 2d 189 (CA5 1974); *Fairley* v. *Patterson*, 493 F. 2d 598 (CA5 1974); *Cooper* v. *Allen*, 467 F. 2d 836 (CA5 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971); *Taylor* v. *Perini*, *supra*; *Morales* v. *Haines*, 486 F. 2d 880 (CA7 1973); *Donahue* v. *Staunton*, 471 F. 2d 475 (CA7 1972), cert. denied, 410 U.S. 955 (1973); *Fowler* v. *Schwarzwalder*, 498 F. 2d 143 (CA8 1974); *Brandenburg* v. *Thompson*, *supra*; *La Raza Unida* v. *Volpe*, 57 F. R. D. 94 (ND Cal. 1972). The Court of Appeals for the Fourth Circuit has refused to adopt the private-attorney-general rule. *Bradley* v. *School Board of the City of Richmond*, 472 F. 2d 318, 327–331 (1972), vacated on other grounds, 416 U.S. 696 (1974). Cf. *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Comm'n*, 497 F. 2d 1113 (CA2 1974).

This Court's summary affirmance of the decision in *Sims* v. *Amos*, *supra*, cannot be taken as an acceptance of a judicially created private-attorney-general rule. The District Court in *Sims* indicated that there was an alternative ground available—the bad faith of the defendants—upon which to base the award of fees. 340 F. Supp., at 694. See also *Edelman* v. *Jordan*, 415 U.S. 651, 670–671 (1974).

[47] The Senate Subcommittee on Representation of Citizen Interests has recently conducted hearings on the general question of court awards of attorneys' fees to prevailing parties in litigation and attempted "to ascertain whether 'fee-shifting' affords representation to otherwise unrepresented interests, whether some restrictions or encouragement of the development is needed, and what place, if any, there is for legislation in this area." Hearings on Legal Fees before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pt. III, p. 788 (1973) (Sen. Tunney). As MR. JUSTICE MARSHALL said for the Court in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974), with respect to fee shifting under the Miller Act, 49 Stat. 793, as amended, 40 U.S.C. § 270a *et seq.*, "Congress is aware of the issue," 417 U.S., at 131 (footnote omitted). As in that case, "arguments for a further departure from the American Rule . . . are properly addressed to Congress." *Ibid.*

U. S. 375, 391–392 (1970); *Hall* v. *Cole*, 412 U. S. 1, 5, 9 (1973). By imposing an absolute bar on the use of the "private attorney general" rationale as a basis for awarding attorneys' fees, the Court today takes an extremely narrow view of the independent power of the courts in this area—a view that flies squarely in the face of our prior cases.

The Court relies primarily on the docketing-fees-and-court-costs statute, 28 U. S. C. § 1923, in concluding that the American rule is grounded in statute and that the courts may not award counsel fees unless they determine that Congress so intended. The various exceptions to the rule against fee shifting that *this Court* has created in the past are explained as constructions of the fee statute. *Ante*, at 257. In addition, the Court notes that Congress has provided for attorneys' fees in a number of statutes, but made no such provision in others. It concludes from this selective treatment that where award of attorneys' fees is not expressly authorized, the courts should deny them as a matter of course. Finally, the Court suggests that the policy questions bearing on whether to grant attorneys' fees in a particular case are not ones that the judiciary is well equipped to handle, and that fee shifting under the private attorney general rationale would quickly degenerate into an arbitrary and lawless process. Because the Court concludes that granting attorneys' fees to private attorneys general is beyond the equitable power of the federal courts, it does not reach the question whether an award would be proper against Alyeska in this case under the private attorney general rationale.

On my view of the case, both questions must be answered. I see no basis in precedent or policy for holding that the courts cannot award attorneys' fees where the interests of justice require recovery, simply because the claim does not fit comfortably within one of the previously sanctioned judicial exceptions to the American rule. The Court has not in the past regarded the award of attorneys' fees as a matter reserved for the legislature, and it has certainly not read the docketing-fees statute as a general bar to judicial fee shifting. The Court's concern with the difficulty of applying meaningful standards in awarding attorneys' fees to successful "public benefit" litigants is a legitimate one, but in my view it overstates the novelty of the "private attorney general" theory. The guidelines developed in closely analogous statutory and nonstatutory attorneys' fee cases could readily be applied in cases such as the one at bar. I therefore disagree with the Court's flat rejection of the private attorney general rationale for fee shifting. Moreover, in my view the equities in this case support an award of attorneys' fees against Alyeska. Accordingly, I must respectfully dissent.

I

A

Contrary to the suggestion in the Court's opinion, our cases unequivocally establish that granting or withholding attorneys' fees is not strictly a matter of statutory construction, but has an independent basis in the equitable powers of the courts. In *Sprague* v. *Ticonic National Bank*, *supra*, the lower courts had denied a request for attorneys' fees from the proceeds of certain bond sales, which, because of petitioners' success in the litigation, would accrue to the benefit of a number of other similarly situated persons. This Court reversed, holding that the allowance of attorneys' fees and costs beyond those included in the ordinary taxable costs recognized by statute was within the traditional equity jurisdiction of the federal courts. The Court regarded the equitable foundation of the power to allow fees to be beyond serious question:

"Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. . . ." "Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional [statutory] taxable costs is part of the original authority of the chancellor to do equity in a particular situation." 307 U. S., at 164, 166.[1]

In more recent cases, we have reiterated the same theme: while as a general rule attorneys' fees are not to be awarded to the successful litigant, the courts as well as the legislature may create exceptions to that rule. See *Mills* v. *Electric Auto-Lite Co.*, 396 U.S., at 391–392; *Hall* v. *Cole*, 412 U.S., at 5. Under the judge-

[1] See also *Kansas City Southern R. Co.* v. *Guardian Trust Co.*, 281 U.S. 1, 9 (1930); *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580 (1946).

made exceptions, attorneys' fees have been assessed, without statutory authorization, for willful violation of a court order, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 426–428 (1923); for bad faith or oppressive litigation practices. *Vaughan* v. *Atkinson*, 369 U. S. 527, 530–531 (1962); and where the successful litigants have created a common fund for recovery or extended a substantial benefit to a class, *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116 (1885); *Mills* v. *Electric Auto-Lite Co., supra.*[2] While the Court today acknowledges the continued vitality of these exceptions, it turns its back on the theory underlying them, and on the generous construction given to the common-benefit exception in our recent cases.

In *Mills*, we found the absence of statutory authorization no barrier to extending the common-benefit theory to include nonmonetary benefits as a basis for awarding fees in a stockholders' derivative suit. Discovering nothing in the applicable provisions of the Securities Exchange Act of 1934 to indicate that Congress intended "to circumscribe the courts power to grant appropriate remedies," 396 U.S., at 391, we concluded that the District Court was free to determine whether special circumstances would justify an award of attorneys' fees and litigation costs in excess of the statutory allotment. Because the petitioners' lawsuit presumably accrued to the benefit of the corporation and the other shareholders, and because permitting the others to benefit from the petitioners' efforts without contributing to the costs of the litigation would result in a form of unjust enrichment, the Court held that the petitioners should be given an attorneys' fee award assessed against the respondent corporation.

We acknowledged in *Mills* that the common-fund exception to the American rule had undergone considerable expansion since its earliest applications in cases in which the court simply ordered contribution to the litigation costs from a common fund produced for the benefit of a number of nonparty beneficiaries. The doctrine could apply, the Court wrote, where there was no fund at all, *id.*, 392, but simply a benefit of some sort conferred on the class from which contribution is sought. *Id.*, at 393–394. As long as the court has jurisdiction over an entity through which the contribution can be effected, it is the fairer course to relieve the plaintiff of exclusive responsibility for the burden. Finally, we noted that even where it is impossible to assign monetary value to the benefit conferred, "the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders." *Id.*, at 396. The benefit that we discerned in *Mills* went beyond simple monetary relief: it included the benefit to the shareholders of having available to them "an important means of enforcement of the proxy statute." *Ibid.*

Only two years ago, in a member's suit against his union under the "free speech" provisions of the Labor-Management Reporting and Disclosure Act, we held that it was within the equitable power of the federal courts to grant attorneys' fees against the union, since the plaintiff had conferred a substantial benefit on all the members of the union by vindicating their free speech interests. *Hall* v. *Cole*, 412 U.S. 1 (1973). Because a court-ordered award of attorneys' fees in a suit under the free speech provision of the LMRDA promoted Congress' intention to afford meaningful protection for the rights of employees and the public generally, and because without provision of attorneys' fees an aggrieved union member would be unlikely to be able to finance the necessary litigation, *id.*, at 13, the Court held that the allowance of counsel fees was "consistent with both the (LMRDA) and the historic equitable power of federal courts to grant such relief in the interests of justice." *Id.*, at 14.

In my view, these cases simply cannot be squared with the majority's suggestion that the availability of attorneys' fees is entirely a matter of statutory authority. The cases plainly establish an independent basis for equity courts to grant attorneys' fees under several rather generous rubrics. The Court acknowledges as much when it says that we have independent authority to award fees in cases of bad faith or as a means of taxing costs to special beneficiaries. But I am at a loss to understand how it can also say that this independent judicial

---

[2] On several recent occasions we have recognized that these exceptions are well established in our equity jurisprudence. See *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129–130 (1974); *Hall* v. *Cole*, 412 U.S. 1, 5 (1973); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718–719 (1967). See also *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n. 4 (1968); 6 J. Moore, Federal Practice ¶ 54.77 [2], p. 1709 (2d ed. 1974).

power succumbs to Procustean statutory restrictions—indeed, to statutory silence—as soon as the far from bright line between common benefit and public benefit is crossed. I can only conclude that the Court is willing to tolerate the "equitable" exceptions to its analysis not because they can be squared with it, but because they are by now too well established to be casually dispensed with.

B

The tension between today's opinion and the less rigid treatment of attorneys' fees in the past is reflected particularly in the Court's analysis of the docketing-fees statute, 28 U.S.C. § 1923, as a general statutory embodiment of the American rule. While the Court has held in the past that Congress can restrict the availability of attorney's fees under a particular statute either expressly or by implication.[3] see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), it has refused to construe § 1923 as a plenary restraint on attorney's fee awards.

Starting with the early common-fund cases, the Court has consistently read the fee-bill statute of 1853 narrowly when that Act has been interposed as a restriction on the Court's equitable powers to award attorneys' fees. In *Trustees* v. *Greenough*, 105 U.S. 527 (1881), the Court held that the statute imposed no bar to an award of attorneys' fees from the fund collected as a result of the plaintiff's efforts, since:

"[The fee bill statute addressed] only those fees and costs which are strictly chargeable as between party and party, and [did not] regulate the fees of counsel and other expenses and charges as between solicitor and client . . . . And the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require . . . ." *Id.*, at 535–536.

In *Sprague*, *supra*, the Court again applied this distinction in recognizing "the power of federal courts in equity suits to allow counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute." 307 U.S., at 164. The Court there identified the costs "between party and party" as the sole target of the 1853 Act and its successors. The award of attorneys' fees beyond the limited ordinary taxable costs, the Court termed costs "as between solicitor and client"; it held that these expenses, which could be assessed to the extent that fairness to the other party would permit, were not subject to the restrictions of the fee statute. *Id.*, a 166, and n. 2. Whether this award was collected out of a fund in the court or through an assessment against the losing party in the litigation was not deemed controlling. *Id.*, at 166–167; *Mills*, 396 U.S., at 392–394.

More recently, the Court gave its formal sanction to the line of lower court cases holding that the fee statute imposed no restriction on the equity court's power to include attorneys' fees in the plaintiff's award when the defendant has unjustifiably put the plaintiff to the expense of litigation in order to obtain a benefit to which the latter was plainly entitled. *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962). Distinguishing *The Baltimore*, 8 Wall. 377 (1869), a case upon which the Court today heavily relies, the Court in *Vaughan* noted that the question was not one of "costs" in the statutory sense, since the attorneys' fee award was legitimately included as a part of the primary relief to which the plaintiff was entitled, rather than an ancillary adjustment of litigation expenses.[4]

Finally, in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), the Court undertook a comprehensive review of the assessment of attorneys' fees in federal court actions. While noting that nonstatutory exceptions to

---

[3] In *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974), we held that attorneys' fees should not be granted as a matter of course under the provision of the Miller Act that granted claimants the right to "sum justly due," 49 Stat. 794, as amended, 40 U.S.C. § 270b(a). To overturn the American rule as a matter of statutory construction would be improper, we held, with no better evidence of congressional intent to provide for attorneys' fees, and in the context of everyday commercial litigation such as that under the Miller Act, 417 U.S., at 130.

[4] Although *Vaughan* was an admiralty case and therefore subject to the possible narrow reading as a case evincing a special concern for plaintiff seamen as wards of the admiralty court, we have not given the case such a narrow construction. See *Hall* v. *Cole*, 412 U.S., at 5; *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S., at 129 n. 17. Indeed, the *Vaughan* Court itself relied on *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA4 1951), a nonadmiralty case in which the plaintiff was awarded attorneys' fees as an equitable matter because of the obduracy of the defendant in opposing the plaintiff's civil rights claim.

the American rule had been sanctioned "when overriding considerations of justice seemed to compel such a result." *id., at* 718, the Court held that the meticulous provision of remedies available under the Lanham Act and the history of unsuccessful attempts to include an attorneys' fee provision in the Act precluded the Court's implying a right to attorneys' fees in trademark actions. The Court did not, however, purport to find a statutory basis for the American rule, and in fact it treated § 1923 as a "general exception" to the American rule, not its statutory embodiment. 386 U.S. at 718 n. 11.

My Brother WHITE concedes that the language of the 1853 statute indicating that the awards provided therein were exclusive of any other compensation is no longer a part of the fee statute. But we are told that the fee statute should be read as if that language were still in the Act, since there is no indication in the legislative history of the 1948 revision of the Judicial Code that the revisors intended to alter the meaning of § 1923. Yet even if that language were still in the Act, I should think that the construction of the Act in the cases creating judicial exceptions to the American rule would suffice to dispose of the Court's argument. Since that language is no longer a part of the fee statute, it seems even less reasonable to read the fee statute as an uncompromising bar to equitable fee awards.

Nor can any support fairly be drawn from Congress' failure to provide expressly for attorneys' fees in either the National Environmental Policy Act or the Mineral Leasing Act, while it has provided for fee awards under other statutes. Confronted with the more forceful argument that other sections of the *same* statute included express provisions for recovery of attorneys' fees, we twice held that specific remedy provisions in some sections should not be interpreted as evidencing congressional intent to deny the courts the power to award counsel fees in actions brought under other sections of that Act that do not mention attorneys' fees. *Hall* v. *Cole*, 412 U.S., at 11; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S., at 390–391. Indeed, the *Mills* Court interpreted congressional silence, not as a prohibition, but as authorization for the Court to decide the attorneys' fees issue in the exercise of its coordinate, equitable power. *Id.*, at 391. In rejecting the argument from congressional silence in *Mills* and *Hall*, the Court relied on the established rule that implied restrictions on the power to do equity are disfavored. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944).[5] The same principle applies, *a fortiori*, to this case, where the implication must be drawn from the presence of attorneys' fees provisions in other, unrelated pieces of legislation.[6]

In sum, the Court's primary contention—that Congress enjoys hegemony over fee shifting because of the docketing fee statute and the occasional express provisions for attorneys' fees—will not withstand even the most casual reading of the precedents. The Court's recognition of the several judge-made exceptions to the American rule demonstrates the inadequacy of its analysis. Whatever the Court's view of the wisdom of fee shifting in "public benefit" cases in general, I think that it is a serious misstep for it to abdicate equitable authority in this area in the name of statutory construction.

II

The statutory analysis aside, the Court points to the difficulties in formulating a "private attorney general" exception that will not swallow the American rule. I do not find the problem as vexing as the majority does. In fact, the guidelines to the proper application of the private attorney general rationale have been suggested in several of our recent cases, both under statutory attorneys' fee provisions and under the common-benefit exception.

---

[5] The words of the *Hecht* Court apply well to the case at hand: "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." 321 U.S., at 329–330.

[6] The Court makes the further point that 28 U.S.C. § 2412 generally precludes a grant of attorneys' fees against the Federal Government and its officers. Even if this is true, I fail to see how it supports the view that the private attorney general rationale should be jettisoned altogether. There are many situations in which other entities, both private and public, are sued in public interest cases. If attorneys' fees can properly be imposed on those parties, I see no reason why the statutory immunity of the Federal Government should have any bearing on the matter.

In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), we held that successful plaintiffs who sue under the discretionary-fee-award provision of Title II of the Civil Rights Act of 1964 are entitled to the recovery of fees "unless special circumstances would render such an award unjust." 390 U.S., at 402. The Court reasoned that if Congress had intended to authorize fees only on the basis of bad faith, no new legislation would have been required in view of the long history of the bad-faith exception. *Id., at* 402 n. 4. The Court's decision in *Newman* stands on the necessity of fee shifting to permit meaningful private enforcement of protected rights with a significant public impact. The Court noted that Title II did not provide for a monetary award, but only equitable relief. Absent a fee-shifting provision, litigants would be required to suffer financial loss in order to vindicate a policy "that Congress considered of the highest priority." 390 U.S., at 402. Accordingly, the Court read the attorneys' fee provision in Title II generously, since if "successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." 390 U.S., at 402.

Analyzing the attorneys' fee provisions in § 718 of the Education Amendments Act of 1972, the Court in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 718 (1974), made a similar point. There the school board, a publicly funded governmental entity, had been engaged in litigation with parents of schoolchildren in the district. The Court observed that the two parties had vastly disparate resources for litigation, and that the plaintiffs had "rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system." *Id.*, at 718. Although the analysis in *Newman* was directed at construing the statutory-fees provision and the analysis in *Bradley* went to the question of whether the fees provision should be applied to services rendered before its enactment, the arguments in those cases for reading the attorneys' fee provisions broadly is quite applicable to nonstatutory cases as well.

Indeed, we have already recognized several of the same factors in the recent common-benefit cases. In *Mills*, we emphasized the benefit to the class of shareholders of having a meaningful remedy for corporate misconduct through private enforcement of the proxy regulations. Since the beneficiaries could fairly be taxed for this benefit, we held that the fee award should be made available. Similarly, in *Hall*, we pointed to the imbalance between the litigating power of the union and one of its members: in order to ensure that the right in question could be enforced, we held that attorneys' fees should be provided in appropriate cases. Additionally, we noted that the enforcement of the rights in question would accrue to the special benefit of the other union members, which justified assessing the attorneys' fees against the treasury of the defendant union.

From these cases and others, it is possible to discern with some confidence the factors that should guide an equity court in determining whether an award of attorneys' fees is appropriate.[7] The reasonable cost of the plaintiff's representation should be placed upon the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.

There is hardly room for doubt that the first of these criteria is met in the present case. Significant public benefits are derived from citizen litigation to vindicate expressions of congressional or constitutional policy. See *Newman* v. *Piggie Park Enterprises, supra.* As a result of this litigation, respondents forced

---

[7] These teachings have not been lost on the lower courts in which the elements of the private attorney general rationale have been more fully explored. See, *e. g., Souza* v. *Travisono*, —— F. 2d —— (CA1 1975); *Hoitt* v. *Vitek*, 495 F. 2d 219 (CA1 1974); *Knight* v. *Auciello*, 453 F. 2d 852 (CA1 1972); *Cornist* v. *Richland Parish School* Board, 495 F. 2d 189 (CA5 1974); *Fairley* v. *Patterson*, 493 F. 2d 598 (CA5 1974); *Cooper* v. *Allen*, 467 F. 2d 836 (CA5 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971); *Taylor* v. *Perini*, 503 F. 2d 899 (CA6 1974); *Morales* v. *Haines*, 486 F. 2d 880 (CA7 1973) *Donahue* v. *Staunton*, 471 F. 2d 475 (CA7 1972;), cert. denied, 410 U.S. 955 (1973); *Fowler* v. *Schwarzwalder*, 498 F. 2d 143 (CA8 1974); *Brandenburger* v. *Thompson*, 494 F. 2d 885 (CA9 1974); *La Raza Unida* v. *Volpe*, 57 F. R. D. 94 (ND Cal. 1972); *Wyatt* v. *Stickney*, 344 F. Supp. 387 (MD Ala. 1972); *NAACP* v. *Allen*, 340 F. Supp. 703 (MD Ala. 1972).

Congress to revise the Mineral Leasing Act of 1920 rather than permit its continued evasion. See Pub. L. 93–153, 87 Stat. 576. The 1973 amendments impose more stringent safety and liability standards, and they require Alyeska to pay fair market value for the right-of-way and to bear the costs of applying for the permit and monitoring the right-of-way.

Although the NEPA issues were not actually decided, the lawsuit served as a catalyst to ensure a thorough analysis of the pipeline's environmental impact. Requiring the Interior Department to comply with the NEPA and draft an impact statement satisfied the public's statutory right to have information about the environmental consequences of the project, 83 Stat. 853, 42 U.S.C. § 4332 (C), and also forced delay in the construction until safeguards could be included as conditions to the new right-of-way grants.[8]

Petitioner contends that these "beneficial results . . . might have occurred" without this litigation. Brief for Petitioner 11, 36–42. But the record demonstrates that Alyeska was unwilling to observe and the Government unwilling to enforce congressional land use policy. Private action was necessary to assure compliance with the Mineral Leasing Act; the new environmental, technical, and land use safeguards written into the 1973 amendments to the Act are directly traceable to the respondents' success in this litigation. In like manner, continued action was needed to prod the Interior Department into filing an impact statement; prior to the litigation, the Department and Alyeska were prepared to proceed with the construction of the pipeline on a piecemeal basis without considering the overall risks to the environment and to the physical integrity of the pipeline.

The second criterion is equally well satisfied in this case. Respondents' willingness to undertake this litigation was largely altruistic. While they did, of course, stand to benefit from the additional protections they sought for the area potentially affected by the pipeline, see *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), the direct benefit to these citizen organizations is truly dwarfed by the demands of litigation of this proportion. Extensive factual discovery, expert scientific analysis, and legal research on a broad range of environmental, technological, and land use issues were required. See Affidavit of Counsel (Re Bill of Costs), App. 213–219. The disparity between respondents' direct stake in the outcome and the resources required to pursue the case is exceeded only by the disparity between their resources and those of their opponents—the Federal Government and a consortium of giant oil companies.

Respondents' claim also fulfills the third criterion, for Alyeska is the proper party to bear and spread the cost of this litigation undertaken in the interest of the general public. The Department of the Interior of course bears legal responsibility for adopting a position later determined to be unlawful. And, since the class of beneficiaries from the outcome of this litigation is probably coextensive with the class of United States citizens, the Government should in fairness bear the costs of respondents' representation. But, the Court of Appeals concluded that it could not impose attorneys' fees on the United States, because in its view the statute providing for assessment of costs against the Government, 28 U.S.C. § 2412, permits the award of ordinary court costs, "but [does] not includ[e] the fees and expenses of attorneys." Since the respondents did not cross-petition on that point, we have no occasion to rule on the correctness of the court's construction of that statute.[9]

Before the Department and the courts, Alyeska advocated adoption of the position taken by Interior, playing a major role in all aspects of the case.[10] This litigation conferred direct and concrete economic benefits on Alyeska and its principals in affording protection of the physical integrity of the pipeline. If a court could be reasonably confident that the ultimate incidence of costs imposed upon an applicant for a public permit would indeed be on the general

---

[8] See S. Rep. No. 93–207, p. 18 (1973); H. R. Rep. No. 93–414, p. 14 (1973); Hearings on S. 970, S. 993, and S. 1565 before the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess., pt. 4, pp. 56, 127 (1973).

[9] The statute, construed in light of the rule against implied restrictions on equity jurisdiction, may not foreclose attorneys' fee awards against the United States in all cases. Section 2412 states that the ordinary recoverable costs shall not include attorneys' fees; it may be read not to bar fee awards, over and above ordinary taxable costs, when equity demands. In any event, they are plainly circumstances under which § 2412 would not bar attorneys' fee awards against the United States, see *e. g.*, *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 484 F. 2d 1331 (CA1 1973).

public, it would be equitable to shift those costs to the applicant.[10] In this connection, Alyeska, as a consortium of oil companies that do business in 49 States and account for some 20% of the national oil market, would indeed be able to redistribute the additional cost to the general public. In my view the ability to pass the cost forward to the consuming public warrants an award here. The decision to bypass Congress and avoid analysis of the environmental consequences of the pipeline was made in the first instance by Alyeska's principals and not the Secretary of the Interior. The award does not punish the consortium for these actions but recognizes that it is an effective substitute for the public beneficiaries who successfully challenged these actions. Since the Court of Appeals held Alyeska accountable for a fair share of the fees to ease the burden on the public-minded citizen litigators, I would affirm the judgment below.

Remarks of Mr. Justice Marshall

Financing Public Interest Law: The Role of the Organized Bar

Thank you, Mr. Chairman. I am delighted to be in this beautiful city of Montreal and to join you on the occasion of the 1975 Award of Merit Luncheon. In saluting the many contributions of state and local bar associations in the field of continuing legal education you pay tribute to men and women who are dedicated to one of the most important ideals of our profession: that all persons and groups should be able to receive competent representation in the legal process.

My remarks to you today concern the implementation of this ideal. My purpose is to encourage the growing efforts of some lawyers and bar associations to commit themselves to this ideal in a concrete way. I believe that the time has come for the organized bar to direct more of its energy and resources in this direction. And so, as we honor state and local bar associations for what they have already done, I will try to suggest some steps that bar associations might consider taking in the future.

These views develop from basic perceptions about our legal system. As I have seen it during my career, our legal process—whether in the court, legislatures or administrative agencies—is largely an adversary process. Decision-makers generally rely upon facts and arguments presented to them by outside parties whose interests often conflict. The presentation of these contending viewpoints makes it possible, in theory at least, for the decision-maker to make a good decision and for wise law to develop.

Most of us recognize that the theory is flawed in practice. There is often an imbalance in the legal process. Not all viewpoints are equally represented before most decision-makers. For obvious reasons, lawyers generally represent clients who can afford to pay them. As a result, many persons and groups fail to receive adequate legal representation. The effect is that the decision-making process itself is skewed, and the premises of the adversary system and of the lawyer's role in the legal process are questioned.

The problems are not new, nor are calls for their solutions new. What is new is that over the last decade or so, more and more lawyers have sought to dedicate their professional lives to providing representation to underrepresented interests in all facets of the legal process.

For want of a better term, I shall use the phrase "public interest law" to refer to the diffuse efforts aimed at providing legal resources for the unrepresented. As the recent report of the second American Assembly on Law and a Changing Society, co-sponsored by the ABA, noted

"While there may be ambiguity of definition and scope, a serious void in our legal institutions is being filled by the activities of lawyers who engage in representation of groups and interests that would otherwise be unrepresented or underrepresented."

The cohesive element in this movement is recognition of the need to equalize representation and to revitalize the adversary system by assuring diversity of input.

---

[10] In requiring Alyeska to pay only half of the fee, the Court of Appeals correctly recognized that, absent the statutory bar, the Government would have been in an equal position to shift the costs to the public beneficiaries.

[11] See Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 902–905 (1975).

The new wave of public interest law built upon the successes of civil rights and civil liberties lawyers who for decades have been working through private non-profit organizations. It was given further impetus by the OEO Legal Services Program. The development of the newer public interest law firms was a natural outgrowth of the expansion of public interest law into new areas. Public interest lawyers today provide representation to a broad range of relatively powerless minorities—for example, the mentally ill, children, the poor of all races. They also represent neglected but widely diffuse interests that most of us share as consumers and as individuals in need of privacy and a healthy environment.

As I have already said, public interest law is necessary to create a balance in the legal system, to assure that all interests get a fair chance to be heard with the help of a lawyer. The basic point was perfectly put by Justice Black in *Gideon* v. *Wainwright:*

"The government hires lawyers to prosecute and defendants who have money hire lawyers to defend them are the strongest indicators of widespread belief that lawyers . . . are necessities, not luxuries."

To paraphrase Justice Black, if government and industry need high quality lawyers to represent their interests in our complex society, less well organized or less powerful interests also need to have access to high quality legal representation.

We condemn the adversary system to one-sided justice if we deprive the legal process of the benefit of differing viewpoints and perspectives on a given problem. This is not to say that the viewpoint of the underrepresented must or should always prevail. I mean no such implication. Rather, I strongly contend that the decision-maker should have the opportunity to assess the impact of any given administrative, legislative or judicial decision in terms of all the people whom it will affect. This cannot be accomplished without a public interest presence whose function is to advocate, in the true sense, the needs and desires of the underrepresented and unrepresented segments of society.

As the New York Times recently noted, the public interest practice has attached some of the best legal minds—"the brightest graduates of the best law schools, the editors of law reviews, the law clerks to Supreme Court Justices, [and] the disillusioned refugees from the more prestigious law firms." With a force of barely 250 lawyers, a tiny fraction of the 355,000 members of the nation's legal profession, public interest lawyers have attacked formidable foes and scored some extraordinary victories. Many of these victories have occurred in court litigation. But public interest law has increasingly turned to other forums.

For example, as the Wall Street Journal recently reported, the Nader organization has at least one lawyer who spends all of his time monitoring the activities of the Civil Aeronautics Board, attempting to supplement the presentations of the airline industry with some input from the perspective of those consumers who use the airlines. Less activity has taken place on the legislative front, largely because private non-profit organizations and their lawyers may not lobby if they wish to keep their tax-exempt status. This may be one reason that courts are asked to deal with so many large social policy issues. Perhaps the time has come to permit greater lobbying by the public interest lawyers. Public interest lawyers have also played a significant educational and research role, with direct and indirect effects on all of us.

In spite of these successes, public interest law has always had one major problem: funding. Almost by definition, public interest lawyers represent persons or groups who cannot compete in the ordinary market for legal services. Often, the cost of public interest lawyering exceeds the economic benefit to the individual client. In these circumstances, the funding of public interest law is a problem without an easy solution.

In analyzing the dimensions of this problem your illustrious past president, Chesterfield Smith, stated

"[T]he gap between the need for legal services and the availability of those services . . . will never be closed without . . . institutionalized support by the organized bar. . . ."

To foster integrity and public confidence in government, the public interest bar must be kept financially afloat. Realistically, busy lawyers with paying clients are not generally inclined to give scarce hours to a demanding public interest practice. But they might consider contributing the value of a few hours per month to a fund or foundation established by a state bar for the support of independent, public interest lawyers.

In view of the obligation of lawyers for the proper functioning of the adversary system and their monopolistic hold over the role of representation, each member of the profession, in my opinion, must assume a special responsibility to assure fairness in the adversary process. Toward this end several bar associations have initiated pilot funding programs to support the local interest practice. In highlighting these projects this afternoon I salute these efforts and concur in the recommendation of the recent ABA-American Assembly conference which called for an "increase of funding of public interest legal services by lawyers, bar associations and individuals and organizations with social justice."

At present several sources are helping to provide legal resources to those who cannot afford to pay for them, but each suffers from one or more liabilities. First, the federal government supports legal services through the newly created Legal Services Corporation. While the work of the Corporation will be built on the OEO legal services model, the statute proscribes federally-funded lawyers from handling certain controversial matters, such as school desegregation, abortion, selective service and post-conviction procedures. Moreover, test cases and affirmative class action cases require prior approval of the project director. These restrictions on the activities of legal services lawyers seriously limit their opportunity meaningfully and independently to represent the needs of their clients. This politicizing of legal representation may be an inevitable consequence of government funding.

On another front Congress is presently considering creation of an Agency for Consumer Advocacy. The legislation has passed the Senate and has overwhelming support in the House. As presently drafted, the bill calls for the ACA to intervene in administrative and court proceedings whenever the interest of the consumer may be affected. In my view the agency could be a major public interest law resource and deserves the endorsement of all friends of equal justice. But it cannot completely replace the need for independent lawyers representing specific consumer interests before the agencies.

Second, the judiciary has awarded attorneys fees to lawyers acting for the substantial benefit of the public in civil rights and other cases of public importance. I do not fear, as do many of the members of the public interest bar, that the recent Supreme Court decision in the Alaska pipeline case sounded the death knell to public interest law. In my opinion the majority of the Court recognized the pressing need for compensation of attorneys who act in the public interest. In the words of my Brother White:

"It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances.

While the Court declined to endorse the power of a court to identify those circumstances, it acknowledged the power of a court to redistribute litigation costs with legislative authorization. With more than 30 statutes presently on the books containing provisions for awards of attorneys fees and more on the drafthoard, I envision this particular problem as temporary in nature. It is now the responsibility of Congress to provide for the award of attorneys fees by courts and agencies if it wishes to make it possible for private parties to enforce certain federal laws. But while the availability of attorneys fees awards is important, it is shortsighted to place complete reliance on this particular source. Court-awarded fees are not an elixir for the funding problem. The scope of public interest law extends to activities in which fee awards are not possible, and, in any case, fee awards will always be an uncertain and delayed source of funding. Thus support for this broadened range of activities must come from a permanent, more comprehensive source.

Third, foundations and many individuals contribute generously to civil rights and public interest law firms. Some organizations such as the Sierra Club and Wilderness Society are membership organizations that rely on dues to support their legal activities. Such funding is unpredictable and permits no long-range planning capability. Foundation support has supplemented such groups and wholly supported public interest firms on a year-to-year basis. But no sustaining financial support has evolved from this source. Moreover, a tight economy has reduced the amount of grants and threatens their continued institutional support required to bridge the gap between the need and availability of legal services.

In 1971 the Beverly Hills Bar Association established the Beverly Hills Bar Association Foundation with a one-time seed money grant of $15,000. The Foundation has 15 directors—seven appointed by the President of the Associ-

ation and the other eight elected by the members. The board of directors represents a cross section of the legal community and includes several corporate lawyers, three law professors, a director of the local legal aid society, civil rights, environmental and consumer lawyers, and minority group lawyers.

Financial support for the Foundation comes from the private bar. Law firms are solicited to contribute at the rate of $100 per firm lawyer per year. In its first year of operation it raised over $20,000 from these contributions. Additional staff and financial support comes from foundations, public interest organizations and individuals.

The private bar also contributes legal staff to the Foundation through a voluntary pool of about 200 attorneys. The matters handled by the Foundation include significant reform work in the problem areas of voting, broadcasting, consumer protection, and state bar examinations.

The creation of a public interest law firm bearing the name of a bar association is the most important statement which any association can make regarding its commitment to providing equal justice to all. Throughout both the legal community of California and the poor and minority communities, the Foundation is fast gaining the reputation of providing legal representation in many significant cases. But this view is not universal. Early criticism arose from members of the state legislature who were angered by the Foundation's representing Mexican-Americans on reapportionment issues and members of the bar who were upset about challenges to the bar exam and other controversial cases. I find none of the objections valid.

Controversy is an integral part of a lawyer's business. Controversy accompanies most efforts to correct social wrongs. Persons raising controversial issues are surely entitled to representation. With all the lawyers arrayed on the side of justice, as they are, it is cetrainly appropriate to provide some opportunity for reformers to have the benefit of legal assistance. The reformers may prove to be wrong, but they deserve to be heard before we hastily decide that they are wrong.

However, it does seem to me that there is one real problem with the Beverly Hills scheme which places exclusive reliance on a voluntary pool of attorneys for staff power. Public interest law is a specialty like any other and requires full time effort. Time demands and possible conflicts of interest with paying clients make it difficult, if not impossible, for volunteers to give singular focus and attention to the needs of their public interest clients.

In most respects the Philadelphia experience follows a pattern similar to that in California, but does have certain innovative aspects that are worthy of note. At the urging of the public-minded leaders of the Philadelphia Bar Association the former Lawyers Committee for Civil Rights Under Law was expanded into the Public Interest Law Center of Philadelphia (PILCOP).

The board of directors is drawn from a cross-section of the legal profession and the community. With a seed grant of $10,000 plus an equal commitment for two additional years from the Philadelphia Bar Association Foundation—which makes charitable contributions to legally related projects from the commissions on its life insurance and disability insurance policies (as is the case with the ABA Endowment)—the PILCOP steering committee solicited three year commitments from large law firms at $50 per lawyer, from individual practitioners, and from foundations. From one-third to one-half of the lawyers in a metropolitan area like Philadelphia are employed by the larger firms. These are also the locations where the need for legal services for minorities, consumers and taxpayers will be the greatest. If Philadelphia has raised over $50,000 annually from this source, smaller cities should be able to match this commitment on a proportional basis. Several of the local family foundations became interested in the project and agreed to substantial commitments for a three-year period. Perhaps the most exciting source of funding for the Center came from the state government which, with the Governor's strong endorsement, has agreed to fund Legal Services for People Who are Different at $275,000 a year for a three-year period. Focusing on problems of the mentally ill, the elderly and the gifted, a task force will work as a special unit within the center to improve the quality of representation for these groups. The Center staff of six lawyers handles other cases which have the potential of major redress or significant precedent in areas such as housing, consumer protection, education and the environment.

I find two aspects of the Philadelphia proposal most instructive. First the use of a pre-existing organization as the foundation of the bar-sponsored public interest law firm represents an efficient use of legal resources. The Boston Bar Association has followed this same path in making a similar professional and financial commitment in the development of its public interest law firm. Second, the presence of staff lawyers avoids the dispersion of energies that accompanies operation solely with a volunteer pool while the cooperation of the bar in general allows the staff to draw on specific expertise from lawyers at large firms, if necessary.

The District of Columbia Bar Association is also exploring avenues for funding the public interest practice. The District Bar has recently conducted a symposium on pro bono needs and services in the Washington community. Out of this symposium issued a lengthy final report which lead to the formation of a special committee to determine how much potential support there is within the bar association for funding public interest activities. I understand that the labors of the seminar will be duly recognized later this afternoon.

The alternatives which will surface from the Committee's work will undoubtedly reflect the large number of public interest law firms in the District. With this proliferation of public interest lawyers the development of a foundation to distribute funds to pre-existing law firms might be more advisable than the creation of another public interest firm. Perhaps the funds could be derived from an increase in membership dues or a special assessment to improve the decision-making process and the adversary system. The Board of Directors of the foundation would then be responsible for distribution of the funds to public interest firms on a regular basis, thereby creating a permanent funding source for those organizations. While some objections have been raised to this approach, it seems to me as a matter of policy that lawyers are obliged to make good their moral commitment to equal justice.

Although these projects are at varying stages of development, they all reflect a common commitment to moving bar associations beyond their traditional support of legal aid and public defender projects into support of law-reform programs concerned about social issues.

As our society moves toward realization of full representation for all citizens, the permanent funding of public interest law practice by the organized bar offers an administratively feasible and financially reasonable means of demonstrating in tangible form a commitment to equal justice under law. While I recognize that some difficult problems of implementation remain, I see no reason to delay making a special commitment to the public interest practice by offering direct support from the bar associations. With this in mind I challenge you as the leaders of the state and local bar associations to work toward this end and to encourage your associations to take hold and effective steps in this direction.

CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

Attached are the responses to my letter to the ABA, which I also sent to a number of prominent law school deans, law school professors, public interest lawyers, public interest organizations, leading members of the private bar, all the State bar associations, and some of the major foundations.

JOHN SEIBERLING.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., August 8, 1975.

JAMES D. FELLERS, ESQ.,
President, American Bar Association,
Chicago, Ill.

DEAR PRESIDENT FELLERS: As you know, the Supreme Court recently ruled that, with only a few narrow exceptions, federal courts have no power to award attorneys' fees in the absence of specific statutory authority (*Alyeska Pipeline Service Co.* v. *Wilderness Society*, May 12, 1975).

I have introduced legislation (H.R. 7826 and H.R. 8221) to overturn *Alyeska* by adding the following new section 1930 to Title 28 of the U.S. Code:

"If in a civil action the court determines the interests of justice so require, the court shall award reasonable attorneys' fees to the prevailing party. The United States shall be liable for such fees the same as a private party."

I am enclosing copies of statements I have made in the Congressional Record on the subject of attorneys' fees.

In addition to this general legislation, I have introduced bills to permit or require the payment of attorneys' fees to plaintiffs who prevail in actions under the civil rights acts (H.R. 7828 and H.R. 8220), the Mineral Leasing Act of 1920 (H.R. 7825 and H.R. 8218), the National Environmental Policy Act of 1969 (H.R. 7829 and H.R. 8222), and the injunction section of the Clayton Act (H.R. 7827 and H.R. 8219).

Several other attorneys' fees bills are pending before Congress. H.R. 4675, introduced by Congressman Crane, would require the payment of attorneys' fees to defendants who prevail in civil actions brought by the United States. H.R. 6296, introduced by Congressman Koch, would require such payments to defendants who are acquitted in criminal cases brought by the United States. H.R. 7968, introduced by Congressman Drinan, would permit the assessment of attorneys' fees and litigation costs against the United States in civil rights, consumer, and environmental cases in which a party prevails in a court action challenging an agency decision. Finally, H.R. 7969, also introduced by Congressman Drinan, would permit attorneys' fees to be awarded in civil rights cases.

I would very much appreciate having the ABA's views on H.R. 7826 and H.R. 8221, and on any of the other bills to which I have referred. Specifically, I would be interested in the ABA's response to the following questions:

(1) Is the "American Rule" (i.e. generally no awards of attorneys' fees), as limited and defined by *Alyeska*, in the public interest and in the interests of justice? Would overturning *Alyeska* (by authorizing courts to award attorneys' fees in civil cases) be in the public interest and in the interests of justice?

(2) Should the awarding of attorneys' fees be (a) prohibited, with the few exceptions remaining after *Alyeska*, (b) made mandatory, (c) left to the discretion of the courts, with or without general statutory guidelines?

(3) Should the awarding of attorneys' fees be permitted or required for plaintiffs who prevail in "public interest" cases, i.e., those prevailing "private attorneys general?" If so, how should the concept of public interest cases be defined? Should the awarding of attorneys' fees be the rule or the exception for plaintiffs who prevail in public interest cases? For plaintiffs who prevail in purely private cases?

(4) Is public interest litigation a significant tool for making the government and private parties obey federal law? Without remedial legislation, what effect will *Alyeska* have on public interest law? How should public interest law be financed? How should other pro bono litigation be financed?

(5) Should the courts be given the discretion to award attorneys' fees to parties which technically have not prevailed, e.g., to plaintiffs whose meritorious cases are mooted by governmental action?

(6) Is the "interests of justice" standard of H.R. 7826 and H.R. 8221 appropriate? If so, what general factors should the courts consider in making such a determination?

(7) Under what circumstances should attorneys' fees be awarded to prevailing defendants? Should the standards be different from those for awards to prevailing plaintiffs?

(8) Under what circumstances should the United States (either as a complainant or as a defendant) be required to pay attorneys' fees when it loses a civil action? Should the United States be required to pay attorneys' fees to acquitted criminal defendants?

(9) Are there any circumstances under which the United States should be entitled to recover attorneys' fees (or some other measure of legal costs and expenses) when it prevails?

(10) Should attorneys' fees be awarded to private parties who prevail in administrative agency proceedings?

(11) Are there any specific laws which should be amended to permit or require the award of attorneys' fees to prevailing plaintiffs or parties?

(12) Is there any significant danger that non-meritorious cases will be filed (or have been filed) for purposes of obtaining "blackmail settlements" or that

any cases are filed primarily to obtain attorneys' fees without regard to benefiting the real parties in interest? What remedies are available in such cases?

Please feel free to answer any or all of these questions, which are intended to explore the parameters of the subject of attorneys' fees. While some of the questions may raise difficult and controversial policy issues, it is my hope that Congress will come to grips with these issues in a manner which promotes and protects the public interest and the interests of justice.

I am sure that Congress will be most interested in the ABA's views on attorneys' fees.

Thank you very much.

Sincerely,

JOHN F. SEIBERLING,
Member of Congress.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., September 26, 1975.

Hon. JOHN F. SEIBERLING,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: Lawrence E. Walsh, President of the American Bar Association, has asked me to thank you for the letter of August 8th addressed to his predecessor James D. Fellers. We apologize for the delay in responding occasioned by the change in administration.

The American Bar Association has no specific position on the subject matter covered by H.R. 7826 and H.R. 8221. It is, of course, of great interest and a number of Committees under the general leadership of the Consortium on Legal Services and the Public are studying it. It is quite possible that a position will be recommended for approval by the Association's House of Delegates at our Midyear Meeting in February. We will certainly keep you informed of developments.

The Association very much appreciates the opportunity of participating in this way on the development of policy on this very important issue.

Sincerely yours,

LOUIS B. POTTER.

CONCORD, MASS., *August 21, 1975.*

Hon. JOHN F. SEIBERLING,
Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: I thank you for your inquiry of August 13th. I claim no expertise respecting awards of attorney's fees, and am too hard-pressed to undertake to study the several bills and questions you put to Mr. Fellers.

But I believe that so called "private Attorney General" suits have in general been beneficial and endorse your bill that would give courts discretion to award fees for such services.

In my article in 78 Yale L.J. 816 I assembled material showing that such suits have long been encouraged in England as an aid to law enforcement.

Sincerely yours,

RAOUL BERGER.

ENVIRONMENTAL DEFENSE FUND,
Washington, D.C., August 25, 1975.

Hon. JOHN F. SEIBERLING,
Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: Your letter of August 13, 1975 to Arlie Schardt has been forwarded to me in Mr. Schardt's absence. I have reviewed the legislation which you submitted in June to overturn the result of *Alyeska Pipeline Service Company* v. *Wilderness Society.* The legislation would, I believe, represent a major step forward in the functioning of the American judicial system by enabling the public interest attorneys to receive compensation, under appropriate circumstances, for their efforts.

There are a number of technical problems in this area that we believe should be addressed in the hearings which will be scheduled for this fall. Let me list these briefly for you and then discuss briefly the direction we hope reform efforts will take:

1. The problems raised by the Eleventh Amendment and the question of whether a federal court can award attorneys' fees against a state government;
2. The appropriate standards for determination by the judiciary of the desirability of awarding attorneys' fees;
3. The propriety of awarding attorneys' fees in favor of a loser when the loser substantially contributes to important public policy change that benefits the public even though he ultimately loses the lawsuit;
4. The appropriate formula for calculating the amount of attorneys' fees to be awarded;
5. The reviewability by an appellate court of a district court's determination to award attorneys' fees;
6. The award of attorneys' fees against the United States Government in both civil and criminal cases.

It has always been our position that any proposal for attorneys' fees must involve a reserve of a great deal of discretion for independent judgment on the part of the federal judiciary. We have always been confident that this judgment would be exercised responsibility and with the best notions of the public interest in mind. Nevertheless, it may be desirable for Congress to set forth in general terms the standards for determination by the court whether attorneys' fees should be awarded. Some standards which have been suggested from time to time, and may be useful for discussion are:

(*a*) Whether the losing party would have been deterred from asserting his position in court by the threat of attorneys' fees in the event he lost;

(*b*) Whether the interest represented by the winning party is so diffuse that our economic system would be unlikely to provide any individual or group of individuals who would obtain sufficient economic advantage from his victory to justify economically supporting the litigation;

(*c*) Whether the party to be awarded attorneys' fees has really changed public policy in an important and beneficial way;

(*d*) Whether the award of attorneys' fees would encourage other litigation that would produce outcomes beneficial to public policy.

Another very important area for your examination is the award of attorneys' fees in administrative proceedings. Much of EDF's activity is devoted toward administrative cases—for example, the lengthy pesticide proceedings in the Environmental Protection Agency, and massive interventions in electric rate cases around the country to advocate the adaption of peak load pricing by American electric utilities. In any of these administrative proceedings, it is often unclear who is the "winner" and the "loser." A standard of—"major contribution to the quality of the public policy outcome"—major contribution to the quality of the public policy outcome"—might be more useful than a "victory" or "defeat" test. EDF would strongly favor the award of attorneys' fees in these administrative cases—in fact, such cases may be more important for the environmental movement in the long run than court proceedings.

In summary, we favor strongly the position which you are taking and consider this to be an issue of extreme importance for our continued existence. We hope that the hearings scheduled this fall will address some of the issues discussed in this letter, and would be happy to assist in providing our expert and technical assistance upon request to the Committee either in writing or orally.

Once again, let me thank you for your substantial efforts in this important direction.

Yours very truly,

PHILIP J. MAUSE.

CITIZENS COMMUNICATIONS CENTER,
Washington, D.C., September 18, 1975.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: I am writing at the invitation of Congressman John F. Seiberling to present testimony to your Subcommittee during scheduled

hearings on his and other bills relating to the award of attorneys fees in federal litigation. It is my understanding that hearings are now scheduled to begin on October 6, 1975.

Citizens Communications Center, of which I am Executive Director, is a public interest law firm that has, since 1969, been representing national and local citizens groups in broadcasting and cable television proceedings before the Federal Communications Commission and the appellate courts. During that time, we have been primarily dependent upon foundation support, with some operating funds also coming from honorariums, publications, reimbursement of direct, out of pocket expenses by a few clients, and some fees received in settlements. A brochure briefly describing our services, and a mimeographed sheet describing some of our accomplishments, are enclosed.

Since our inception, we have looked to reimbursement of attorneys' fees as one of the few means by which the rights of the public could continue to be represented in federal communications regulation. While the FCC, under Court mandate in 1966, became one of the first federal agencies to open full standing in its processes to members of the public as "private attorneys general", there are no economic incentives to stimulate the growth of a private bar to represent those interests. Viewer and listener groups who litigate before the F.C.C. on issues of racial discrimination, lack of responsive public affairs or children's programming, and similar issues have no direct economic stake in the outcome of the litigation. They thus cannot, even on a contingent fee basis, muster the resources to obtain private counsel. Even assuming they had the resources, such groups would find that with very few exceptions the large private communication bar interprets conflict of interest so broadly as to preclude their representation of any citizens interests while they represent any broadcaster or cable operator.

For this reason, Citizens has, since 1970, been seeking a definitive ruling on the power and duty of the F.C.C. to award attorney's fees in litigation before it. We were, of course, seeking application of the parallel precedents being then developed in the federal courts under the "private attorney general" theory. My attached testimony, presented to Senator Tunney's Senate Subcommittee on Representation of Citizen Interests during its September–October 1973 hearings on attorneys fees, details much of our efforts up to that point.

Since that time, unfortunately, the test case in which we were seeking our fees, and upon which we were pining our hopes of obtaining a definitive ruling on the power and duty of the F.C.C. and other federal administrative agencies to award such fees, became a casualty of the *Alyeska* decision.

In June, 1975, just over a month after *Alyeska*, the U.S. Court of Appeals for the District of Columbia, relying on the Supreme Court's action, held in *Turner* v. *F.C.C.*, that if only Congress could specify that counsel fees could be awarded to litigants before Federal courts where the public interest so required, Congressional action was likewise required to authorize federal administrative agencies to do so. A copy of the opinion in *Turner* is attached. Our effort to obtain attorneys' fees has, in fact, become the definitive holding for all federal agencies, but in precisely the opposite direction than we had anticipated.

Ironically, this court reversal came only shortly after we, along with other public interest law firms seeking rulings, had convinced the Internal Revenue Service to include administrative agency-awarded, as well as court-awarded, fees within the allowable funding received by tax-exempt firms such as ours.

For these reasons, which I will explain in much greater detail in my testimony, I believe that it is essential for your Subcommittee at least to consider including in any legislation it adopts fee award authorization for litigation before federal administrative agencies as well as that before federal courts. There are a great many other public interest law firms and private attorneys either directly employed by nonprofit intervenors or representing them that also devote all or most of their efforts to vindicating public rights before particular administrative agencies. Indeed, the law in these regulatory areas is so specialized that total commitment to any agency practice is virtually required if interests of the public are to be well served in that agency's actions. We and other attorneys similarly situated cannot benefit from a statute allowing the award of attorneys' fees solely in federal civil cases. Most bills in this area, in fact, do not yet even provide for the potential award of attorneys' fees by a federal appellate court for a meritorious appeal of an agency action brought to vindicate broad public interests, much less in such litigation at the agency level itself.

I am confident that your Subcommittee will wish to at least continue and add to the constructive continuing debate on this topic. By formally re-extending, on the Subcommittee's behalf, the invitation offered by Congressman Seiberling, the Committee will gain the results of our long experience in citizen intervention before federal agencies that underlies the need for this legislation to address this important public need. If requested, we could also offer specific statutory language to accomplish this purpose for your Subcommittee's consideration.

Sincerely,

FRANK W. LLOYD,
Executive Director.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
New York, N.Y., August 19, 1976.

Hon. JOHN F. SEIBERLING,
Congress of the United States, House of Representatives,
Washington, D.C.

DEAR MR. SEIBERLING: I warmly commend your initiative in drawing attention to the gap in existing law which the *Alyeska Pipeline* case illustrates. I am not prepared, however, to support your proposal to direct the allowance of reasonable attorneys' fees to the prevailing party whenever a court "determines the interests of justice so require."

Before the *Alyeska Pipeline* decision, nobody could confidently foretell when a court might deem an award of fees to be suitable. Congress should not simply recreate the somewhat chaotic situation that previously obtained. Instead, it should, in my opinion, attempt to spell out the circumstances in which it believes an award to be appropriate.

Moreover, I am unclear whether you mean that "the prevailing party" should receive an award or whether you intend only to reward a victorious "private attorney general." Suppose that an environmental protection league or other self-appointed protector of an asserted "public interest" sues a utility company to restrain the building of a power plant. After three years of litigation, the utility company prevails. Do you contemplate its recovering its legal expenses from the losing side? If a court thought that "the interests of justice so require," would you be content to see the do-good group's treasury depleted in order to compensate the winning side in this example of "public interest litigation"?

Finally, I am troubled by recollection of "strike suits"—derivative stockholders' actions—which proliferated in the corporate field in past years because attorneys more or les financed them in the hope of being awarded fees in the end. Lest so-called "public interest litigation" also become enmired in scandal and cynicism, I should like to have a legislative study which would consider whether and precisely when "private attorneys general" should be spurred into action by the prospect of their own attorneys' enrichment.

In short, I agree with you that the problem of fee awards deserves attention; but I favor a more cautious approach than your statutory proposal envisages.

Sincerely yours,

WALTER GELLHORN.

STANFORD LAW SCHOOL,
Stanford, Calif., August 19, 1975.

Hon. JOHN F. SEIBERLING,
House of Representatives,
Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: In response to your letter, I support enthusiastically the proposed legislation that would overturn the *Alyeska* case. In my view, courts should have discretion to award attorneys' fees in civil cases.

I am delighted that you are working on behalf of this legislation and will be pleased to help in any way that I can.

Cordially,

THOMAS EHRLICH.

HARVARD LAW SCHOOL.
Cambridge, Mass., August 20, 1975

Hon. JOHN F. SEIBERLING,
Longworth House Office Building,
Washington, D.C.

DEAR MR. SEIBERLING: I heartily approve of your proposal to give the federal courts discretion, in any civil case, to award reasonable attorneys fees to the prevailing party and to apply the same rule to the United States as to any other party.

The awarding of such fees should not be made mandatory, but should be left in the discretion of the courts, as you propose, so that the court can fashion a more equitable remedy for each case. If the rule were applied to all civil actions the various piecemeal proposals such as those confined to civil rights actions, NEPA actions, or "public interest" actions would not be necessary.

I also support Congressman Koch's bill to require payment of attorney's fees to defendants who are acquitted in criminal cases brought by the United States.

Sincerely,

VERN COUNTRYMAN,
Professor of Law.

THE FORD FOUNDATION,
New York, N.Y., September 9, 1975.

Hon. JOHN F. SEIBERLING,
House of Representatives,
Congress of the United States,
Washington, D.C.

DEAR MR. SEIBERLING: I write in response to your request for my views on the subject of allowing Federal courts to award fees in public interest lawsuits. I have read your remarks on this subject in the Congressional Record and share your concern that unless there is an adequate legislative response to the *Alyeska* case much important legal work in the fields of civil rights, poverty, environment and consumer protection may not be done.

I understand that you will receive detailed comment on the proposed bill from the Council for Public Interest Law, an organization which has received support from the American Bar Association, the Ford Foundation, the Rockefeller Brothers Fund and the Carnegie Corporation, and which is dedicated to the growth and development of public interest practice. I would like to limit myself to more general comments on attorneys' fees and the relevant experience of the Ford Foundation.

Since 1963, the Ford Foundation has been responsive to the need to provide legal services to the unrepresented and underrepresented in our society. Our initial activities focused on making law available to the poor. Later, after the creation of the OEO legal services program, we moved into the civil rights and public interest areas. Today the Foundation supports a number of legal organizations active in these areas, some of which have benefited from the awarding of attorneys' fees and rely on them to help in meeting the needs of the community they serve.

In my view, "private attorneys general" play an important role in enforcing the law and helping the unrepresented to protect their civil and constitutional rights. A foundation can provide support only for a limited number of organizations, and then only for a reasonable time, before it moves on to other pressing public issues. While the Ford Foundation at present intends to continue its concern for adequate legal representation, the long-range viability and effectiveness of public interest law must depend on the development of self-sustaining support in the community as a whole. Clearly, attorneys' fees are one important source of such support, and I commend your efforts to deal with this issue in an affirmative manner.

If I can be of any other help, please let me know.

Sincerely,

MCGEORGE BUNDY.

LAW CENTER,
Los Angeles, Calif., August 19, 1975.

Re your letter August 13, 1975, legislation regarding lawyers' fees.

Hon. JOHN F. SEIBERLING,
Congress of the United States,
House of Representatives,
Longworth House Office Building,
Washington, D.C.

DEAR SIR: Several years ago I suggested that consideration be given to reimbursement of taxpayer's attorneys' fees in certain cases in which the taxpayer is successful. A reprint is enclosed, "Should the Government Reimburse Taxpayer's Attorneys' Fees in Tax Litigation", 45 American Bar Association Journal 978 (1959).

2. The idea of that article should be expanded to consider reimbursement in any case in which a litigant is successful in demonstrating the unconstitutionality of a statute, or arbitrary conduct of a government agency, or other situations where the effect is to improve law and the administration of justice.

3. I also suggest that serious consideration be given to reimbursement in criminal cases where a defendant is found not guilty.

4. The reimbursement in any event should be limited to "reasonable" compensation. "Reasonableness" should be construed in each situation to take into account the total posture of the case so that, among other things, the amount of judgment for the fee awarded against the losing party is not necessarily the fee which the lawyer may properly charge his victorious client.

5. One of my concerns, perhaps some doubt, about legislation which awards fees to the prevailing party is the impact that such legislation might, in the future, have on the freedom to sue. One of the great freedoms—not often discussed as one of our fundamental freedoms—is the right of access to the judicial process. Awarding a judgment for attorney fees to the prevailing party may be a minor deterrent to the use of court process. What concerns me more is that I visualize the possibility that once such legislation is enacted, the next major legislation might require the plaintiff to post a bond as a condition precedent to filing a law suit. I would find a bond posting requirement too serious a deterrent to the freedom of access to the courts. I would feel much better about your proposed legislation if there were a way to give assurance that future legislation would not condition access to the courts. I doubt that there is any way to give such assurance, although I believe the item worthy of discussion and consideration.

6. In connection with settlements of controversies, I had, some years ago suggested that legislation which might shift some fees, in the circumstances I outlined, would encourage settlements. (This might have some bearing on your item (12)). "Court Congestion—Is Settlement the Key?", 35 Los Angeles Bar Bulletin 3 (1959). Reprint enclosed.

7. (a) May I suggest for your consideration, the relationship of lawyer fees to income taxes. Some kinds of fees are now a deductible item of expense, generally fees of this nature and incurred as a business expense, and fees coming within the scope of § 212 of the Internal Revenue Code. Medical expenses are, in general, deductible. I believe that some studies have been made, and others are being made, concerning the deductibility of fees paid to lawyers.

(b) My dominant interest in the lawyering process is in the field of preventive law. I seek to develop lawyering techniques so that lawyers will be better prepared to assist the legally healthy person to remain legally healthy. In my opinion there is need for lawyer services in preventive law practice. Your proposed legislation is not concerned with preventive law practice. There are some influences now in society (pre-paid legal service plans, group legal services, etc.) which seem to encourage the use of lawyers preventively. It is possible that an expansion of the deductibility of lawyers' fees would be an additional step in that direction. In my opinion such a result would be socially desirable.

8. I have no objection to your furnishing the thoughts in this letter to the Judiciary Committee. There may, if you deem them worthy, be included in the hearing record. I doubt that my testimony at a hearing would add anything further, but if you feel otherwise, I should be pleased to have your comments.

Respectfully,

LOUIS M. BROWN.

LAW CENTER,
Los Angeles, Calif., August 27, 1975.

HON. JOHN F. SEIBERLING,
Congress of the United States, House of Representatives, Washington, D.C.

DEAR MR. SEIBERLING: Thank you very much for your letter of August 13, 1975 in which you asked me for my views on the Alyeskan Pipeline Service Company case which ruled that federal courts have virtually no power to order the award of attorneys' fees without specific legislative authority. I regret to say that I do not have time at this moment to analyze your proposed legislation in detail, but I have just finished reading a very important law review article which bears directly on the question of awarding of fees in such cases. The article is entitled "Fee Awards and the Eleventh Amendment" and may be found in 88 *Harvard Law Review* 1875 (June 1975). The author concludes that

"Awards of attorneys' fees from state funds are undoubtedly located somewhere in the dusk of Eleventh Amendment jurisprudence. Perhaps for this reason, one court has suggested that it would be inappropriate to apply to them a mechanical retroactive/prospective test. The best approach would seem to be one which would take into account the importance of these awards to the enforcement of federal law and to the effective functioning of the federal courts. Such an approach would seem consistent with traditional Eleventh Amendment interpretation which has, through complex doctrines, attempted to reconcile the concept of state sovereignty with the ultimate supremacy of federal law."

I strongly suggest that your staff analyze the article carefully.

Sincerely yours,

DOROTHY W. NELSON.

NATIONAL BAR ASSOCIATION, INC.,
Fort Lauderdale, Fla., September 16, 1975.

HON. JOHN F. SEIBERLING,
Congress of the United States, Longworth House Office Building, Washington, D.C.

DEAR MR. SEIBERLING: As President of the National Bar Association I am corresponding with you to inform you that we are acutely interested in your legislation designed to overturn the Alyeska case.

I would be willing to appear and testify at hearings regarding attorney's fees before the judiciary committee.

Please keep me advised on how my organization may help in this important legislation.

Sincerely,

W. GEORGE ALLEN.

LEWIS AND CLARK COLLEGE,
Portland, Oreg., August 31, 1975.

HON. JOHN F. SEIBERLING,
Congress of the United States, House of Representatives, Washington, D.C.

DEAR MR. SEIBERLING: Thank you for writing to me recently with respect to *Alyeska* and your proposals for legislative change. First, I wholeheartedly agree with your assessment of that case and the need for change. During the last two years, I have been heading up a lawyer-student team prosecuting a Section 1983 class action on behalf of all the indigent prisoners in the Oregon correctional system against the Governor of Oregon and others. My hours alone were in the neighborhood of 250, other attorneys' over 100, and student time between 1750 and 2000. We did not take this case for money, but once we discovered we could receive compensation, we applied for it. (I had advised our Dean that any award to me would be given in toto to the school.) In any event, *Alyeska*, two weeks prior to the trial, eliminated any chance for substantial compensation.

Second, I thank you for your kind words about my being an authority with respect to attorneys' fees, but you exaggerate. Frankly, I feel there are many more qualified attorneys and law professors in this area and I compliment you on the questions raised in your letter to James Fellers. They are certainly thought provoking, taking in the whole field of attorneys' fees as they do. I feel very strongly about seeing *Alyeska* overturned, not for personal reasons, but for the reasons you mention in the Congressional Record. As for fees in other types of actions

(general private civil litigation, for example), I am not sufficiently knowledgeable to take a position at this time on whether we should follow the so-called "English Rule" or not. Obviously, the threat of paying the defendant's attorney in the event of an unfavorable jury verdict would have a "chilling effect" on the institution of legitimate lawsuits by a sizeable percentage of potential plaintiffs.

Before supporting such a change, I would like to see all the arguments pro and con. At this point in my relative ignorance, I prefer the "American Rule" in the ordinary private civil case.

As indicated above, however, the *Alyeska* type situation is totally different from private litigation and the decision definitely needs to be overruled. Good luck!

Sincerely yours,

WILLIAM J. KNUDSEN, JR.,
Professor of Law.

NATIVE AMERICAN RIGHTS FUND,
Boulder, Colo., September 30, 1975.

HON. JOHN F. SEIBERLING,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. SEIBERLING: Please accept my apologies for not responding to your letter of August 13, 1975 sooner. In the last month, I have managed to get married, take a honeymoon, and spend several days preparing for trial in Nevada. As a result, I have not had an opportunity to consider your request as carefully as I would like to. Nevertheless, I would like to make a few brief comments.

The Native American Rights Fund represents Indian Tribes and Indian communities in federal court litigation involving significant questions of Indian law. Much of our work involves jurisdictional and resources disputes with the states in which Indian Tribes are located. Historically, Indian tribes have suffered at the hands of many state governments, and have had to rely on the protection of the United States to guarantee and protect their resources and their way of life from state sanctioned interference. When Tribes are forced to undertake litigation to protect their own rights, without the assistance of the United States, they necessarily rely on treaties and important federal policies to resist state interference. In this respect, they are acting as private attorney generals in asserting preeminent federal rights. For this reason, Indian Tribes are deeply concerned with the decision of the United States Supreme Court in *Alyeska Pipeline Service* v. *Wilderness Society*, for it places on the Tribes the financial burden for assuring that their rights are preserved. For the same reason, the Native American Rights Fund as a foundation-supported Indian law firm is deprived by the Supreme Court decision of an opportunity to recoup much of its expensive litigation costs in actions brought against the states. For these reasons we very much support legislation which you have introduced. We urge that the legislation itself or its legislative history make specific reference to the unique problems of American Indians and the appropriateness of awards of attorneys' fees to them when they successfully vindicate their rights and federal policies.

We also support your legislation insofar as it makes the United States liable for fees in the same manner as the states. As you may know some of the most serious deprivations of Indian rights occur as a result of actions taken by the United States. On many occasions the United States has a serious conflict of interest between its duty to act as trustee for Indian resources and its policies directed to the general public. Thus when Tribes are forced to litigate against the United States and assert a breach of fiduciary duty it is important that they be able to recoup part of their substantial litigation costs. *See, e.g., Painte Tribe of Indians* v. *Morton*, 360 F. Supp. 609 (D.D.C. 1973), reversed, 499 F.2d 1095 (D.C. Cir. 1974).

I would like to make one comment about any legislation designed to allow an award of attorneys' fees against the states. Under the Eleventh Amendment the states are protected from unconsented damage awards. As indicated in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and other recent Supreme Court decisions, it is extremely difficult to find situations where a state can be deemed to have waived its immunity. Although it is as yet unresolved whether the Eleventh Amendment prohibits awards of attorneys' fees against states or state officials, we think it

would be desirable to include in any legislation a provision which would establish state consent to be sued for attorneys' fees. In this regard we would suggest that in any law suit brought against an official of a state, if the state's attorney general elects to defend the state official then the state shall be deemed to have consented to an award of attorneys' fees. Although this provision would not provide consent under the Eleventh Amendment for all actions brought against the states, it would cover a large number of federal claims now brought against state officials.

I and my colleagues at the Native American Rights Fund are available to assist you in any way to enact the legislation which you have proposed. I hope these short comments will be of help.

Very truly yours,

ROBERT S. PELCYGER.

WASHINGTON, D.C., *September 11, 1975.*

HON. JOHN F. SEIBERLING,
House Office Building,
Washington, D.C.

DEAR MR. SEIBERLING: The intelligence and courage you bring to the resolution of the *Alyeska* problem for the public interest law movement is encouraging and commendable.

As you may know, for over seven years I served as a commissioner on the Federal Communications Commission. Perhaps I should have not been as surprised as I was by the discovery, but the fact is that that agency (like most others) relies almost entirely upon the participation of public groups to detect violations of law and other abuses by the "regulated" industries for which it has responsibility.

At the same time virtually every conceivable stumbling block is placed in the way of effective action by those groups.

Central to the effectiveness of these "private attorneys' generals" upon which so much American justice is dependent, is the availability of adequate financing. As you know, many of these young lawyers are willing to work at salaries well below those they could obtain from large private law firms. Nonetheless, they do need some income for themselves and for their expenses.

There are almost no limits to the lengths to which a private corporation can go in its litigation as these expenses are generally merely passed on to the taxpayers and consumers in the form of higher prices and "business expenses." Public interests groups are very hard pressed for funds and may even be subjected to harassment by the Internal Revenue Service for their activities.

I have often urged that regulatory commissions should not need to serve the interests of big business 100% of the time, that 99% should really be enough. Under this proposal 1% of all regulatory commissions' funds would be set aside to reimburse the reasonable fees and expenses of public interest group lawyers appearing before them.

Simple justice—if not, indeed, the survival of our nation—requires that some provision be made for the funding of this activity in our society. I am heartened at your interest in the matter, and wish you all success.

Sincerely,

NICHOLAS JOHNSON.

THE ROCKEFELLER FOUNDATION,
New York, N.Y., September 17, 1975.

HON. JOHN F. SEIBERLING,
House of Representatives, Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: Thank you for your letter of August 13, 1975 inviting comment on proposed legislation to overturn the recent Supreme Court decision relating to the equitable power of a Federal Court to award attorney's fees.

Although the Foundation is aware of the importance of public interest advocacy and has made selected grants in this field, we are precluded from responding to your request because of the restrictions in Section 4945 of the Internal

Revenue Code and regulations thereunder on the right of a private foundation to comment on pending legislation.

Sincerely yours,

JOHN H. KNOWLES, M.D.

RUDD, KARL, SHIERER, LYBARGER & CAMPBELL CO. L.P.A.,
ATTORNEYS AND COUNSELORS,
Cleveland, Ohio, September 5, 1975.

Re award of attorneys' fees in civil cases.

Hon. JOHN F. SEIBERLING,
Longworth House Office Building,
Washington, D.C.

DEAR MR. SEIBERLING: Your letter of August 20, 1975, addressed to me as Chairperson of the Friends Committee on National Legislation has been forwarded to me here. The subject of your bill H.R. 7826, is not one on which the FCNL has adopted any position, so I cannot speak for it. However, I have strong views on the matter personally and am glad to express them to you.

I think you have hit the nail right on the head. Your bill is most welcome and I hope it passes. As an attorney in private practice I am constantly faced with the necessity of considering whether I can still make a living if I undertake to provide the service a prospective client seeks. In a number of cases the only thing that has provided any chance for reasonable compensation has been the possibility of obtaining an award for fees as a "private attorney general" pursuant to Section 733.61 of the Ohio Revised Code.

The arguments you offer in your statements in the Congressional Record, June 12 and June 25, 1975, I believe are sound. Passage of your bill is needed in the interest of justice and to prevent the drying up of most federal public interest litigation in the areas where Congress has not already provided for awards of fees. The principle of your bill is sound and should be applied across the board.

Sincerely yours,

RALPH RUDD.

SIERRA CLUB,
San Francisco, Calif., September 22, 1975.

Congressman JOHN F. SEIBERLING,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: I want to thank you for your letter of August 13th and want to congratulate you for introducing legislation to overturn the Alyeska decision by giving the courts authority to award attorneys' fees in civil cases.

We were dismayed by the decision in the Alyeska case and certainly strongly support legislation of the type that you have introduced. I am asking our attorneys to carefully study your bill and to forward more detailed comments that would be useful for the Judiciary Committee.

Yours truly,

MICHAEL MCCLOSKEY,
Executive Director.

STERN FUND,
New York, N.Y., September 3, 1975.

Mr. JOHN F. SEIBERLING,
House of Representatives, Congress of the United States,
Washington, D.C.

DEAR MR. SEIBERLING: Thank you for your kind invitation to submit my views on fees for public interest lawyers.

I do strongly favor such court awards but am afraid I just don't have the time to prepare proper testimony at this time.

With best wishes,

Sincerely,

DAVID R. HUNTER.

LAW OFFICE,
Washington, D.C., August 29, 1975.

Hon. JOHN F. SEIBERLING,
Congress of the United States, House of Representatives,
Washington, D.C.

DEAR MR. SEIBERLING: This letter is written in response to your request for my views regarding attorneys' fees and H.R. 7826 and H.R. 8221 in particular.

I believe the *Alyeska Pipeline Service Co.* v. *Wilderness Society* must be legislatively overturned and that congressional action to this end should be rapid. One means of doing so would of course be the legislation which you introduced in June.

The legislation you proposed has the advantage over most proposed legislation in that it would permit the award of attorneys' fees in all classes of cases. Thus, it would automatically include, among others, environmental, consumer, civil rights and federal employee grievances; these and other classes of cases will often not be brought even if meritorious because the persons injured are without financial resources adequate to pay an attorney unless the possibility exists of attorneys' fees being paid by the defendant.

I am concerned, however, that since the bill permits anyone to be awarded attorneys' fees, it might be used by the government, large corporations and others with adequate resources to conduct litigation to obtain attorney's fees from such less affluent parties. If attorneys' fees were awarded for affluent litigants it would almost certainly intimidate persons with limited resources from bringing meritorious lawsuits out of fear they might be held liable for attorneys' fees.

The Council for Public Interest Law has prepared a model attorneys' fees statute which appears to avoid the difficulties raised by H.R. 7826 while retaining the breadth of coverage as regards these kinds of cases. The proposed bill provides:

(1) In any civil action arising under a statute of the United States or the Constitution, the court may allow the prevailing party reasonable attorneys' fees, in the interest of justice, if the court determines that (a) the prevailing party has conferred a substantial public benefit; and (b) (1) the economic interest of the prevailing party is small in comparison to the costs of effective participation, or (2) the prevailing party does not have sufficient resources adequately to compensate counsel.

(2) 28 U.S.C. 2421 is hereby amended by deleting the words "but not including the fees and expenses of attorneys."

(3) Nothing in this section shall be construed to limit the courts' authority to award attorneys' fees pursuant to other statutory provisions or inherent judicial powers.

We suggest that this bill might better accomplish your aim of giving persons with limited resources access to the court which is equal to those with greater resources.

Very truly yours,

BRUCE J. TERRIS.

THE UNIVERSITY OF TEXAS AT AUSTIN,
SCHOOL OF LAW,
Austin, Tex., September 19, 1975.

Hon. JOHN F. SEIBERLING,
Member of Congress,
Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: In view of the kind remarks in your letter of August 13, I reread the *Alyeska* case and considered your letter to ABA President Fellers and the other materials enclosed with your letter. For whatever benefit they may be, my reactions are offered.

The "American Rule" should be retained as our general rule. The underlying policy should be to encourage our citizens to use the courts to settle their differences. In the normal cases by John Q. Public vs. Joe Doe, the litigants are more likely to use the courts if attorney fees are not shifted. A comparison of the volume of litigation in this country with that in England bears this out. Therefore, no new rule by statute or court decision should swallow up

the American Rule. Individuals now often are discouraged from litigating because of the prospect of paying one lawyer, and the prospect of paying both sets of lawyers would normally have an unfortunate effect upon one's willingness to protect rights in court.

Shifting of the expense of attorneys fees should be permitted in certain kinds of cases, and therefore *Alyeska* requires some statutory changes be made. But a blanket, unbridled discretion given to trial judges to shift the expense of attorneys fees is unwarranted and would be detrimental by reason of the uncertainty created. Some statutory guidelines are needed. To state as a test in § 1931, "if ... the interests of justice so require," does not seem to be sufficiently definite; interpretation might be either too broad or too narrow.

I would not be troubled by shifting attorney fees, in appropriate cases, even though the party had not technically prevailed. The test perhaps does not need to include an element of having prevailed.

In any event there should be no blanket prohibition against awarding attorneys fees against the United States. The United States certainly should be subject to payment of attorneys' fees in circumstances where private litigants must pay; in addition, awards of attorneys' fees against the United States may well be justified in other situations.

The exact holding and effect of *Alyeska* is not completely clear to me. In absence of statutory authorization for award of attorneys fees, certain exceptions to the general American rule seem to be recognized in the decision: an exception for award against one acting in bad faith, and an exception where a common fund was created, which to some extent is recognized as extending to the conferring of a common benefit. The majority opinion seems most concerned whether there is also a recognized exception where one acts to vindicate important rights of citizens, or the so-called private attorney general exception. The majority opinion seems at least to recognize that courts have inherent power to award attorneys fees in some situations and the question was how far to extend this in enforcement of statutory rights.

The dissenting opinion by Justice Marshall seems accurate in suggesting that the problem is to formulate a "private attorney general" exception that will not swallow up the American rule. He suggested three limitations or elements of such a rule, the first two being: "(1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel." (He had a third but it does not appeal to me.) I believe those two elements might well be brought into a statute defining a new private attorney general exception to the general American rule and applicable to enforcement of statutory rights.

My concern with the language of the proposed new § 1930 is that it might not be interpreted creating a new, broad private attorney general exception, for it might be read as merely reaffirming the inherent power of the courts—a power recognized in *Alyeska* but found insufficient to justify an award under the facts. On the other hand, the statute might be construed so broadly as to swallow up the American rule. I therefore would prefer to see the "interests of justice" language replaced by some more particular standard, such as the two elements quoted above from Marshall's opinion. A similar approach is that of J. Anthony Kline in his testimony before the Subcommittee on Representation of Citizen Interest; he stated that public interest litigation usually meets three tests: (1) the issues involved are regarded as being of extreme importance and the importance can be inferred from legislative action or the very fundamental nature of the right at stake; (2) final judgment in the case will affect a substantial element of the public; and (3) the litigation is commenced by private plaintiffs rather than the government. A test along that line might be worked into the statute.

[7]There are other situations where the problems of attorneys fees need statutory correction. For example, in the area of veterans claims 38 U.S.C. §§ 3403 and 3404(c) limit to $10 the amount which a lawyer may receive for representing a veteran other than in litigation. If an attorney represents a veteran on a benefits claim and charges a reasonable fee which the veteran pays, the attorney is subject to a fine of $500 and two years at hard labor in a federal penitentiary; 38 U.S.C. § 3405. Additionally, a V.A. regulation, 30 C.F.R. § 14-648, prevents one representing a veteran from contacting any member of Congress for assistance in processing the veteran's claim. The latter regulation probably violates the First

Amendment by denying the right to petition Congress. The statutes mentioned certainly seem designed to prevent a veteran from securing adequate legal services. This is an area needing provision for awards of reasonable attorneys fees against the United States.

There are similar but less severe problems relating to social security claims. 42 U.S.C. § 406(a) provides that in an administrative proceeding before H.E.W., fees are required to be approved by the Secretary or his representative and the administrative determination is not subject to judicial review. In judicial proceedings, the court may award to the attorney of a successful claimant a reasonable fee "not in excess of 25% of the total of past due benefits." 42 U.S.C. § 406(b). That limitation should be rejected. Statutes governing claims such as veterans' and social security should not set permissible fees so low that the claimants cannot obtain the legal help of counsel they desire. Rather than limitations that interfere with obtaining counsel, provisions for awards of reasonable fees against the United States should be substituted.

Obviously, I approve the general principles underlying your bills. I have not read the bills you mentioned that were introduced by Congressmen Crane, Koch and Drinan and therefore I am in no position to comment on the specific provisions of those bills. However, I believe I would find them acceptable because some of them provide for awards against the United States in certain cases involving unequal financial resources of litigants, and others of them seem to further the private attorney general exception without swallowing up the American Rule, of which I generally approve.

Thank you for the offer to permit me to testify at hearings before the Judiciary Committee. I am not making such a request, however, because I doubt that I will have occasion to be in Washington, D.C., at any appropriate time.

Sincerely,

JOHN F. SUTTON, JR.

THE UNIVERSITY OF TENNESSEE,
COLLEGE OF LAW,
Knoxville, Tenn., August 21, 1975.

Hon. JOHN F. SEIBERLING,
Member of Congress,
Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: Thank you for your letter with enclosures of August 13. I certainly am in sympathy and accord with your proposal of legislation to permit the federal courts in appropriate cases to award attorney's fees. As you point out in your remarks to the Congress and in your letter, such a capacity in the federal courts can greatly enhance the role of the consumer and the individual citizen in achieving widely recognized advances in important areas of the law such as environmental protection, civil rights, consumer protection and other areas of public interest law.

My heartiest congratulations and best wishes for the success of your efforts.

Yours sincerely,

KENNETH L. PENEGAR, *Dean.*

THE UNIVERSITY OF TEXAS AT AUSTIN,
SCHOOL OF LAW,
Austin, Tex., August 20, 1975.

Hon. JOHN F. SEIBERLING,
House of Representatives,
Washington, D. C.

DEAR REPRESENTATIVE SEIBERLING: I have your letter of August 13th concerning the *Alyeska* case.

I have no doubt but that *Alyeska* was correctly decided. It semes to me that the awarding of attorneys' fee is as the Court said, "a policy matter that Congress has reserved for itself." 95 S.Ct. at 1627.

Plainly it is now for Congress to decide as a matter of policy whether and to what extent it wishes to authorize the award of attorneys fees. On what policy issue I would urge Congress to proceed with extreme caution. I think that long

experience has demonstrated that the American Rule, as defined by *Alyeska*, is in the public interest and in the interest of justice. One of the real problems in our society today is the tendency of our people to look to the courts, rather than to legislative bodies, for the solution to every grievance, real or imagined, in our social system. We would only encourage that tendency if successful plaintiffs were to have their attorneys compensated at the expense of the defendants. It would not be a two way street because in most instances the plaintiffs are of limited means and would be unable to pay an attorney's fee to the defendant if the defense should prevail.

I do not think that *Alyeska* will have the deleterious effect on public interest litigation that some are predicting. The movement in the lower courts away from the American Rule is a very recent development. I think that the Bar and interested groups will continue to arrange for counsel in meritorious cases as they have done for so long.

Sincerely yours,

CHARLES ALAN WRIGHT.

THE UNIVERSITY OF UTAH,
Salt Lake City, Utah, August 21, 1975.

Hon. JOHN F. SEIBERLING,
Congress of the United States,
House of Representatives,
Washington, D. C.

DEAR MR. SEIBERLING: This is in response to your letter of August 13 and enclosures with reference to H.R. 8221, which is designed to reverse the policy position applied by the Supreme Court in the Alyeska case with respect to attorneys' fees in civil cases.

I do not claim special knowledge or insight with respect to this interesting and important matter, but I am emboldened to offer some observations with respect to it. In the first place, I do have some difficulty with the reasoning of the majority in the Alyeska case since piecemeal action in the past by the Congress with reference to the allowance of attorneys' fees is not the same as comprehensive treatment which might justly be taken as preemptive. But the court has spoken and I move to my second point. For Congress to grant broad discretion to the federal judiciary along the line you have proposed would provide desirable flexibility under a broad standard to be applied as a matter of sound judgment from case to case. Were experience over time a legislative policy of that sort to point to the need for more definite legislative standards, the Congress could work to provide them.

Let me add a personal note. When I was Dean of the College of Law at Ohio State nearly 25 years ago I enjoyed the friendship of a very fine individual who was Chairman of the Art Department. I refer to Frank Seiberling. Is he your kinsman?

Sincerely,

JEFFERSON B. FORDHAM.

THE VIRGINIA BAR ASSOCIATION,
Winchester, Va., September 24, 1975.

Hon. JOHN F. SEIBERLING.
Longworth House Office Building,
Washington, D.C.

DEAR MR. SEIBERLING: You previously wrote to The Virginia Bar Association suggesting that it might support your Amendment to Title 28 of the United States Code, which would add Section 1930, and provide that the Court could tax costs of attorneys' fees to the losing party. You indicated that The Virginia Bar Association should reply to your correspondence with a view toward the reply being incorporated in the Congressional Record.

This matter has been discussed with the Executive Committee of The Virginia Bar Association. Unfortunately, your correspondence was not received in time to refer this for study as to its total effect on the legal system of the United States. Therefore, our reply must be based on the time available.

It is the opinion of The Virginia Bar Association that, under the circumstances of the short notice given to us, the Virginia Bar Association cannot recommend

approval of such a sweeping change. Looking at the United States Code in question, it seems to us that your proposed legislation far exceeds the scope of the problem created by the *Alyeska* case. The legislation in question would apparently permit a Federal Judge to award attorneys' fees to the prevailing party in any case brought in Federal Court and not merely to the case of the "public interest attorney."

We do not believe that such a change would be advisable without a full study of the ramifications which it may have on the judicial system. Recognizing that such a system is in effect in England, nevertheless it is contrary to our long-standing practice in the United States and changes of such a character should only result from full consideration.

With all best wishes, I remain

Very truly yours,

THOMAS V. MONAHAN.

Mr. KASTENMEIER. I note that in fact you have introduced several bills, H.R. 8219, 8220, 8221. Would it be possible to integrate the approaches of each of these bills in a single bill?

Mr. SEIBERLING. Yes, it would. The bill H.R. 7826, 8221, which is before you, in effect does that by covering any civil action under the laws of the United States, and it seems to me that this is a desirable result because we can often have an anomalous situation on a particular bill, for example, the Federal Insecticide, Fungicide, and Rodenticide Act, which is now in the process of being worked through the floor of the House. I expect to offer an amendment to that act to authorize the awarding of attorneys' fees, and yet it is possible that the House will reject that—you never know from one bill to the next how the mood is going to be. We could end up with a peculiar situation where some statutes have such a provision, and others do not. Yet there is no logical reason for the distinction.

Therefore, it seems to me we ought to have a comprehensive bill to permit fee shifting in any Federal case.

Mr. KASTENMEIER. You have anticipated the question I was going to ask. As a matter of fact, it is one of the purposes of this hearing, to determine whether the numerous bills on the subject should be treated in an omnibus fashion or piecemeal by the specific subject area.

Mr. SEIBERLING. I think it would be much better to do it in omnibus fashion. Since my bill would provide for the court to make a determination in each case whether the interest of justice justified the award of attorneys' fees to the prevailing party or to the prevailing plaintiff, and for the court to decide in a given case whether an award is appropriate or not. I do not think we can make a decision even under a specific statute whether it is appropriate in every case. I think that is something we have to allow the courts flexibility to decide.

Mr. KASTENMEIER. Do you have any feeling whether this legislation would have any effect in the Federal system on attorneys' fees generally, and whether it would tend to increase, decrease, or cause fees to remain the same in this sort of litigation, or whether it would increase or decrease litigation generally?

Mr. SEIBERLING. To answer your first question—it certainly is not going to make attorneys' fees any less, and I would expect there would certainly be more cases where attorneys' fees are awarded. I rather doubt it will make them any higher because the court in each case is going to have to decide what the award should be, and the court will not award an unreasonably high fee. However, I want to stress a point

that is often forgotten, which is that court-ordered attorneys' fees are awarded to the litigant, not to the attorney directly.

As to increasing litigation, I think the bill will bring increased litigation. As a matter of fact, that is the whole purpose of it. However, it will only increase litigation to the extent that there is a good chance that litigation is justified because the party will not undertake extensive litigation unless he either has a lot of funds or a great monetary stake—in which case the attorney's fees provision does not make much difference—or the litigant feels he has a very strong case, in which case the litigation and the award of attorneys' fees are justified.

Mr. KASTENMEIER. Thank you. I am going to yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. I thank the chairman for yielding and the distinguished gentleman from Ohio for advocating this type of legislation.

I do not have any useful questions to ask which have not already been propounded by Mr. Kastenmeier. I feel that something like this has been needed for a very long time in appropriate cases. My only concern would be that unless the remedy would be applied very properly by the courts, we might be bringing about litigation which approaches frivolous litigation, simply for the sake of becoming eligible for the fee.

Mr. SEIBERLING. Except if it is frivolous in the sense it is unjustified, the court could not award the fee because if the party did not win the case, it would not be covered by the statute.

Mr. DANIELSON. Since we are accustomed to seeing things both ways, what is your comment as to awarding fees to the Government in the case of litigation which was brought, and the plaintiff does not prevail?

Mr. SEIBERLING. If the Government is the prevailing plaintiff, I think it should be awarded the fee the same as anyone else. To award fees to the Government when it is the prevailing defendant might chill the plaintiff's constitutional right of access to the judicial process.

Mr. DANIELSON. Knowing that sometimes litigation is conducted on a contingent fee basis or a partially contingent fee basis, what would be your comments as to the requirement for putting up some kind of a bond to show the responsibility?

Mr. SEIBERLING. I frankly think the bond question is a separate question.

Mr. DANIELSON. Separate, but it relates.

Mr. SEIBERLING. I am not prepared to answer that question, but obviously, in appropriate cases, the courts do require a bond, and usually it is a matter of their general power as the court of equity to see that frivolous cases are not brought and that damage is not done to an innocent party through frivolous litigation, but that is really a very complicated subject.

Mr. DANIELSON. Very complicated because it has a dampening effect on the bringing of an action where one should not be brought.

Mr. SEIBERLING. Yes, and sometimes in an injunction case, for example, if you do not post bond you cannot get a preliminary injunction. Of course, that has a profound effect where irreversible actions are the subject of the case, and there are a lot of angles to that which ought to be the subject of a separate discussion.

Mr. DANIELSON. Thank you for bringing it to us. I think you have covered it very well.

Mr. SEIBERLING. Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I wonder if you could enlighten us about the history of this whole subject. It is my understanding that the ordinary statutes providing costs to the prevailing party were originally supposed to compensate the party for his attorneys' fees, those that have gone by. Those costs statutes usually provide for a small amount in today's terms, but perhaps they were not so small when they were enacted?

Mr. SEIBERLING. A problem does not really arise where there is a statute that expressly covers this. The trouble is that there are a lot of cases in which the statute is silent.

In English courts, as I understand it, the rule is that the court has discretion to award attorneys' fees to the prevailing party. In American courts the majority rule has generally been the other way around unless there is statutory authorization. The Supreme Court in the *Alyeska* case reaffirmed the so-called "American Rule," and then refused to make an exception to it, in the absence of any statutory authority for any so-called private attorneys general, a group of citizens bringing a case pro bono publico.

So that is why I introduced this particular bill, H.R. 7826/8221.

Mr. PATTISON. I was not referring to that. What I was referring to was, I think, a common practice in most States. Certainly it is in New York. That is, there is a statutory cost which is awarded to the prevailing party, and it is usually a very small amount of money. It is my understanding that those awards were originally intended to be attorneys' fees. I am not talking about the costs, the out-of-pocket disbursements for serving a summons. I am talking about the actual statutory costs.

Mr. SEIBERLING. I suppose it varies in individual States. I think some courts have construed costs to include attorneys' fees, although I have always understood that "costs" normally referred to the cost to the judicial system of processing the case.

In Ohio that is the usual connotation.

Mr. PATTISON. Certainly, that is true in criminal cases. I would be interested in seeing if some history could be developed on that. It would make a difference.

Mr. SEIBERLING. I do not think cost awarding in Federal cases is adequate to cover attorneys' fees at all. Whether it was originally intended to or not, it certainly does not today. We all know how astronomical fees can be.

Mr. PATTISON. If it was originally intended to, it might make a difference in the attitude of many people. We have just gotten out of date as far as what the amounts should be.

Mr. SEIBERLING. I have not researched the background of the cost provisions in the Federal law. That is an interesting question. It might be worth taking a look at.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. We thank our colleague for his appearance this morning.

Mr. SEIBERLING. Thank you, Mr. Chairman and members of the committee. It was a real pleasure, and I appreciate this opportunity.

Shall I give the stenographer this set of documents? Or your counsel?

Mr. KASTENMEIER. Yes, please give them to Miss Higgins, our counsel, please.

Mr. KASTENMEIER. At this point, the Chair would like to accept and make part of the record a statement of Robert F. Drinan, a member of this subcommittee, on this subject, and on behalf of his bill. He is in a different committee, but should be here later in the morning.

[The statement of Hon. Robert F. Drinan follows:]

STATEMENT OF HON. ROBERT F. DRINAN

Mr. Chairman, the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee meets today on a matter of vital importance to the protection of legal rights. The question before it may be simply stated: Who should pay for the attorney fees of persons seeking to vindicate their federal constitutional, statutory, or common law rights? Should the losing party always be made to respond with attorney fees to the prevailing party? Or should that principle be applied only in certain kinds of litigation?

The occasion for these hearings has been propelled by the recent decision of the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In that case the Wilderness Society, the Environmental Defense Fund, Inc., and the Friends of the Earth sought to enjoin the construction of the trans-Alaska oil pipeline because of the ecological dangers it posed. Although the plaintiffs initially succeeeded in the courts, they ultimately lost on the merits of the dispute when Congress authorized the construction of the pipeline.

Notwithstanding the congressional resolution, the plaintiffs sought to recover their counsel fees because, in their view, they had acted as a "private attorney general" to advance the interests of the general public. The Court of Appeals for the District of Columbia agreed with them and awarded the fees. The Supreme Court granted a writ of certiorari and reversed the judgment.

The Court held that, even though the plaintiffs may have acted as a "private attorney general," they could not recover their counsel fees. Under the so-called "American Rule," attorney fees are not to be taxed as costs against the losing party, with rare exception, unless a statute authorizes it. Because no statute permitted awarding counsel fees to the *Alyeska* plaintiffs, they could not recover the great expense of conducting that litigation.

The decision announced in *Alyeska* has been criticized by some as a very harsh and unfair judgment. It is pointed out that the Supreme Court went out of its way to disapprove the awarding of attorney fees in public interest cases. In footnote 46 of its opinion, the Court disapproved a number of lower court decisions which awarded fees in such cases, even though the only matter before the Court involved the trans-Alaska pipeline litigation.

It would not serve any real purpose to debate the merits of those contentions. The significance of the *Alyeska* decision is that Congress, not the courts, is to determine who should pay the counsel fees of parties in litigation. If we do nothing, the courts will continue to apply the "American Rule," whatever injustices or hardships result.

The Subcommittee has before it a number of bills which would authorize the award of counsel fees in various circumstances. To be sure, these measures do not make any radical departure from what Congress has done in the past. Over the years we have authorized courts to award attorney fees in a wide variety of cases. For example, such authorization may be found in the Packers and Stockyards Act, the Clayton Act, the Securities Exchange Act, the Fair Labor Standards Act, and the copyright law. Testimony by other witnesses, I am advised, will furnish to the Subcommittee a complete list of all such statutory provisions, of which there are more than forty.

With the indulgence of the Subcommittee, I would like to discuss briefly the three attorney fee bills which I have introduced, two of which are supported by Chairman Rodino. The third has not been circulated for co-sponsorship. H.R. 8742 (which is identical to H.R. 7969) would authorize the courts to award counsel fees to "the prevailing party" in cases brought to vindicate any federal civil or constitutional rights. The terms "civil rights" and "constitutional rights" are well known expressions in federal jurisprudence.

The phrase "civil rights" would include, for example, any action brought under the various civil rights statutes (*e.g.*, 42 U.S.C. 1981, 1982, 1983, and 2000d) or under any other civil rights provision, such as 31 U.S.C. 1242 (the revenue sharing law). The phrase "constitutional rights" also has a specific meaning in federal law. Such actions would include proceedings to enforce the First Amendment's command against abridging freedom of speech and the press, the Fourth Amendment's prohibition against unreasonable searches and seizures, and other protections of the Bill of Rights.

H.R. 9552 is similar to H.R. 8742, but is narrower in scope. Except for technical changes, it is identical to S. 2278 which Senator Tunney introduced just before the August recess, The substance of these measures was originally in Section 403 of the Voting Rights Act extension bill reported out of the Senate Judiciary Committee last July. But when the time for extending the Voting Rights Act came dangerously close to expiring, the Senate version of the extension, including Section 403, was put aside in favor of the House bill.

H.R. 9552 would authorize the award of attorney fees to "the prevailing party" in actions brought under specific civil rights statutes. It does not have the general applicability of H.R. 8742. It would allow fees only in cases filed pursuant to 42 U.S.C. 1981, 1982, 1983, 1985, 1986, and 2000d. Unlike H.R. 8742, it would not provide counsel fees in cases involving civil or constitutional rights not based on any of those six sections of Title 42. I should add that the vast majority of civil rights cases are in fact instituted pursuant to those six sections. Thus the limitations of H.R. 9552, while real, are not fatal to its effectiveness.

The third bill, H.R. 8743, is an amendment to the Administrative Procedure Act. It would permit the awarding of attorney fees to a party challenging certain types of actions by federal agencies. It would apply whenever any person sought judicial review of agency conduct which "adversely affects civil or constitutional rights, or consumer or environmental interests." The provision would be available if the subject matter of the dispute fell into any of those four categories.

The four classes of cases covered by H.R. 8743, while broadly defined, are again defined with familiar phrases in federal jurisprudence. I have already discussed the scope of the terms "civil rights" and "constitutional rights." The phrases "consumer interests" and "environmental interests," while newer to the legal lexicon, have taken on fairly clear meaning. Ordinarily, but not always, such interests would be defined by a congressional statute dealing with consumer protection or environmental concerns. To determine whether the challenge to particular agency action was to advance "consumer or environmental interests," the court would merely look to the substantive nature of the petitioner's complaint and the provision of law upon which she or he relies.

I should add that the defendant agency in such cases would not necessarily be one which ordinarily deals with consumer or environmental interests. For example, *any* executive department which deals with environmental matters, not just the Environmental Protection Agency, would be covered by this bill if it took action adverse to environmental interests. Although the key words in H.R. 8743 have clear meaning, they are also intended to be broad enough and sufficiently flexible to encompass a wide range of agency action, including new developments in these four areas of concern.

There are, to be sure, common threads which run through each of these three bills. First, all of them, in whole or in part, deal with civil rights. Second, only "the prevailing party" would recover attorney fees. The losing litigant would never be eligible. Third, the bills commit the award of counsel fees to the discretion of the judge. Under present case law interpreting similar statutory provisions, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam). A prevailing defendant could recover such fees where the suit was brought in bad faith or to harass the party.

Fourth, under these bills the Federal government could never recover its attorney fees. On the other hand, it would be required to pay the counsel fees of a private prevailing party, which is prohibited generally by current law (see 28 U.S.C. 2412). These bills, if enacted, would be exceptions to the general prohibition in 28 U.S.C. 2412. That section need not be amended, however, since it now states: "Except as otherwise specifically provided by statute. . . ."

Fifth, under H.R. 8742, state and local governments would be treated in the same manner as the Federal government. They must respond with attorney fees, if ordered by the court, to a prevailing plaintiff, but they could not recover their fees if they won. H.R. 9552 does not expressly so provide, but is intended to embrace the same principle. If needed for clarification, I would, of course, favor an amendment to remove any uncertainty.

Since the decision in *Alyeska*, it is quite clear that Congress has the responsibility to determine who should bear the expense of counsel fees in litigation. When citizens are acting as "private attorneys general" in representing the public interest, it seems to me they should not be required to pay their attorneys out of their own pockets when they prevail. Many of the suits involving civil or constitutional rights and consumer or environmental interests are instituted to benefit a large number of citizens who cannot alone afford to protect their own interests in such matters.

Furthermore the defendants in such cases are almost always governmental entities or private parties with vast resources. When private citizens, acting on their own or as representatives of a class, seek to challenge the actions of such powerful interests, it is appropriate to assist their efforts. By allowing courts to award such plaintiffs reasonable attorney fees when they prevail, we are, in effect, redressing the great imbalance between the individual citizen on the one hand and powerful corporate or government interests on the other.

Because of the immediate need to correct that imbalance in public interest litigation, I cannot overemphasize the importance of swift congressional action. I am particularly concerned with civil rights litigation. Prior to the *Alyeska* decision, lower federal courts had awarded counsel fees in many such cases without an express statute, using the "private attorney general" theory. In *Alyeska*, the Supreme Court expressly disapproved of those lower court opinions. As a consequence the civil rights bar, which has never suffered from excessive funds to litigate the invasion of such rights, has been severely crippled by the decision.

In view of the pressing need, the passage of legislation to permit the awarding of attorney fees in civil rights cases must receive the highest priority. I am advised that court awarded counsel fees account for approximately 15 percent of the budget of the NAACP Legal Defense Fund. For small practitioners across America, such fees have an even greater effect on their ability to represent private citizens who cannot afford a lawyer. In its August newsletter, the Council for Public Interest Law discussed the impact of *Alyeska* on public interest litigation. Based upon its initial survey, "the area most adversely affected will be civil rights litigation brought under the post-Civil War civil rights acts." *Pipeline* at 2 (August, 1975).

In many of the civil rights statutes recently passed, Congress has inserted a provision directing the courts to expedite civil rights cases. In view of these expediting provisions mandating the courts to act swiftly, we should ourselves move with dispatch when civil rights interests are at stake. Considering the vital role which attorney fee awards play in such law suits, now is the time for acting expeditiously.

Mr. KASTENMEIER. Next, the Chair would like to greet our colleague from Illinois, Mr. Philip Crane, who is the author of H.R. 4675, H.R. 8378, and H.R. 8821, which are identical or substantially so; and H.R. 9093 on the subject.

TESTIMONY OF HON. PHILIP M. CRANE, A REPRESENTATIVE IN CONGRESS FROM THE 12TH CONGRESSIONAL DISTRICT OF THE STATE OF ILLINOIS

Mr. CRANE. Thank you, Mr. Chairman.

Before I begin, let me extend my thanks to you and all the members of the subcommittee for inviting me to be here this morning. The

opportunity to testify on what I believe to be a most timely subject is certainly appreciated. All I ask is your indulgence if at times my phrase is less legalistic than these walls are normally accustomed to. That stems from an academic background in history rather than the background in law which the prestigious members of this committee have.

What brings me here this morning is a deep-seated concern that the rise of the independent and the semiautonomous Federal regulatory agencies, such as EEOC, FDA, EPA, SEC, and FTC, CAB, and ICC, and even the IRS, are bringing about a decline in the caliber of justice in this country. While contesting civil suits initiated by these agencies seems to be a relatively easy matter in theory, in practice it is often more expensive than it is worth. Many individuals or businesses find that it is cheaper to plead "no contest" or to negotiate some sort of a compromise, than it is to stand up for their rights in a court of law while others are afraid that if they fight and win, they will be subject to future harassment from the agency involved. As a consequence, compliance by coercion rather than compliance based on the merits of the case is becoming the rule rather than the exception.

Let me cite two case histories that illustrate the problem, one an antitrust case, the other a tax case. In the first instance, three rock salt companies were accused of price fixing, the maximum fine for which was, at the time, $150,000. However, believing themselves innocent, they decided to fight the case, which took 2½ years for them to win. When it was over, the legal battle had cost them $775,000—over five times what it would have cost them to capitulate.

In the second example, the IRS tried to collect an excise tax from both a manufacturer and a retailer, prompting the manufacturer to take the case to the Court of Claims. After over $25,000 had been spent in legal fees, the court decided in favor of the manufacturer, but as in the case of the rock salt firms, the company lost a significant amount of money even though totally innocent.

I could cite other examples, but I think these are sufficient to underscore the injustice that is developing, an injustice which works a particular hardship on the little man who is far less able to absorb such losses than a bigger company. In fact, more than a few small businessmen cannot afford either to fight the agency or succumb to its dictates, so they are simply going out of business and putting more people out of work.

What makes all this particularly galling is that these same people are paying taxes every year to help support the very agency that is making life miserable for them. Not surprisingly, more and more Americans are coming to feel that they are digging their own graves and there is nothing that they can do about it.

Well, I believe that there is something that can be done about it, something that will not only be more equitable, but will give the regulatory agencies and the IRS an incentive not to file unwarranted civil actions or claims—in the case of IRS—in the first place. My proposal, which is incorporated in H.R. 4675, which I introduced last March and in other submissions of that same bill calls for the automatic awarding of reasonable compensation for attorney's fees and other litigation costs to successful defendants in civil actions filed by the

U.S. Government. Admittedly, the awarding of attorney's fees goes contrary to common law as well as existing statutes, and the mandatory award feature runs counter to the discretionary provision in 28 U.S.C., section 2412, but unless the compensation is both adequate and guaranteed, it is not likely to have the desired effect.

In order that there may be no doubt as to what precisely I have in mind and who will be covered by it, and to what extent, let me go over the language of H.R. 4675 more carefully.

First of all, the reference to the United States as a plaintiff is meant to cover all departments, agencies, and commissions of the United States, and not just those which file suit under the auspices of the Department of Justice.

Second, since persons contesting IRS claims of deficiency are, for all practical purposes, defendants in a civil action being filed by a Government agency, it is my intention that they be covered by this bill as well. At present, the IRS is the plaintiff only in cases where the person's ability to pay is in question, so extending compensation to taxpayers who successfully rebut tax liability claims made against them will require the addition of some perfecting language. However, under the circumstances, I feel such an addition is both consistent and justified.

Third, the term "other litigation costs" should be construed as meaning not only the court costs as billed by the clerk of the court—such as juror's pay and marshal's fees—but also such actual costs as: witness fees; the costs of transcripts of evidence and testimony; travel expenses, room and board for witnesses listed by the defendant in compliance with the pretrial orders of the court; the costs for parties of discovery under Federal rules of civil procedure and, in IRS cases, accountants' fees.

Fourth, the phrase "who prevails in a civil action" is intended to refer to the party who is the ultimate victor in the case. Thus, a defendant who won in a district court but lost in the appeals court would not be entitled to compensation. But if the defendant's victory in the district court was upheld in the appeals, he would be entitled to compensation for his legal expenses throughout the entire process. Without stifling the Government's right to appeal a case it thinks has merit, this procedure should make it think twice about the strength of the merits.

Fifth and finally, the compensation for reasonable legal fees would be mandatory, and the court's role would be limited to determining the amount of the award.

Before leaving that topic, I might also note that the British have been using a legal compensation system for years, and as a consequence they have developed some guidelines for determining what constitutes a reasonable compensation award. Such guidelines, to the extent they are applicable or deemed wise, could be most useful in helping our judges decide award amounts should this bill be enacted into law.

Having said that much, let me move on briefly to some of the advantages that would be derived from passage of this legislation.

First, it would remove the financial penalty for those who successfully exercise their right to defend themselves in court.

Second, it would encourage businesses and individuals to challenge Federal civil suits and IRS claims they believe to be unjustified.

Third, by virtue of the fact that the amount of compensation paid out each year by any given agency or commission would become public knowledge, the American people would, for the first time, have a quantitative measure of agency error.

Fourth, such a yardstick would give agency personnel an incentive not to become overzealous or to engage in harassment tactics for personal or political reasons.

Fifth, the knowledge that an agency would have to pay for its mistakes would encourage it to simplify its rules and regulations and drop those that are unreasonable or unnecessary.

And sixth, the reimbursement of defendants unsuccessfully sued by the Government would not only reduce the incidence of compliance by coercion, but would give the people a renewed faith in our system of justice.

In the 7 months that have passed since this bill was first introduced, the response has been little short of amazing. 20 members of Congress have now cosponsored this legislation and expressions of support have poured in from individuals and businesses all over the country. In many instances, these communications have included case histories illustrating the need for the legislation or suggestions for improving it.

While many of these suggested improvements have merit and should, I think, be looked into during future hearings, let me in the interest of brevity limit myself to discussing one which effectively complements my bill without expanding its scope.

More specifically, the idea presented by several people was that both fairness and accountability would be enhanced if the agency directly responsible for the unjustified suit was required to pay the compensation awarded out of its own budget during the same fiscal year that the suit was settled. Upon reflection, I could not agree more; not only would successful defendants be assured of recouping their losses in a reasonable time, but the agencies would have all the more reason to be as objective as possible in their proceedings.

In conclusion, let me just reiterate that, with the Federal bureaucracy having evolved into what is often called the fourth branch of Government, the citizen can no longer stand up for his rights as easily as Government can accuse him of wrongs. Therefore, it seems only logical to assume that the American judicial process is in need of revamping, at least insofar as civil suits involving the Federal Government are concerned.

But, while I believe recent history clearly indicates the need for mandatory compensation of defendants in suits filed and lost by the Government, I am adamantly opposed to any provision that would force the defendant to compensate the Government for its costs should it win. Such an expansion of the legal compensation concept would not only give the Government an undeserved reward—on top of the fine it would collect—for doing what it is supposed to do anyway, but it would also give the agencies and their personnel added incentive to pursue unsubstantiated cases. It would, in effect, constitute a system of taxation.

In short, given the growing power of the Federal Government, legal compensation should be limited to a mandatory one-way street going in the direction of the defendant, and I hope that these hearings will be the first step in that direction.

Again, Mr. Chairman, I wish to thank you and the subcommittee members for hearing me out this morning. If there are any questions, I would be happy to try and answer them.

Mr. KASTENMEIER. Thank you very much for your excellent testimony. You were, I take it, the first Member of Congress to introduce a bill on this subject. There are many now, but your bill H.R. 4675, was the first, at least in this Congress

Mr. CRANE. Yes, sir.

Mr. KASTENMEIER. Had you introduced such bills prior?

Mr. CRANE. No, Mr. Chairman. I had not. In fact, the stimulus behind introduction of this bill was a specific case I know of, of a gentleman who came down here and had a very heavy fine levied against him by SEC.

My wife and I had dinner with him that evening. He was understandably morose. He had been told by his attorneys that they were confident that they could have won the case for him and apparently even some of the people at SEC indicated that he had a good case. But the cost to him to defend himself would have been roughly twice what the fine was. So he left here with a great deal of disillusionment. And the thought crossed my mind at the time that there was a gross injustice here and I wished more people in that situation would fight such cases. But, on the other hand, I could understand why a businessman would throw in the sponge and say he is not going to fight a case on principle if it constitutes double costs.

Mr. KASTENMEIER. I think your citation of the rocksalt company's problems and having to pay $75,000 in fees is a good point. Then the *Alyeska* case had nothing to do with the stimulus as far as you are concerned. Apparently, it was a stimulus for others to reduce attorney's fees cases in other areas. Does the *Alyeska* case—have you any comment on it? Will it change your mind? Do you think it was reinforcing as far as your position is concerned?

Mr. CRANE. I am not that conversant with all of the particulars of that case, Mr. Chairman. But I am not necessarily persuaded it is reinforcing. As I indicated, I think that it is a legitimately debatable point to contemplate the day when individuals might file suit against Government with the loser paying the legal fees.

But the bill I have submitted is a rifleshot directed to a specific type of injustice. I think, beyond that, it is not partisan and it is not ideological. I think conservatives and liberals alike can agree that there is an injustice that exists when Federal agencies are in this position. Beyond that, it is more disturbing that an overzealous member of the bureaucracy who files a case against an individual who pleads no contest is, in effect, building up brownie points on his résumé for a presumed promotion, because when you have a no contest there is the implicit assumption of guilt. As a result, the bureaucrat involved is apparently doing his job more effectively than some of the other members of his agency.

To the extent that is the case, it seems to me that some kind of remedial action is called for. I think it is a growing type of problem that was certainly not contemplated by the Founding Fathers, but it is a fact of life in our present situation.

Mr. KASTENMEIER. How do you react to the approaches of others? And I ask you this because, in terms of ultimate disposition of this question, we will be confronted with a series of proposals. For example, one of our other colleagues has introduced a bill which would amend the Civil Rights Act of 1964 to provide discretionary awarding of attorney's fees and costs to the prevailing party, other than the Government entity or governmental officer, acting officially in cases involving civil or constitutional rights.

Mr. CRANE. I am basically sympathetic with the concept, but the discretionary feature of it disturbs me a little bit. As I indicated in my testimony, one of the things that has to be guaranteed, is the certainty of reasonable legal costs being absorbed by the Government when it does not prevail in a case which it initiated. I would want to do further exploration and research on a broader concept than that. But I am fundamentally and instinctively sympathetic with the notion that the individual citizen needs protection from Government in such instances, first of all, because he lacks the resources which the Government has at its disposal with which to prosecute, and second, it is his tax money that is being used to prosecute him. In other words, he is paying for his own prosecution. And, on top of that, sustaining an out-of-pocket cost. Sometimes, in the course of losing a case, he also pays a fine.

Mr. KASTENMEIER. Thank you.

I yield to the gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

I have been sitting here thinking about the rationale for the payment of attorney's fees in any cases. I have come up with three possible rationales. There may be others that you can add. It seems to me that one reason for authorizing the payment of fees to either side of a controversy, particularly the plaintiff, would be to encourage the utilization of a remedy which a class of plaintiffs may not otherwise be able to utilize.

I think that that is a legitimate Government concern. But if we are going to use that as a rationale, then we ought to focus in upon those plaintiffs who are indeed unable to gain access to the court by reason of a lack of financial resources and not simply award that benefit to everyone without reference to their individual ability to pay fees.

Another rationale is to consider attorneys fees as a penalty against a litigant, either plaintiff or defendant, who may assert either a cause of action or a defense in bad faith. I understand, and I think I would support, the imposition of fees as a penalty in those cases. But, of course, that would require a discretionary decision on the part of the judge to impose it where appropriate, and not do so where it would be inappropriate.

A third point of view is that fees should be considered a legitimate part of the costs of a law suit and that the prevailing party ought to be made whole, that is, to include attorneys fees. This point of view rejects a lot of case law, perhaps even common law, but I can

understand the argument being made. You may have other reasons for assessing fees, but it seems to me that in those three cases which I mentioned the fees ought to be discretionary rather than mandatory because they turn upon a state of facts which differ from case to case. For example, a case may involve facts indicating bad faith or good faith, the ability to pay or the lack of ability to pay.

That being the case, would you comment upon the wisdom of mandating the payment of attorneys fees to either side in all cases covered by the statute?

Mr. CRANE. I think the examples you cited are more consistent with the proposal of Mr. Seiberling than my own. I am not proposing that an individual be able to initiate a suit against the Government. It is only in the case where the Government has initiated suit against the individual and he finally prevails in that case that I propose fees should be awarded. I am on less sure ground as to some aspects of Mr. Seiberling's bill because I have not studied it carefully. However, I can see that it you say that any individual can bring suit against the Government, it might be necessary to insist that whoever loses that suit must pay the fees and that there might also be conditions which are discretionary, as you pointed out.

But in the case that is cited here, it seems to me that the mandating of the absorption of legal costs is in order because the individual is the one who is being prosecuted by Government. And, if he wins his case, it was improperly prosecuted by Government. Since the Government has incredible resources, and the individuals tax dollars were used to carry on the prosecution, which in fact becomes persecution in the types of cases I have cited, he should be compensated. While I only gave two examples here, and the third was the basis for my submission of this bill, I have since received a number of communications from people who have had similar experiences with Government prosecutions which were not as dramatic as the rock salt companies. While some of them may be debatable on the question of whether the people could have won had they carried their cases to court, there are other cases where they did in fact prevail against the Government and bore the out-of-pocket costs themselves. Some of these cases were much less dramatic than the $775,000 paid by the rock salt companies, but were no less injurious to the individuals who could not afford the fees.

Mr. WIGGINS. I am trying to find some philosophical way in which to judge all of these various bills. That is how we should approach the matter of attorneys fees. Your bill deals with narrow aspects of the problem, that is, actions commenced by the Federal Government in which it does not prevail and whether the defendant in those cases should be awarded fees. That is only part of the problem. There are a great many other private actions filed in which the plaintiff does not prevail and the defendant, in vindicating a right or in proving that he has not abused somebody else's right, has out-of-pocket costs. That is a victory in the eyes of the defendant.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

I was interested in Mr. Wiggins' comments because the rationale of a philosophical basis is one thing we certainly ought to go on here.

Judging from your statement and from the whole picture, part of the appeal to me and maybe to many of us is that there ought to be a balancing of the power in our court. It seems to be fundamentally unfair that one party is the Government with also unlimited resources, funds, personnel, availability of records, availability of investigating personnel, and whatnot; on the other hand, you have the private citizen. What was that thing twisting slowly in the wind? He is out there all alone anyway and it is chilly out there financially.

The cost to an individual citizen of resisting litigation by the Government is almost unbelievable to persons who have never been involved. I do not think they can understand the chilling effect of being sued by the Government. It makes you almost want to go to Australia or to someplace from which there is no extradition relief. But your remedy, and I am not demeaning it—on all these concepts you have to start someplace and then find out where they lead to, your remedy would allow the attorneys fee to the prevailing defendant. The statement indicates that if he lost in the district court but won on appeal, he would then be compensated all the way through.

How about the defendant who loses?

Mr. CRANE. If he were to lose his case then his legal fees would not be picked up and if he lost, say, in a lower court and then in appeal court too, he would not get compensation. It is only if he lost in a lower court and won in appeals court that finally that determination would be made.

Mr. DANIELSON. I understand that, but to me the compelling reason for attorneys fees is fairness. I think that most of us will concede that often the balance between winning and losing a case is very fine. A margin of 51 to 49 can often be the weight of evidence. A case can be lost even when you really should be ahead. But just because an essential witness has died or moved away, or because documents are gone or something like that, the amount in balance is so tiny sometimes, that if we are going to be motivated here by fairness then maybe we should look to compensating the attorneys fees of a losing defendant sometimes.

The equities are not nearly as clear as might be assumed from the winner and loser factors alone. Sometimes it is almost a photofinish, and the merits of the losing defendant's case are almost as good as those of the winner.

In a multijudge court or in a jury, often you find the split between those who decide the issue was just one person. You have not thought about that. I am not going to ask you questions on it, but I want you to know that is going through my mind.

Mr. CRANE. Could I inject one thing? I think with respect to providing any compensation in the type of situation that you have described here, there I would be wholeheartedly in favor of making that a discretionary rather than a mandatory compensation. I might also note that in theWays and Means Committee we are working on tax law right now, and one thought came into my mind that addresses itself to the problem you have described. Take, for instance, the situation in which the IRS claims you owe $100,000 in back taxes; if you argue that point and you finally prevail to the extent that you reduce it to $30,000 instead of the $100,000 the IRS initially claims you owed,

you would get 70 percent, the difference between the $30,000 and the initial $100,000 that they had insisted upon collecting. You would get 70 percent of your accountant's fees or tax lawyer's fees picked up by the Government.

Mr. DANIELSON. That is an interesting variation on this. You know very well if you are doing this in Ways and Means. Tax court litigation is expensive usually; often you have a bona fide challenge by a taxpayer to the Government and the difference between winning and losing, even though there may be no difference between the $100,000 and $30,000, let us say it is $100,000. The difference between winning and losing may hinge on some interpretation of one of the most technical little points of tax law you can imagine. Sometimes it is like picking fly specks out of black pepper. You really do not know where you are.

Yet, the whole attorneys fees issue could hinge on that. I know you are not prepared to answer these specific questions, but if we are going to get into this field, I for one am going to hope our committee will do some thinking about whether we should award them where you have a very meritorious case, even if you lose, because the burden of fighting the Government is almost beyond description.

I also think that a citizen renders a useful service to all the people when he contests an ambiguous law until the courts determine what it means. I think that we have got an awful lot to chew on if we are going to consider a bill on this subject.

Mr. CRANE. I agree with you wholeheartedly, Mr. Danielson. And I think that the broader implications of the relationship between the citizen and his government today, with the resources of the latter, is a vital subject. I commend your subcommittee for devoting its attention to it. I would only make a plea in that connection. I think the specifics of the bill I have introduced, which is narrow in scope, are such that it could be treated separately before getting into the broader subject of conceivably revising our laws so as to guarantee that individuals might, in all cases, get discretionary settlements to cover the type of situation you have described here.

That is a broad subject that I think really warrants a very thorough investigation.

Mr. DANIELSON. I understand your point. Your bill could be a starting point. Anybody who has been around here very long knows you do not come up with a perfect law the first time. You make a step and then you amend it, and amend it, and amend it. I see your point.

Mr. CRANE. It is in part building on a definition of what are indisputable injustices that ought to be remedied. Perhaps this is charting a new direction of law here in the United States, but it would certainly seem warranted in view of the fact that we have a gigantic bureaucratic establishment with 75 regulatory agencies and a dozen or so major departments all in the position of being able to cause a great deal of harm and injustice if there is not some way of redressing excesses of zeal by members of those various executive departments.

Mr. DANIELSON. I understand your position. I thank you and yield back.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I am interested in pursuing this problem of discretionary versus mandatory because I understand your point of making it mandatory makes it possible to get a lawyer to represent you. The lawyer may not be willing to go in and represent you if it is up to some judge's discretion. He may defend during a course of a trial or something of that nature.

On the other hand, there are wins and losses which are different from each other, the different standards of proof, so often the Government might fail in its proof because the standard of proof is something closer to beyond a reasonable doubt. The defendant would then have won, and will eternally be regarded perhaps by all the parties as having won.

I hate to use the word "technical" point because people always say he won a technicality in the first amendment or something like that, but the point being that, yes, for want of a better word, he won on a technicality, and yet we all understand that the Government just could not prove that a bunch of corporations got together to sell rocksalt and fix prices. So it would seem to me there would be an area where a judge might want to use his discretion and say, for example, "I will authorize a third of the reasonable attorney's fees." I agree that perhaps it shouud be mandatory that they award attorney's fees. Perhaps there should be some area of discretion in the bill in terms of how well the prevailing party won.

Mr. CRANE. I did have in here—and of course, this is one of those undefined terms that presumably you gentlemen could arrive at a greater definition of than I have in mind right now—that phrase, "reasonable legal fees", which give some discretion in determining how much compensation might be given. If a fellow goes out and hires all the best lawyers, tax lawyers, available in the private sector, presumably he would incur much greater expense in his defense than a court might deem proper.

But it does seem to me that, on a point you raised, there would be cases where undoubtedly most people would presume that the defendant who got off was, in fact, really guilty—but that gets into areas beyond the facts of the case that we have to work with. When in doubt I say err on the side of the defendant.

Mr. PATTISON. The other thing which is troubling in the winners only concept, is this question of when you are litigating what is essentially a question of law—and many of our technical statutes come down to that—it is really not a question of fact. The facts are pretty clear. The question is a question of law. I am afraid that if we have a winners only rule you may have exactly the same thing that happens if you are three-quarters of the way through a case and you know that if you win the case, you will get compensation for your attorney's fees which you have already built up; you know if you lose the case you will get nothing. Then you plea bargain on that basis. You settle on that basis because you are afraid you are going to lose, not because you are guilty of anything, and because your interpretation of the law is not going to be the same interpretation as the Supreme Court ultimately comes down with. There are lots of places where reasonable men can differ on those things.

Mr. CRANE. I agree with you. That is why Mr. Danielson's proposal is significant. Perhaps, in situations like that, it would be good to have discretionary escape value where a judge could sit down and say we have honest disagreements amongst honest men here; we can understand why you gentlemen would not want to carry your case further and try and make some kind of settlement with the agency involved. That might be an extension above and beyond the specifics, which are rather narrow, of the bill I have submitted for your consideration. Within the broader context of your discussion of this whole question of the role of the individual versus Federal agencies, and what courts should do and what they should pay, and what should be discretionary and what should perhaps be mandated, it would clearly seem to me that suggestion of yours comes within that purview.

Mr. PATTISON. One other comment, and that is that your bill deals solely with civil litigation.

Mr. CRANE. Yes, it does.

Mr. PATTISON. I would not want by passing the statute to end up having the agency make a judgment to go criminal rather than civil, which I think sometimes they can. That is because when you criminally indict, you now have that same pressure over him to settle, to plead no contest, or to plead to something lesser. I think there ought to be some thought given to that area, also. There is nothing more frightening than to be indicted for one of those technical violations, an SEC violation or an Internal Revenue violation in which you sometimes have the option of going one way or the other, or both.

Mr. CRANE. There are implications in this whole area that I am grateful you gentlemen have decided to focus your attention on, because it seems to me there are reforms long overdue here.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. I have just one or two.

Granted, it would not reach many of the cases you have in mind, but would we accomplish some of what you seek to accomplish if we made the United States liable for attorney's fees in cases in which the defendant won the case and could show bad faith? At least that would be one incremental option which could recompense a defendant.

Mr. CRANE. Do you mean a bad faith initiation by the Government against an individual?

Mr. KASTENMEIER. Yes.

Mr. CRANE. Absolutely.

I hesitate to get into a debate into questioning another person's motive. That is what bothers me a little bit there, frankly. Whether the Government acted out of bad faith, which I suppose is difficult to prove in a court of law, is a question of intent. However, I would favor, whether the suit was initiated out of bad faith or well-intentioned but misguided zeal, guaranteeing a protection against it. But, certainly if you wanted to make a tentative first step I would very definitely be in favor of that.

Mr. KASTENMEIER. Second, we asked the preceding witnesses, Mr. Seiberling, what his opinion would be regarding the effect of the enactment of his bill, and I would ask you the same question with respect to your bill on attorney's fees. Also, please comment upon

the suits which would be affected and, the effect upon the amount of litigation. In Mr. Seiberling's cases the bill probably would have no effect on attorney's fees but would actually produce more litigation.

Mr. CRANE. I listened to his testimony in that regard. I agree with him on the assessment of attorney's fees with respect to litigation.

However, in this area, I think it would actually reduce litigation. I can see how his would result in an increase, but I think mine would reduce litigation because the Federal agencies involved would be much more circumspect. They would not get the fellow who is filled with a great deal of enthusiasm and zeal, rushing out to file cases against people in the private sector because he figures for every one of those he wins his chances for promotion improve. I suspect there is a percentage figure available which shows that the average citizen intimidated in this situation would just as soon pay his fine and have the Government out of his hair.

And yet, as I indicated, the present circumstances provide a kind of incentive to the aggressive bureaucrat because it looks like he is doing his job more efficiently than others, and the rewards are there for him. So I think my bill would cut out that sort of thing and on balance result in less rather than more litigation.

Mr. KASTENMEIER. On behalf of the committee——

Mr. WIGGINS. Mr. Chairman, I have one more question. I want to be sure I understand the reach of your proposal.

Is it confined to litigation?

By that I mean an action filed in the U.S. district court or perhaps some original action in some other Federal court, and is not intended to include any administrative agency which may be quasi judicial in nature.

Mr. CRANE. No. It does include all administrative agencies.

Mr. WIGGINS. I see. Thank you.

Mr. DANIELSON. May I inquire, Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. DANIELSON. I think the chairman brought up the question of bad faith as a factor. Just so it appears at this part of our record, I think we would have to be very careful there. In the first place, a court would have to make a finding of bad faith before they could award a fee on that basis. I think courts would necessarily be very constrained and very reluctant to make a finding of bad faith, because it is going an awful lot further than saying, well, a lawsuit was not justified. You are attributing something to the motivations of the people. I think that would have a dampening effect on awarding attorney's fees.

Secondly, that would be a court finding and might very well expose the agency personnel to a lawsuit for tort damages of some kind. You would have a judicial finding they did this in bad faith. It would be a malicious prosecution of one kind or another.

My own opinion, and it is obviously based upon just a first blush thought, is that we should be reluctant to use that as a factor.

I have no other questions.

Mr. KASTENMEIER. On behalf of the committee, I would like to thank our colleague, compliment him on his leadership in this field and his presentation this morning.

Mr. CRANE. Thank you, Mr. Chairman. Thank you, [illegible] the committee.

Mr. KASTENMEIER. Before calling the next witness the Chair would like to observe that our colleague, the Hon. Mark [illegible]s of North Dakota, will appear on Wednesday morning along with a cast of congressional witnesses.

Now the Chair would like to call on Mr. Charles A. Hobbs, Esq., member of the Special Committee on Public Interest Practice of the American Bar Association.

TESTIMONY OF CHARLES A. HOBBS, ESQ., MEMBER, SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE OF THE AMERICAN BAR ASSOCIATION

Mr. HOBBS. Thank you, Chairman Kastenmeier.

Mr. KASTENMEIER. You have a statement with certain attachments. The attachments may be received and made part of the record, and you may proceed, sir.

Mr. HOBBS. Do I take it you are also admitting the statement, or would you like me to give that orally?

Mr. KASTENMEIER. If you would be prepared to do so, atlhough I notice it is so short that you might like to recite it. However you care to proceed.

Mr. HOBBS. Mr. Chairman, with your permission, I would like the statement admitted into the record. I will give a few short words, then, and be available for any questions you or the committee might have.

Mr. KASTENMEIER. Without exception, the statement will be included in the record.

[The prepared statement with attachments of Mr. Hobbs follows:]

STATEMENT OF CHARLES A. HOBBS ON BEHALF OF THE SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE OF THE AMERICAN BAR ASSOCIATION

My name is Charles A. Hobbs. My office address is 1735 New York Avenue, Washington, D.C. 20006.

I am here on behalf of the Special Committee on Public Interest Law of the American Bar Association, at the invitation of your Committee.[1] Our committee was appointed by President Chesterfield Smith in 1973, and has been continued by Presidents James D. Fellers and Lawrence E. Walsh. Our purpose is to study the emerging field of public interest practice, and evaluate how it relates or should relate to the activities of the bar as a whole. Our chairman is Harry L. Hathaway of Los Angeles, who has delegated me to appear before you on behalf of our committee.

Mr. Chairman, our committee supports the concept that Congress ought to permit the allowance of attorney fees to prevailing plaintiffs in public interest cases. Our reasoning is that this will encourage attorneys to handle such cases when they have a reasonable prospect of success, but where a judgment will produce no fund of money, and the client or group to be benefitted is unable to pay for having its interest represented.

While I am speaking only for our Special Committee on Public Interest Law, our views do reflect official ABA policy. Last August the ABA approved a resolution defining public interest legal service and recognizing the obligation of the bar to provide and support public interest legal service. A copy of the resolution and report is attached hereto, Attachment 1. This resolution came

[1] On October 1, 1975, Chairman Kastenmeier wrote ABA President Walsh, inviting him or his designee, and a representative of the Special Committee on Public Interest Practice, to testify at these hearings.

before the House of Delegates at two previous conventions, was amended and coordinated with other ABA committees, and finally two months ago was unanimously approved by the House of Delegates.

One of the clauses of the resolution declares that it is incumbent on the organized bar "to assist, foster and encourage governmental, charitable and other sources to provide public interest legal services." Certainly allowance of reasonable attorney fees to the prevailing party in public interest cases would "foster and encourage" the providing of public interest legal services, and is therefore a concept supported by official ABA policy.

I might add that six state and local bar associations have adopted resolutions substantially similar to the one just adopted by the ABA, and several more are considering doing so.

The Committee may be interested to know of a bill now being considered by the California legislature, S.B. 664, reproduced here as I include this simply to show still another variation in the approach to the fee question.

Another item the Committee may consider of interest is the Final Report of the American Assembly on Law and a Changing Society II. This report, attached hereto recommended among other things—

"5. Enactment of legislation permitting courts and administrative agencies to award attorney's and expert witness' fees to parties who vindicate significant public interests in court or administrative proceedings;"

Other witnesses and the Committee's staff will no doubt cover the history and legal theories of the American rule against allowance of attorney fees. I would point out, however, that the Supreme Court's decision in the *Alyeska* case (May 12, 1975) has overruled a rather impressive body of recent cases which had allowed attorney fees on a "private attorney general" theory. The decision was a serious blow to public interest lawyers. Heretofore, their financing has come largely from grants, and one important source of these grants—foundations—has been serving notice for several years that they cannot be depended upon for permanent financing. In other words, in the wake of *Alyeska* a serious financial problem is facing the public interest lawyers. That problem would be alleviated by passage of legislation allowing attorney fees to prevailing plaintiffs in public interest cases.

On August 11, 1975, Congressman Seiberling wrote ABA President Fellers on the possibility of legislation to allow attorneys fees, and included a list of 12 specific questions. I regret that I will be unable to discuss those questions in any official capacity, because neither our committee nor any representative of the ABA Administration has been able to specifically consider them. However, I believe that what I have said above will answer some of those questions, in policy if not in detail.

I would further note that neither my committee nor any representative of the ABA Administration has specifically considered any of the bills relevant to this hearing, and hence my comments cannot be deemed to be in specific support of any of them. As I said above, however, our committee and the ABA do support the general policy behind these bills.

CHARLES A. HOBBS.

AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE

RECOMMENDATIONS

The Special Committee on Public Interest Practice recommends adoption of the following:

Resolved, that it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services;

Further resolved, that public interest legal service is legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:

1. *Poverty Law:* Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.
2. *Civil Rights Law:* Legal representation involving a right of an individual which society has a special interest in protecting.
3. *Public Rights Law:* Legal representation involving an important right belonging to a significant segment of the public.

4. *Charitable Organization Representation:* Legal service to charitable, religious, civil, governmental and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

5. *Administration of Justice:* Activity, whether under bar association auspices, or otherwise, which is designed to increase the availability of legal services, or otherwise improve the administration of justice.

Further resolved, that public interest legal services shall at all times be provided in a manner consistent with the Code of Professional Responsibility and the Code of Judicial Conduct:

Further resolved, that so long as there is a need for public interest legal services, it is incumbent upon the organized bar to assist each lawyer in fulfilling his professional responsibility to provide such services as well as to assist, foster and encourage governmental, charitable and other sources to provide public interest legal services.

Further resolved, that the appropriate officials, committees, or sections of the American Bar Association are instructed to proceed with the development of proposals to carry out the interest and purpose of the foregoing resolutions.

REPORT

This resolution was deferred to the Annual Meeting at the Chicago Midyear Meeting so that is could be discussed with various segments of the organized bar.

Since then it has been reviewed from within the ABA and outside the Association. In February 1975, a Conference of Bar Leaders was held in New York City. Bar associations from Washington, D.C. to Boston were represented by their respective bar leaders; in most cases presidents and presidents-elect. The resolution was found generally acceptable and there was uniform agreement that the organized bar should do more to assist lawyers in fulfilling their public interest legal services obligations. There was no dissent from the proposition that each lawyer had a duty to provide public interest legal services.

As of the writing of this report, several state and local bar associations have adopted a statement of obligation substantially similar to that being proposed for adoption by this Committee. It is the Committee's opinion that these associations are leading associations, and the American Bar Association should also undertake the lead in this vitally important areas of the delivery of legal services. The District of Columbia Bar, the Chicago Council of Lawyers, the Beverly Hills Bar Association, the Arizona, Philadelphia and Boston Bar Associations have passed substantially identical resolutions to that being proposed. The Association of the Bar of the City of New York, the Florida Bar and the Seattle-King County Bar Association presently have the subject matter under active consideration.

The resolution has been reviewed and approved by the ABA Committee on Ethics and Professional Responsibility, and has been referred to all relevant committees and sections of the Association. It has also been favorably acted upon by the Consortium on Legal Services and the Public, which includes the following ABA committees:

(a) Standing Committee on Lawyer Referral Service.
(b) Special Committee on Delivery of Legal Services.
(c) Standing Committee on Legal Assistance to Servicemen.
(d) Standing Committee on Legal Aid and Indigent Defendants.
(e) Special Committee on Prepaid Legal Services.
(f) Special Committee to Survey Legal Needs.

The Young Lawyers Section, the Council for Advancement of Public Interest Law, and the National Aid and Defender Association have also approved this resolution.

In general, the resolution states that it is the lawyer's duty, as a function of his professional status, to provide public interest legal services; legal services without fee or at a substantially reduced fee. The resolution further provides several areas which would qualify for fulfillment of this obligation.

Suggestions received from the Council of Criminal Justice Section have been reflected in the resolution since the Midyear Meeting. The resolution reflects resolution reflects these suggestions and, additionally, those received from bar leaders contacted from within and outside the ABA.

Generally, the pertinent changes to the resolution are:

(1) The duty has been expressly stated as deriving (among other things) from the professional status of a lawyer.

(2) The application of the resolution is limited to lawyers in the practice of law (e.g., judges would be exempted from some activities because of their status as judges; government lawyers would not necessarily be exempt, unless by definition their work qualified and their compensation was substantially reduced as a result).

(3) Areas 1 through 4 have been simplified and shortened and one additional area has been added; that is Area 5, which would cover certain uncompensated work, such as bar association or related activity.

(4) The resolution has also imposed an obligation upon the organized bar to foster and encourage governmental and charitable sources to provide public interest legal services and to further encourage and assist each lawyer in fulfilling his obligation.

In our many deliberations since September 1973, the Committee has concluded that the Canons and Ethical Considerations, although not explicitly, make it clear that the legal profession and each individual lawyer share the responsibility for providing public interest representation and that there is a duty on each individual lawyer to provide his share of such public service work.

Of course, behind the development of the resolution is our Committee's further conclusion that lawyers and the organized bar are in need of guidance in determining the areas in which they should become involved in performance of this duty.

The duty of each lawyer and the legal profession is well supported by authorities and in the basic precepts of the profession.

Roscoe Pound stated a profession's true function most succinctly:

> There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.

For this reason, in part, a lawyer's time and energies must be allocated not only according to the demands of the marketplace, but as well to the needs of society for his professional skills. It is the element of public service which distinguishes a profession from a trade, and our profession should impose upon itself the duty of such public service.

The Code of Professional Responsibility supports the resolution and the Ethical Considerations encompass services to the poor, but there is no mention of a professional obligation to provide representation in cases seeking the vindication of an individual's fundamental civil rights, or rights belonging to the public at large, where society needs to have its rights vindicated but as a practical matter the would-be plaintiff or defendant will take action to vindicate or defend those rights only if he receives aid, and does not have to bear the costs himself. (Canons 2; EC2-25; EC2-16; EC8-3.)

Ethical Considerations are "aspirational in character." As such, unlike the Disciplinary Rules, they are not enforeable standards, but are "objectives toward which every member of the profession should strive." [1]

Canon 2 provides: A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

EC2-25 provides: The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need.

See also EC2-16, which states: Persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should supply and participate in ethical activities designed to achieve that objective.

---

[1] Code of Professional Responsibility, Preamble and Preliminary Statement, p. 1 (1970).

And see EC8-3, which states that: Those persons unable to pay for legal service should be provided needed services

It is clear from the Canons and Ethical Considerations that the legal profession accepts responsibility for providing public interest representation, and that each individual lawyer shares this responsibility, but it is not clear exactly what types of legal services will fulfill the individual lawyer's obligation, or how much he is expected to do. Lack of affirmative guidance as to what each individual lawyer is expected to do has resulted in many lawyers and law firms doing little or nothing. A collective responsibility must be translated into a defined individual duty in order to realistically expect that each lawyer will contribute his share. The profession has not yet done this and our resolution is designed to meet this end. The Committee strongly recommends that the Association take action to cause lawyers to recognize their professional obligation.

Respectfully submitted.

HARRY L. HATHAWAY,
Chairman.
EDMUND J. BURNS.
RODERICK A. CAMERON.
FRANK T. GRAY.
CHARLES A. HOBBS.
ARNOLD B. KANTER.
CHARLES J. PARKER.
WILLIAM G. PAUL.
HOWARD L. SHECTER.
MARNA S. TUCKER.

August 1975.

[Amended in Senate, Sept. 11, 1975]

SENATE BILL NO. 664, INTRODUCED BY SENATOR SONG, MARCH 31, 1975

An act to add Section 1021.5 to the Code of Civil Procedure, relating to attorney's fees [, and making an appropriation therefor.]

The people of the State of California do enact as follows:

SECTION 1. *The purpose of this act is to hold both public and private parties or entities accountable to the public for their acts or omissions. It is the intent of the Legislature that this purpose be carried out by the award of attorney's fees, expenses, and costs to prevailing plaintiffs who bring actions which confer a substantial benefit upon the public.*

SEC. 2. Section 1021.5 is added to the Code of Civil Procedure, to read:

1021.5. Upon motion, a court shall award attorney's fees, costs, and expenses to a prevailing plaintiff against a defendant in any action which has resulted in the enforcement of an important right, if a significant benefit has been conferred on a large class of persons and the necessity and financial burden of private enforcement are such as make the award essential.

As used in this section, "significant benefit" includes a nonpecuniary, as well as a pecuniary, benefit.

[Reprinted from 44 U.S. Law Week 2017, July 8, 1975]

FINAL REPORT

At the close of their discussions the participants in The American Assembly on Law and a Changing Society II, at Stanford Law School, Stanford, California, June 26-29, 1975, reviewed as a group the following statement. The statement represents general agreement; however, no one was asked to sign it. Furthermore it should not be assumed that every participant subscribes to every recommendation.

LAW AND THE PUBLIC INTEREST

Essential to the solution of future problems is the assurance of fair representation in the decision-making process—vindication of the "public interest" in the public and private sectors—and representation of persons and causes who have previously not been effectively represented. These principles have been established and generally accepted. We must complete their implementation.

"Public interest law" is an important recent development. While there may be ambiguity of definition and scope a serious void in our legal institutions is being filled by the activities of lawyers who engage in representation of groups and interests that would otherwise be unrepresented or underrepresented. Such public interest law activities are major responsibilities of the legal profession. Adequate support measures should be adopted, including:

1. Encouragement of public interest lawyers to engage in a broad range of activities, including litigation, research, presentation of matters and lobbying before administrative agencies and other decision-making bodies, and public education and informaton activities;

2. Removal or lessening of unreasonably restrictive procedural and jurisdictional obstacles to the practice of public interest law by all lawyers;

3. Revision of the Internal Revenue Code to eliminate impediments to the funding of public interest law;

4. Encourage increased funding of public interest legal services by lawyers, bar associations and other individuals and organizations concerned with social justice;

5. Enactment of legislation permitting courts and administrative agencies to award attorney's and expert witness' fees to parties who vindicate significant public interests in court or administrative proceedings;

6. Endorsement and continuation of the work of the American Bar Association-sponsored Council on Public Interest Law so that the concept of public interest law may be fully accepted and made a permanent part of the legal process.

Maintenance of effective public interest law activities should not, however, obscure the obligation of lawyers and the organized bar to assure that legal services are available for all.

Mr. Hobbs. Mr. Chairman, I am here on behalf of the Special Committee on Public Interest Law of the American Bar Association. Our committee is a special committee that has been reappointed 3 years now, and our job is to study the nature of this emerging field of public interest law and to make recommendations back to the American Bar Association of how it fits in or should fit into the practice of law, and what is the duty of the bar with respect to public interest obligations.

Our committee supports the concept that Congress ought to permit the allowance of attorneys' fees to prevailing plaintiffs in public interest cases. Our reasoning is that this will encourage attorneys to handle such cases when they have a reasonable prospect of success but where a judgment will produce no fund of money and the client or group to be benefited has an important public question but is unable to pay for having his interests represented.

I am here, of course, on behalf just of the Special Committee on Public Interest Practice, but it is nevertheless true that the views that I just gave which are those of our committee also reflect official American Bar Association policy. Last August the American Bar Association, after having considered it in three different conventions, approved unanimously our resolution, which I have attached as attachment No. 1.

One clause of the resolution provides that it is incumbent upon the bar to assist, foster, and encourage governmental, charitable, and other sources to provide public interest legal services. So this, therefore, is the official policy of the American Bar Association, and certainly, allowance of attorneys' fees in public interest cases would be to foster and encourage the provision of public interest legal services and therefore is a concept supported by the American Bar Association.

The two gentlemen from California may be interested in attachment No. 2 which is a proposed Senate bill in the California Senate which seems to have the same purpose as Congressman Seiberling's bill has,

which is to allow to a prevailing plaintiff the attorney's fees. The California bill has tried to set up some standards which you may find interesting. Rather than leaving the matter entirely to the court, the California Legislature is considering these standards:

First: It would have to be enforcement of an important right; if it was a trivial right, the court would not have discretion to allow the fee.

Second: A significant benefit would have to be conferred on a large class of persons, so that if it were just a dispute between neighbors and no one else was affected, again, no fees would be allowed.

Finally: The necessity and financial burden of private enforcement must be such as to make the award essential. This gives the court a lot of discretion, but also gives some guidance.

I would make one more observation, Mr. Chairman, and that is, the American Bar Association by this resolution, which is attached as attachment No. 1, recognizes the duty of each lawyer, each member of the bar, to contribute some part of his time to public interest legal services. Most of us think of this, or used to at least, as criminal appointments. Well, this field has been expanded by the American Bar Association to include the kind of issues that some of us are focusing on today—environmental issues, civil rights issues, and the like.

However, even if every lawyer contributed what might be a generally agreed reasonable amount of his time, the amount of time needed to handle all of the needs is much more than the bar can provide. Perhaps I am anticipating a question of why don't lawyers do more to help the public, and those who can not afford it. The answer is, we are doing a lot already, and we hope that more and more such services will be available.

We think they will never be more than a fraction of the total amount needed unless the day comes when half of us are lawyers.

Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Hobbs.

In your prepared statement you point out that the Supreme Court's decision in the *Alyeska* case overruled a rather impressive body of recent cases, which has allowed the attorney's fees under the private attorney general theory.

Do you think *Alyeska* was decided correctly?

Mr. HOBBS. Of course, I cannot speak for the committee on that respect, and I do not know how valuable it would be to give you Charlie Hobbs' personal views. I think the Supreme Court was taking a conservative approach by saying this matter involves such a large financial commitment we'd better leave it up to Congress to make the decisions, rather than the courts.

And many people would find that a commendable attitude.

Mr. KASTENMEIER. I recognize you are speaking on behalf of the Special Committee on Public Interest Practice. You may want to confine your remarks to that general area in terms of how the bills before us are presented, but you perhaps observed that there are a series of bills calling for the awarding of attorneys fees, not merely in terms of public interest practice or in terms of the Senate bill in California, not merely in terms of the prevailing plaintiff, but also in terms of a prevailing defendant where pecuniary interests are involved in connection with the Government.

Do you have, first of all, a point of view about this other legislation beyond the Seiberling bill? Have you examined all those pieces of legislation, or merely that of public interest practice.

Mr. HOBBS. Mr. Chairman, yes; in preparation for today I did look at all the bills. I am aware of what they do.

But our committee has not seen any of the bills, and, therefore, I cannot speak specifically to any of these bills. I can only say that they reflect a philosophy which is very much in keeping with what our committee has decided is a good philosophy.

Mr. KASTENMEIER. I was going to ask you whether, in examining all these bills, the affinity of treatment of a single problem would, in your view, lead to a single omnibus approach, or whether we would have to deal piecemeal with Mr. Crane's proposed legislation, with Mr. Drinan's legislation and with Mr. Seiberling's legislation.

Mr. HOBBS. There are two ways to look at "piecemeal."

One would be, Do you want to have that clause in each statute that may involve litigants in public interest questions, as opposed to an omnibus bill that says, in all public interest litigation attorneys fees may be allowed.

I would favor an omnibus approach there because I am foreseeing the problems of the public interest lawyers; they need to know where they stand. If the philosophy is to allow fees in proper cases, I think a decision of Congress made once and for all would be convenient and would avoid the difficulties and, perhaps, different interpretations you might have under different statutes.

Another form of piecemeal, or breakdown of the problem, you might say, is the nature of the case. For example, there has been brief mention today of criminal cases. As a practicing lawyer, I have had defendants who were totally innocent, for example, and yet, the Internal Revenue Service took the criminal approach, criminal way, to go after the client.

In the case I am thinking of, the Court of Appeals was so indignant at this approach that they gave us judgment from the bench. Our client had incurred over $20,000 worth of legal fees, but there was no way to cover those. We could not even recover administrative costs because in a criminal case that is not permitted. Had they gone the civil way, we would at least have recovered several thousand dollars for a transcript. That strikes me as a different type of problem than the problem of the environmental case, the voting rights case and it might be—I am not sure—it might be wise to have a separate omnibus bill for each major class of cases like that, or possibly, an omnibus bill with different sections; each section handling a class. But it is a very complex, comprehensive problem.

Mr. KASTENMEIER. Similar to the Federal rules of civil procedure and Federal rules of criminal procedure separately?

Mr. HOBBS. And administrative area is another.

Mr. KASTENMEIER. One of the reasons I raised the question, Mr. Hobbs, is because of a philosophy as alluded to by Mr. Pattison and Mr. Wiggins, and by all members of the panel.

What is the philosophy which should serve as the approach for this committee if it indeed desires to move forward with legislation? Is it that it might be most convenient to say that our concept of cost has

been expanded to include attorneys fees, or that our experience in contemporary litigation indicates that those who prevail in litigation are not made whole unless they can be relieved of the cost of attorneys fees, and that this should be reflected in some amplified concept of cost? Or should the committee consider some other approach which justifies looking at the problem commonly across the barrier separating criminal cases from civil cases.

If the implication is there, we may have to look at criminal matters as well as civil matters in terms of affording a sort of relief, this change in American law.

What are your comments on that?

Mr. HOBBS. On the possibility of saying this is expanding the concept of cost to include really what your costs are, that is a sound theory, but it ought to be kept in mind that lawyers go through law school learning that the American rule is that you just do not recover your attorney's fees.

I have actually researched this back to cases decided in Connecticut in 1798. I think, was a case which allowed an attorney fee, but the reason it was unique, is that it is one of the few that ever did. All the other cases say you cannot get your attorney's fees.

Therefore, I think to say the concept of costs has been outpaced by inflation really does not match the actual way the rule has developed. I think you just cannot get your attorney's fees in this country unless you fit within several categories.

In one category the other side has acted in bad faith or vexatiously; then you can get your fees. Or you have produced a fund of money that you can take your fee out of; that is commonly used. But the third category, this private attorney general idea, was the one that had grown up in beautiful flower until *Alyeska*—and I do not criticize it—until the *Alyeska* case found it was up to Congress to approve that type of authority.

If you want to say it is an expansion of cost, you can; Congress certainly has that power. But to me, I would not call it that because I would call it what it is—it is the allowance of attorneys' fees for the first time in American history under something other than one of the recognized exceptions.

Mr. KASTENMEIER. Our problem with that is, how much across the board? That change—a rather radical change—should go to all the legislation before us, Mr. Crane's case and others, and what will follow in the American system, as far as the State and local practice, as a result of these changes if we adopt more or less the British system, as I understand it.

What implications does this have? I am certainly not prepared to even guess at this point.

Mr. HOBBS. I would say it is impossible to predict. The conservative approach would be to carve out one fairly observable area—say, the public interest area—and start with that and let others come later.

Another would be to institute a major study of all the areas to which this concept might apply. I think if you did that you are talking, probably, about a 2-year study with a lot of cost involved to it.

In an omnibus bill, that would really cover everything and would have a lot of controversy, no doubt, because of the financing of it.

To the extent you are just shifting fees from plaintiff to defendant, it does not cost the Treasury anything, but whenever the United States is a party, as it is in administrative cases, criminal cases, and some civil cases, that has implications to the Treasury that Congress should really measure before it goes too far.

I am sure Congress would want to do that.

Mr. KASTENMEIER. I yield to the gentleman from California.

Mr. WIGGINS. Mr. Hobbs, you mentioned in your statement that expert witness' fees ought to be considered as an item of cost to be attached to the prevailing party.

My memory on the current law is hazy in that regard, and I would appreciate your observation.

Mr. HOBBS. First of all, my reference to it is not my own, but rather it is in the final report of the American Assembly held last June. They recommended that not only attorneys' fees—legislation authorizing attorneys' fees—but also expert witness' fees. That is where it appears; it is not my own.

My experience—and I have 17 years experience in litigation and the practice of law—my experience has been that the losing side does not have to pay the expert wiciness fees of the other side. I cannot, offhand, think of any exceptions to that; it is not allowed as a cost.

Mr. WIGGINS. That would reflect, then, a change.

Mr. HOBBS. Yes.

Mr. WIGGINS. The policy base upon which the recommendations are made is stated on page 2 of your statement, near the top, which says that, "it would encourage attorneys to handle such cases"—such cases being public interest cases.

Can a case be made that such an encouragement is needed? Some might observe this as a robust field of law and that no encouragement is needed. Some might even argue that it needs to be discouraged rather than encouraged.

Mr. HOBBS. One reason it is robust is for two reasons.

I know a lot of public interest lawyers, and being on my committee, I have a lot of modern input as to what they think and what they want. A lot of them have had a lot of hopes on this private attorney general theory, which was recently dashed last June.

I think it is fair to say that part of the robustness has been on a basis that has now been eliminated.

Another part of the basis to support for—I agree with you—robust participation of public interest lawyers has been foundation support. Now the foundations—Ford Foundation and others—have served notice that they are reaching an end to where they feel they should continue to finance these public interest law firms and public interest programs, they are cutting back and there is going to come a time when there will be no funding.

Other foundations have said this also. This is not something they want to permanently finance. Seed money to get it started, yes, but it is always understood from the beginning they would have to find other methods of financing.

The other sources of grant money—for example, the Legal Services Corp., a new device just approved by Congress, will provide some public interest legal service. That is one source. But I doubt you would say if that were the only source it would be robust.

Still another source would be private grants. But that, like foundations, you cannot be sure it would go on forever. In other words, I conclude the robustness we have seen is probably going to diminish unless some encouragement or new source of financing comes into the picture.

Mr. WIGGINS. The recommended resolution of the Special Committee on Public Interest Practice contains some interesting whereas clauses.

The first one is, "Resolved that it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services."

That, followed by a further resolved that, "a public interest legal service is a legal service provided without fee or at a substantially reduced fee, which falls into certain enumerated categories."

You are either going to have to revise our responsibilities, or perhaps moderate that language a little bit, because you are saying it is a professional responsibility that we have to do this gratuitously or at a reduced fee.

I wonder whether or not the reasonable attorney's fee fixed should be reduced to accommodate the professional duty which the bar holds to a certain class of litigants.

Mr. HOBBS. Are you saying, "Do I have a more frugal view of reasonable attorneys' fees when it awards fees"?

Mr. WIGGINS. I am using your language, and that is that the bar owes a duty to certain class of litigants to take the cases at reduced fees.

Mr. HOBBS. Sure.

The American Bar Association has unanimously declared that is true. The trouble is, there is not going to be a lawyer to undertake a major civil rights case; it might run him a year of full-time work. And some of the larger environmental, civil rights, employment discrimination cases, do run that. True, some of those statutes provide for attorneys' fees, that is the only reason they are getting that kind of service.

Mr. WIGGINS. I am of the general opinion that attorneys feel this sense of responsibility, but they also feel the need to pay the expenses for their office, and they will only take a pro bono case if it can be disposed of quickly, unless you are a very large firm that devotes a certain percent of practice to pro bono work.

Mr. HOBBS. Our committee had a lot of trouble quantifying this duty. We did not feel we could reach a salable consensus because of so many variables. A rural practitioner ought not to be expected to contribute, perhaps, as much of his time as a city practitioner in a large firm. So we could not quantify it.

I think eventually the tide is going to reach a point where a guy who takes one criminal case a year and goes down and pleads guilty is not doing enough. Some people feel that he is right, and there is no consensus on that. But if your point is that we could get a lot more out of lawyers if they would stand up to their duty to provide this kind of public interest service, I agree with you.

If your point is, if we could have this we would not need the legislation, I couldn't agree with you.

Mr. WIGGINS. I do not think my judgment is going to be based on the fact that I am in a State, but if we provide fees it is going to discourage attorneys rather than encourage them to stand up and do that which has been declared to be their professional responsibility.

Mr. HOBBS. Yes, but there is another part of the resolution which I think is relevant.

On page 2, second paragraph down, it says, "Further resolved that so long as there is a need for public interest legal services" it is incumbent upon the bar to have the lawyers do their duty.

That little clause represents a lot of debate in our committee, and that utopia might some day arrive, and it would also be some way to pay the fee—from a Government grant or some other place—in a public interest case.

When that day comes, the lawyer's duty to provide free services, to give up part of his income other than through the taxes he already pays, would dissolve. If the need dissolves, his duty to help alleviate that need dissolves.

We saw a possibility of some day utopia arriving and there being no further need for free legal services.

Mr. WIGGINS. One final matter, Mr. Chairman.

You list five classes of cases in the resolution which are included within the phrase, "of public interest legal services." The first three—poverty law, civil rights law, and public rights law—are typically addressed to great public questions.

It would seem to me that the lawyers in this field are active in lobbying for legislation which meets a national responsibility, as they see it. And if they are ineffective in achieving their objective then they can go to court and try to have the court do what Congress failed to do in providing for certain rights or benefits.

The public fee that you envision should only be paid in the case of litigation, and not the ongoing lobbying effort, which everyone involved in public service law seems to be deeply involved in.

Mr. HOBBS. Yes. We are addressing only the litigation question, but you probably asked that question because you have heard of the fact that public interest lawyers would like also authority, I guess financing, to lobby as well as litigate, which is true.

We are not addressing that at all; that is another area along with the criminal and administrative and civil—you could say legislative is a fourth area where the possiblity of fees might be considered, but we do not address that.

Mr. WIGGINS. I have never sued on behalf of a client or the U.S. Goverment, but I have been counsel for many plaintiffs who were entitled to recovery of attorneys fees. My discussions with those clients I hope are not atypical. They started out by discussion of my fee, and it was also clear to my client that I was not going to depend upon the collectibility of some judgment which was attorneys fees or the solvency—which may, at that moment, be unknown to me—of the target defendant. That is, before I undertook the case, my fees were going to be arranged with my client, and I hoped that I would be able to repay my client out of the reasonable attorneys fee recovered, but my services were not contingent upon the payment of that judgment for reasonable attorneys fees.

Somebody else might tell me I have done something unethical in doing that, but I do not think so.

Mr. PATTISON. You have done a wonderful job.

Mr. WIGGINS. What I am saying is that unless you have a solvent defendant where recovery is really not in doubt, the inclusion of a part of a judgment for reasonable attorneys fees does not necessarily get your plaintiff client off the hook for some front money.

I do not think you proposed going so far as to provide the client with enough money to stimulate an attorney to take the case, in the first instance.

Mr. HOBBS. No. I do not think anyone is suggesting that. I think you have to take the case to the end and see how you come out under almost all the proposal—and you have to win before you ask the judge to allow an amount, and you have to collect.

Mr. WIGGINS. That is often the hardest part.

Mr. HOBBS. It sometimes is.

Mr. WIGGINS. I yield back to the Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I am glad you were able to appear and give us the benefit of your thoughts here and those which you were authorized to express on behalf of the ABA. I hope you will keep this subject in the forefront and pass it on to the responsible committees within the ABA because I have a feeling we are commencing on what is going to be a long, long set of hearings, and possibly quite a bit of legislation before it is done, and that may take about 10 years. We will probably have to do as Mr. Crane suggested and take care of the more immediate needs to start with.

My mirror tells me we are opening a long subject here. That is why I enlisted the aid of you and your committee from the ABA. I think we have a long way to go.

Traditionally, when America was essentially rural and life was simpler, there was a natural process, if a person was offended by our laws, one way or the other, if he had a conflict with his Government, we could assume that he would resist and resort to the courts and the judicial system in having the problem resolved. The expense of doing so was not so great that it was something that you just could not handle. Even a small city lawyer, I think, in 1900, would be willing to take a case pretty far, if need be, just pro bono publico. But I do not think that is true any more. The expense of just living, the expense of running an office, the overhead you have to pay and all of the pressures that are upon you, whether it would be a good idea or not, it makes no difference. I do not think it is within the capacity of a private practitioner today to carry too big a load of public interest law. He cannot afford to do it, not just on the criminal side, but on the civil as well.

I have noticed, while you were talking, that even within the span of the time since World War II, years ago, when I was practicing, we did not have a Federal public defender, and the phone would ring every so often and the judge would say, I have a case I want you to defend, so why do you not come up and be here at 2 o'clock. Well, he came. I was favored with seven felonies 1 year. One of them was a 2-week fraud case. It is a heavy financial burden. We now have Federal public defenders in criminal cases, and I think they are providing a useful service on something that is overdue. We should go on with it.

That brings me right back to where I started. I think the ideal in our canons and ethical considerations is every lawyer contributing

some of his time to the public good. This is a fine ideal; but I think maybe we are fooling ourselves if we think that is a solution to these problems. It just will not work. The burden is too big. The financial burden is too big.

I think it is not possible any more. The cost of preparing litigation and handling it and the cost of taking appeals on important issues entails too much with modern technology—the research capabilities, investigation capabilities, transcripts, depositions, briefs. I do not see how a person can finance this out of his own pocket unless he is fabulously rich. Then, of course, it would not make any difference. But it is not enough.

I have a guess coming. I have a feeling that what we may have to do in many of these cases, in addition to your attorney's fee, which is the starting point here, we may have to come up with some kind of a devil's advocate for the public. A public advocate maybe sounds better. But controversies between the American people and their Government exist, and new ones will continue to come up. We accept the concept that the people's Government can have its attorneys paid out of the public treasury and its investigators' costs paid out of the public treasury. How about the people's interest, which may not be the same, and which may have to be contested—maybe the Legal Services Corp., maybe something like the public defender, I do not know. These issues affect all of us.

I do not think you can tie it to just being an award of attorneys' fees. We often have a situation where the issue is so close; as Mr. Pattison said, you can stipulate to the facts, but what does the law mean. You have to go all the way to the Supreme Court, maybe, to find out what the law means. Should the individual citizen pay that burden? Is that a burden that society should pay?

I am raising questions that do not necessarily require an answer, but I would appreciate your comments.

Mr. HOBBS. You said one thing that revived some memories. Our committee spent a lot of time debating what the source of this duty was, to give free legal aid to people who need it. Where does it come from? Is it just the fact that they make a lot of money? That is part of it. Society treats them as very high class people, that is part of it. You have to respond to people who give you those privileges.

The biggest reason, we thought, was the need of the public to have both points of view properly represented. When the Government is involved, it is going to give a good run to its point of view. But too many cases have been decided by default, the failure to have a good presentation on the part of the other side. That is the other side I am talking about, that needs the free legal service, or financed by the Ford Foundation or the Government. Somebody should get in there and put up a good argument for the other point of view. Even if he loses, there may be a public good that is achieved.

Mr. DANIELSON. I would like to add to that if I may. You say why should lawyers do it. They should do it because it is essentially a legal problem. You would not want lawyers on one side of it and nonlawyers on the other side. You need lawyers on both sides. It follows in as the duty of the profession. There is no one else to do it. You cannot have blacksmiths on one side and lawyers on the other any better

than you could have blacksmiths on one side and lawyers on the other shoeing horses. The poor horse would suffer, would he not?

I think it is an essential part of our profession, and how we pay for it is really the issue we are talking about here. Let us take an analogy, the medical profession. When I was a kid, all doctors took care of a certain number of patients without getting paid. In my home town, I remember in the depression, one doctor accidentally got rich. He took in corn in payment of his medical fees, and then Roosevelt came up with a great idea, and he lent people 40 cents a bushel on their corn. He never had it so good. He took it in at about a nickel.

We are talking about how do you pay for it. I would say it is 10 years off, but we are unique. Our Government belongs to our people, and when there is a conflict between the two, is there any greater justification to have the Government side of the case paid out of the Treasury than to have the people's side of the case paid out of the Treasury? We are all the better for it when we resolve these questions. I do not know how to do it. But I think we have a real question here, and we may spend a few years working on it.

I yield back the balance of my time.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I do not have very much to add to that. I practiced law for 17 years and saw a lot of changes occur in that time in the bar's attitude, from a time when there were not any public defenders. When you took cases, and we always took cases, you usually gave pretty bad service to people that you represented. We always did work for YMCA or whatever for nothing. But we got to a point where it became so complicated that you could not do that, so we charged them half fees, or something like that. It got to be a point where you started to have conflicts. Some of your corporate clients would be upset. You were taking a case that maybe was not affecting them directly, but was inimical to their perceived interest.

I think it is necessary we have legislation in this area because I think you are going to have to have public interest law firms doing these things. I think the big law firms, the Sullivans and the Cromwells and those big firms are going to be under so many constraints that they are just not going to be willing on a pro bono basis to let their partners take on cases that the bar used to traditionally do and sometimes did pretty well.

But I think we have to respect the fact that things are getting so much more complicated, that it is going to be necessary to pay for these things, and somebody has got to pay for it. We used to do it on a Robin Hood basis. We always overcharged our clients who could pay for it.

I have no questions.

Mr. KASTENMEIER. On behalf of the committee we thank you for your appearance. Before this question is ultimately resolved we may need to inquire of you again as to your position to the special committee on the general question confronting us now.

Mr. HOBBS. It is a pleasure, Mr. Chairman.

Mr. KASTENMEIER. The last witnesses this morning are Armand Derfner and his wife, Mary Francis Derfner, representing two differ-

ent capacities: the Lawyers' Committee for Civil Rights, and Attorneys' Fees Project.

Welcome.

The Derfners have been connected with that question, and we invite their testimony this morning.

TESTIMONY OF ARMAND DERFNER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS; ACCOMPANIED BY MARY FRANCES DERFNER, DIRECTOR, ATTONEYS' FEES PROJECT.

Mr. DERFNER. Thank you very much, Mr. Chairman and members of the committee, for the opportunity to appear here and for the probing questions that we have been listening to this morning. We think the committee has already, even at the start of these hearings, shown a very good grasp for both the problems and areas of possible solutions.

I am going to summarize very briefly the statement and ask leave of the committee to introduce for the record my statement, to which is attached a letter from Mary Frances Derfner to Congressman Seiberling, which is one of the responses, I think, the Congressman was referring to.

Mr. KASTENMEIER. Without objection, your statement in its entirety, together with the letter and the other materials attached to it will be accepted and be made part of the record.

[The information referred to follows:]

STATEMENT OF ARMAND DERFNER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. Chairman and members of the Subcommittee, I am Armand Derfner, a member of the Executive Committee of the Lawyers' Committee for Civil Rights Under Law. With me is Mary Frances Derfner, Director of the Lawyers' Committee's Attorneys' Fees Project, who has been studying this important question for four years. We want to thank you for the invitation to present the views of the Lawyers' Committee on the subject of court awards of attorneys' fees, and to discuss the need for legislation in response to the recent Supreme Court decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*.

In my statement I will be focusing on the important role attorneys' fees play in enabling private citizens to help Congress enforce its most basic and fundamental promises to the American people. Although my comments will probably apply equally to all types of public interest litigation, including environmental and consumer protection, civil liberties and civil rights, the Lawyers' Committee's chief interest lies in traditional civil rights cases, or cases enforcing the rights of minority groups and poor people, and it is from this perspective that we have observed the development of the law of attorneys' fees.

The Lawyers' Committee was organized in 1963, at the request of President John F. Kennedy, to bring the resources of the legal profession to bear on the legal problems of minority groups, poor people, and others whose civil rights have traditionally gone unvindicated. Through the efforts of the Committee's offices in Washington, D.C., Jackson, Mississippi, and ten other cities, hundreds of lawyers throughout the nation are now contributing thousands of hours of high-quality legal services each year to cases and projects developed by the Committee.

The Lawyers' Committee's purpose was, and has remained, that of assisting in the enforcement of the national policies laid down by the framers of the Constitution and by the Congress. Based on our experience over the past four years of the Attorneys' Fees Project's existence, the Lawyers' Committee is now more firmly convinced than ever that court awards of attorneys' fees in public interest litigation are vital to widespread enforcement of the law, and that the concept of fee shifting in public interest litigation is workable and equitable.

In large part, the views of the Lawyers' Committee have been set forth in Ms. Derfuer's answer to a recent letter from Rep. Seiberling, and in order to avoid repetition, I would like to have her response entered in the record at this point as an appendix to my statement. I know that Rep. Seiberling has received views from others, and he is to be commended for undertaking the very responsible and critical task of finding out what legislation is called for. All of us who are interested in effective enforcement of national policies are also grateful to the Subcommittee for moving with such dispatch on this vital question, and I know that the answers collected by Rep. Seiberling will be a major contribution to the Subcommittee's deliberations.

In *Alyeska*, the Supreme Court held that federal courts have no equitable power to award fees in the absence of specific legislative authority from Congress. The principal effect of *Alyeska* was on the line of cases in which the courts had awarded attorneys' fees to "private attorneys general" who successfully enforced fundamental national policies. In awarding fees, these lower courts had not departed from the traditional "American rule" that, in ordinary cases, each litigant should bear his own attorneys' fees; instead, these awards were adjuncts to equitable relief given in particular cases as parts of the courts' obligation to provide full and effective relief in enforcing major Constitutional and Congressional policies. That obligation has been repeatedly stated by the Supreme Court itself:

". . . [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. at 674 (1946).

A glance at the history of attorneys' fees in American law may be useful in understanding the present situation.

In England, as in virtually every other common law country in the world, attorneys' fees have generally been awarded to the part who prevails in all types of civil litigation. This country, however, broke with the English practice early in its history, not by any reasoned or planned decision, but largely through historical accident. Once the path was chosen, it became a well-established rule, over two centuries, that in American federal courts each litigant bore the cost of his own attorney.

This "general American rule" against fee shifting has never, however, been inflexibly hard and fast, and both Congress and the courts have developed exceptions to it. Congress has, over the years, passed in excess of 50 statutes calling for either mandatory or discretionary fee shifting to a prevailing plaintiff or a prevailing party. And it has always been recognized that federal courts, sitting in equity, had the discretion to award fees in the absence of statutory authorization, if overriding considerations so dictated. *See Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939).

In developing the areas of judicially created exceptions to the general American rule, the courts followed the traditional pattern of evolutionary growth which has been the genius of the common law. Thus attorneys' fees became regarded as an appropriate punishment for those who litigate in bad faith, by using dilatory tactics or raising specious defenses in their cases, or by ignoring settled law and forcing another to sue to obtain what is clearly due him (the bad faith, or "obdurate obstinacy" exception). And in those cases where there was a recovery for the benefit of a class, fees were assessed from the "fund" created by the lawyers' successful efforts (the "common fund" exception). These were the two most common nonstatutory exceptions to the "general American rule" against fee shifting prior to modern times.

In recent years, however, two developments joined to give rise to new variations of the equitable doctrine of attorneys' fees. First, in the Civil Rights Act of 1964, Congress adopted provisions authorizing courts, in their discretion, to award fees in cases proving discrimination in public accommodations (Title II) and employment (Title VII). These provisions signaled the end of exclusive reliance on the negative punishment rationale in public interest cases. The shift to an increasingly broad and positive rationale for awarding fees was not widespread, however, until 1968. In that year, the Supreme Court held that

"[W]hen a plaintiff brings an action under . . . Title [II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of

the highest priority. If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. . . ." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, at 402 (1968).

Then in 1970, the Supreme Court broadly expanded courts' discretion in cases not arising under fee statutes, in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). There are Court ordered fees paid to plaintiffs who proved that defendants had issued misleading proxy statements in violation of the Securities Exchange Act. The *Mills* decision was based on a theory of "corporate therapeutics"—because the lawsuit benefited the corporation being sued (by securing compliance with the law), the corporation, and not the plaintiffs, should pay for the benefit, even though the benefit might never be financial.

Encouraged by the Supreme Court's holdings,[1] lower courts began to award fees in cases involving stautes which set broad national policies but were silent as to attorneys' fees. The most common awards were made under the Reconstruction civil rights statutes, 42 U.S.C. §§ 1981, 1982 and 1983—statutes which protected rights similar to those protected in the 1964 Civil Rights Act, and whose language specifically instructed the courts to "use that combination of federal law, common law and state law as will be best adapted to the object of the civil rights laws."[2]

The rationale most commonly used by courts in awarding fees in suits brought under statutes which are silent as to attorneys' fees was an adaptation of the Supreme Court's *Mills* and *Newman* rationales, and has been variously called the "private attorney general," the "common benefit," and the "legal therapeutics" rationale. Briefly stated, courts said that, when a private party brings suit to enforce the law, he is acting as a *private attorney general*, engaging in *legal therapeutics* by forcing compliance with the law, and thereby providing a *common benefit* for the public. The theory, no matter what its label, is basically a "full and appropriate relief" rationale: attorneys' fees are not just a permissible remedy in cases to enforce Congressional mandates; they are a *necessary* one, without which private citizens simply cannot pursue the rights Congress has promised them.

The law has always provided protection for property rights—for example, by statutes, providing for treble damages and attorneys' fees in commercial cases. The more intangible personal rights have been more elusive and less protected, but after *Newman* and *Mills*, lower courts increasingly recognized the need to encourage aggrieved parties to pursue adherence to the law on a broad scale, and increasingly recognized the critical role of attorneys' fees in this process.

In *Alyeska*, the Supreme Court took a giant and devastating step backward, ignoring its own earlier attorneys' fee cases and its cases on federal courts' equity power. At the same time, however, the Court invited Congress to restore the courts' equity power through legislation, and it is that legislation which this Subcommittee is to consider.

* * * * * * *

This Subcommittee is considering a number of bills, which seem to fall into four main categories:

(1) H.R. 7826 and H.R. 8221, construed at their broadest, could overturn the general American rule;

(2) H.R. 7826 and H.R. 8221, construed at their narrowest, would probably restore the exact situation as it existed at the time of *Alyeska*, and essentially restore the courts' broad discretion to give fees in public interest cases;

(3) H.R. 7825 and H.R. 8218 are examples of specific legislation authorizing attorneys' fees in narrow groups of cases brought under specific acts or sections of acts; and

(4) H.R. 8552 is an example of what we have called generic, or categorical, provisions, in which an area of the law is dealt with in general. For reasons set forth at length in Ms. Derfner's letter, which I will summarize here, it is the last that we think is preferable.

---

[1] About this time, the Supreme Court also made it clear that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies," Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969), and that courts should "interweave . . . new legislative policies with the inherited body of common-law principles. . . ." Moragne v. States Marine Lines, 398 U.S. 375, 392 (1970). *See* Lee v. Southern Home Sites, 444 F. 2d 143 (5th Cir. 1971).

[2] Brown v. City of Meridian, Mississippi, 356 F. 2d 602, 605 (5th Cir. 1966). *See* 42 U.S.C. § 1988; Lefton v. City of Hattiesburg, Mississippi, 333 F. 2d 280 (5th Cir. 1964).

(1) The traditional American rule, as applied to ordinary private cases, has a great weight of history behind it, no matter how slender the initial justification. The need for change is far from apparent, especially since the major examples used to illustrate the unfairness of not awarding fees—the small claims whose value is exceeded by the lawyer's fee—generally arise not in federal court but in state court, and are therefore not of primary concern to this Subcommittee. At the same time, the change would involve major policy questions, not least of which would be what type of system to adopt—since the foreign systems vary widely among themselves. In short, while it may be worthwhile to begin a study of the overall American rule, and to study the experience with fee shifting in foreign countries and in those few states which have adopted some form of generalized fee shifting, it seems to me quite premature to think of legislation doing away with the American rule before there has been a great deal more study.

(2) Restoration of the pre-*Alyeska* situation would reinstate the equity power of courts to continue the revolutionary process by which the private attorney general theory was gradually developed. Courts would be exercising broad discretion, but in keeping with the statutory and Constitutional policies to be enforced in the cases before them. Because of the uncertainty and inconsistency, which was the chief target of the opponents of the private attorney general theory, such a restoration would be an incomplete response to *Alyeska*. There are many areas where Congress knows enough to legislate with greater specificity and should do so, as in the civil rights area which I will discuss later. As an adjunct to such specific legislation, however, a statute designed to give courts discretion to award fees in public interest cases generally would be useful.

(3) Specific legislation, such as H.R. 7825 and H.R. 8218, fits the pattern that has prevailed in most of the attorneys' fee provisions up to this point. This type of provision is a highly inefficient way to proceed because it carves out a specific portion of an area of the law and deals with it without simultaneously dealing with related areas of the law, sometimes even in other sections of the same statute. This method may have been acceptable as long as the courts filled in the interstices. For example, courts in recent years have awarded fees in housing cases under 42 U.S.C. § 1982 by reference to the fee provision contained in the Fair Housing Act of 1968. The Supreme Court, however, in the *Alyeska* opinion, took pains to insert dictum rejecting several cases which had awarded fees based on such statutory analogies. In light of the Supreme Court's apparent insistence that a fee be awarded only when Congress has *explicitly* so directed, the specific approach is both time-consuming and inefficient, and most important, irrational and inequitable because it inevitably includes some cases of certain types while excluding others that involve the same policies of Congress.

(4) H.R. 9552 takes the generic approach to attorneys' fee legislation. This approach allows consistency in cases which arise in a particular area of the law, but which may involve different aspects of that area, or which have different procedural and jurisdictional bases. Under such an approach, the contours of a particular generic fee provision can be shaped to meet the policy needs of the area of the law involved. Only this summer, Congress passed an excellent generic fee provision in section 402 of the Voting Rights Act Amendments, which provides fees for voting cases in general (under the fourteenth and fifteenth amendments and related statutes), rather than, as with the previous pattern, providing fees only in cases brought under the Voting Rights Act itself or only under a section of that Act.

The generic categories can be defined in various ways, such as by subject matter (*e.g.*, voting), by procedure (*e.g.*, rulemaking proceedings before agencies of a certain type), or in other ways. In any event, such an approach is a rational and versatile response to Congress' task of providing enforcement mechanisms for its policies.

* * * * * * *

The merits of bills dealing with particular areas are best discussed by those who are familiar with the areas in question. The Lawyers' Committee's experience has been in the area of civil rights, and on the basis of our experience we are prepared to say that a bill authorizing attorneys' fees in the generic area of civil rights cases is vital.

The enforcement of our civil rights laws, including 42 U.S.C. §§ 1981–1988 and other Reconstruction statutes, as well as the more recent civil rights laws, is our nation's highest obligation. It is also highly dependent upon private enforce-

ment, and yet is an area in which the presently available legal resources are far too few.

The bulk of the nonstatutory private attorney general cases in the past few years were cases under the Civil Rights Laws. These cases, as well as cases under specific attorneys' fee provisions of recent civil rights laws, provided Congress and the courts with a thorough education in attorneys' fees in this area, and resulted in a detailed body of law on technical questions like the scope of courts' discretion, the comparative liability and entitlement of different parties to litigation, and the proper amount of fees. There is thus a clear record to support the proposition that a generic provision governing the entire area should be superimposed upon the existing patchwork of specific provisions.

One of the bills before this Subcommittee, H.R. 9552, is specifically tailored to this record. It is virtually identical to a provision which was introduced in the Senate earlier this year, and successfully reported out by the Senate Judiciary Committee as a proposed section 403 of the Voting Rights Act amendments.

H.R. 9552 would allow a court, in its discretion, to award attorneys' fees to a prevailing party in suits to enforce the civil rights acts which Congress has passed since 1866. This bill follows the language of section 402 of the Voting Rights Act, and of Titles II and VII of the 1964 Civil Rights Act. All of these acts depend heavily upon private enforcement, and fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate these important Congressional policies.

Courts have been instructed, since the passage of our first civil rights laws, to use the broadest and most effective remedies available to achieve the goals of these laws, and these remedies have included awards of attorneys' fees as costs. The Civil Rights Act of 1866 directed courts to use whatever combination of federal, state and common law is most suitable to enforce civil rights. 42 U.S.C. § 1988. In 1870, Congress passed three separate provisions mandating fee awards to victims of certain election law violations. Enforcement Act of 1870, 16 Stat. 140. One year after enacting that law, Congress directed that remedies provided in such laws should be available in all cases involving official violations of civil rights. Sec. 1, Ku Klux Klan Act of 1871 (predecessor of 42 U.S.C. § 1983).

In other recent civil rights laws, Congress has included the effective remedy of attorneys' fees. Fee shifting provisions have been successful in enabling vigorous enforcement of these laws. Before *Alyeska*, many lower federal courts followed these Congressional policies and exercised their traditional equity powers to award attorneys' fees under earlier civil rights laws as well, thus restoring an important historic remedy for civil rights violations.

The *Alyeska* decision created an unexpected and anomalous gap in laws. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same case brought under 42 U.S.C. § 1981, which protects similar rights, but involves fewer technical prerequisites to the filling of an action. Fees are allowed in a suit under Title II of the 1964 Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials who are sworn to uphold the laws.

H.R. 9552 provides the specific statutory authorization required by the Court in *Alyeska*. Provision for court awards of reasonable attorneys' fees to prevailing parties is a necessary under the provisions of §§ 1981–1988, and Title VI of the Civil Rights Act of 1964, §§ 2000d–2000d–4, as it is under other civil rights statutes which already specifically provide for such awards.

The *Alyeska* decision had its most damaging effect in the area of civil rights, and created an immediate need for legislation. I will not repeat the extensive discussion in Ms. Derfner's letter about the need for attorneys' fees in this area, but will simply repeat its conclusion that without attorneys' fees, "the nation must expect its most basic and fundamental laws to be objectively repeated by the economic fact of life that the people these laws are meant to benefit and protect cannot take advantage of them." Letter, p. 9.

* * * * * * *

There has been much progress over the past decade in protecting human rights and in enforcing federal laws adopted for that purpose. Attorneys' fees are an essential element of effective enforcement of this Congress' laws, as well as the Constitution. The *Alyeska* decision tosses the responsibility for authorizing attorneys' fees back to Congress, and we are confident that Congress will respond to that challenge.

Thank you very much.

CONTINUED

1 OF 5

LAWYER'S COMMITTEE FOR CIVIL RIGHTS,
ATTORNEYS' FEES PROJECT,
Charleston, S.C., September 29, 1975.

Re Attorney's fee legislation.

Hon. JOHN F. SEIBERLING,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: I thank you very much for your invitation to submit my views, as Director of the Lawyers' Committee for Civil Rights Under Law's Attorneys' Fees Project, on court-awarded attorneys' fees in general, and on currently pending legislation in particular. The Lawyers' Committee has long felt that federal courts' increasing willingness to award attorneys' fees in public interest litigation was vital to the ability of lawyers to represent citizens seeking to protect the public interest. It is heartening to see that so many members of Congress seem to share your opinion, and have reacted so quickly and so tangibly to the United States Supreme Court's opinion in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, a decision which threatens to reverse nearly a decade of progress through which court awards of attorneys' fees had enabled private citizens to enforce Congressional policies and guarantees in such important areas as civil rights, the environment, and consumer protection.

The Lawyers' Committee for Civil Rights Under Law was established in 1963, at the request of President John F. Kennedy, to involve members of the legal profession in representing previously unrepresented segments of American society. Since the late 1960's, the Lawyers' Committee has viewed the concept of fee shifting in public interest litigation as a major and invaluable tool for bringing about this increased involvement of the Bar in the problems of poor and minority citizens, consumers, and the environment. If the *Alyeska* decision is allowed to stand it will be a major blow not only to those few lawyers throughout the country who have established practices based almost entirely upon public interest litigation, but also to those lawyers in traditional private practice to whom the possibility of an award of attorneys' fees has meant the ability to represent, in a meaningful way, public as well as private interests. More importantly, if the *Alyeska decision.* As the Supreme Court explained the law in 1973:

the nation as a whole. As I spell out below, the concept of fee shifting in public interest cases has, for the past several years, gone a long way toward ensuring that judicial process in America functions as it should, and toward ensuring that the laws which Congress passes to protect the American citizen do just that.

* * * * * * *

1. "Across-the-Board" fee shifting, or universal indemnity

Some of the legislation which has recently been introduced in the House of Representatives (e.g., H.R. 7826 and H.R. 8221) authorizes discretionary fee shifting in the complete range of all federal civil litigation, private as well as public interest, if "the interests of justice so require." This language can be interpreted in many different ways. One possible interpretation is that the provision is designed simply to restore the law to its status before *Alyeska*, because the language essentially restates what everyone thought the law was prior to the *Alyeska* decision. As the Supreme Court explained the law in 1973:

"Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' *Sprague* v. *Ticonic National Bank*, and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.' *Mills* v. *Electric Auto-Lite Co.*, 296 U.S. 375, 391–92 (1970." *Hall* v. *Cole*, 412 U.S. 1, 4–5 (1973) (Brennan, J.) [Footnotes omitted].

Under this view, courts gave fees where litigants acted in bad faith, or where litigants provided either a monetary fund or a nonmonetary benefit common to a class, and the fees awarded shifted the cost of producing the fund or benefit to all beneficiaries. These two rationales for awarding fees—the bad faith, or "obdurate obstinacy" rationale and the "common benefit/common fund" rationale—were applied, albeit rarely, in both private and public interest litigation. A third pre-*Alyeska* rationale—the private attorney general rationale, where litigants

vindicated a strong Congressional policy through a lawsuit—was applied only in public interest cases.

Because the *Alyeska* decision purportedly left intact both the "obdurate obstinacy" and the "common fund/common benefit" rationales, while rejecting only the "private attorney general" rationale, the net effect of H.R. 7826 and H.R. 8221, if this first interpretation is intended, would be to restore to the courts the power to award fees to private attorneys general, or private citizens who sue in the public interest to enforce the nation's laws. It could therefore be viewed as a broad bill authorizing court awards of attorneys' fees in public interest litigation.

But if this is the intent, I do not believe the statute does enough. Such a statute would undo much of the harm done by the *Alyeska* decision, and would for that reason represent a significant improvement over the present situation. At the same time it should be recognized that such a statute would restore the uncertainty that characterized the private attorney general line of cases as they stood at the time of *Alyeska*.[1] If this situation were merely restored, environmental protection might warrant fee shifting in Oklahoma but not in Tennessee; the same suit brought in two different districts might warrant fees in one court and not in the other.

It would be difficult for Congress to eliminate this uncertainty effectively in the language or legislative history of an "across-the-board" public interest fee shifting statute, so the degree of consistency achieved would depend upon judicial discretion. If courts adequately recognized that attorneys' fees in public interest cases are essentially adjuncts to legislation or Constitutional provisions expressing specific substantive policy, they could achieve some consistency.

I believe that Congress can and should pass more comprehensive fee shifting provisions in many areas of the law, such as those covered by the civil rights attorneys' fee bills now pending, but a bill which is clearly understood to restore the pre-*Alyeska* law, even though it retained the uncertainty problem, would be useful in the areas where Congress has not acted specifically.

There is a second possible interpretation of H.R. 7826 and H.R. 8221: they may be viewed as not merely restoring the private attorney general theory, but as giving courts general discretion to award fees in *all* civil cases, purely private as well as public interest. If this interpretation is intended, the provisions do too much, and their very breadth would defeat their purpose. Because the same broad language would be applied to all federal cases, ranging from a case of racial discrimination in jury selection to a diversity case involving a contract claim between a manufacturer and distributor, drafting of adequate standards would be impossible. The differences between public interest cases and private cases are simply too great to encompass within the language of a single general fee statute.

In this context, the largest difference between private and public interest cases is that private cases generally reflect no specific policy, no goal to be favored, no claim or defense to be encouraged or discouraged. In short, they reflect a preference for strict neutrality, and a focus purely on the individual case. Public interest cases, on the other hand, arise under specific statutes enacted to achieve certain legislative goals. Federal courts have always been instructed to use their equity powers (one of which would be the power to award counsel fees) broadly and imaginatively to enforce these legislative goals. The private attorney general theory was itself an outgrowth of the need for courts to use their equity powers to encourage enforcement of legislative goals.

Clearly, then, the "interests of justice" standard could not have the same meaning in purely private cases, where neutrality is necessary, and in public interest cases, where equity favors the side seeking to assert and vindicate Congressional policy. Yet any attempt to develop different standards from identical language would be apt to create dangerous confusion within the courts, which would be apt to create dangerous confusion within the courts, which would be intensified by the difficulty which would arise in defining the dividing line between private cases and public interest cases (especially in those many cases which have both private and public elements).

Additionally, if H.R. 7826 and H.R. 8221 contemplate reversal of the general American rule against fee shifting, and adoption of the English rule of universal indemnity, wherein fee shifting is virtually automatic, it is questionable whether

---

[1] *Compare* Bradley v. School Board of the City of Richmond, 472 F. 2d 318, 329 (4th Cir. 1972), *vacated & fee award reinstated*, 416 U.S. 696 (1974), *with* Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960).

the interests of justice would be served. Fees are now authorized in purely private cases under the bad faith standard and the common fund/common benefit standard, but have been awarded only rarely under either rationale. I do not presume to know whether authorizing attorneys' fee awards in private litigation under additional theories, or authorizing a virtually automatic award of fees to a prevailing party in purely private litigation, would help or hamper the administration of justice in the United States.

The benefits and drawbacks of the general American rule have been hotly contested in recent years. Proponents of the rule argue that a change would deter litigation by creating a likelihood that a litigant would be forced to pay both his own and his opponent's lawyer. Opponents of the rule argue that a litigant who wins a lawsuit is not made whole if he must pay an attorney's fees out of his own pocket. For every argument on one side, there is an argument on the other, and, because the country has had no experience with universal indemnity, no one really knows that effect its adoption would have on the American system of justice.[2] I do not believe it would be wise for Congress to adopt universal indemnity without first trying to ascertain, through empirical investigation and comparative international legal research, what its effects would be,[3] and what its contours would be,[4] in the American legal system.

There is, however, no need for research into the desirability of awards of attorneys' fees in public interest cases. Our experience over the past ten years has shown us that fee shifting in public interest cases is both an effective and a necessary means of enabling private citizens to take advantage of Congressional enactments which allow for citizen suits, and thereby to act as private attorneys general, engaging in thereapeutic enforcement of the nation's laws.

2. The importance of attorneys' fee awards in public interest litigation

In recent years there has been increasing national emphasis on legal representation in public interest cases. Lawyers in traditional private practice have devoted more and more time to such cases; many lawyers have sought to develop practices based largely or wholly on such cases; and many programs have been established, with government or foundation support, which have hired full-time staff lawyers to represent previously unrepresented segments of, and interests in, the society. But neither the substantial commitment of many members of the Bar, nor the enormous contributions of government- or foundation-funded programs, can begin to meet the legal needs of minorities and poor people, environmentalists and consumers, upon whom the responsibility for enforcing the law increasingly rests.

For private practitioners, the basic problem is the fact that their livelihoods depend upon collecting fees for their cases. Public interest cases are frequently

---

[2] In fact, both sides of the controversy often offer their theory as the remedy for the exact same problem. For instance, the supporters of the American rule argue that it allows the poorer citizen to press his claims in court without the fear that he will be forced to pay both his own and his opponent's lawyer; supporters of universal indemnity, on the other hand, argue that a poor citizen will be more, not less, likely to sue under a system of universal indemnity, because the often prohibitive expenses of suit would be borne by his opponent. Proponents of the American rule argue that, if this is true, adoption of universal indemnity would increase court congestion by encouraging recourse to the courts and the institution of more small claims; opponents argue that adoption of universal indemnity would clear the courts by encouraging out-of-court settlements of claims.

[3] As one commentator has noted:

"It is certainly not clear whether justice compels the granting of indemnity to all successful plaintiffs and defendants . . . . The arguments relating to court congestion, small claims, and the discouragement of colorable claims are all essentially based on unsubstantiated inferences of how litigants will behave . . . . The questions relating to the behavior of prospective litigants . . . cannot be answered on the basis of information currently available. More evidence should be assembled concerning the following issues: how most litigants in America presently view their chance of success; how many litigants would be frightened out of court by indemnity; and how many small claims are presently not pressed because of indemnity. In addition, more data should be assembled concerning the behavior of litigants in indemnity countries: are small claims really pressed more often; are many people frightened out of court; and what percentage of cases art settled out of court.

"Considering the dangers—increasing the disparity among litigants based on wealth; penalizing unsuccessful, but innocent, plaintiffs; increasing dilatory tactics—and the uncertainty of their magnitude, it is not startling that no American jurisdiction has ventured to adopt indemnity for all successful plaintiffs and defendants." P. Mause, *Winner Takes All: A Reexamination of the Indemnity System*, 55 *Iowa L. Rev.* 26, 38 (1960).

[4] The system of universal indemnity varies in virtually every nation which has adopted it, conforming to the characteristics of the country and its legal system. There is thus no one model for the United States to follow.

very complex, requiring massive amounts of research and fact-gathering time. The private lawyer can rarely afford to devote much tme to nonpaying work when to do so would limit his ability to handle paying cases.[5]

Many foundations have funded legal organizations to represent environmentalists and poor or minority citizens, and these programs contribute heavily. But these foundations cannot be expected to continue to enforce the laws of the nation without help, and their resources, which are quickly shrinking, could do no more than make a small dent in the number of violations of critical rights even when they were able to make larger contributions.

The federal government, too, has contributed to the representation of minorities and poor people, through Legal Services programs. These programs, however, are able to handle the cases of only the extremely poor, and are able to handle only a small fraction of the legal needs of the extremely poor people in this country.

These three categories of attorneys—private practitioners, foundation-funded, and government-funded lawyers—face an additional problem: because of the limited resources available to them in public interest cases, they are rarely able to afford the technical assistance of expert witnesses, or even the secretarial help required to present the best case, while their opposition frequently has virtually unlimited resources, often including expert outside counsel. A federal, state, or even local agency defendant can draw upon the public treasury, and call upon full-time research assistants, the Federal Bureau of Investigation or state or local law enforcement investigators, and the myriad of support services which exist for the use of these agencies. Corporate litigants likewise often have vast resources, subsidized by tax deductions, with which to resist public interest claims. The result is that, especially in the larger public interest case, the sides become extremely unequal. This fact subverts the American system of justice, where two equal sides are expected to face one another in a vigorous adversary procedure, and the side asserting the correct position—not necessarily the side with the most money—wins.

Through court awards of attorneys' fees: (1) the courts themselves are assuring the more equal and vigorous adversary process which is the foundation of the American system of justice; (2) the enforcement of fundamental rights is recognized as a public responsibility, and need not continue to rely on the charitable impulses of a few; (3) the enforcement of fundamental rights need not depend solely upon government agencies, many of which are defendants in civil rights and civil liberties and environmental cases, and which traditionally adopt a conventional or conservative approach in public interest cases, so that pluralism and the assertion of novel solutions to complex problems are enhanced; (4) private practitioners are able to pursue the public interest without penalty; (5) public interest litigation can continue without foundation support; and (6) the Legal Services lawyer becomes more able to handle the problems of a greater number of extremely poor clients.

The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all, a clean and healthy environment, and fair treatment from those corporations and financial institutions which increasingly control our daily lives. Although some of these laws can be enforced by the Justice Department or other federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of the law. This fact has been recognized in statutes specifically giving private citizens the right to go to court to redress grievances, and by court decisions which have broadly expanded the concepts of private causes of action, standing to sue, and citizen access to administrative proceedings. But in large part these broadened concepts exist only on paper, for Congress and the courts have stopped far short of taking

---

[5] Even under the pre-*Alyeska* system of fee shifting in public interest cases, the unreasonably small amounts awarded in most suits (if an award was made at all) were inadequate to stimulate the participation of the private Bar. It is my hope that any legislation which Congress passes will deal with the problem of courts which award insultingly low fees in public interest suits, assuming that they are either less complex or less worthy than commercial cases. The purpose behind public interest attorneys' fees is to give private citizens seeking to vindicate Congressional policies *equal* access to the courts. That purpose will be fulfilled only when fees in public interest cases are reasonable, and can "compete" with fees in other fields of litigation.

measures which would permit citizens to take advantage of them. Private citizens must be given not only the right to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the Congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire nation, not just the individual citizen, suffers.

Unless effective ways are found to provide equal legal resources, the nation must expect it most basic and fundamental laws to be objectively repealed by the economic fact of life that the people these laws are meant to benefit and protect cannot take advantage of them. Attorneys' fees have proved one extremely effective way to provide these equal legal resources in public interest litigation,[6] and are, in fact, an obvious and logical complement to citizen suit provisions. When Congress calls upon citizens (either explicity or by construction of its statutes) to go to court to vindicate its policies and benefit the entire nation. Congress must also ensure that they have the means to go to court, and to be effective once they get there. No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen:

"The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication . . . . if a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right." *Knight v. Auciello*, 453 F.2d 852, 853 (1st Cir. 1972).

3. The "generic" and "specific" approaches to fee legislation

The question now arises, if Congress should authorize awards of counsel fees in public interest litigation, how should this be done. As I have specified above, the "across-the-board" approach to fee shofting is too uncertain to be regarded as a complete solution; more specific legislation is called for. Unfortunately, the specific approach traditionally used by Congress, whereby fees are authorized statute-by-statute, is too narrow to be a complete solution either.

The specific approach is the one Congress has used in most areas to date, and in public interest areas during the past decade, with but two exceptions.[7] This approach has worked well so long as the courts exercised their discretion to award fees in cases which were brought under statutes in which fees were not specifically authorized. The *Alyeska* decision, however, robs the courts of such discretion, and thus generates, I believe, a need for a significant modification of the specific approach. Courts before *Alyeska* had generally assumed that, at least where Congress had provided for fees in one statute in a given area, cases brought to enforce Congressional policies in that area should merit fee shifting even if they did not specifically arise under the provisions containing the authorization. So, for example, courts generally awarded fees in fair housing cases brought under 42 U.S.C. § 1982, a Reconstruction statute, on the theory that Congress had designated fair housing as a field appropriate for fees thorugh its inclusion of a fee provision in the Fair Housing Act of 1968. The *Alyeska* case rejected—without giving reasons—even this limited approach.

---

[6] Those public interest statutes which do contain specific authorization for fee shifting have been remarkably effective statutes. Congress obviously already recognizes the effectiveness of providing such a remedy in public interest legislation, for public interest statutes in which fee shifting is authorized have become increasingly common.

[7] During the past decade, provisions authorizing fee awards in cases brought under specific statutes have been passed in many public interest areas. Among these statutes are: Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a–3(b) (public accommodations); Title VII of the same Act, 42 U.S.C. § 2000e–5(k) (employment); the Fair Housing Act of 1968, 42 U.S.C. § 3612(c); the Truth-in-Lending Act of 1968, 15 U.S.C. § 1640; the Clean Air Act of 1970, 42 U.S.C. § 1857h-2(d); the Water Pollution Control Act, 33 U.S.C. § 1365(d); the Marine Protection Act, 33 U.S.C. § 1415(g)(4); the Noise Pollution Control Act, 42 U.S.C. § 4911(d); and the 1974 amendments to the Freedom of Information Act, 5 U.S.C. § 663(a)(4)(E). The exceptions are the Voting Rights Act Amendments of 1975, P.L. 94–73, and the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, discussed below.

Several of the provisions which are now pending before the House of Representatives also use the same "specific" approach: H.R. 7825 and H.R. 8218 (Mineral Leasing Act); H.R. 7829 and H.R. 8222 (National Environmental Policy Act of 1969); H.R. 7827 and H.R. 8219 (injunction section of the Clayton Act); and H.R. 8368 (condemnation proceedings).

The *Alyeska* decision has thus created a void which the specific approach either cannot fill, or cannot fill for many years, and which would therefore leave very fundamental rights unvindicated for a long time. Many public interest lawsuits are brought under statutes which were passed a century ago, or a decade ago, or even four and five years ago, before Congress realized the importance of fee shifting, and which therefore do not include fee provisions. In order for Congressional response to *Alyeska* to be complete, it would be necessary, under the specific approach, to isolate *every* law Congress has ever passed; to decide which of these laws contain a Congressional policy important enough to merit fee shifting (or which sections of a law do and which do not contain such important Congressional policies); and then to draft language amending the laws, one by one. While model statutes could be drafted to make the process less laborious, no one model could be adequate, for the same reasons no one, broad statute could be adequate. The same would hold true for model legislative history.

So, while the "specific" approach may be useful for pending or future legislation, or for legislation in which major revisions are being contemplated anyway, I believe that adoption of several bills using the "generic" approach is necessary to fill the gaps—both to cover the gamut of important legislation passed long ago and to remedy omissions and oversights in more recent legislation. The "generic" approach was used in the Voting Rights Act Amendments of 1975, P.L. 94–73, in which fees were authorized in any litigation (not just litigation under that Act or a section of it) to enforce the voting guarantees of the fourteenth and fifteenth amendments and statutes passed thereunder. Congress, in essence, chose voting as an *area*—not just the Voting Rights Act as a *statute*—in which the enforcement of Congressional policies was important enough to merit fee shifting under the "private attorney general" rationale. A similar approach was used in section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, which authorizes fee shifting in school discrimination suits brought under any statute. Again, Congress made the decision that school discrimination was an *area* in which enforcement of Congressional policies was vital.[8]

The generic approach avoids the problems of the across-the-board approach by dealing with only one area of the law at a time, so that the Congressional policies involved are basically the same, and uncertainty and inconsistency can be minimized. But it also deals consistently with more than one statute at a time, and therefore accomplishes Congress' goals more quickly and rationally than the specific approach.[9]

The generic approach can encompass provisions of varying scope and breadth, from quite narrow to fairly broad. The Emergency School Aid Act of 1972, 20 U.S.C. § 1617, is an example of a narrow generic approach, dealing, as it does, with discrimination in public education alone. Section 402 of the Voting Rights Act Amendments, P.L. 94–73, is broader, authorizing awards of attorneys' fees for proof of violations of the voting guarantees of the fourteenth and fifteenth amendments. H.R. 7969 and H.R. 8742, authorizing fee shifting in suits under "any provision of law which provides for the protection of civil or constitutional rights," is a very broad use of the generic approach.

Under the generic approach, Congress might authorize fee shifting in cases the result of which is the vindication of a Congressional policy (as reflected in

---

[8] The "generic" approach is also used in several fee shifting provisions now pending before the House of Representatives: *e.g.*, H.R. 7828 and H.R. 8220, authorizing awards of attorneys' fees in actions brought under the Reconstruction Civil Rights Acts, H.R. 9552, authorizing fees under those Reconstruction statutes and Title VI of the 1964 Civil Rights Act; H.R. 7969 and H.R. 8742, authorizing fee shifting in civil and constitutional rights cases; and H.R. 7968 and H.R. 8743, authorizing fee shifting in judicial review of agency action involving the environment, civil rights or consumer protection.

[9] The similarities within existing fee provisions in one area indicate that Congress has normally adopted the same standards, and often the same statutory language, for cases arising within one area. For example, most of the statutes authorizing awards of attorneys' fees in the environmental law field are the same: the Water Pollution Prevention and Control Act, the Clean Air Act, the Marine Protection Act, and the Noise Pollution Control Act all use identical language in their fee provisions. The same standards apply in most consumer protection fee provisions, *e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681(n); Truth-in-Lending Act, 15 U.S.C. § 1640(a); and two provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1918(a) and 1989(a). Similarly, the majority of antidiscrimination fee provisions contain identical language—*e.g.*, Titles II and VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a–3(b) and 2000e–5(k), Voting Rights Act Amendments of 1975, Section 402—and even where the language is different (as with the Emergency School Aid Act, 20 U.S.C. § 1617 and the Fair Housing Act, 42 U.S.C. § 3612(c)), the judicial interpretation and legislative history have been similar or identical.

federal statutes) on (broadly) environmental protection, or (narrowly) air pollution (whether suit is brought under the Clean Air Act or 42 U.S.C. § 1983, *inter alia*). Or fees might be authorized when a private suit vindicates statutory policies on (broadly) consumer protection, or (narrowly) fair lending practices. Or the generic approach can merely lump together various statutes which involve similar rights, and authorize fees under those statutes (the approach taken in H.R. 7828, H.R. 8220, and H.R. 9552, authorizing fee shifting in actions under various Civil Rights acts).

The generic approach could also be used in a procedural, rather than a categorical, fashion. For example, a statute might authorize the award of fees in administrative hearings, or in rulemaking, licensing or adjudicatory proceedings. Or a statute might authorize fee shifting whenever a private citizen prevails in a suit to force the United States to abide by nondiscretionary statutory obligations. One such statute is presently before the House, H.R. 7968/8743, which authorizes awards of attorneys' fees to parties who substantially prevail in judicial review of agency proceedings and who thereby further policies concerning civil rights, the environment, or consumer protection (a combination of both the categorical and procedural generic approaches).

One attendant benefit of either the categorical or procedural generic approach would be the widespread availability of model language and model legislative history for fee legislation in the various categories. Should Congress, for example, pass a broad statute authorizing fee shifting for environmental protection, the language and history of that legislation could thereafter be applied or adapted for subsequent environmental legislation with convenience and consistency.

The two public interest "generic" statutes which now exist—the Emergency School Aid Act of 1972 and the Voting Rights Act Extension of 1975—have not been in effect very long, but thus far there have been no substantial problems arising from their interpretation. If the generic approach is used, and its purposes carried out by the courts, it may be possible to rely heavily upon more broad, generic statutes, cutting down the necessity for specific statutes in the future. The result would be, in essence, a return to the pre-*Alyeska* "private attorney general" rationale in public interest cases, with the important difference that Congress would have specified which of its policies and which areas of law were important enough to merit private attorney general treatment, so tha vindicaion of these policies would receive uniform treatment throughout the country.

* * * * * * *

Again, I wish to praise Congress for its immediate response to the *Alyeska* decision. The effects of this decision, unless remedial legislation is passed, will be devastating: citizen suits, which have been responsible in large measure for much of the progress made in the areas of civil rights, environmental and consumer protection for the past decade, will be stifled and perhaps prohibited entirely; the vindication of important Congressional policies in such public interest areas will be made to depend upon the financial resources of those least able to promote them; violation of fundamental human rights will go unchallenged; and statutes which allow citizens to go to court to pursue the public interest will become historical documents, rather than the useful tools for law enforcement which they have been over the past decade. As the attached editorial from a conservative Southern newspaper in my hometown points out, the *Alyeska* decision, in effect, "has put an apparent stopper to . . . public interest case[s]," which, although "widely held to be nuisances," have contributed to "major progress . . . in a desirable direction." I must agree with the editor, that "[t]he court decision must not be allowed to effect a permanent setback to that progress."

You and the other representatives who have introduced attorneys' fee legislation in response to the *Alyeska* decision are to be commended.

Very truly yours,

MARY FRANCES DERFNER.

Attachment.

[From the News and Courier, Charleston, S.C., June 6, 1975]

"PUBLIC INTEREST" CASES

The U.S. Supreme Court has put an apparent stopper to a type of law suit which in recent years has become known as the "public interest" case and which a variety of organizations and individuals have been using successfully to establish a new body of law. The "public interest" case is one generated by a group of

citizens—the Wilderness Society, say, or the NAACP—which is trying to establish rights for itself and the public in general. Many groups of those kinds cannot finance the legal talent needed to win an award against high-priced opposition of state governments or oil companies, so they have been relying on courts to grant attorneys fees in connection with the awards. Hence when the Wilderness Society won a case against the Alaska Pipeline in a court of appeals, it also received a grant of attorneys' fees which could have amounted to more than $100,000.

"Public interest" cases are widely held to be nuisances, so the Supreme Court decision will be received with cheers in many places. Yet a viable mechanism is certainly needed to establish public interest (as opposed to merely individual or corporate interest) and protect it. Thanks to the practice now outlawed of compelling those who have been judged to operating against public interest to pay court costs, major progress has been made in a desirable direction. The court decision must not be allowed to effect a permanent setback to that progress.

Mr. DERFNER. Historically, in America there has been a tradition unlike that in many other countries, by which there were no attorneys' fees awarded. I think Congressman Pattison put his finger on some early history which really reveals that that development is largely accidental.

Be that as it may, that is the tradition that has grown up. Nonetheless, there have always been exceptions for what the courts have called overriding equitable considerations, that is, exceptions to the run-of-the-mill case in which fees could be awarded or should be awarded for one of a variety of reasons. One of these exceptions is what is sometimes known as the bad faith, or more properly, the frivolous litigation concept. It does not necessarily limit itself to bad motives of the litigants so much as it says that where you bring a case that is totally frivolous or you defend on the case of a frivolous defense, you should bear the expense of having put the other person to an unfair burden.

A second is the situation where one party brings about either a common fund or benefit for a large group of people, and it is felt he should not bear by himself the entire burden.

A third situation has been that where statute provides for attorneys' fees. Finally, especially in recent years, there began to arise the private attorney general theory. The private attorney general theory really is nothing more than a situation where the courts have said:

> We are commanded by Congress to enforce a certain policy—whether it be in the Clayton Act or whether it be in the Norris-LaGuardia Act or the Civil Rights Acts—and we are therefore commanded by the Constitution and Congress to devise all appropriate remedies to enforce that statute.

The Supreme Court itself said on many occasions that courts have not only the power but the duty to adopt any reasonable remedy that would assist in enforcing the statute, that would assist in enforcing the policy of Congress.

So, the courts began to realize, as I think all the Congressmen on the committee realize, since some of them have been in private practice, that you just do not get widespread enforcement of congressional policy or congressional statutes unless there is a real access to court. This is the real nature of the private attorney general theory. It was not a charitable construction or an imaginative invention. It really was an adjunct to policies that Congress had itself adopted, where the courts said:

> We need to consider awarding attorneys' fees in order to effectuate this policy, just as we have to decide in our discretion whether an injunction is needed here as well as a declaratory judgment.

The question of attorneys' fees may fall in the category of necessary relief or full and appropriate relief.

Mr. KASTENMEIER. You said the courts embarked upon this. Did litigants themselves, attorneys for litigants, devise the private attorneys general concept to implement congressional policy?

Mr. DERFNER. The litigants pressed it in many cases, but it was the courts that began increasingly to adopt it and to decide that it was within their discretion and within their obligation to award the particular form of relief.

Mr. KASTENMEIER. At lower levels as demonstrated in the *Alyeska* case.

Mr. DERFNER. Yes. In that case the Supreme Court said the courts had no authority, even though the courts had always been thought to have the authority to grant equitable relief which seemed to be in keeping with the purposes of the statute. Attorneys' fees were now held to be out of bounds. In fact, the *Alyeska* case came as quite a contradiction to some earlier cases of the Supreme Court. One of them, although it did arise under a statute, I think is particularly important, and that is the *Newman* case, which is just a very short case, a few pages, decided in 1968. The Supreme Court dealt with the Civil Rights Act of 1964, and recognized the central role of attorneys' fees in making sure the statute could be enforced. The court said essentially that if people were forced to bear the burden themselves of enforcing that act, it just would not get enforced, and therefore attorneys' fees were a necessary remedy.

That is why, as I say, it came as quite a surprise, when the Supreme Court in the *Alyeska* case said that courts did not have this power in the absence of authorization from Congress.

I think—frankly, this is my personal opinion—that the *Alyeska* case was erroneously decided, and of keeping with everything the Supreme Court and lower courts had ever held about the breadth of the courts' discretion to enforce statutes.

Be that as it may, I think what the Court was not saying that a private attorney general theory was a bad idea or that it lacked wisdom or was poor policy, but simply that Congress ought to give a little bit more direction. I think in that sense the Court specifically referred to Congress and in effect tossed the ball back into the lap of this subcommittee and the other Members of Congress. In fact, the Court had some things to say in that opinion, and in other opinions, too, about how useful attorneys' fees are in enforcing congressional policies.

Mr. KASTENMEIER. May I ask, did *Alyeska* overrule *Newman* or did it distinguish it.

Mr. DERFNER. It distinguished from it because it said *Newman* was a situation where Congress had, in fact, provided the authority to give attorneys' fees.

What the Supreme Court essentially said was that where Congress does that, certainly we are on firm ground. But it said that it would not find that authority except where there was some indication from Congress. So it, in a sense, invited Congress to spread that authority to other areas, to other statutes.

The subcommittee has a number of bills before it dealing with different types of approaches, and the witnesses up to now have given a very good rundown of the different approaches. The questioning has brought out some of the differences.

I would like to just offer a few comments on the different approaches. First, as to the question of just expanding the concept of costs and generally providing attorneys' fees across the board, as is the practice in many foreign countries, I think we are a long way from that, if indeed we ever really should get to that point. I think that would be a major change in American policy, going contrary to a long tradition. It may be a wise thing, but I have real doubts, and in any event it would require a lot of study over a number of years. And it would call for a lot of comparative research.

That would be a situation in which every single case called for an award of attorneys' fees. That is quite different, I think, from the kinds of cases on which many of the witnesses have been focusing so far; cases in which fees are thought of as an adjunct to congressional policy, an adjunct to statutory enforcement or to enforcement of constitutional provisions. It is these latter types of cases we are talking about when we use the term public interest, and I think perhaps it would be a lot clearer if the term used, instead of "public interest" cases, were something like "national policy" cases or cases involving full and appropriate relief to enforce congressional and "constitutional requirements"—terms that make it clear that fee awards are tied to existing policies that Congress has commanded be enforced.

If H.R. 8221, introduced by Congressman Seiberling, is understood to be limited to such cases rather than reversing the general American rule, it has merit to it. It would essentially restore the pre-Alyeska law, and give courts in the generality of such cases the discretion to award fees. However, I think that is far from a complete solution, and if that were to be adopted, it should only be for the interstices.

A better approach would be for Congress to authorize fee awards in specific areas, such as has already been the case in the voting area, or such as I will suggest should be done in the civil rights area, and such as could be done in other areas. This approach could be supplemented with a general bill that would allow for fees in appropriate cases, even in those areas where Congress has not spoken.

But I think Congress should start by being fairly specific, and I think the best way to do that is by what we call the generic approach; that is, to deal with a category of cases at a time, while still perhaps supplementing that with the overall Seiberling bill that would allow for the interstices to be filled in.

In that light, I would like to speak just for a second about one specific bill before this committee which I think does deserve a great deal of attention, and which ought to be given priority consideration: H.R. 9552, introduced by Congressman Drinan. This is a civil rights provision. It deals with specific statutes that would be covered in specific types of cases. It takes up the area that was most damaged by the *Alyeska* decision, because it is in the civil rights area that the *Alyeska* decision had its most damaging effect.

What it does is to fill in a lot of gaps that were created by that decision, in an area where many statutes—but far from a complete list—

already provide for fees; and the result is to create a good deal of inconsistency, which could be alleviated by passage of the Drinan bill. The Drinan bill is similar to a provision that was introduced by Senator Tunney in the Senate this past summer, and was in fact reported out by the Senate Judiciary Committee. It never came up for a vote, and therefore it has not been passed, but I think it has demonstrated Senate support, and I think it is something this committee ought to consider its highest priority item.

Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Derfner, and Mrs. Derfner. Do you wish to comment?

Mrs. DERFNER. I have nothing to add.

Mr. KASTENMEIER. Let me go in reverse order and yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. I think if we are going to pass legislation like this it would have to be either followed by some rather extensive kind of rulemaking, or else we ought to include procedures in our own legislation to deal with the mechanisms for establishing reasonableness, and perhaps in long cases, obligations for fees. For example, in matrimonial cases the wife has traditionally applied for counsel fees for the very purpose we are talking about when she is unable to pay because she is dependent upon her husband. She goes to a lawyer. The lawyer goes to court, and says that she should have some separate living expenses, and that she has to pay for his services in order for him to enforce her rights. Maybe there should be a way to preliminarily determine whether you are going to get legal fees, or to determine whether this is a frivolous action. If you go to the judge and you say,

Here is the case; if I prove this, this and this, which my client alleges, can you tell me you are going to award me legal fees, or that you probably will, (or something of that nature) so that I do not waste the next 4 years of my life doing this kind of thing?

I would be interested in your comments about that kind of mechanisms, actually setting the fee in some way that is not just simply a judge off the top of his head saying $1,500.

Mr. DERFNER. In the question of the mechanisms, the courts have been quite adept, and there has been relatively little difficulty in developing bodies of law under the existing fee statutes that for questions of the sort you are talking about. In fact, one of the specific things that has been approved by the Supreme Court several times, has been the award of interim fees where that seems to be a necessity. It is not something the courts do as a matter of course, but it is something that is possible where it is appropriate.

As to the matter of setting the fees, the courts have developed a good body of law on that, too.

Mrs. DERFNER. The private attorney general theory has been in operation since 1968, and therefore for the past 8 years, the courts have been dealing with discretionary awards under the private attorney general theory, even when they are not statutorily authorized. And there is quite a body of law that has grown up governing the amounts set for fees. It used to be that courts would sit back and scratch their head and say, "this one looks like a $200 case, and that

one looks like a $600 case." That is no longer—or up until *Alyeska*, was no longer the case.

Courts had established a set of rules, saying you should take into consideration this factor, this factor, and this factor. This is how you should deal with it. The courts were dealing with questions of the appropriateness of amounts, and when the fees should be awarded, and under what circumstances fees should be given in an interim fashion. The law is there, and courts were able to deal with it in a broad discretionary fashion without any kind of specific guidelines before. Since the case law is there, if you feel that guidelines are necessary, it would not take a great deal of research to put together a basic guideline.

Mr. PATTISON. I yield back to the chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

I just want to recognize that, in the concept of attorneys' fees that we are speaking of here today, we are limiting this to matters involving a controversy between a citizen and the Government, not between citizens as such in private litigation between citizens. We are not talking about that. We are only speaking of cases between citizens and Government.

Mr. DERFNER. That varies with the bill, of course. Unquestionably, we are dealing with questions of important public policy, but I think sometimes—depending on the bill—sometimes, those do involve citizens against other citizens. For example, in equal employment cases, you have a citizen who has been deprived of opportunity to advance in his job suing a corporation or a union which has held him down. So in those situations, there is a citizen against citizen. You are right in the sense we are not talking about situations in which it is some private concern about the boundary between two people's houses or anything like that.

Mr. DANIELSON. The problem of how to mechanically provide for the fees in this system is going to be a little bit difficult here. Mr. Derfner said you probably could base legislation, to some extent, on the old case law that has now been superseded. I think we are going to have a big, long problem here. I think I will be amenable to starting off by meeting the immediate problems, and see where this is going to lead us.

I appreciate your help. I have not read your statements. They just came this morning. You may rest assured I will. Thank you.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Would you tell me a little bit about the Lawyers' Committee for Civil Rights; what its funding is, the source of funding in that, how many attorneys you have on board, and things of that nature?

Mr. DERFNER. I am a member of the executive committee. The Lawyers' Committee was founded in 1963. It was initially founded at the request of President Kennedy, who called together a number of prominent lawyers from various parts of the country, and asked if they could create a mechanism by which the civil rights and fundamental rights laws of the Congress could be enforced by private people, the private bar and private citizens.

The committee has been in existence since that time. It has an office in Washington, D.C. It has an office in Jackson, Miss., which has

been in operation since 1965, and it has committees in various cities—about 10, I think, at the last count. Among the members of the executive committee are approximately a dozen past presidents of the American Bar Association, several former Attorneys General, prominent lawyers from various parts of the country, and promient teachers and so forth.

This is the executive committee, that basically oversees, supervises, and sets the basic policy. The committee's operations are carried out by a number of lawyers who I think now number in the neighborhood of 15, and that has varied over the years. They engage in projects in various fields. One project, for example, deals with the law of employment discrimination committed by agencies of the Federal Government.

Another project is the Jackson, Miss., project, which is a traditional civil rights law office, bringing litigation, chiefly Federal litigation, in Mississippi. The projects are involved in litigation. They are involved in a substantial amount of research. There are publications which are freely available. Some are studies, some are surveys of the law. It is essentially a multifaceted operation.

The funding comes in part from foundations, in part from contributions from private members of the bar who give to the Lawyers' Committee in the belief that it is performing a useful service for the Nation; partly from corporations.

Mr. WIGGINS. What is the amount of your annual budget?

Mr. DERFNER. I am not certain, but I think in recent years it has been in the neighborhood of $1 million.

Mr. WIGGINS. If it is determined to institute a lawsuit in, let us say, Los Angeles, do you customarily employ private counsel and pay that counsel to proceed? Or do you use in-house counsel and move them to Los Angeles?

Mr. DERFNER. As far as I know, the Lawyers' Committee has never employed or paid private counsel. The Lawyers' Committee's principal manner of operation is through the donated services of private members of the bar. To deal with your example: there is a local Lawyers' Committee in Los Angeles. There is also one in San Francisco. If there were an important case that people in that area thought should be brought and would like the Lawyers' Committee help on, what would typically happen is that a firm in that area, whether downtown Los Angeles, Beverly Hills, or the valley, would be asked to take it on as a public service.

In many cases, if it fell in an area where one of the full-time staff members on the Lawyers' Committee had been concentrating, the local lawyer would be able to get some help in research, and sometimes in the litigation, from a staff member of the Lawyers' Committee.

Mr. WIGGINS. What are the names of some other organizations that are engaged in similar activities? The American Civil Liberties Union comes to mind. Maybe you can indicate some of the others.

Mr. DERFNER. The Legal Defense Fund, the NAACP Legal Defense Fund, which has been engaged in cases involving racial discrimination since 1939. The NAACP, which is essentially the offshoot of a separate branch which has also been engaged in racial discrimination cases for about 25 or 30 years. There is a Puerto Rican legal defense fund in New York. I think there are various organizations which concentrate on the

specialized legal areas involving, say, women's rights, Indian rights, environmental areas, and the like.

All told, I would suppose that throughout the country there might be something like a couple of hundred lawyers who work full time in these areas; which, since we have about 300,000 or 400,000 lawyers in this country, makes that about one-tenth of 1 percent of the lawyers in this country who are engaged in this practice.

Mr. WIGGINS. Is your practice——

Mr. DERFNER. I should say, in my own case, I am not a staff member of the Lawyers' Committee. I was at one time. I am now engaged in private practice in Charleston, S.C., and I am in a position of somebody who is trying to make a living based on the fees he collects from clients, and trying to bring cases for what seems to be the public good.

Mr. WIGGINS. You have mixed emotions to what is referred to as the Lawyers' Committee. Tell me how much of the activities of the Lawyers' Committee is engaged in litigation? That may be a tough question for you to answer, but I would like to get some flavor as to whether it seeks to litigate the rights of individuals and vindicate those rights in the court, or does it also have a major effort to shape the legislation in the first instance?

Mr. DERFNER. No. I would say that the activity of the Lawyers' Committee, if I had to break it down—and this is just a guess—I would say probably a third of it would be general research on the effects of new laws, on the interpretation of regulations or guidelines, or the impact of certain kinds of policies—research much as the Civil Rights Commission or the Urban Institute, or even Library of Congress does. Another third of it might be research that is related to particular types of cases. For example, somebody who is concentrating on the area of, say, Government employment discrimination will spend a good deal of his time researching that area and working with lawyers who have cases there, providing them assistance in bringing cases to their attention, developing arguments, and that sort of thing.

Another third of it—or a little bit less—is probably direct litigation; that is, appearances by staff members in specific cases. The amount of work on legislation is of necessity minute, and it is limited to those situations in which the staff members provide assistance to Congressmen and Senators upon request, which is the requirement of the Internal Revenue Service in providing 501(c)(3) tax exemptions.

To the extent there is any legislative work, it would be in that area, and I would suppose the amount of it would not even approach 1 percent of the committee's time. The number of times that a committee staff member has testified or provided legislative assistance in that way has not been more than two or three times in the past year.

Mr. WIGGINS. Are you being paid today for your time?

Mr. DERFNER. No.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. DERFNER. Just so there will not be misunderstanding, Mrs. Derfner is a staff member of the Lawyers' Committee, and she is being paid. This is part of her workweek.

Mr. WIGGINS. I understand that.

Mr. KASTENMEIER. If people are doing pro bono work presently and this is continued, to what extent do they need compensation by virtue of a change in the law? In other words, the present public interest practice would seem to mitigate the need for compensation as opposed to some other case or class of cases because of the practice of either taking a case for no compensation or reduced compensation.

Mr. DERFNER. I think the few cases that have attracted a lot of attention in recent years have obscured the fact that for every case that is brought, there are countless other cases that really ought to be brought because they represent a situation in which a statute is not being enforced, but in which they cannot be brought because there is no lawyer for them or because a lawyer might be willing to take the case, but cannot afford even the out-of-pocket expenses.

Mr. KASTENMEIER. In such cases, do you feel attorneys' fees might make the difference?

Mr. DERFNER. Yes; I think they would make the difference. In my own case, I think as a practical matter I spend more time on public interest or uncompensated cases than many people I know. I just have to put a limit on them. I just have to say, I just cannot spend more than x percent or x number of hours this month or this quarter on uncompensated cases. I see 10 or 20 cases, not that I would simply like to bring, but that need to be brought, for every one I can take on or every one somebody else can take on.

I do not think that either the small number of people who are able to find funding for full-time work or the best intentions of private members of the bar to contribute a portion of their work or a portion of their firm's budget or even the few efforts of the Federal Government in certain areas, I do not think any of those can add up to anything more than a fraction of the cases.

We are talking about cases in which Congress has said, this is the law, this is the policy which should be enforced. I think attorneys' fees are a way that Congress can provide for somebody else to do the enforcing.

Mr. KASTENMEIER. Do you see any danger of abuse in awarding attorneys' fees?

Mrs. DERFNER. The type of legislation contained in all the bills now before the subcommittee calls for attorneys' fees to a successful party. I do not believe that type of legislation would breed abuse, because if you bring a frivolous lawsuit, you are going to wind up paying the other side, and you get your own fees repaid—recompensed only if your suit has merit, and you substantially prevail in the end.

Mr. KASTENMEIER. What are the arguments against attorneys' fees in public interest or in civil rights cases? What arguments are made, if you are aware of them?

Mrs. DERFNER. I am not aware of any that have been made—any substantive objections. There have been some objections to the manner in which the private attorney general concept operated without statutory authorization in the past. In the fourth circuit, a case subsequently reversed by the Supreme Court said that the private attorney general concept put the courts in the position of having to

decide which congressional policies were important enough and which were not important enough or which parts of the statute were important enough and which were not important enough to merit fee shifting. The fourth circuit, and the Supreme Court in *Alyeska*, felt that courts should not be in that position. That, so far as I know, is the only objection to the private attorney general theory I have ever heard.

Mr. KASTENMEIER. My last question here is in terms of H.R. 4675, Mr. Crane's bill, which stems from a different philosophical basis, namely that these are individuals who are defendants against litigation precipitated by the Federal Government in which they prevail. Would you agree there is a need to award them attorneys' fees?

Mr. DERFNER. I think there are certainly many cases in which a great deal of unfairness is brought about by a suit brought by the Federal Government, but before going the whole way of carving out a giant exception to the American rule, the appropriate place to start is with what the chairman suggested, by authorizing fees to be awarded against the United States when it brings a suit frivolously.

I recognize what the Congressman from California said about the problem of finding "bad faith," but I think "frivolous" would be an acceptable standard that might solve some of those problems. But I do not think I would say that every time somebody is sued by the United States and wins, that he automatically gets his fees.

Mr. KASTENMEIER. Thank you, Mr. Derfner and Mrs. Derfner for your contribution this morning.

We are concluding this morning's testimony, but on Wednesday next in this room at 10 o'clock we will continue for our second, and for the time being our last day on hearings on the various bills before us relating to the award of attorneys' fees.

Until 10 o'clock on Wednesday, this subcommittee is adjourned.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned, to reconvene Wednesday, October 8, 1975, at 10 a.m.]

AWARDING OF ATTORNEYS' FEES

WEDNESDAY, OCTOBER 8, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE OF THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m. in room 2226, Rayburn House Office Building, the Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, and Railsback.

Also present: Gail P. Higgins, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order.

Today we resume the second day of hearings on the subject of awarding of attorneys' fees. The impetus for these hearings, for six of these eight attorneys' fees bills which are now pending in the subcommittee, is the Supreme Court's recent decision in the *Alyeska* case of May 12 of this year. In that case, the Court ruled the courts have no power to award attorneys' fees under the private attorney general theory, unless the statute specifically authorizes it.

These hearings are the start of a legislative effort to focus on the problems and needs raised by the *Alyeska* case, and by any other situation which may justify awards.

Today, we are pleased to have a distinguished panel of attorneys who will discuss the attorneys' fees problems in the context of public access to the courts, and administrative proceedings. On Monday, we received testimony from three Congressmen who separately initially sponsored a total of seven different bills. And today, we are very pleased to honor our colleague, Mark Andrews of North Dakota, who was the original sponsor of H.R. 8368. I am pleased to greet our colleague.

TESTIMONY OF THE HONORABLE MARK ANDREWS, A REPRESENTATIVE AT LARGE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Mr. ANDREWS. Thank you, Mr. Chairman. It is good to be here.

I want to thank you for allowing me to appear before your distinguished subcommittee, and also for scheduling hearings on this legislation I have introduced.

As you know, the fifth amendment to the Constitution provides, and I quote: ". . . nor shall private property be taken for public use with-

out just compensation." The intent and purpose behind this fifth amendment clause is to allow the Government to take property it deems essential for "public use," but at the same time, to put the landowner-condemnee back in the same or similar position he was before the condemnation occurred, by paying him "just compensation."

Briefly, the reason I have introduced this legislation is to assure landowners that the letter, as well as the spirit, of the "just compensation" clause is fulfilled. Basically, the problem results wherein a landowner receives a just compensation award, which is then diminished up to a third, to pay court costs and attorneys' fee. As an example, I would like to insert for the record a case wherein a North Dakota farmer received for his land a judgment in the amount of $13,660.26, which was then reduced to $7,610.57 after he paid $2,244.40 in court costs and $3,805.29 in attorneys' fees. Is this "just compensation"? Has the landowner in this case been made whole? I think not.

I would like, Mr. Chairman, to include this document at this point in the record.

Mr. KASTENMEIER. Without objection, the case will be received and made part of the record.

[The material referred to follows:]

ATTORNEYS AT LAW,
BAIR, BROWN AND KAUTZMANN,
Mandan, N. Dak., April 4, 1975.

Mr. and Mrs. ALBERT E. KLAIN,
Turtle Lake, N. Dak.

DEAR FOLKS: We have received payment from the government on your condemnation case. Enclosed is a statement showing the distribution we will be making of the funds.

If you would like to stop at our office at 1:30 on Tuesday, April 8, 1975, we will go over the entire matter with you and make disbursement of your share. If for any reason this isn't convenient, call Mrs. Shaw and she will make arrangements for another time for you.

Very truly yours,

BAIR, BROWN & KAUTZMANN.

Enclosure.

P.S. Both of you must come to the office to sign the check.

Gross Recovery	$13,660.26
Less costs:	
Saugstad	978.00
Knudson	1,234.00
Bair, Brown & Kautzmann	12.40
Lindell	20.00
Total	2,244.40
Net recovery	11,415.86
Less ⅓ attorneys' fees	3,805.20
Net to client	7,610.57
Total	6,049.69

Mr. ANDREWS. Some may argue that the case I have referred to is just an example of excessive attorneys' fees. However, I have been informed by many members of the bar in my State that a contingency fee of one-third is very common in condemnation actions. As I am not an attorney, I do not think it would be proper or fair for me to state

what are or are not reasonable or unreasonable attorneys' fees. This is not the issue addressed in my legislation anyway.

However, I do feel my proposed legislation would assure that landowners receive fair compensation for their property. It does this by allowing the court to award fees and expenses of attorneys to the condemnee. By doing this, the situation is eliminated wherein a landowner's award is diminished substantially by court costs and attorneys' fees. I would also like to point out that this legislation prevents a windfall to the landowner-condemnee by limiting costs to those actually incurred in litigation.

Mr. Chairman, I suppose one could maintain that juries already take attorneys' fees into consideration when deciding on the amount of the award. However, it is just as easily arguable that juries do not and cannot take attorneys' fees into consideration, because of instructions from the bench.

I am sure that opponents of this bill will also assert that its adoption will provide an incentive for landowners to litigate. Even so, the landowner under this legislation would only get what he is entitled to—fair compensation for the value of his land.

In closing, Mr. Chairman, I want to point out that I believe there are many landowners in my state who are not receiving "just compensation". As Members of Congress, I am sure that it is a firm desire of all of us to make sure that protections written into our Bill of Rights are indeed realized for the benefit of all. We cannot afford these abuses to continue.

Again, I thank you for allowing me to testify before your committee. It is my hope that action will be taken on this legislation, as I know it has been the concern of other members in previous Congresses as well. Before answering questions, I would like to make some additional comments.

First, I would briefly like to point out just why we have this problem in our State. We have built two interstate highways, one east and west across the State, one north and south across the State, and the question of compensation to the landowners has always been a matter of concern. Many of these landowners, because the government could not come in and give them substitute acreage were forced off the farm. Something that should be considered by this subcommittee in the area of condemnation reform is the following situation: if you are going to take a hundred acres from farmer A, maybe the Government could come in and offer him 100 acres of similar land in close proximity to the land he is now farming—and you eliminate the problem of how much it is worth, and a host of other things.

The primary need of the man who owns the land is to get back into a condition he was in before the Government project came through. We are finding the same problem on canal rights of way, and other project area pickups for the Garrison Diversion project. And because of this, we have a great deal of interest in my state in condemnation reform.

I would like to include in the record, if I might, Mr. Chairman, a statement from Stanley Moore, the president of the North Dakota Farmers Union, the largest farm organization in my State, that illustrates the problem they feel their farmers have; and letters from

Sperry and Schultz that explain what kind of problems arise in this whole condemnation process of taking real estate by the United States Government, followed up by an article from the McLean County Independent, which is headlined, "Land Worth $52,280 But Grabingers Net $45,000"—a headline that is repeated all too often, and certainly does not speak for equity for the landowner.

Finally, Mr. Chairman, I would like to include in the record a telegram from the President of our State Bar Association, which confirms the support of the executive committee of the State Bar Association in North Dakota for my bill. These members of the bar, who have been experiencing first-hand the frustrations of their farmer-landowner clients, feel that this type of legislation would be most helpful in protecting the rights of the individuals involved.

Mr. KASTENMEIER. Without objection, the four items that you have offered for the record will be accepted and made a part of the record.

[The material referred to follows:]

[McLean County Independent Feb. 1975]

MUST PAY COURT COSTS: LAND WORTH $59,280 BUT GRABINGERS NET $45,000

Kenneth Grabinger, 37, is an articulate farmer who has seen the diversion project ruining his farming unit five miles southwest of Turtle Lake.

Grabinger and his wife Donna have lived on their 480-acre farm since they were married in 1963. Grabinger also owns 320 acres about eight miles north of his farm.

The "home place," the 480-acre farm, was a good unit for the Grabingers which supported 55 head of stock cows. That was until the federal government indicated it would need some of Grabinger's land for the diversion project.

Although the canal cut just a corner of Grabinger's land (amounting to only eight acres), the federal government has acquired that eight acres plus nearly 200 more (for wildlife).

The land which the government acquired by condemnation was the finest land in the unit. Low land (some of it Turtle Creek bottomland), the land is as good as high land which is irrigated, Grabinger feels.

It was impossible to find land in the area to replace that lost to the diversion project, and Grabinger said no offer of assistance (to aid in finding land) was ever given by the Bureau of Reclamation or the Garrison Diversion Conservancy District. (A proposed state law would require the district to provide such assistance; see article concerning Klain).

Land that Grabinger found (and which he "just acquired") to replace his lost acreage is not nearby . . . unless one can say 15 miles is nearby. One tract of land, 80 acres, is 15 miles west of his "home place"; the other, 160 acres of pastureland, is 15 miles north.

"It's not going to be the same," Grabinger says. "While I've been able to look at the cows behind the barn, now I'll have to truck them up to the pasture and back. And who's going to watch them?" he asks, knowing there's no answer.

Grabinger's experiences with the Bureau of Reclamation began in December 1970 when an appraiser first visited the Grabinger farm.

"I always knew I would be affected, but I just never felt it would be so much." Grabinger explained he has known that the diversion project would affect his life since he was a youngster "when surveyors would tramp through mother's garden" (the garden of his mother, Mrs. Alvin Grabinger, six miles northwest of Turtle Lake).

And when Kenny became aware that he was going to lose a good part (and the best part) of his farming unit, he couldn't do anything about finding replacement acreage. Why? For two reasons: 1) federal income tax laws make it unwise to buy replacement land before the forced sale of other land and 2) young farmers particularly are unable to get financing because all they own is already mortgaged.

In the spring of 1971, a Bureau of Reclamation negotiator arrived on the Grabinger farm and advised Kenny to "sign here." The government's offer was

$23,500 for the approximately 200 acres.

Grabinger refused and in the succeeding months the negotiator returned a couple of times.

Grabinger's counter offer was $58,000 although later, during the period of negotiation, Kenny said he would settle for $33,000, an offer which was also refused.

In February 1972, Grabinger's land was condemned. More than two years later, in May 1974, the court made its award—$59,280, the true value of the land (when it was condemned in February 1972).

But Grabinger never received the "true value" of the land. Because federal law requires private persons to pay for their court costs, Grabinger wound up with $45,000 . . . his attorney and the appraisers he had retained cost him the difference.

And, in addition, Grabinger incurred considerable personal expenses and inconveniences while fighting his government for what he feels was rightfully his. Part of the expense and inconveniencies was the loss of two weeks of spring's work when he felt he had to be in Bismarck to hear the condemnation cases in federal court.

"Why should a person be forced to pay 'just compensation' for his 'just compensation'?" Grabinger asks.

Grabinger is also critical of the Bureau of Reclamation for the way in which it proceeds against single farmers while keeping others in doubt.

He asked that he be allowed to retain ownership of about 140 acres of wildlife habitat land in the Bureau's "Turtle Creek Area." Grabinger's land is the only segment acquired in that area which stretches for nine miles in a north-south direction along the creek and which includes about 12,000 acres. (See stories about Addison Parks and Morris E. Miller).

While Grabinger's request to retain ownership of the Turtle Creek land was turned down, he is leasing the area now (Grabinger has been advised the lease arrangement will end after 1976).

When Grabinger was told that he could lease the Turtle Creek land, he was informed the price would be $500 a year. Grabinger's counter offer of $400 was rejected . . . but after a couple of weeks Grabinger received a telephone call, advising him the price would be $319.

"While that price was okay for Kenny, it shows how they (the Bureau of Reclamation) operate," Grabinger said.

The court decision awarding Grabinger $59,280 for his land (less than the costs he incurred in seeking the judgment) was appealed when the government moved for a mistrial, but U.S. District Judge Bruce Van Sickle ruled against the government.

Grabinger said he understood that three other condemnation cases of area residents were being appealed by the Bureau. The cases reportedly involve Albert and Pearl Wall, Charles Schlichenmayer and John Reiser Sr.

Kenny and Donna Grabinger also express disgust with the way the Bureau has allowed contractors to "root up" roads in the area with their heavy equipment and to commit other abuses. The Bureau is responsible because its men are supposed to supervise the job, they said.

[Western Union Telegram]

BISMARCK, N. DAK.,
October 7, 1975.

Hon. MARK ANDREWS,
Capitol, Washington, D.C.

This will confirm the support of the executive committee of the State bar association of North Dakota of H.R. 8368 which will be heard by the Judiciary Subcommittee on Court, Civil Liberties, and Administration of Justice October 8, 1975.

A. G. ERICKSON,
President, State Bar Association of North Dakota.

U.S. Representative Mark Andrews:

The following material is the position statement you requested in your recent letter for hearings on H.R. 8368.

The North Dakota Farmers Union believes that the burden of proof in the need for eminant domain proceedings in the acquisition of farm land and property

for Federal projects must be more firmly placed on the agency requiring the land.

At the present time the farmer faces a serious dilemma when his property is required for a Federal project. The farmer exists in an atmosphere of a continual threat of condemnation proceedings in negotiations with a Federal agency. Such a situation limits the ability of an individual landowner to fully negotiate on an even scale with the Federal agency.

Often the landowner's decision in such negotiations is based more on the choice between the lesser of two evils rather than on sound economic judgements.

For example: If the farmer is convinced that the offer for his property and the severance damages by the Federal agency does not fully reflect the value of the property or the decreased value of the remaining property, he must decide whether his ability to receive just compensation through the condemnation process in court, minus the litigation expenses and attorney fees, will exceed the Federal agency's condemnation price for that property.

Thus the property owner is an untenable position. If he is successful in court through the condemnation process, he still is left in a lesser economic position than he should rightfully be. From the amount the court has determined to be fair and just compensation for the loss of his property, he must then deduct his litigation expenses and attorney fees.

North Dakota farmers have experienced such dilemmas in the acquisition of land for the Garrison Diversion project and other Federal projects.

For this reason, the North Dakota Farmers Union believes a change is required in the condemnation process. Attorney fees and litigation expenses of a landowner undergoing condemnation should be paid for by the Government in cases where the landowner successfully shows that the condemnation price or severance damages were inadequate.

This would help insure that the landowner receives full and just compensation, and therefore is no better or no worse economically after the landtaking than before.

It would further place greater responsibility for thorough negotiations, updated appraisals, and other improved land acquisition practices upon a Federal agency. Thus the landowner and the Federal agency would both be negotiating on a more even basis.

The North Dakota Farmers Union supports legislative efforts to correct the present inequities in Federal land acquisition.

STANLEY M. MOORE,
President, North Dakota Farmers Union.

SPERRY & SCHULTZ,
ATTORNEYS AT LAW,
Bismarck, N. Dak., October 15, 1974.

Re United States Condemnation Cases

Hon. MARK ANDREWS,
Congressman for North Dakota,
2411 Rayburn Office Building, Washington, D.C.

DEAR CONGRESSMAN ANDREWS: It would appear that little or no progress has been made on modifying the cost statute, section 2412, of Chapter 28 of the USC. We just completed the trial of one of these cases, involving the Garrison river diversion canal, and the government's offer was $43,100.00, the verdict being $107,235.00. There was no increase in the offer at any time.

It should be of interest to know just what the government spent on this trial, in fighting the landowners, who had a good farm of 1120 acres, before it was ruined by this taking. This farm is located in the most southerly part of the canal, which is in McLean County, to the southwest of McClusky.

If the canal had been constructed directly from Lake Audoubon to Lone Tree, where the first benefits will be made available, they would have saved about twenty-five miles of construction, which could do no good, as we do not need more water for wildlife in this part of the state, and you can readily determine that by checking an ordinary North Dakota road map, showing all of the lakes that we have, many of which have not been properly utilized for either fish or wildlife.

This forced the landowners to employ expert appraisers, and of course attorneys, to defend their interest. The courts have now construed section 2412, even

with the 1966 amendment, to mean that this does not apply to condemnation cases, for any kind of costs. See U.S. of America vs. 2186.63 Acres in 464 Fed. 2d 676, decided in 1972.

A reading of this case and the facts referred to show the tremendous injustice that has been enforced upon some of these landowners, the conduct of the government having made it impossible to obtain justice by negotiation or even by trial, when the landowner must pay for this kind of litigation, as to his part.

I am enclosing a small reprint of the canal, showing the curve in it, referred to, and why appropriations doesn't do something about this kind of waste is very hard to appreciate.

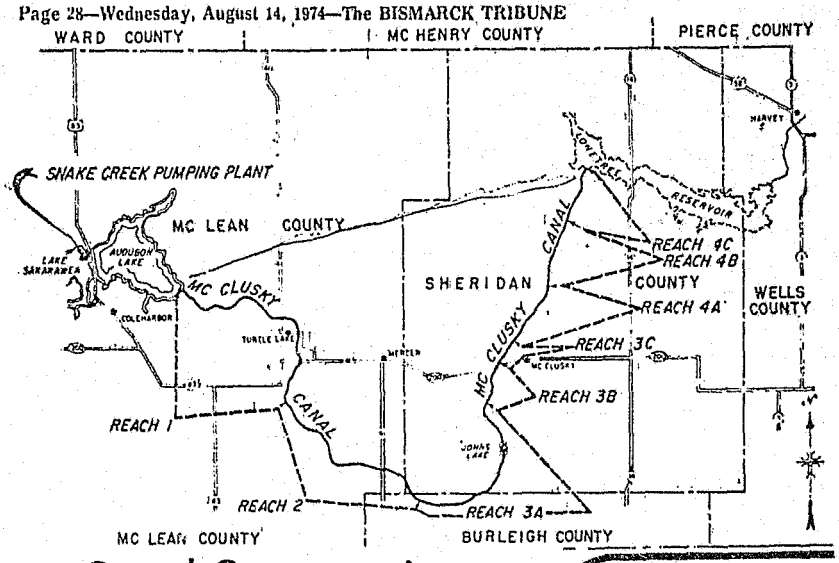
With best wishes for a successful campaign, I am

Respectfully,

FLOYD B. SPERRY.

Enclosures.

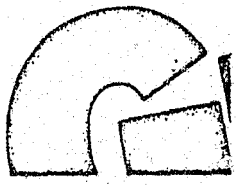
Page 28—Wednesday, August 14, 1974—The BISMARCK TRIBUNE



Canal Construction

This Bureau of Reclamation map shows the various reaches of the McClusky Canal which will conduct water from Lake Audubon to the Lonetree Reservoir and is the principal supply works for the Garrison Diversion irrigation project. Bids will be opened Thursday at Harvey on Reach 3-B which will include the tunnel under N.D. Highway 200.

Canal Work Bids Opening Thursday



SPERRY & SCHULTZ,
ATTORNEYS AT LAW,
Bismarck, N. Dak., March 11, 1974.

Hon. MARK ANDREWS,
Congressman for North Dakota, House of Representatives, 2411 Rayburn Office Building, Washington, D.C.

DEAR CONGRESSMAN ANDREWS: It was nice of you to write me on March 6th, and to send me a copy of the letter from the Department of Justice, along with the proposed bill.

I believe that the bill would serve the purpose, very well, except that on the second page, subdivision (b), I think that in the second line the words "by statute or" should be omitted, and the word "by" inserted between the words "amount" and "court".

It is also my opinion that section 1920 should be amended, as follows: after the word costs, I think that these words should be added "by or against the United States,". And then following subdivision 5, I believe that there should be added "reasonable attorneys fees, expert witness fees, and other necessary expenses, for landowners in condemnation cases, where the government is taking the property".

The words "by statute" are actually superfluous because if the proposals suggested are approved, then we would have the statute, and no other would be necessary. I think that Section 1920 should be amended for clarity, and if we are going to get this done, it no doubt will stand for decades, except for minor changes.

We brought about this kind of a law in North Dakota, through our Section 32–15–22, and which has saved farmers, ranchers, and other landowners millions of dollars, making it possible for the rule of Eminent Domain to mean what its philosophy requires, and that is to permit the landowner to come out whole.

The Act refered to by Mr. Johnson, in the Attorney General's Office, is simply too limited, in effect, to help the average landowner, as it does not apply where the land is actually taken.

As previously pointed out, I think that it is a miscarriage of justice to take land from owners, when they can get no more than the actual value for damages, and then be required to pay the expenses, including attorney fees, for defending their rights and this is the situation that we are trying to avoid.

It apears that Mr. Johnson does not disagree with my position, but that he merely points out that there is no statute, at the present time, which would provide for this equitable relief to owners.

Thanks and best wishes.

Sincerely,

FLOYD B. SPERRY.

SPERRY & SCHULTZ,
ATTORNEYS AT LAW,
Bismarck, N. Dak., December 27, 1973.

Re Condemnation for Real Estate by the United States Government.

NORTH DAKOTA CONGRESSMEN,
Washington, D.C.

GENTLEMEN: I am certain that you are aware of the general concept of condemnation law, where property is taken from a landowner by the government, and which is that the owner should receive just compensation for the property taken, and also left whole. This means that the owner should not have to pay attorney fees to defend his property, nor his other expenses, to offset the procedures employed by the government, which uses salaried officials and has expense money available for competing appraisals.

Congress did provide for costs against the government in certain cases, by the amendment of Section 2412 of Chapter 28 of the United States Code Annotated, but this does not include attorney fees, which usually run about 25%, and in some cases over that, of the increase in damages, awarded by juries, above the best offer made for the purchase of the property by the government.

We have observed Chapter 62 of the United States Statutes, Section 304 and 84, from the publication dated January 2nd, 1971, but in my opinion this does not provide for attorney fees, for landowners, in condemnation cases. If this

bill became enacted into law, it would provide for attorney fees, for a litigant, in certain cases, but in analyzing this act carefully, we do not think that it would cover this item of expense in condemnation actions.

Since you must agree that it is only fair to the landowner that he should be paid the value of the property, taken from him, and which is often ruinous to his operations, we believe that you will also agree that this item of attorney fees, in such cases, should be allowed against the government, so that the owner can meet the procedures employed by the Department of Justice, and which runs into a substantial amount of money.

We would appreciate word from you, with reference to remedying this injustice, and if some act has been recently enacted, which we are not aware of, we would like to be informed of that.

I think that the simplest remedy would be to again amend Section 2412, referred to, and we observe that this is an area in which attorneys have not taken an active part to assist in bringing this adjustment before Congress, as it was successfully accomplished in the State of North Dakota, and many other states for condemnation litigation, in State District Courts.

Respectfully,

FLOYD B. SPERRY.

SPERRY & SCHULTZ,
ATTORNEYS AT LAW,
Bismarck, N. Dak., October 6, 1975.

Hon. MARK ANDREWS,
Congress of the United States,
House of Representatives,
Washington, D.C.

DEAR MR. ANDREWS: I have not been unmindful of the call from your office, through Mr. Dwyer (I am not certain that I am spelling this name right, but I am sure that it was close enough so that you will know who I mean).

I wrote you quite fully in regards to this problem on December 27, 1973, and because of the time that expired I have given up for the time being, on this legislation.

It, obviously, is wrong for the government to take this property by condemnation, for public works projects, which property is not for sale, and then require the landowner to pay out about ⅓ of what he gets for his attorney fees, more for his witnesses, and also his own expense, leaving it difficult for him to realize more than about 60% of the market value of his property, as determined by the court or a jury.

As you know, North Dakota has remedied this problem as have a number of other states, by providing that costs including reasonable attorney fees may be taxed against the state or the taking agency. This would even apply to the United States government if it proceeded in the state court, and this seldom, if ever, does happen.

In the last case that we tried the jury awarded approximately $64,000.00 above the best offer from the government and since the case was pending for two or three years the landowner had to accept 6 percent on this money, even though he had obligations requiring him to pay interest of 9 percent, and in some cases more than that.

The basic rule of condemnation law is that the landowner should be left whole, and you can see that this is very far from that. Why other congressmen do not insist upon this injustice being remedied, is difficult to understand, and I am afraid that the different agencies are more successful in the opposition than the landowners are in obtaining justice.

I regret that I cannot appear in Washington on this bill, but if it does come up now it will be at a time when we cannot possibly leave our work here; October is our most difficult month for getting away, because of numerous court terms and other conflicts.

There would also be a strong possibility that if I did come to Washington upon my own time and expense, the hearing would be postponed and the trip would be for nothing. If I could pick my own time for appearing I would certainly take advantage of that opportunity, but knowing how the government process must work, I am not experiencing that kind of optimism.

Respectfully,

FLOYD B. SPERRY.

[94th Cong., 1st sess., H.R. 8368]

A bill to amend section 2412 of title 28, United States Code, to provide in a condemnation proceeding the discretionary award of fees and expenses of attorneys to the condemnee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2412 of title 28, United States Code, is amended by inserting "(a)" before the last sentence, and by adding at the end thereof the following new subsection:

"(b) In a proceeding to condemn real property for the use of the United States or its departments or agencies, a judgment for costs as enumerated in section 1920 of this title and reasonable fees and expenses of attorneys may be awarded to the condemnee. A judgment for costs and reasonable fees and expenses of attorneys when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the condemnee for the costs incurred by him in the litigation. Payment of a judgment for costs and reasonable fees and expenses of attorneys shall be as provided in section 2414 of this title for the payment of judgments against the United States.".

SEC. 2. The amendment made by the first section of this Act shall apply to condemnation suits commenced on or after its enactment.

Mr. KASTENMEIER. I take it North Dakota is not in a peculiarly unique position with respect to the need for such legislation. I would think that virtually any other State could have similar problems.

Mr. ANDREWS. I would certainly think so, Mr. Chairman. Certainly, the needs of highway construction, airport construction, whatever public works; and now, with the new needs for energy, and the construction of pipelines and all of the rest, make this type of legislation even more important than it has been in the past.

Mr. KASTENMEIER. In reading your bill, H.R. 8368, it states, "Reasonable fees and expenses of attorneys may be awarded to the condemnee. Therefore, they are not necessarily awarded, but presumably may be by discretion of the court." Is that correct?

Mr. ANDREWS. That would be the intent of the legislation. Again, I look to this subcommittee for expertise in exactly how they want to phrase this. If the subcommittee should change "may" to "shall", it certainly would not result in any objections from me.

Mr. KASTENMEIER. It has been pointed out to the committee, the so-called American rule is against awarding the prevailing party attorneys' fees in civil actions, with certain very narrowly drawn specific exceptions.

Mr. ANDREWS. That is true, Mr. Chairman. But when you are dealing with the farmer, who has probably never done business with a lawyer before in his life, and who is faced by a host of Government attorneys and/or the power of big government coming and saying you have got to yield up your land, to whom does the farmer turn? You are not dealing with a corporation that has an attorney on retainer. You are dealing with an individual that has to turn to someone in the community to protect him, to gain his rights.

The problem arises, not because of any landowner trying to take advantage of the Government, but rather the Government appraiser's taking advantage of the landowner. Customarily, their initial offerings are about two-thirds of what the land is worth. Some of them are arrogant to the point of saying, take it or leave it—we have got all the attorneys. You have got to hire one, you have got to pay the court costs. These threats have been made.

This is why the farmers resent this overall approach of the Federal Government. One of the biggest challenges you and I face, actually, as members of Congress, is restoring credibility and good faith in our Government. People feel they have been done in in so many different ways, and this is just one of the very personal ways they feel big government has taken advatage of them, by coming in, and setting a value they know is arbitrarily low, because they know it is less than land has been selling for in the community; and in effect saying—fine, you do not want to accept it—we have got lawyers—you have got to find one—you will probably spend more in legal fees than you will get in additional awards—it is to your advantage to settle.

Mr. KASTENMEIER. I do not doubt that it is exactly as you describe it. I think we might, if we explored this particular area further, want to consult with our sister Committee on Public Works, particularly their highway subcommittee, to determine whether there is any way these practices can be mitigated other than by awarding attorneys' fees. This is still a relevant question since this whole area is being explored by the subcommittee.

Let me ask you this. If the State of North Dakota condemns land for State highway purposes, may attorneys' fees be recovered by the same farmer.

Mr. ANDREWS. Yes.

Mr. KASTENMEIER. We might like to have——

Mr. ANDREWS. I could provide a copy of the North Dakota statute for the record.

Mr. KASTENMEIER. I think that would be very useful for us, because I could understand readily how the farmers would feel discriminated against if they have some sort of equitable access to the potential award of attorneys' fees in State proceedings, but not in Federal proceedings.

Mr. ANDREWS. One of these letters I filed in the record, Mr. Chairman, refers to the law in North Dakota, Section 32–15–22, but we have a copy of the North Dakota Code, and will make a copy of that particular section, and provide it for the committee.

[The material referred to follows:]

32–15–22. *Assessment of damages.*—The jury, or court, or referee, if a jury is waived, must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein. If it consists of different parcels, the value of each parcel and each estate and interest therein shall be separately assessed;

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff;

3. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages;

4. If the property is taken or damaged by the state or a public corporation, separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construc-

tion of the improvement proposed by the plaintiff, and if the benefit shall be equal to the damages assessed under subsections 2 and 3, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the benefit shall be less than the damages so assessed the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the portion taken;

5. As far as practicable, compensation must be assessed separately for property actually taken and for damages to that which is not taken.

SOURCE: R. C. 1895, § 5965; R. C. 1899, § 5965; R. C. 1905, § 7595; C. L. 1913, § 8223; R. C. 1943, § 32-1522.

Mr. ANDREWS. When we were talking about individuals, Mr. Chairman, I have a letter from Leland Vossler that sets forth some of the problems they had as individuals, written in their own hand, setting forth an exhibit of what happened not only from the standpoint of legal fees but also income tax treatment after their land was taken for a Garrison Diversion condemnation. I would like to include it in the record also.

Mr. KASTENMEIER. Without objection, that exhibit will also be received and made part of the record.

[The material referred to follows:]

MERCER, N. DAK.,
October 3, 1975.

Congressman MARK ANDREWS,
2411 Rayburn Office Building, Washington, D.C.

CONGRESSMAN MARK ANDREWS: I would first like to say Thank you for the opportunity to be heard. In our opinion the laws on condemnation are antique, even though they have been changed a few years ago.

We ask that this letter be made part of the hearing record on Bill H.R. 8368. We have experienced a condemnation action in conjunction with the Garrison Diversion project in North Dakota. Our land was condemned in February of 1972 but didn't get to court until August of 1974. We lost 352 acres and the government offer was $46,300, the jury awarded us $71,560. I am inclosing Exhibit A which gives you a break down. Note that the total amount received by us for the taking was $45,143.

We replaced 190 acres at a cost of $35,200 this left us $9,943.22 to buy 162 acres. We couldn't find land reasonably close by and the price of land doubled by 1974. Our time to replace expired, so had to pay Capital Gain taxes on 9,943.22 besides state taxes. We would still like to replace this land but at today's price of land it would take $40,000. We asked the government to find us land in exchange, this was refused leaving us wondering, frustrated and bitter. We feel we are $30,000 short of becoming whole again this should not have to be.

In writing or changing the law, we would hope you consider instances were property cannot be replaced in a year or two and the inflation rate. A tax break for those who elect not to replace they're property. In our case we can't use our machinery to the fullest extent because of the reduced acres. Our expenses for lawyer and appraisers was $11,245.47 this does not cover the countless trips, telephone calls, and time loss because of the condemnation action.

We ask that bill H.R. 8368 be given favorable consideration by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. We also ask that the bill be made retroactive to include all land condemnation cases associated with the Garrison Diversion project or other projects that are not yet completed.

Thank you again.

Sincerely,

LELAND and EUNICE VOSSLER.

Mr. Andrews, we don't have another copy of exhibit A, could you make a copy and return one of them.

EXHIBIT A

LELAND VOSSLER: INCOME TAX TREATMENT—GARRISON DIVERSION CONDEMNATION

	Take	Severance damages	Interest	Total
Gross receipts	$53,560.00	$18,000.00	$3,897.02	$75,457.02
Less expenses (allocated on percent basis)	8,416.78	2,828.69		11,245.47
Net amount received	[1] 45,143.22	[2] 15,171.31	[3] 3,897.02	64,211.55

[1] See the following table:

Compute gain as follows:	
Net take, above	$45,143.22
Less cost of property sold, exhibit B	10,320.86
Net long-term capital gain	34,822.36
Computation of recognized long-term capital gain:	
Net take	45,143.22
Proceeds reinvested [a]	35,200.00
Recognized gain	9,943.22

[2] No income tax consequences—reduce the basis of the remaining property (See exhibit B.)

[3] Fully taxable, report on line 11, p. 1 of 1040 and list in pt II of schedule B.

[a] Computation—basis of replacement property:	
Cost of replacement property	$35,200.00
Less nonrecognized gain:	
Total gain	34,822.36
Gain recognized	9,943.22
Total	24,879.14
Adjusted basis	10,320.86

Mr. KASTENMEIER. I yield to my colleague, the gentleman from New York, Mr. Pattison.

Mr. PATTISON. You raised the issue in your statement about the encouragement to landowners to litigate. I think that is a serious problem. I think that the discretionary part of your law would to some extent overcome that. I am thinking of the situation where the Government has offered a fair amount—let us say $10,000—and it turns out that the landowner goes to his lawyer, and the lawyer says, "Well, that is pretty close; but we lose nothing by trying the case. So we will sue for $20,000."

They end up getting $10,200 or something, and tacked on to the bill of the State or the Federal Government, in this particular case, would be another reasonable attorneys' fee, whatever that might be. And it would seem to me that having nothing to lose, you would tend to litigate in almost every case.

Mr. ANDREWS. That is true, and it may be—we had some discussion about the fact of putting in a percentage above the initial offer by the Federal Government before these attorney fees were paid.

Mr. PATTISON. If you do not get 25 percent higher, then you do not get attorneys' fees, or something like that.

Mr. ANDREWS. It was a case of the ambulance chasing. I think what we want to avoid is setting up an easy kind of deal for a group of attorneys to enter into any and all land condemnation cases. Obviously, this is not the intent of my legislation. This is strictly to take care of those farm families, or those families in town, who have been given unfairly low offers initially, and who hesitate about taking their recourse in the courts, because they feel that if they are offered a third less, the court award they receive will still be reduced a third for court costs and attorneys' fees.

Mr. PATTISON. It is a little bit different from the normal contingent fee case, because in the normal contingent fee case, you face the real possibility of collecting nothing—and that is the justification for the contingent fee. In the case of a condemnation case, you never face that possibility. You know you cannot lose your case. You are going to get an award. The question is, how much? In every case, you know you will be successful. You are going to be successful in getting something—you are going to win. You may not win as much as you want to win, but you are going to win something. So perhaps we ought to think about legislation which—if we are going to guarantee or pretty much guarantee a legal fee to the condemnee—perhaps we would prohibit contingent fees.

Mr. ANDREWS. Of course, if his fee is one-third of what he gets over the initial offer, his fee is not going to be much if the initial offer was originally fair.

Mr. PATTISON. That is correct. As a matter of fact, I think that is much more likely to be the arrangement, rather than a third of the whole thing.

Mr. ANDREWS. I would assume so, and that would be one of the built-in features that would protect us against legal sharpshooters who wanted to go in and take advantage in each and every case. This is why I think this type of legislation is self-protective, because the legal fees are not high unless the original offer by the Government is grossly low. If the original offer by the Government is grossly low, then the legal fees become an important percentage of what the individual should have gotten to be treated equitably, and that is the problem to which I am addressing this legislation.

Mr. PATTISON. I understand that.

Mr. ANDREWS. When you add the court fees in with it, you end up with the individual, in effect, getting maybe 60 percent or so of the award that is given to him, instead of the total thing. By the time you add the attorneys' fees plus court costs and all the rest, which supposedly give the landowner a better deal than he got before, because the court award is higher than the initial offer, the fact of the matter is that the landowner is only getting 60 to 80 percent of what his land was worth because he had to yield away half or more of any extra amount he may have received.

So he goes out, and in place of being able to pick up 40 acres to replace 40 acres, he can only pick up 25 acres or 30 acres.

Mr. PATTISON. No further questions.

Mr. KASTENMEIER. This is an interesting area, and one I think we would need to explore more fully. For example, just another point occurs to me. It may be that the Federal Government is a very vulnerable defendant in such civil actions; that is to say, the Government may offer $40,000—which is a reasonable price for the parcel of land—but the judge and jury in that area may feel that they prefer to give the benefit of the doubt in terms of values to the local landowner. I would like to know whether there is a difference between what is actually fair and what the awards actually are in cases of that type.

There may be a difference. I am very interested in this issue in addition to other issues which have been raised.

In any event, I wish to compliment my colleague for his presentation this morning, and for taking the leadership in an area of possible reforms in the law concerning the award of attorneys' fees. To the extent that we develop such legislation further, we may need to come back to you.

Mr. ANDREWS. I appreciate the interest and help and time you have given me to begin the exploration of this most important subject to my constituents. I think it is a rather vital and important change in the Federal law.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Congressman Andrews.

Now the Chair would like to call Mr. Charles Halpern, executive director of the Council for Public Interest Law, a group jointly sponsored by the American Bar Association and several foundations to make substantial grants in the public interest law field.

Mr. Halpern?

Mr. HALPERN. Thank you, Mr. Chairman.

My colleague is Judith Bartnoff, an attorney with the Council for Public Interest Law, who assisted in the preparation of our testimony. If the Chair pleases, I would like to submit our written statement for inclusion in the record, and summarize it.

Mr. KASTENMEIER. Without objection, your 15-page statement will be accepted and made a part of the record.

[The prepared statement of Charles R. Halpern follows:]

STATEMENT OF CHARLES R. HALPERN, COUNCIL FOR PUBLIC INTEREST LAW

INTRODUCTION

The Council for Public Interest Law is an organization established in January, 1975, to help assure that adequate legal representation is available to groups and individuals who lack the resources and ability to purchase legal services, particularly in cases of broad public importance.[1] Jointly funded by the American Bar Association, the Ford Foundation, the Rockefeller Brothers Fund, and the Edna McConnell Clark Foundation, the Council has brought together leaders of the private and public interest bar in an effort to develop and expand legal services in areas where such services have been inadequate, such as environmental protection, consumer protection, minority rights, rights of the poor, and rights of the mentally ill.

During the past several years, new institutions have been established and new efforts launched to provide legal representation in these areas. In many cases the costs of litigation were high and the client groups were poor. Hence, citizens could only obtain access to the courts if legal representation was subsidized by an outside source. As a partial response to this problem Congress established a federal program to fund legal services for the poor in 1965. Similar programs were funded by foundations and other donors to provide legal services for unrepresented groups not covered by OEO programs. These various undertakings came to

[1] Co-chairmen of the Council are William Ruckelshaus and Mitchell Rogovin. Council members include John Adams, Executive Director, Natural Resources Defense Council; Professor Barbara Babcock, Stanford Law School; L. Stanley Chauvin, Jr., member ABA Board of Governors; William T. Coleman, Secretary of Transportation; Robert Gnaizda, Deputy Secretary of Health and Welfare, State of California; William T. Gossett, former ABA president; Charles R. Halpern, Executive Director, Council for Public Interest Law; William Hastie, Senior Circuit Judge, U.S. Court of Appeals, Third Circuit; Harry Hathaway, Chairman, ABA Committee on Public Interest Practice; Professor Burke Marshall, Yale Law School; Mario Obledo, Secretary of Health and Welfare, State of California; Orville Schell, former president of the Association of the Bar of the City of New York; Whitney North Seymour, Jr., former president, New York State Bar Association; Chesterfield Smith, former ABA president; and Bruce Terris, attorney, Washington, D.C. The views set out in this testimony do not represent the opinions of the Council's sponsoring organizations.

be known as "public interest law." The name did not indicate that the client knew in any ultimate sense where the public interest lay. Rather the term "public interest law" reflected the belief that the public interest was best served where all sides were effectively and vigorously represented, and public interest law was designed to assure a vigorous adversary process.

The impact of this development has been significant. The first effort was to establish the right of citizens to participate in administrative proceedings and court cases affecting their interest, and the law of standing has significantly expanded in recent years. Citizen groups, represented by public interest lawyers, seized new opportunities to demand vigorous enforcement of environmental, consumer, and civil rights laws. The important contributions of citizen involvement and public interest law have been widely recognized. Justice Thurgood Marshall stated in a speech to the annual meeting of the American Bar Association this year:

Public interest lawyers today provide representation to a broad range of relatively powerless minorities—for example, the mentally ill, children, the poor of all races. They also represent neglected but widely diffuse interests that most of us share as consumers and as individuals in need of privacy and a healthy environment.

As I have already said, public interest law is necessary to create a balance in the legal system, to assure that all interests get a fair chance to be heard with the help of a lawyer. The basic point was perfectly put by Justice Black in *Gidcon v. Wainwright:* "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend them are the strongest indicators of the widespread belief that lawyers . . . are necessities not luxuries."

To paraphrase Justice Black, if government and industry need high quality lawyers to represent their interests in our complex society, less well organized or less powerful interests also need to have access to high quality legal representation.

We condemn the adversary system to one-sided justice if we deprive the legal process of the benefit of differing viewpoints and perspectives on a given problem. This is not to say that the viewpoint of the underrepresented must or should always prevail. I mean no such implication. Rather, I strongly contend that the decision-maker should have the opportunity to assess the impact of any given administrative, legislative, or judicial decision in terms of all the people whom it will affect. This cannot be accomplished without a public interest presence whose function is to advocate, in the true sense, the needs and desires of the underrepresented and unrepresented segments of society.

This year, the American Bar Association resolved that every lawyer and bar association has a responsibility to assure that public interest legal services are broadly available and to help develop mechanisms for the delivery of such services.[2]

A continuing concern of the groups who have won new access to the courts and of the lawyers representing them has been simple but acute: money to subsidize the attorneys' fees that makes access effective. Direct federal subsidy is not likely to expand sufficiently to meet the need for legal service, nor will it cover the many groups and individuals which are unable to obtain representation but are not totally indigent. Foundation support will, in all probability, diminish in the future, as foundation priorities shift to other areas. Hence, there is a need to insure that new financial sources be developed to assure that the right of citizen participation that has been won over the past several years remains a reality. The award of attorneys' fees in appropriate public interest cases has been an increasingly significant way of providing citizens with adequate representation and encouraging them to vindicate public rights.

AWARD OF ATTORNEYS' FEES IN PUBLIC INTEREST CASES

Attorneys' fees have, in a number of cases, been awarded by federal judges to successful litigants suing as private attorneys general. In many contexts, particularly civil rights and environmental protection statutes, Congress has used the technique of fee awards to encourage private enforcement of the law. By pro-

[2] William Ruckelshaus, citing his experience at the Environmental Protection Agency, stated: "Until the advent of public interest law firms, many citizen interests were often unrepresented in our society because few individuals or groups could afford legal representation. Today public interest lawyers are providing many groups of citizens with unprecedented access to public policymaking processes. This has significantly raised the quality of governmental decisions. The country needs hundreds more of these citizen lawyers."

viding a financial incentive, Congress has encouraged concerned citizens to seek legal redress from governmental or private illegality.

At the same time that Congress was encouraging private enforcement of public rights, the courts were doing something similar. The courts relied on their inherent equitable power to award fees to private attorneys general where their action conferred a general public benefit. A growing common law has evolved in the federal courts, with each court building on the experience and reasoning of other courts who made decisions in related matters. The courts tailored their decisions to the facts and circumstances of the cases before them in a manner which permitted flexibility and appropriate responses to novel situations.

The manner in which attorneys' fee awards have helped encourage private citizens to function as private attorneys general is reflected in a landmark mental health case decided by a federal judge in Alabama. *Wyatt v. Stickney*, 344 F. Supp. 387 (1972 M.D. Ala.) That case involved the three public mental institutions in the State of Alabama, each of which was a grossly underfunded, understaffed custodial institution where a variety of mentally ill and mentally retarded people, were confined under conditions of starkest deprivation. The residents, confined against their will, typically indigent, and lacking the most basic social skills, were not in a position to protect their rights. Through their guardian and a few professional staff, they obtained the services of two Alabama lawyers who took their case without any advance fee. These lawyers succeeded in establishing that there was a constitutional right to adequate treatment and that the institutions fell far below constitutionally required standards. The court entered an order requiring that the institutions conform to specific minimum standards.

During the course of this litigation, the attorneys disregarded other professional responsibilities and devoted their energy to this case; one of the lawyers spent almost full-time for 18 months working on it. At the end of the litigation the court awarded an attorneys' fee, recognizing the unique service provided by the attorneys, the need to encourage such litigation, and the absence of any damage recovery.

The device of awarding attorneys' fees to successful litigants who file suits to vindicate a broad public interest has proved to be a flexible and effective way to make such litigation possible. Fees are only awarded in successful cases. The court has an opportunity to appraise the professional quality of the lawyer's work. The court can set fees at levels high enough to encourage lawyers to take on such cases, while avoiding windfall profits to the lawyers. Most important, fee awards can assure that legislative and constitutional policies are effectuated, by underwriting the activity of citizens who act as private attorneys general.

THE ALYESKA PIPELINE DECISION

This trend in the federal courts toward fee awards in public interest cases continued until May, 1975, when the Supreme Court brought the development to an abrupt halt with its decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (May 12, 1975). In *Alyeska*, the court held that the federal courts could not award attorneys' fees to successful plaintiffs in public interest matters without express authorization from Congress for such an award.[3] The Court relied on an obscure statute passed by Congress in 1853, holding that this statute pre-empted the power of the federal courts to make fee awards. The Court recognized that "the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances." 421 U.S. at 271. But the Court held that the shifting of attorneys' fees incurred by private attorneys general to their opponents is within "the legislature's province."

The *Alyeska* decision, therefore, does not reflect a decision based on "social policy," but instead is based on a statute that the Court considered binding. The decision leaves the issue of attorneys' fee awards in the hands of Congress. The Supreme Court has held that almost 125 years ago Congress withdrew the power from the courts. It is up to Congress to restore that power. The need for Congress to act is urgent.

THE IMPACT OF ALYESKA

The *Alyeska* decision has already begun to choke off citizen access to the courts. Lawyers who undertook major cases on behalf of the poor and disadvan-

[3] The Court did hold that fees could be awarded in cases in which a "common fund" was created or the defendants acted in an "obdurate" fashion.

taged have been forced to reconsider their commitments and their future selection of clients. Consider the situation of a Seattle lawyer who spent more than a thousand hours representing a group of 400 poor people who were to be put out of their homes by an urban freeway project. They were able to raise only $4,300 for their representation, but the lawyer was willing to take the case in the hope of a supplemental fee award at the end of the litigation, if he were successful. After twenty-one months of litigation, the district court ruled that the freeway had been illegally planned because community groups had been excluded from the planning process, in violation of a federal statute. The court invited the lawyer to submit a fee application, but before the court passed on the application, the Supreme Court's *Alyeska* decision came down.

The case cost the Seattle firm approximately $56,000 to handle. As a result of the *Alyeska* decision, the firm has already cut back its public interest work. work. Other groups have asked the lawyer to take on cases but he has said that he cannot do it without hope of a fee recovery. A group concerned about plans to redesign a highway along the Oregon coast came to him and asked him to represent them. He refused, explaining, "I just spent two years of my life fighting a freeway. As a result of that case, the right of citizens to participate in decisions that critically affect their lives was established. The homes of thousands of people were saved. The taxpayers were saved millions of dollars. And I was paid less than three dollars an hour. I can't afford to do it again."

Other lawyers who have undertaken substantial public interest cases in the past are concluding, after *Alyeska*, that they too "can't afford to do it again." A lawyer in Rhode Island spent more than one-third of his professional time handling cases on behalf of prisoners—trying to clarify their rights and assure that they are protected. Based on prior case-law, he had reasonably expected a fee award if he was successful on the merits. The court awarded him a fee, but the *Alyeska* decision overturned the lower court's award. Commenting on the impact of *Alyeska* for him, he stated:

"Quite frankly, no private attorney can afford to devote that amount of time to a case, without compensation and still expect to survive. Without the award of attorneys' fees as an incentive to undertake this type of litigation, it is difficult for me to imagine any of us undertaking similar burdens in the future or for that matter to continue to devote a similar amount of time to the pending litigation. We simply cannot afford that burden.

We have worked many long and hard hours on these cases and sacrificed a great deal of our private practice. Should we be denied an award of attorneys' fees, it would remove what little incentive there was for undertaking this difficult, undesirable, and time-consuming litigation."

In a similar vein, the lawyer who handled the mental patients' case in Alabama, to which we previously referred, stated:

"In light of Alyeska, our firm will find it nearly impossible to become involved in complex civil rights or public interest litigation where no statutory right to the award of attorneys' fees exists."

Unless Congress acts to reverse the *Alyeska* decision, many lawyers—especially those who are not financed by foundations or the federal government—will not be able to undertake major public interest litigation on behalf of unrepresented interests. The problem requires immediate attention. Congress has an obligation to deal with the attorneys' fees problem created by *Alyeska*.

SOME RECOMMENDATIONS AND COMMENTS ON LEGISLATIVE PROPOSALS

The most immediate need is for Congress to respond to the *Alyeska* decision with a new law which establishes explicitly that the federal courts have the authority to award attorneys' fees to successful litigants in public interest cases. a simple statute, along the following lines, would be sufficient:

In any civil action arising under a statute of the United States or the Constitution, the Court may allow the prevailing party reasonable attorneys' fees, in the interest of justice, if the court determines that (a) the prevailing party has conferred a substantial public benefit; and (b) (1) the economic interest of the prevailing party is small in comparison to the costs of effective participation, or (2) the prevailing party does not have sufficient resources adequately to compensate counsel.

In dealing with the attorneys' fees problem, Congress should also take the opportunity to clarify existing policies and practices. This overall task has the following components:

1. Attorneys fees should be made explicitly available in all civil rights cases brought under the Constitution or civil rights statutes, as provided by H.R. 9552. (See also S. 2278.) A provision to this effect passed the Senate Judiciary Committee last summer but was not voted on the Senate floor. It should be passed into law.

Other areas of law where fee awards are particularly appropriate to encourage the representation of citizen interests—such as the protection of clean air and water—should be delineated. In such specific provisions, legislation can define with more precision the types of cases in which fees may be awarded, the amount of such fees, etc.

2. Attorneys' fees should be allowed in administrative agency proceedings where representation of citizen interests is important to the public interest. This can be provided on an agency-by-agency basis or through an amendment to the Administrative Procedure Act.

3. Congress should repeal the federal statute (28 U.S.C. § 2412) which prohibits attorneys' fee awards against the federal government. In many cases, citizens serving as private attorneys general file suits in which the government is the defendant or, along with a private party, is co-defendant. In such cases, where the suit is successfuly prosecuted, the government should be treated like any other defendant: a fee recovery should be permitted against the federal government, in the discretion of the trial judge.

4. Congress should hold oversight hearings to assure that fee awards are being set sufficiently high by the courts to make public interest litigation financially viable for lawyers. If less are set significantly below marketplace levels, the congressional policy of encouraging citizen enforcement by providing fee awards would be frustrated. In this connection, Congress should investigate the practice of the Justice Department of urging that fee awards in complex public interest cases be set at unrealistically low levels.

5. Congress should conduct an inquiry into the Internal Revenue Service's rulings which arbitrarily limit the acceptance of fees by tax-exempt public interest law firms. These rulings have a detrimental affect on the expansion of public interest legal services; they discriminatorily single out public interest law firms and impose stringent limits on acceptance of fees, whereas tax-exempt hospitals, universities and the like are permitted to accept fees without limit.

SOME FINAL OBSERVATIONS

Legislative proposals for altering the law regarding attorney's fee awards should be measured against this yardstick: will a change increase access to the courts for unrepresented and underrepresented groups? The above recommendations would help substantially to open the courts and administrative agencies to citizen participation. We urge that Congress deal with this urgent problem first. It is the attorneys' fee award in the context of public interest litigation which requires immediate attention and which involves the largest element of public interest.

The American Assembly on Law and a Changing Society II, convened by the American Bar Association, met last June to consider the state of American law and the challenges of the future. Public interest law was a specific focus of concern: Essential to the solution of future problems is the assurance of fair representation in the decisionmaking process—vindication of the "public interest" in the public and private sectors—and representation of persons and causes who have previously not been effectively represented. These principles have been established and generally accepted. We must complete their implementation.

"Public interest law" is an important recent development. While there may be ambiguity of definition and scope, a serious void in our legal institutions is being filled by the activities of lawyers who engage in representation of groups and interests that would otherwise be unrepresented or underrepresented.

In enumerating needed support measures, the Assembly Report called for: Enactment of legislation permitting courts and administative agencies to award attorneys' and expert witness' fees to parties who vindicate significant public attorneys' and expert witness' fees to parties who vindicate significant interests in court or administrative proceedings. . . .

Some pending proposals, such as H.R. 9093, go considerably beyond this focus. Some would revise the American rule regarding attorney's fee awards. It can be argued that the courts should be given generalized authority to transfer fees from one litigant to another in any lawsuit; and it can be urged that the losing

party should routinely be required to bear the winning parties attorneys' fees. These basic alterations in the American litigation system should not be undertaken, however, without a much more thorough study of their practical implications. There is at this time an insufficient data base to justify such experimentation, nor has there been sufficient consideration given to such a change, within the legal profession or without.

CONCLUSION

We appreciate the opportunity to present our views regarding the issue of attorneys' fee awards in public interest proceedings. The organized bar has recognized that public interest legal services must be made more broadly available. The legislative activity evoked by the Alyeska decision is an encouraging sign. A prompt congressional decision to authorize reallocation of the costs of litigation to encourage private attorneys general could materially improve the quality of justice, the availability of legal services, and the vigor of the adversary process.

TESTIMONY OF CHARLES R. HALPERN, EXECUTIVE DIRECTOR, COUNCIL FOR PUBLIC INTEREST LAW; ACCOMPANIED BY JUDITH BARTNOFF, ATTORNEY

Mr. HALPERN. The Council for Public Interest Law is an organization established in January 1975 to help assure that adequate legal representation is available to groups and individuals who lack the resources and ability to purchase legal services, particularly in cases of broad public importance.

The council is a joint venture of the American Bar Association, the Ford Foundation, the Rockefeller Brothers Fund, and the Edna McConnell Clark Foundation. These foundations have been active in supporting legal services for previously unrepresented groups, and the American Bar Association has, over the past 10 years, played a leadership role in efforts to extend legal services to groups who are unable to obtain such services.

The council's concerns range into the areas of poverty law, environmental protection, consumer protection, and rights of minorities, the mentally ill, children, and other disadvantaged groups who have traditionally been unrepresented within the legal system. The council's basic goal is to assure that legal services are more broadly available to such groups and, in particular, that adequate financial support is available to subsidize their legal representation.

Over the past 10 years, there have been a number of efforts to expand legal services to groups and individuals who have been unrepresented in the past. In 1965 a Federal program was established in the Office of Economic Opportunity to provide legal services to the poor. In subsequent years, a number of private foundations and private law firms established programs to extend legal services to persons who were unable to afford legal representation.

The impact of this development has been significant. First, the legitimacy of participation in courts and administrative agencies for the poor, for environmental protection groups, for consumer representatives, and similar groups was firmly established. These citizen groups, once given access through legal representation to the courts and administrative agencies, then proceeded to make substantive and important contributions to the decisionmaking process. Through their lawyers, they demanded vigorous enforcement of environmental, consumer, and civil rights laws among others.

In a speech which he delivered to the American Bar Association last summer, Supreme Court Justice Thurgood Marshall aptly summarized the important role that public interest law has come to play. He stated:

> Public interest law is necessary to create a balance to assure that all interests get a fair chance to be heard with the help of a lawyer.

The basic point was perfectly put by Justice Black in *Gideon* v. *Wainwright*:

> That government hires lawyers to prosecute, and defendants who have the money hire lawyers to defend them, are the strongest indicators of the widespread belief that lawyers are necessities, not luxuries.

To paraphrase Justice Black:

> * * * if government and industry need high quality lawyers to represent their interests in our complex society, less well organized or less powerful interests also need to have access to high quality legal representation.

It is this need for high quality legal representation that brings us here today. As I have indicated, Federal subsidy programs and foundation subsidy programs have, in the past 10 years, sought to provide the financing necessary to provide legal services to unrepresented groups. But, these sources of subsidy have not been adequate in the past, nor are they likely to be adequate in the future, to meet the tremendous unmet need.

In recent years, Congress and the courts have increasingly turned to attorneys' fee awards in so-called "private attorney general" cases to assure adequate access to the courts for concerned and interested citizen groups. Basically, this has involved the award of attorneys' fees to citizen groups or to individuals who go to court to seek vindication of broad public rights. To illustrate how attorneys' fees have been thus used, let me briefly describe the case of *Wyatt* v. *Stickney*, a case brought in Federal court in Alabama on behalf of the class of mentally ill and mentally retarded residents in that State's mental institutions.

At the time the suit was filed, some 5 years ago, these mental hospitals and schools—as they were euphemistically called—were custodial institutions in which thousands of citizens were kept in conditions of starkest deprivation. These residents in the institutions for the mentally ill and retarded were, for the most part, not only indigent, but totally incompetent to identify and protect their own rights.

Through their guardians, they succeeded in finding two private lawyers in Alabama who undertook to represent them in an effort to clarify what their constitutional rights were, and to make sure those rights were respected in the State institutions. Those lawyers worked without fee, literally for years. One lawyer spent virtually full time for 18 months on the case. *Wyatt* v. *Stickney* ultimately resulted in a decision in the district court, affirmed in the court of appeals, establishing that there is a constitutional right to treatment, and setting out with precision and detail what the rights of these inmates in the State institution were.

Now, the court quite properly recognized in this case that no lawyer could undertake a case like this without some hope of compensation. Pointing to the emerging case law providing for the award of attorneys' fees to private attorneys general, the court made a fee award to the lawyers who handled the case. The fee was based on the hours

the lawyers spent on the case, taking into account the substantial public benefit conferred on all the citizens of Alabama by the *Wyatt* decision.

I cite this case as one which is representative of a growing body of case law in the late sixties and early seventies. This case law development was brought to an abrupt halt, as the subcommittee knows, by the Supreme Court's decision in the *Alyeska Pipeline Service Co.* case on May 12, 1975.

In that case, the Supreme Court held that the Federal courts lacked the authority to award attorneys' fees to successful plaintiffs in public interest matters without the express authorization of Congress for such an award. The Court was not making a judgment on the policy value of attorneys' fee awards to private attorneys general—quite the opposite. The Court recognized that "the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances." But the Court held that Congress had withdrawn the power to make such awards from the Federal courts by virtue of an 1853 statute relating to the award of routine litigation costs in the Federal courts.

The Court said that any change in that 1853 statute was within the legislature's province. It is that decision of the Court in *Alyeska* which makes it appropriate and necessary for Congress to address this question at this time.

In thinking about a suitable legislative response to the *Alyeska* decision, I think it is important to look first at what the impact of *Alyeska* has been. Let me cite another situation in which a lawyer undertook to represent a traditionally unrepresented group to suggest the consequences of *Alyeska*.

This case occurred in Seattle, and was litigated in the Federal court in the State of Washington. A group of 400 poor people who were about to be put out of their homes by an urban freeway project sought out a lawyer to represent them in opposing the construction of this freeway through their neighborhood. They were able to raise among themselves slightly more than $4,000. With that money, they were able to persuade a lawyer to take their case. That lawyer, again looking to the developing case law on attorneys' fee awards, hoped for a supplemental fee if he prosecuted this case successfully, he obviously had enough confidence in the case to take it on with that contingency.

After 21 months of litigation, the district court ruled that the freeway had been illegally planned because community groups had been excluded from the planning process, and because a Federal statute governing such matters had been violated. The court invited the lawyer to submit a fee application, but before the court had an opportunity to pass on that application, the *Alyeska* decision came down.

The lawyer who brought the case estimated that his handling the case cost his firm $56,000. As a result of the *Alyeska* decision, that firm has already cut back on its public interest work. When other groups have approached this lawyer with requests for him to represent them in similar matters, he has been forced to turn them down.

In refusing one group that was concerned about a highway being planned along the Oregon coast, he explained:

> I just spent 2 years of my life fighting a freeway. As a result of that case, the right of citizens to participate in decisions that critically affect their lives was established, the homes of thousands of people were saved, the taxpayers were

saved millions of dollars, and I was paid less than $3 an hour. I can't afford to do it again.

Other lawyers who have handled similar public interest cases functioning on behalf of clients as private attorneys general are making similar reassessments of their own work and their own commitments.

For example, the lawyer who handled the mental patients case in Alabama, to which I previously referred, stated:

In light of *Alyeska*, our firm will find it nearly impossible to become involved in complex civil rights or public interest litigation where no statutory right to the award of attorneys' fees exists.

The urgent need then, Mr. Chairman, is for remedial legislation promptly to remedy the adverse consequences of the *Alyeska* decision.

Let me make some concrete recommendations, if I may.

The first, and most urgent, need is to restore to the courts the discretion to award attorneys fees in public interest cases where the interests of justice are served by such an award. On page 11 of our prepared testimony, we suggest a simple statute which would have that effect. That, in our view, is the most pressing need.

There are several other steps that Congress should also consider at this time. However, in thinking about responses to *Alyeska*, and about ways to assure more adequate public access to the courts and administrative agencies, it makes sense to concentrate on those areas where the need is most dramatic. We concur with Father Drinan in his H.R. 9552, that the civil rights area is one where there is an urgent need for prompt legislation to permit attorneys' fee awards in cases to enforce the civil rights laws.

We also suggest—although it is probably outside the scope of this subcommittee's jurisdiction—that the environmental area is another in which there is an urgent need for legislation to provide for attorneys' fee awards.

Second, we think that Congress should authorize attorneys' fee awards in the administrative process. Again, Father Drinan has presented a bill which would provide for fee awards when courts review administrative agency actions. But there is also a need for attorneys' fees to support public participation in the administrative agencies.

There is, for example, a need for environmental protection groups to be heard within the Environmental Protection Agency. We know that affected industries present their cases to the agency; the citizen groups whose interests are equally affected should also have an opportunity to present their viewpoints. If that opportunity is to be meaningful, attorneys' fee awards in such administrative proceedings are critical.

Third, we would urge that Congress repeal the Federal statute, 28 U.S.C. section 2412, which prohibits attorneys' fees awards against the Federal Government. In many cases, citizens suing as private attorneys general will sue the Government as a defendant, or as a co-defendant along with a private party. If the interests of justice dictate that an attorneys' fee be awarded, it should be within the power of the court to make such an award against the Federal Government as well as against any private defendant.

Fourth, we would urge that Congress hold oversight hearings to assure that fee awards are being set sufficiently high by the courts to make public interest litigation financially viable for lawyers.

For example, under title VII of the 1964 Civil Rights Act, there is now legislative authority for attorneys' fee awards. But, fee awards in many large and complex cases have been set at levels that are unrealistically low. Any lawyer knows that big, complicated cases cannot be handled for a rate of $20 per hour; this is common knowledge to any lawyer in any part of the country. And yet on many occasions the Justice Department has urged that fees be set at that level in cases where the Federal Government is involved, and the courts have set fees at levels that low.

The Congressional policy reflected in statutory attorneys' fee award provisions is effectively frustrated when fee awards are set so low. We would urge that, among other things, an inquiry be directed to the Justice Department to try to determine how they decide what is a reasonable fee in these cases, and why they are urging the courts to set fees at levels which would make such cases totally impractical for lawyers to undertake.

Finally, we suggest that Congress conduct an inquiry into the Internal Revenue Service's rulings which arbitrarily limit the acceptance of fees by tax-exempt public interest law firms. Many of the lawyers providing representation to previously unrepresented groups are working in public interest law firms set up as nonprofit corporations with a tax-exempt status. The Internal Revenue Service has set out a set of arbitrary rules which prohibit such groups from accepting client-paid fees and severely restrict their ability to accept court-awarded fees. It would be appropriate, I think, for a committee concerned with adequate representation in the Federal courts to address an inquiry to the Internal Revenue Service that would question this arbitrary and unnecessarily restrictive policy.

I would like to end my presentation, before I make myself available for questions, by noting briefly the Final Report of the American Assembly on Law in a Changing Society which was convened by the American Bar Association in June to assess the state of American law and to try to anticipate future developments and future problems. The subject of public interest law and the subject of attorneys fees were singled out for particular consideration.

With regard to public interest law, the Final Report of the American Assembly noted this important recent development and stated:

> While there may be ambiguity about its precise definition and scope, a serious void in our legal institutions is being filled by the activities of lawyers who . . . engage in representation of groups and interests that would otherwise be unrepresented or underrepresented.

The American Assembly then went on to set out a series of recommendations to assure that these legal services are more broadly available, and that more lawyers are encouraged to take on representation of the indigent and of those whose interests are too diffuse or who have too little financial interest to be in a position to retain a lawyer.

Also, among the recommendations of the American Assembly was this:

> Enactment of legislation permitting courts and administrative agencies to award attorneys' fees and expert witness fees to parties who vindicate significant public interests in court or administrative proceedings.

Precisely this kind of remedial legislation is what is urgently needed at this time.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Halpern. One of your recommendations is that the Congress should repeal Federal statutes which prohibit fee awards against the Federal Government. You also recommend that Congress hold oversight hearings to assure that the awards are being set by the courts at a level which makes public interest litigation financially viable for lawyers. Would you please explain what you mean by "public interest" litigation? Apparently it is litigation against other parties rather than against the Federal Government.

Mr. HALPERN. Let me give you an example, Mr. Chairman, of a case brought against the Federal Government, because attorneys' fee awards against the Federal Government are permitted in a limited range of cases. For example, in employment discrimination cases against the Federal Government, attorneys' fee awards are authorized.

One case now pending in the Court of Appeals in the District of Columbia is such a case. A lawyer in Washington undertook the case on a contingent basis, and was successful in proving that the Department of Justice, in fact, had discriminated against a female employee on the basis of sex. After a rather lengthy proceeding, the employee was awarded back pay and a raise in grade. The lawyer then sought an attorneys' fee award, at a level of $75 an hour. His normal billing rate was up to $50 an hour and, since this was a contingent matter, what he was seeking was in lawyer's terms, a relatively modest bonus for the contingency factor.

The Justice Department in that case first contested the lawyer's right to be awarded a fee at all. The Department gave in on that point, but argued in the Court of Appeals that the amount of the fee should be reduced. At one point, they argued that the fee should be set at the rate of $20 an hour for out-of-court time and $30 an hour for in-court time. Later they argued that the ceiling should be the normal billing rate of $50 an hour, notwithstanding the fact this was a contingency case, and that the "normal rate" is for cases where a fee commitment is made in advance. One of the judges in the Court of Appeals, in questioning the Government's lawyer during argument 2 months ago, said to the Justice Department lawyer: "What you are really saying when you urge these low fees is that you want to put these lawyers out of business, is it not?" And the Justice Department, in my view, had no adequate explanation, no adequate response to that question. This leaves a very large question in my mind, and I think it should be a question that this subcommittee inquires into.

Mr. KASTENMEIER. In other words, you are urging repeal of the Federal statute which generally prohibits attorneys' fees awards and you propose that if the general prohibition is repealed, the awards should be sufficiently high to make the attorney's involvement a viable exercise.

Mr. HALPERN. That is correct.

Mr. KASTENMEIER. Let me very briefly explore the basis for attorneys' fees. A certain class of people can have access to attorneys. Among them are the poor, certain consumer groups, environmentalists, civil rights groups, and constitutional rights groups. In recent years the activities of these groups have been underwritten by private foundations, by the legal profession itself which either reduced its fees or performed totally pro bona work, by certain State entities

such as legal services corporations, and by other Federal or State entities which help underwrite the cost of legal services.

The award of attorneys' fees in certain cases would be another basis for making legal services accessible to these groups. Is that not basically correct?

Mr. HALPERN. That is basically correct, Mr. Chairman.

Mr. KASTENMEIER. In other words, we might well look at it in its entirety. Is this justifiable in terms of making legal services accessible to a very large group of people—to entities who, for public policy reasons, require preferential treatment in obtaining access to the legal system?

One of the problems we have in looking at it generally is that even if we accept the fact that some groups should be awarded attorneys' fees to assist them in obtaining access to the legal system, what are the appropriate limitations on the award of fees? Should the award be limited to civil rights cases only, to constitutional rights only, or should they extend beyond that to public interest law, to cases in which the litigant is acting as a private attorney general. Or should the award of fees also be permitted in cases such as those suggested by Mr. Crane and by Mr. Andrews?

At what point do we stop? How radical of a change in the traditional American system can we go to? These are very difficult questions and I would ask your comment on the latter. How far can we go? How wide should the exception be which would grant attorneys' fees to the prevailing party?

Mr. HALPERN. We would urge that the subcommittee focus on that area where the need is greatest, and that is the area of private attorneys general. Let me stress here that we are not really talking about a new departure in American law. We are talking about the law as it was widely understood in most of the U.S. circuit courts on May 1, 1975. We want to return to the situation where the courts had discretion to award attorneys' fees in cases where a private litigant conferred a substantial public benefit by bringing a suit that was not primarily for his pecuniary advantage.

The other subsidies that you have mentioned for bringing unrepresented groups into the courts are not sufficient, nor are they going to be sufficient. It is really a mistake for us to be satisfied with a Federal judicial system which relies on the discretionary grants of private foundations to assure that all segments of the population have access to the courts. We must have a court system, and rules for governing those courts, which will assure access for all citizens on their own, without looking to the Board of Trustees of the Ford Foundation to shore up a sagging process.

The issue is not one of preferred standing or preferred access for unrepresented groups and those who are too poor to hire their own lawyers, but only a sufficient subsidy to bring them up to the level of wealthier persons who can hire a lawyer and go into Federal court to vindicate their rights. The attorneys' fees device is, it should be noted, a peculiarly flexible technique for underwriting participation in federal courts.

After all, we are talking about fee awards after a case has been litigated, after a Federal judge has had an opportunity to evaluate the performance of the lawyers, and after he has decided on the merits

that the plaintiff was right on the law and on the facts in the suit filed. Our suggestion, therefore, is that the subcommittee's primary focus be on the private attorney general cases. Those bills which look to the more basic question of the so-called American rule for the allocation of the costs of litigation should wait; there is no urgent need there. There has been insufficient study, in our view, of the practical consequences of a broad scale tampering with the American rule to take such legislative action at this time.

Our preferred approach to the fee awards to private attorneys general is the omnibus approach. We would hope, however, that Father Drinan's bill and the other bills which look to particular subject matter areas also get priority attention.

Mr. KASTENMEIER. My last question is, Which bill do you prefer? Is there a single bill which best encompasses the approach that you have suggested?

Mr. HALPERN. With regard to the civil rights area, we like Father Drinan's bill, H.R. 9552, best. With regard to the omnibus bill, we have reservations about what is now before the subcommittee and prefer the kind of approach reflected in our language on page 11 of my prepared statement.

Mr. KASTENMEIER. At the top of page 11 in your prepared statement you have the text of what could be a bill, but which has not yet been introduced?

Mr. HALPERN. That is correct. It seems to us to be tailored to the dimensions of the present need.

Mr. KASTENMEIER. Thank you.

I yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. I am having some trouble with your problems of definition I guess. Suppose you have two interveners in a suit; one that takes the position that a particular dam should not be built; another that takes the position that a certain dam should be built, and they both intervened on the basis of public interest. They do not represent any large corporations or utilities. One takes the position that if the dam is built, we will lower the utility rates, and therefore benefit a large body of people. The other takes the position that although that may be true, it is going to damage the environment as well as the basic ecological balance of the particular area.

Those positions can be justified on a public interest basis, depending on how you define it. I suppose you could not really make a distinction between either one of those, and that both positions are positions that are entitled to be advocated, even though one position may coincide with the position of the utility which is going to build the dam. Someone is going to lose and someone is going to win.

No. 1, should the award be confined only to the winner? And No. 2, if not, how do you prevent the public utilities from informing an organization called Friends of the Consumer or something and intervening on that basis, thus financing the utility's legal fees?

Mr. HALPERN. The virtue of the attorneys' fee approach is that it leaves a great deal of discretion to the judge who decides the case. Only one party is going to prevail in the type of situation you suggest. And in our language, we indicate that it is the prevailing party whose fee, in the discretion of the court, can be awarded.

Mr. PATTISON. Let me interrupt a second. It is true that your language talks about the prevailing party. But let us take a case where a public interest firm is representing some consumers in a rate case. They take the position that the rate should not go up, but the utilities say that the rates should go up and then somewhere in between the court makes the decision. Now, who is the prevailing party?

Mr. HALPERN. In a case like that, I think we have to rely on the discretion of Federal judges to evaluate what public benefit is conferred by the participation.

Mr. PATTISON. But if you say prevailing party, we might cut out that person who got, perhaps, 90 percent of what he was looking for on behalf of the public.

Mr. HALPERN. You run into definitional problems there. The fact is that the Federal courts have shown remarkable good judgment and remarkable capacity to be flexible in evaluating who it is who prevails in a case like that. If it is 90 percent, many courts have been willing to say, well, you really prevailed here on the merits and we will award a fee. That is what the courts have done, in fact.

Mr. PATTISON. So, we have to be careful in defining "prevailing." If we are going to use that term, we have to make that something other than absolute.

Mr. HALPERN. Yes. I think that whatever record is made, reports prepared by the subcommittee and the like, should make very clear that the prevailing party does not necessarily mean prevailing on 100 percent of the initial position urged.

Mr. PATTISON. Should there be a distinction between the nonprofit public interest law firm, and General Motors? Let us suppose General Motors takes the position that they are not only representing the interest of General Motors, but really the interest of all the people. They may be fighting the imposition of additional pollution control standards and they say:

> Listen, this is not an important thing. The amount of pollution that comes out of these exhausts is insignificant. It is getting absorbed by the atmosphere. And what this is really going to do is cost the American public a lot of money in terms of gasoline, which we are running out of.

So, they take a position and sure, they hire their own high-priced law firm, but let us suppose they prevail in a case like that and then they say, "Look, we are entitled to being paid because we have won. We have saved all the people of the United States a lot of money, even though that each one of them was saved only an insignificant amount."

Mr. HALPERN. Again, the courts have shown considerable good judgment and discretion in distinguishing between General Motors and a citizens group in Bogalusa, La., which is aggrieved over a civil rights problem or an environmental problem. The approach we suggested on page 11 focuses first on the financial resources of the party who is seeking an attorney's fee award and second on the economic interest of the prevailing party. So, in the case you have posited, General Motors, whatever it thought about the good of America, would still have a basic financial interest and that would, in most cases, preclude an award of attorneys' fees to General Motors.

Mr. PATTISON. Would it not be possible for General Motors to hire its own lawyer and also interest another group of people, representing

not General Motors but all the people in similar situations, to buy gasoline and then to let their part of the lawsuit carry very little of the expenses of the litigation. The public interest group could then try to get a legal fee. Let the other one pay for the lawsuit, rather than General Motors paying the expenses.

I am not talking about a collusive situation. I understand I am putting it in those terms, but you might very well be able to interest, there might very well be people who are interested in bringing a lawsuit, and it would be very difficult to establish any kind of collusion. Obviously if there was a collusive arrangement, you could establish it.

Mr. HALPERN. Under those circumstances, I think a Federal court would inquire whether a substantial public benefit was conferred by this other group that was basically just echoing General Motors' position. It might conclude that General Motors could advocate that position well enough on its own, and therefore deny a fee.

Again, we must remember that we are not talking about a new doctrine in the Federal courts. We are talking about a doctrine that has been tried over the past years. I think this experience has shown that the kinds of problems you are suggesting have, for the most part, been de minimis, and manageable by the Federal courts.

Mr. PATTISON. So, the area of discretion is really very important.

Mr. HALPERN. I think it is. We have the word "may," not "shall," in our statute. I think this is critical, given the complexity of the interests involved in this area.

Mr. PATTISON. If the judge decides you are not entitled to any legal fees, it is very possible you would have a litigable issue.

Mr. HALPERN. That is a possibility.

Mr. PATTISON. To sue the Government on the basis that the Government has abused its discretion.

Mr. HALPERN. There could be an appellate review of that decision, just as there can be review of the decision on the merits.

Mr. PATTISON. You would create some sort of a right, and any kind of a right to litigation is enforceable. I yield.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I am sorry I was unable to get here earlier, though I skimmed through your statement in the meanwhile, and I was here on previous occasions.

There is a problem that comes up in my mind in connection with this, and I would like your comments.

You have made it clear that you tie the assigning of attorneys' fees to "winning"—to being the prevailing party. As a lawyer, you know that often the difference between the evidence of the prevailing party and that of the losing party in a civil action is so little that the court could go either way. I could envision a situation in which the losing party, rather than the prevailing party, might have made some very good points, and under a different judge might have won a case.

Why should that person not receive his attorneys' fees, even though he lost, but he lost by a photofinish?

Mr. HALPERN. I am not prepared to argue that a Federal court should lack the power to award a fee in that case. I am inclined to agree with you that there is a strong argument in such a case, particularly where the defendant may have changed his practices in response to the lawsuit. There is a case in which a fee was awarded—I do not have the

facts precisely, but it involved charges of employment discrimination brought against a southwestern utility—where the company changed its employment practices after the suit was filed. The case was either dismissed or settled, but the court nonetheless, in recognition of the public benefit that resulted from the lawsuit, awarded attorneys' fees to the plaintiff. I think that is appropriate.

Mr. DANIELSON. Even though the defendant prevailed in the action?

Mr. HALPERN. Yes. I am not sure of the precise facts of that case. I could submit a brief memo to the subcommittee for inclusion in the record on that.

Mr. DANIELSON. I would like to have that citation. If you can find it, it would certainly help.

[The information referred to follows:]

WASHINGTON, D.C., *February 13, 1976.*

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: The case discussed in my oral testimony of October 8, 1975, concerning a court-awarded attorneys' fee to a plaintiff who did not technically prevail, is *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). In *Parham*, the plaintiff claimed that he as an individual and blacks as a class were the victims of discrimination in employment on the basis of race, in violation of Title VII of the Civil Rights Act of 1964.

The court found that the plaintiff did not prove that he himself had been discriminated against on account of his race, but that he did establish that Southwestern Bell had systematically discriminated against blacks as a class, at least through the mid-1960's. In the late 1960's, after plaintiff filed his EEOC complaint and subsequent lawsuit, the company voluntarily undertook to implement an equal employment opportunity policy and, as a result, the court found no need formally enjoin the defendant from violating Title VII. The court called the plaintiff's action a "valuable public service," 433 F.2d at 430, and found that the plaintiff's complaint had served as a "catalyst" to prompt the company to undertake its equal employment program. The court accordingly awarded the plaintiff a reasonable attorneys' fee, as a "prevailing party" within the meaning of Title VII. See also *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969) (attorneys' fees awarded in sex discrimination case where no other relief was granted to plaintiff).

I hope that the Committee finds these citations useful. Thank you again for the opportunity to testify before your Subcommittee.

Sincerely,

CHARLES R. HALPERN.

Mr. DANIELSON. If that is the case, the language in the bill you proposed would have to be amended to leave out the words "prevailing party," because otherwise it would prevent the award of attorneys fees in a case such as that to which you just referred.

Mr. HALPERN. The language would have to be changed. Alternatively, this case could be cited in the report of this subcommittee to indicate that this result was intended.

Mr. DANIELSON. You recognize that if we pass a law, the courts are bound by it. If the law refers to "prevailing party," the courts are not going to be able to give fees to the losing party.

Mr. HALPERN. That is right. We would have to change the language. That is quite right, and we should make that change.

Mr. DANIELSON. Following up Mr. Pattison's inquiry, I am going to get away from the General Motors example, because our minds are conditioned to automatically jump in certain directions.

Suppose, instead of worrying about the exhaust emissions, they were worrying about the beauty of the Upper Sacramento Valley. They think it would be nice to protect the virtues of the Upper Sacramento River Valley against encroachments and so on, in the public interest. I think you can say they are financially responsible and that, if they prevail, they confer a great public benefit. All I am doing is taking the ordinary public interest law firm out here and letting it be General Motors—that is, Sir Gallahad for public interest—and they prevail. Should they get their attorneys' fees in this case?

Mr. HALPERN. I have been practicing public interest law for 6 years and I have not seen a case just like that one come along.

Mr. DANIELSON. You are reducing it to personal experience. We are philosophizing here. Now philosophize. What would you think?

Mr. HALPERN. Let me make this point. We are not just talking about public interest law firms; we are talking about lawyers representing clients who are concerned with public interest causes. Let us not make it General Motors.

Mr. DANIELSON. No. We have made it General Motors. You are stuck with it. Let us see what you do; chew on that for a while.

Mr. HALPERN. First of all, I would like to have a look at their corporate charter.

Mr. DANIELSON. We do not have a stockholder derivative action in this case. It has been considered a judgmental decision. Let us bite the bullet. What would you do with it?

Mr. HALPERN. General Motors brings suit and prevails on the merits, in a situation where they have no pecuniary interest.

Mr. DANIELSON. Just the hypothetical case I gave you.

Mr. HALPERN. If they have no pecuniary interest it is a hard case, but I would say that a fee could be awarded in the court's discretion to General Motors in that case.

Mr. DANIELSON. In other words, the financial status of the litigating client would not be a factor?

Mr. HALPERN. We have, on page 11, suggested two relevant criteria. One would make financial position explicitly relevant: Does the party have sufficient resources adequately to compensate counsel? On that one General Motors is out. But our other criterion focuses on the nature of the economic interest of the prevailing party. If the economic interest of the prevailing party is not substantial in comparison to the cost of participation then, in the court's discretion, a fee may be awarded. General Motors would be eligible for a fee award, in the court's discretion, under that criterion.

Mr. DANIELSON. I wanted to bring this out because sometimes we consider these problems under a set of preconceived ideas, and I think you only test the validity of a philosophy when you take it to an extreme. The richest man in the world, let us say J. Paul Getty is the richest man in the world, if he brought an action in the public interest, and the public benefit was conveyed, do you feel the court should have discretion to award him attorneys' fees?

Mr. HALPERN. Yes, sir, I do.

Mr. DANIELSON. And on the loser, you say you can find me a decision which seems to fit my situation. I would appreciate that. I do not know of it, and we obviously need it here.

Thank you so very much.

That is all I have.

Mr. KASTENMEIER. My last question is, apart from the Federal Government, do any of the States have laws which permit such recoveries, to your knowledge?

Mr. HALPERN. In many States there is common law doctrine, as there had been in the Federal courts until May 1975, permitting such fee awards. So the answer is yes, there are such awards in the State courts. In California, in the *Serrano* v. *Priest* case, for example, the public interest lawyers who handled that case over the course of 2 or 3 years were awarded by the State court a substantial fee in light of the significant public benefit conferred.

Mr. KASTENMEIER. So, we are talking about the Federal Government, quite exclusive from practice in State jurisdictions.

Mr. HALPERN. State jurisdictions are quite independent. Moreover, in addition to case law development, some States—like California, in fact—are now considering legislation similar to the legislation being considered by this subcommittee to establish statutorily the power of the courts to award attorneys' fees.

Mr. KASTENMEIER. Thank you very much, Mr. Halpern.

Mr. DANIELSON. Mr. Chairman, may I have another question?

Mr. KASTENMEIER. I yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Need it be restricted to plaintiff's attorneys? How about a defendant's attorney?

Mr. HALPERN. Attorneys' fees could be awarded to the defendant's attorney in cases where the plaintiff's claim was frivolous, or was not made in good faith.

Mr. DANIELSON. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Halpern, for your testimony this morning.

Now the Chair would like to call a panel of witnesses, which will be the third set in five witnesses this morning. Mr. John M. Ferren, who is partner in charge of community services department of Hogan & Hartson of this city, and Mr. Bruce Terris.

Mr. Ferren and Mr. Terris.

[The prepared statement of Mr. Ferron follows:]

STATEMENT OF JOHN M. FERREN

Mr. Chairman, I am John Ferren, a lawyer in private practice from the District of Columbia. I am engaged in various sorts of public interest litigation as the partner in charge of the Community Services Department of my firm. Both you, Mr. Chairman, and Mr. Seiberling have invited me to comment on various bills now before Congress authorizing the awarding of attorneys' fees in appropriate cases. I am most pleased to do so.

In light of the Supreme Court's decision last May in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 95 S.Ct. 1612 (1975), it is now clear that a plaintiff who goes to court to enforce civil rights, or to represent consumers, or to protect the environment, or to assert other interests of the general public, cannot expect to recover attorneys' fees, even if successful in the suit, unless those fees are expressly provided for by statute. I am personally convinced that unless such attorneys' fees statutes are enacted by Congress, many civil rights and public rights will remain unenforced. Large law firms, such as my own, can be expected to undertake a substantial number of cases, without a fee, to fulfill their professional responsibility to increase the availability of legal services; but these law firm resources will not even come close to meeting the

need. If the public's need for legal resources *is* to be met, there will have to be incentives, through the mechanism of court-awarded attorneys' fees, to involve the widest possible participation of the private bar in civil rights and public interest cases. Thus, I very much favor legislation [1] which would authorize the federal courts to award attorneys' fees to private litigants against the government, as well as to parties involved in private disputes, such as civil rights cases, when the award of such fees would be equitable.

Others at this hearing have elaborated upon reasons why such fee awards are necessary to assure that legitimate claims are actually brought. I would therefore prefer to comment on several concerns I have about the language in most of the bills pending before the House.

In the first place, the bills typically incorporate the language of other statutes [2] that provide for the awarding of reasonable attorneys' fees to a "prevailing" plaintiff or party, other than the United States. I believe that some courts could erroneously interpret this standard to mean that before a plaintiff can be deemed to "prevail" and recover attorneys' fees, the case must go all the way through litigation to a final judgment on the merits. That interpretation, of course, would obviously be counterproductive. Often a government agency will settle a case before trial on terms favorable to the plaintiff, or will moot the case after suit has been filed by capitulating to the plaintiff. There have been cases, for example, in which agencies have issued overdue regulations just before the hearing on the suit to compel their issuance has begun. In such situations, attorneys' fees ought to be awardable for the work done to date. Otherwise, the possibility of mootness would deter many prospective plaintiffs and their counsel from bringing meritorious suits; and even when suits were brought, settlement discussions would obviously be discouraged by the unavailability of fees unless the case went to judgment.

There are other problems with a "prevailing" party standard. For example, if a plantiff were to prevail on some but not all counts in the complaint, or were considerably to compromise the claim, would only a portion of the attorneys' time be compensable? Or what if a plaintiff loses but can show that the public has nevertheless benefited from the suit? For example, in *Citizens Ass'n of Georgetown* v. *Washington*, 383 F.Supp. 136, 145 (D.D.C. 1974), the plaintiffs failed to prove that the 1977 air quality standards under the Clean Air Act would be violated by the construction of two buildings on the Georgetown waterfront; but the court awarded the plaintiff attorneys' fees against the municipal co-defendant because the litigation had demonstrated "to the public a record of inaction and action delayed on the part of the District of Columbia government in implementing the Clean Air Act." 383 F.Supp. at 145.

Because of the issues left unresolved by the "prevailing" party language of the proposed legislation, I urge the Committee to redraft the bills along the lines of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h–2, and the Noise Control Act of 1972, 41 U.S.C. § 4911(d), which simply permit the court to award the costs of litigation, including reasonable attorneys' fees, "whenever the Court determines such an award is appropriate." In amplifying this language, the legislative history should underscore the intention of Congress that attorneys' fees are awardable in cases that are settled or mooted by the federal government's outright compliance before judgment. The Senate Public Works Committee Report on the Clean Air Act Amendments of 1970, for example, made clear that litigation costs are awardable under that Act "to plaintiffs in actions which result in successful abatement but do not reach a verdict." S. Rept. No. 91–1196, 91st Cong., 2d Sess., at 38. Similarly, "[t]he court may award costs of litigation to either party whenever the court determines such an award is in the public interest without regard to the outcome of the litigation." S. Rep. No. 91–1196, *supra*, at 65.

It is important, too, for the legislative history to make clear that the plaintiff in a mooted case does not have the burden of proving that the filing of the suit actually caused the government to capitulate. It would require incredible amounts of time and expense for the courts as well as the parties to probe the thought processes of agency officials who violate the plaintiff's rights, then

---

[1] See H.R. 8220, 8221, 8368, 8742, 8743, 9093, and 9552, 94th Cong., 1st Sess.

[2] *See* Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a–3(b) and § 2000e–5k; the Fair Housing Act of 1968, 40 U.S.C. § 3612(c); the Emergency School Aid Act of 1972, 20 U. S. C. § 1617; the Clayton Act, 15 U.S.C. § 15; the Communications Act of 1934, 47 U.S.C. § 206 and the Freedom of Information Act Amendments of 1974, 5 U.S.C. § 552(a)(4)(E).

capitulate after suit is filed, but claim that they had always intended to comply and that the suit had no effect on their eventual decision to do so before the court could hear the case on the merits. It may seem unreal, but federal agencies and the Justice Department have seriously urged this argument. I hope that this Committee will conclude that a plaintiff, in claiming fees for a mooted case, should only have to demonstrate that the case was "legitimate," *see* S. Rep. No. 91–1196, *supra*, at 38, or was meritorious in the sense of its ability to withstand a motion to dismiss, *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3rd Cir. 1970), *cert. denied*, 412 U.S. 918 (1970). Fees would then be awardable to the plaintiff, unless the defendant could sustain the burden of demonstrating "special circumstances [that] would render such an award unjust." *See Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

I should add that if the Committee prefers to keep the "prevailing" party language, the Committee's report can still make clear that a court may deem a plaintiff to prevail in a case mooted by defendant's capitulation, and that the defendant has the burden of demonstrating why fees should not be awarded to the plaintiff in that situation.

Another important question is whether recovery of attorneys' fees should be limited to the plaintiff, or should be available instead to any party. I personally believe that it is a bad policy to permit the United States government to recover attorneys' fees against private litigants, for in my judgment that would deter the kinds of civil rights and public interest litigation that attorneys' fees statutes are intended to encourage. Thus, I very much agree with the approach in several of the bills before this Committee that provide for the awarding of attorneys' fees to a plaintiff or party, "other than the United States." Any private party defendant, however, as a matter of fairness, should be permitted, in the court's discretion, to recover attorneys' fees from plaintiffs who can be shown to have filed a frivolous suit solely for the purpose of harassment. The possibility that a defendant can recover attorneys' fees, of course, is likely to deter civil rights or consumer litigation unless the plaintiff can be sure that attorneys' fees will not be awardable to a defendant in the absence of unquestionable harassment. It would clarify and strengthen a bill, therefore, if this standard for recovery of fees by a defendant were written into the legislation.

Finally, one other substantive aspect of the pending bills should be clarified. Several of them authorize the award of attorneys' fees, but do not cover the other costs of litigation. It is true that 28 U.S.C. §§ 1920 and 2412 permit taxation of costs, including costs against the United States or any of its agencies or officials, so perhaps the drafters of the bills have assumed that these provisions cover the point. But not all costs of litigation, such as expert witness fees and travel expenses, are taxable under those statutes. I urge the Committee to agree that *all* the reasonable costs of litigation, not just attorneys' fees, should be covered by the pending bills. Otherwise, the very point of the bills may be defeated for cases in which typical though nontaxable litigation costs are likely to be heavy, and the plaintiff has no prospect of financing them absent a reasonable hope of recovering costs from the defendant.

Thank you very much, Mr. Chairman.

STATEMENT OF BRUCE J. TERRIS

By way of introduction, I am a private attorney who heads a law office consisting of eight attorneys. While I personally consider the label as misleading, we have what is commonly referred to as a public interest practice. Most of our work consists of environmental, employment, and civil liberties cases. As a result, we have considerable experience in situations where the statutes specifically provide for attorneys' fees, where attorneys' fees might have been payable until the Supreme Court decided the Alaska pipeline case, and where no attorneys' fees should have been recovered under any existing legal theory.

I think it is important to keep constantly in mind the purposes of requiring the payment of attorneys' fees. It seems to me that there are two basic reasons: First, to ensure that statutes passed by Congress are actually enforced and second, to allow persons without sufficient financial resources reasonable access to the courts. I would like to discuss briefly each of these purposes.

We have learned increasingly in recent years the wide gap between the statutes adopted by Congress and their enforcement by the Executive Branch. In situation after situation, the courts have concluded that federal agencies have failed

to comply with the law. Sometimes the law has not been entirely clear and the position of the federal agency was at least reasonable. In other situations, there has been a flagrant refusal to comply with the clear language and intent of Congress. In both circumstances, citizen suits were essential to ensure that the will of Congress was actually carried out.

The second purpose of attorney fee legislation is to ensure access to the courts for all American citizens. Few people appreciate the cost involved in bringing major litigation in this country. My office bills at between $30 and $40 an hour, which is far below the market rate in the District of Columbia. Yet, we have found that major litigation, just on the district court level, requires $5000 for the simplest of cases and generally between $15,000 and $40,000. Obviously, there are few persons or even organizations which can afford such costs.

As a result, numerous cases to enforce federal statutes are not brought simply because of lack of funds. I have frequently turned away persons who wanted to bring suits, which I regarded as having a probable or at least substantial chance of success, because an individual or organization simply did not have the thousands of dollars which were necessary. Even major organizations which have significant resources are forced to limit their litigation to a relative handful of cases and cannot bring other strong and important cases.

The American legal system is based on the belief that the courts offer, through the adversary process, a fair procedure for settling disputes. The sad fact is that, as a practical matter, our courts are closed completely, or at least partially, to millions of people. I emphasize that these are largely middle-income Americans, the large majority of our citizens who are neither so poor that they can receive free legal assistance nor so affluent that they can bear the huge costs of litigation.

Congress has increasingly become aware of the crucial importance of providing in individual statutes for attorneys' fees. Attorneys' fee provisions have consequently been written into the employment sections of the Civil Rights Act, the Freedom of Information Act, and numerous environmental statutes.

I would strongly urge that this trend should be continued and accelerated. One method would be to adopt a comprehensive bill covering numerous statutes which do not contain attorneys' fees provisions and which, based on past experience, particularly require enforcement through citizen suits. I would especially stress the need for inclusion of civil rights statutes and the National Environmental Policy Act. However, I feel certain that further analysis would substantially add to this list.

I would strongly urge, however, that Congress not continue the practice of adopting attorneys' fee provisions statute-by-statute. I believe it is far preferable to adopt general legislation which provides for the payment of attorneys' fees to any party who brings suit or seeks judicial review to enforce any federal statute or any provision of the Constitution and who either prevails or otherwise provides public benefit. I do not see why a distinction should be made between various federal statutes. It seems to me that Congress and the public have a vital interest in ensuring that all federal statutes and the entire Constitution are fully complied with.

I would also like to remind the Committee that the need for payment of attorneys' fees is not limited to court litigation. It is equally important for attorneys' fees to be available in proceedings before administrative agencies. Congress has recently authorized one million dollars for payment of attorneys' fees and other costs in FTC rulemaking proceedings. This concept is fully applicable to other agencies and other kinds of proceedings. Regardless of the agency and kind of proceeding involved, attorneys' fees should be payable if a party has provided a public benefit.

I would urge that legislation be adopted covering proceedings both before the quasi-independent agencies and ordinary executive agencies. Such legislation should include adjudicative as well as rulemaking proceedings. For example, it should apply to license proceedings before the FCC, ratemaking procedures before the FPC, Forest Service procedures involving the right of appeal, and grievance hearings of federal employees. In circumstances such as FCC license proceedings and FPC ratemaking proceedings, where corporations are requesting substantial benefits, the attorneys' fees should probably be payable by the corporation rather than by the federal government.

I am sure the question will be raised whether the payment of attorneys' fees in administrative proceedings might be subject to abuse. Of course abuse is always possible just as in the payment of attorneys' fees by a court. However,

the statute authorizing the payments of attorneys' fees by the FTC gives full control to that agency. It is hardly likely that such control by the administrative agency will result in undue generosity. If anything, the contrary is likely to be true.

In addition, I would urge that, both in court litigation and in administrative proceedings, attorneys' fees should be payable only to those who either could otherwise not afford legal representation or the economic interest of the party in the proceedings is small in comparison to the cost of representation. Such a provision would prevent the payment of attorneys' fee to those who can easily obtain legal representation through their own resources.

I would like to emphasize that I do not believe that appropriate legislation should require a long time to draft and consider. The issue before you is not the American rule concerning attorney's fees. On the contrary, I would strongly urge that Congress not overturn the American rule. If all costs of the prevailing party were normally payable by the losing party, this would have a devastating effect on the opportunity of ordinary Americans and citizen organizations to bring suit. Only the most affluent would dare to go to court.

In recent years and months, a variety of proposals, often trivial or meaningless, have been made concerning how this country should celebrate its bicentennial. I would suggest that the best birthday present that Americans can give themselves is to take our ideals and put them into practice. A good start would be to assure the millions of ordinary Americans that they can go to court to enforce the statutes which Congress has passed and can participate in the administrative proceedings of their government. A comprehensive attorneys' fee bill would go far to secure this basic right.

TESTIMONY OF JOHN M. FERREN, COMMUNITY SERVICES DEPARTMENT, HOGAN AND HARTSON, WASHINGTON, D.C.; ACCOMPANIED BY BRUCE J. TERRIS

Mr. FERREN. Mr. Chairman, I am John Ferren.

I will not read the statement I have submitted for the record, but I would like to highlight a few points. I suspect that Mr. Seiberling and you, Mr. Chairman, invited me here today because I spend most of my time as a partner in charge of a pro bono or community services department in a large law firm here in the city. In this connection, the point I would like to underscore is that, despite the fact that we contribute five full-time lawyers to pro bono activities without legal fees being charged—and these five only account for about 40 percent of the firm's total pro bono effort—this is merely a drop in the bucket in terms of the need in this country for legal resources to be brought to bear on problems of civil rights, consumers' rights, and especially legitimate claims against Federal and State governmental agencies. So I come here as witness to the fact that many of us are spending a lot of time on community service lawyering and yet feel we are losing the fight in terms of meeting the need for legal services to people around the country. I personally feel very strongly that through the mechanism of attorneys' fees statutes of the sort that are being considered by this subcommittee, we will begin to develop the widest possible participation of the private bar in areas of public interest, civil rights, and consumer representation where legal assistance is generally lacking.

Others, of course, are making the case for that. I would merely like to highlight a couple of comments in my prepared testimony that particularly were called to mind by the colloquy between members of the subcommittee and Mr. Halpern. First, I feel very strongly, as Mr. Pattison and Mr. Danielson were suggesting, that the "prevailing party" standard that is incorporated in most of these bills is too

narrow. I am acquainted with a number of situations where lawyers have filed suit against a Federal agency to compel the issuance of regulations when statutory deadlines have been missed. Just before the case has gone to hearing on the merits, the Government has capitulated, the case has become moot.

There are other situations where the case is settled and the question of attorneys' fees drops out, even though the statute may have provided for attorneys' fees to a prevailing party.

So, I think it is terribly important, as Mr. Halpern was saying, that we have the widest possible discretion in the courts in mooted case situations or in settled case situations to award attorneys' fees when appropriate.

I think that point cannot be stressed too heavily. The Clean Air Act and the Noise Control Act are examples of statutes that do not have the "prevailing party" language, but merely authorize the court to award fees to any party when it would be appropriate.

I might say that under the Clean Air Act, Mr. Danielson, Mr. Terris—on my right at the table—did bring a case against the District of Columbia government and a couple of private corporations that wanted to put some buildings up on the Georgetown waterfront. He lost the case, but he still was awarded attorneys' fees. I put a citation of that case into my prepared testimony for the record, because the court found that in bringing the action Mr. Terris helped reveal dilatory tactics on the part of the District of Columbia government—an unwillingness to pursue its own enforcement obligations—and that a public benefit accordingly was conferred.

If you have prevailing party standard and thus limit the recovery of attorneys' fees to those who clearly prevail, then, of course, negotiations toward compromise settlement are going to be deterred. An attorney who takes a case is going to take everybody through a court proceeding that might be unnecessary. I encourage you to eliminate the prevailing party terminology and move to the Clean Air Act or Noise Control Act language containing the basic concept that whenever the court determines an attorneys' fee award is appropriate, it can make such an award. In that way you get away from the problems of how to apply the "prevailing party" standard when you win on one count and lose on three, or there is a compromise.

The only other point I would like to underscore is that most of the bills before this committee award attorneys' fees but do not refer to the other costs of litigation. That may be because there are other Federal statutes permitting taxation of costs, even costs against the Federal Government in limited situations. The problem is that the costs which are taxable under the statutes comprise a very narrow category of costs. They do not normally cover expert witness fees; they do not cover travel when there has been a change of venue that forces an attorney to leave the District of Columbia and go down to Florida to prosecute his action.

I would encourage you again to broaden the language to include not only attorneys' fees, but all the reasonable costs of litigation that would be incurred. Otherwise, even the prospect of attorneys' fees would not be an inducement to the private attorney to get into a case if he faced the prospect of $5,000 to $8,000 in out-of-pocket costs that could not be taxed against the other party.

80-603—77——10

Mr. KASTENMEIER. Thank you, Mr. Ferren.

Incidentally, your statement in its entirety will be accepted and made part of the record.

Mr. Terris, if you would like to proceed.

Mr. TERRIS. Mr. Chairman, my name is Bruce Terris. I am a private attorney who has a law office consisting of eight attorneys. While I personally consider the label as misleading, we have what is commonly referred to as public interest law practice. Most of our work consists of environmental, employment, and civil liberties cases. We represent numerous national environmental organizations, local citizen organizations, ranchers and farmers, college professors and government employees all over the country. As a result, we have a considerable experience in situations where the statutes specifically provide for attorneys' fees, such as the case Mr. Ferren has referred to, where attorneys' fees might have been payable until the Supreme Court decision in the Alaska pipeline case, and where no attorneys' fees have been recoverable under any legal theory.

We also have considerable experience, much of it of an unhappy nature, in the economics of so-called public interest law practice. I think it is important to keep in mind the purposes of requiring the payment of attorneys' fees. It is not to punish anyone. It seems to me there are two basic reasons. First, to insure that statutes passed by Congress are actually enforced, and second, to allow persons without sufficient financial resources reasonable access to the courts.

I would like to discuss each of these purposes briefly.

In recent years we have learned of the wide gap between the statutes adopted by Congress and their enforcement by the executive branch. In situation after situation the courts have concluded that Federal agencies have failed to comply with the law. Sometimes the law has not been entirely clear, and the position of the Federal agency was at least a reasonable one. In other situations, there has been a flagrant refusal to comply with the clear language and intent of Congress. In those circumstances citizen suits were essential to insure that the will of Congress was actually carried out. If Congress is really serious about the laws it passes, I submit it is essential that citizen suits be not only tolerated, but that they be encouraged.

The second purpose of attorney fee legislation is to insure access to the courts for all American citizens. Few people appreciate the cost involved in bringing major litigation in this country. My office bills at between $30 and $40 an hour, which is far below the market rate in the District of Columbia. It is probably about half the market rate. Yet we have found that major litigation, just on the district court level, requires $5,000 for the simplest of cases and generally between $15,000 and $40,000. Obviously, there are few persons or even organizations which can afford such costs.

As a result, numerous cases to enforce Federal statutes are not brought simply because of lack of funds. I have frequently turned away persons and organizations who wanted to bring suits, which I regarded as having a probable or at least substantial chance of success, because an individual or organization simply did not have the thousands of dollars which were necessary. Even major organizations which have significant resources are forced to limit their litigation

to a relative handful of cases and cannot bring other strong and important litigation.

The American legal system is based on the belief that the courts offer, through the adversary process, a fair procedure for settling disputes. The sad fact is that, as a practical matter, our courts are closed completely, or at least partially, to millions of people. I would emphasize that these are largely middle-income Americans, the large majority of our citizens, who are neither so poor that they can receive free legal assistance nor so affluent that they can bear the huge costs of litigation.

Congress has increasingly become aware of the crucial importance of providing in individual statutes for attorneys' fees. Attorneys' fee provisions have consequently been written into the employment sections of the Civil Rights Act, the Freedom of Information Act, and numerous environmental statutes.

I would strongly urge that this trend should be continued and accelerated. One method would be to adopt a comprehensive bill covering numerous statutes which do not now contain attorneys' fees provisions and which, based on past experience, particularly require enforcement through citizen suits. I would especially stress the need for inclusion of civil rights statutes and the National Environmental Policy Act. However, I feel certain that further analysis would substantially add to this list.

I would strongly urge, however, that Congress not continue the practice of adopting attorney fee provisions statute-by-statute. I believe it is far preferable, even than adopting a comprehensive bill that includes a number of specific statutes, to adopt general legislation which provides for the payment of attorneys' fees to any party who brings suit or seeks judicial review to enforce any Federal statute or any provision of the Constitution and who either prevails or otherwise provides public benefit. I do not see why a distinction should be made between various Federal statutes. It seems to me that Congress and the public have a vital interest in insuring that all Federal statutes and the entire Constitution are fully complied with.

I would also like to remind the committee that the need for payment of attorneys' fees is not limited to court litigation. It is equally important that attorneys' fees be available in proceedings before administrative agencies. Congress has recently authorized $1 million for payment of attorneys' fees and other costs in FTC rulemaking proceedings. This concept, I submit, is fully applicable to other agencies and other kinds of proceedings. Regardless of the agency and kind of proceeding involved, attorneys' fees should be payable if a party has provided a public benefit.

I would urge that legislation be adopted covering proceedings both before the quasi-independent agencies and ordinary executive agencies. Such legislation should include adjudicative as well as rulemaking proceedings. For example, it should apply to license proceedings before the FCC, ratemaking proceedings before the FPC, Forest Service procedures involving the right of appeal, and grievance hearings of Federal employees. In circumstances such as FCC license proceedings and FPC ratemaking proceedings, where corporations are

requesting substantial benefits, the attorneys' fees should probably be payable by the corporation rather than by the Federal Government.

I am sure the question will be raised whether the payment of attorneys' fees in administrative proceedings might be subject to abuse. Of course abuse is always possible, just as in the payment of attorneys' fees by a court. However, the statute authorizing the payments of attorneys' fees by the FTC gives full control to that agency. It is hardly likely that such control by the administrative agency will result in undue generosity. If anything, the contrary is likely to be true.

In addition, I would urge that, both in court litigation and in administrative proceedings, attorneys' fees should be payable only to those who either could not otherwise afford legal representation or the economic interest of the party in the proceedings is small in comparison to the cost of representation. Such a provision would prevent the payment of attorneys' fees to those who can easily obtain legal representation through their own resources.

I would like to emphasize that I do not believe that appropriate legislation should require a long time to draft and consider. The issue before you is not the American rule concerning attorneys' fees. On the contrary, I would strongly urge that Congress not overturn that rule. If all costs of the prevailing party were normally payable by the losing party, this would have a devastating effect on the opportunity of ordinary Americans and citizen organizations to bring suit. Only the most affluent would dare to go to court.

In recent years and months, a variety of proposals, often trivial or meaningless, have been made concerning how this country should celebrate its Bicentennial. I would suggest that the best birthday present that Americans can give themselves is to take our ideals and put them into practice. A good start would be to assure the millions of ordinary Americans that they can go to court to enforce the statutes which Congress has passed and can participate in the administrative proceedings of their Government. A comprehensive attorneys' fee bill would go far to secure this basic right.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Terris.

I have some questions, but I will defer them, following those of my colleagues.

I defer to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. I want to thank you and commend you on your statement, both of you. You have responded to a lot of the things I had in mind. I only have one question I would like to ask.

You appear to favor retaining the American Rule where possible, with only some exceptions here, I think for a very legitimate reason. Otherwise, you are going to scare people out of the courts instead of encouraging them to assert their rights.

From that, may I infer that you feel we should restrict this, at least at the beginning, to attorneys' fees in cases involving litigation in the broadest sense between the individuals and Government agencies, or should it also extend to litigation between private parties on both sides?

Mr. TERRIS. I would at least go as far as the Government agencies, but I think I would go further. For example, the Clean Air Act and

most of the environmental statutes and Title VII of the Civil Rights Act, cover litigation to enforce the Federal statute against private parties.

It seems to me there is no reason that, where one has conferred a public benefit by enforcing a Federal statute against a private party, attorneys' fees should not be payable.

Mr. DANIELSON. In that type of a case, the reason a private litigant is bringing the action is because the enforcing agency has not done its job, generally?

Mr. TERRIS. That is normally correct.

Mr. DANIELSON. Why could we not, perhaps, patch that up, by a situation in which the private litigant could get his attorneys' fees for bringing an action against the agency which has the responsibility to enforce the law, to compel them to enforce the law, and then let them carry the load from that point on?

Mr. TERRIS. I am not clear. You mean, at the end of the suit, you would then bring a new suit?

Mr. DANIELSON. No. At the beginning of the suit, why could not a private litigant, who feels he has a job to perform here, bring an action against the agency which has the duty to enforce the law to get rid of the mandate or to compel them to proceed?

Mr. TERRIS. I think you are going to end up with double litigation. You are first going to have to prove your case against the private party on the merits in the suit against the public agency. Then having won there, the public agency is going to bring, in effect, the same lawsuit you have brought against the private party.

I must say, not only would that likely burden the courts, but I also would have some skepticism about how vigorously the Federal agency, having been compelled to take action, would then enforce the right that I asserted.

Mr. DANIELSON. I think you are probably right, but I wanted your comments.

Thank you very much.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman, and thank you, Mr. Ferren and Mr. Terris.

I am sorry I was not here earlier, but I was working on precisely this in connection with revenue sharing. I have stolen all your good ideas and put them into a bill I have on revenue sharing, where a plaintiff who feels he has been discriminated against may bring action and may recover fees if he is the prevailing party.

I welcome Mr. Ferren particularly. I know his work over a number of years in this area, and I hope that we are the prevailing party in this subcommittee and in the House Judiciary Committee with regard to this bill. I think it is very important.

Mr. Chairman, I apologize for not being here the other day when this matter was up. I do have a bill and I have prepared testimony on it. I hope we can, as I say, be the prevailing party.

Thank you very much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Following up on Mr. Danielson's question, might it not be sensible where there is an agency that is responsible for bringing

an action, that as a precondition to attorneys' fees, the request be made to that agency to do what it should do?

In other words, if the Attorney General is supposed to bring an action, then should not the private attorney general first say to the Attorney General, with the full explanation of the case, and the statute and the fact situation, "Here is a case you ought to bring. If you do not bring it, I am going to bring it."

But should the Attorney General have the opportunity first to have that reported to him?

Mr. TERRIS. That is the basic rule under the environmental statutes that have been adopted. I believe it is a 60-day period which is given. I do not think there should be any objection to that, with only one exception. One has to then be very clear on what happens about preliminary relief.

Obviously, if action is about to be taken and one needs a temporary restraining order or a preliminary injunction, there has to be some exception made to allow you to go to court for that, in the situation of an emergency.

Mr. FERREN. You may want to get a hold of some studies that the administrative conference has been making in this connection. There are class actions being brought around the country in identical situations. This suggests the question whether there should not, in effect, be some clearinghouse. You may want to contact the administrative conference to get some of the position papers that relate to the question you are asking.

Mr. PATTISON. Might not there also be some sort of a provision whereby, having brought the action and having notified the appropriate agency, that at an appropriate time they might want to come in, and you have convinced them they want to go from there? That would be a problem, since you might have less confidence that the public agency would vigorously pursue the action. They might even think they are taking over the action for the purpose of losing it. But, nevertheless, if, in fact, it is their job to do it, they should be able to, it would seem to me, do their job, if they do it poorly, then, that is the problem with our system, I guess.

Mr. TERRIS. Most of my clients would welcome the Government coming in and then having themselves stay in as parties and, in effect, be watching what the Government did and be prepared to supplement or bolster the Government's case. Most of my clients are not in a position to turn down any free legal services.

Mr. FERREN. If I may, I think it is terribly important that we keep another perspective in mind, though. If you go too far along the line you are suggesting toward the point where there really are not effective citizen enforcement provisions to provide an alternative to governmental enforcement, you are going to be concentrating all enforcement in governmental agencies. And, of course, they are going to have case loads that far exceed their resources, and certain choices will be made.

I think we have to preserve the opportunity for citizens to bring cases in all of these areas and not have to defer in every instance, even on a right of first refusal, to a Federal agency that may not share that priority.

Mr. PATTISON. In the area that Mr. Ferren was discussing and in the area of disbursements for expert witnesses might it not be sensible to have some system within the judicial system, perhaps by rule of some sort of preclearance, so that you do not end up just presenting a bill for an expert that you have to take to Florida, perhaps for $10,000, where perhaps that may be excessive?

In other words, should there not be some way you could discover roughly what kind of an allowance you might be given for that?

Mr. FERREN. I think that often would be awkward in advance of litigation. I think, again, the Federal courts are used to evaluating costs. I know that within the statutes that now permit costs, the courts scrutinize the claimed costs very effectively. If a statute merely lists the variety of categories in which costs can be assessed, then I think you can leave it to the court to decide whether an excessive expense in any particular category has been incurred.

Mr. PATTISON. I agree. That is what we do with attorney's fees. Lawyers are in a different situation. They are officers of the court; engineers are not. So that you make your deal with the engineers, and you have got a contractual deal with the engineers. With the lawyer, you always have an out. The court can always modify a legal fee under any circumstances it wants to. It cannot modify the contract between the engineer.

Mr. PATTISON. It cannot allow it, I understand that. And, while as between the client and the engineer, it cannot modify it; as between the client and lawyer, it can.

Mr. FERREN. Certainly, there should be an opportunity for any attorney who needs an expert witness, for example, to go to court in that litigation for authority to retain, and the fee question can be discussed. In fact, that happens now from time to time.

I am involved in a case out in Detroit, an urban renewal case, where there was essentially a default by HUD and the city of Hamtramck in providing a remedial plan when constitutional rights of black citizens had been violated through a renewal scheme. We went to court, and the court actually assessed an amount against the defendants in advance to pay for the experts and gave the plaintiffs a chance to develop the remedy. So there are some precedents that can be cited for that kind of preclearance.

Mr. PATTISON. I am interested in Mr. Terris' opening statement about his uncomfortableness with the term "public interest law firm." That leads me to the question of the economics of a public interest law firm.

I take it that there is not really a great difference between a public interest law firm and Mr. Ferren's law firm; it is just a question of who takes more private clients. You feel free to take private clients if you want, on cases where you may make money, I assume?

Mr. TERRIS. I feel free to, but it is an interesting thing. Mr. Ferren's law firm, of course, began as an ordinary commercial law firm, which has slightly modified his position, which, apparently, has not resulted in losing any of its ordinary commercial clients.

One of the interesting things I have found is that, by starting a so-called public interest law firm, commercial clients never come. No corporation of any size whatever has ever come, in the 5 years we have practiced law.

Mr. PATTISON. That is interesting. I would think that would go against the normal experience of lawyers. My experience was, when I took a case that was a public interest case, it always ended up developing clients that paid me money.

Mr. TERRIS. Let me be clear. All our clients pay us money, hopefully.

Mr. PATTISON. I meant good clients.

Mr. TERRIS. I was distinguishing between, in effect, more usual commercial clients who are affluent enough to not worry too much about what they are paying their attorneys, and the clients we have to worry about each and every cent.

Mr. PATTISON. No further questions.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Ferren, I agree with many of the comments in your statement. I wonder if it would not be better to have some criteria to help a court, and, also, as far as any kind of judicial review is concerned or as far as awarding damages after you have made the determination, or after awarding fees and costs, after you have made the determination that it would be in the public interest.

In other words, I wonder if there should not be some additional criteria.

Mr. TERRIS. I think there is an argument for at least listing some of the criteria which a court should consider. I think one of the reasons for that is because the courts have tended to, in environmental and consumer kinds of cases, to award fees which are really too low to encourage lawyers to take the cases. And that is the point of all this.

The point should not be to make lawyers wealthy. It should be to encourage lawyers to be available for citizens to enforce Federal statutes. To do that, attorneys' fees have to be adequate.

I would think that some of the criteria that might very well be written in would be the ordinary commercial rate for lawyers in the community; the fact of a case being on a contingent basis, which would normally increase the fee that ought to be payable; as well as other criteria, such as the performance of the lawyer, complexity of the case. Many of those criteria, by the way, are spelled out in various cases involving attorneys' fees which have been litigated in the District of Columbia circuit and other circuits all over the country.

Mr. RAILSBACK. You quote from language in the Senate report, which is very general, dealing with public interest, whenever the court determines that such an award is in the so-called "public interest," I would be apprehensive that a judge, perhaps, in some case, because of the personal likes or dislikes or biases, might be inclined to award attorneys' fees and costs improperly. Without some measure to guide an appellate tribunal, I would be a little bit afraid a judge could be arbitrary.

Let me just add, before you respond, that one of the preceding witnesses suggested this as a possible standard. He said he would have a finding of public interest or a finding in the interest of justice, he also included a prevailing party which offends you and in which you make a good point may not be good language. Then it goes on to say, in the conjunctive and the economic interest of the prevailing party is small in comparison to the costs of effective participation.

That would be one additional criterion. Or the prevailing party does not have sufficient resources adequately to compensate counsel.

What would you think about those two?

Mr. FERREN. I think these are the kinds of criteria, Mr. Railsback, that Federal judges actually do apply in many instances.

Before you came into the hearing, we were talking about the many gray areas where a defendant, say a Federal agency, capitulates just before suit, so there is technically not a prevailing party, in a sense, because the case has become moot. It is my feeling that you would have to spend a lot of time and care trying to list in a statute and in every circumstance, every criterion that might apply, in deciding whether a fee should be awarded.

And without disagreeing with the fact criteria have to be applied to make equitable judgments in each case, I am skeptical that we will think of all of them, and then we will have a statute where, by negative implication, certain situations are left out and fees would not be awardable. I personally believe, on the basis of court decisions awarding attorneys' fees prior to the Supreme Court decision of last May, that there is a body of law developing which is, in effect, incorporated by reference by the broad statute.

I certainly do not disagree with you that this is a problem one has to be careful about; I am just saying, on balance, that I would like to see the broader approach taken. And if it turns out that there are abuses by the Federal judiciary, then clearly this Congress is going to address the situation, especially as awards against the Government itself may be concerned.

Mr. RAILSBACK. I have serious concerns that, if we legislate and we legislate broadly, and we permit a judge to award attorneys' fees and costs to a litigant, whether he is the prevailing party or not, that that could be so broad and without some sort of criteria to guide a court, given the experiences I have had with judges' understandable personal biases and dislikes, I can see occasions where a judge would make an award under this very broad, permissive legislation, and it would be difficult to have judicial review that would really be able to challenge that particular judge's award.

I guess we do disagree, and I think the language Mr. Halpern suggested is so broad anyway that where he is talking about the economic interests of the party is small in comparison to the benefit, and then he goes on and gives another one where the prevailing party does not have sufficient resources.

I would go further than that, at least in giving some guidance.

Mr. TERRIS. I would agree with those limitations, with exception of the prevailing party question which we have already discussed.

The reason I would is because otherwise I think what we are going to have is large corporations and other people who can afford their own attorneys—and always have and always will be able to—will be able to recover. And I do not think that is necessary.

I would think it is appropriate to give broad discretion to the Federal courts. Mr. Halpern said something I think is worth repeating, and that is that we have some experience under statutes which are very broad, and we know what has happened. I do not think it has

been abused by the Federal judiciary—if anything, I think they have been rather cautious in allowing attorney fee awards. And I think Congress would be right in relying on that experience.

Mr. RAILSBACK. Thank you.

Let me ask one other question.

Should we distinguish between those public interest lawsuits which generate a fund from which lawyers' fees can be paid—that is, a suit for money damages—and those which do not, such as a case for injunctive relief?

Mr. TERRIS. I do not think you should distinguish.

If a fund is created today, for example in class actions, there is nothing in the Alaska pipeline decision which precludes attorneys' fees right now.

So if we are going to make that distinction, there would not be any need for Congress to act. There might be some changes we need, but nothing very important. I think the real point is there is no reason for Congress to make the distinction. When a citizen has conferred the benefit on the public through an injunction action, for example, there is no reason why his attorneys should not be able to obtain a fair fee. Just as much in that case as when there have been money damages.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. I will be very brief; I only have a couple questions.

Is there anything we can do with respect to the costs of court cases?

Mr. Terris, on page 2 you refer to cases generally costing between $15,000 and $40,000. Are we incapable of doing anything about that in terms of cost factors? Is there some way, other than this bill, of course, in terms of the bar and the judiciary system in administration of justice that can reduce the costs of cases generally costing between $15,000 and $40,000?

Obviously, that, in and of itself, tends to deny access.

Mr. TERRIS. That is a question, Mr. Chairman, I have done a lot of thinking about, because obviously those costs are huge.

I think the answer probably is that there are some things that could be done. I think probably to a considerable extent it is not a problem of Congress; it is the judiciary that needs to be far more conscious that it is denying justice, in effect, when what happens in its courts is very expensive. I do not think most judges ever really think about that.

I think the courts are not run, really, on the basis of being conscious of what the costs are. I might say I do not think the Federal Government is conscious of its own costs of what it puts into litigation.

I see all kinds of situations where I am positive that if any individual client—at least one that was not as affluent as General Motors—was actually paying an attorney to do some of the things the Department of Justice does, he would not do them. My clients would not do some of the things the Department does because we cannot afford to do it. Just as the Department never really says, this case has cost us $25,000, and we have wasted $5,000 fooling around with a lot of silly motions; they never came to grips with that. I hate to go on at tremendous length here, but I do think there are things that could be done, but I am not sure how much of it is a matter for Congress and

how much is a matter for other agencies to be conscious of what it is costing in our courts.

Mr. KASTENMEIER. In terms of what Mr. Halpern suggested, and I understand Mr. Ferren would add cost to that, there are three conditions that the court determines: (a) the prevailing party is conferred a substantial public benefit—to follow up on what Mr. Railsback was talking about—and (b) economic interest of the prevailing party is small in comparison to the cost of the effect of participation.

Then he has, or, the prevailing party does not have a sufficient resource adequate to compensate counsel.

Ought we not make that "and," and it would be more limiting. Make that also a condition?

Mr. TERRIS. Let me tell you why "and" would have a very, very serious affect. I think it raises an interesting question.

Large organizations, for example, Consumers Union, Sierra Club, organizations of that kind, if you look at their total resources for the year, it is a large amount of money, so they can afford any individual piece of litigation. But what they cannot afford is to bring anywhere near the number of cases that are presented to them of great public importance, and which are meritorious cases.

And so I think the purpose of that "or" is, in effect, to allow them to sue, because the interest of their members, the economic interest is very small in the outcome of the litigation, and therefore, they would be able to sue.

If you put an "and" in, they would not be able to get attorneys fees. I think you not only would cut them out, but you would end up with litigation brought by lots of splinter and smaller groups, probably not as capable of bringing strong litigation. I do not think you would achieve a great deal other than some confusion.

Mr. KASTENMEIER. Thank you both, Mr. Ferren and Mr. Terris, for your contribution to the committee this morning.

Next, the Chair would like to apologize to the panel and the witnesses—we have four more witnesses. The hour is very late. I think we have been scheduled this morning, but we will do the best we can.

The Chair would like to call Mr. Henry Marsh III, who is a partner in Hill, Tucker and Marsh, and also Vice Mayor of Richmond, Va. He is also a member of the board of the National League of Cities, and we are very pleased to have you here, Mr. Marsh.

[The prepared statement of Henry L. Marsh III, follows:]

STATEMENT OF HENRY L. MARSH III, ESQ., RICHMOND, VA.

In the 21 years since *Brown v. Board of Education*, 347 U.S. 483 (1954), the primary burden of enforcing civil rights in the United States has been borne by private attorneys. In such diverse areas as school desegregation, employment discrimination and voting rights, the law has been enforced largely because a lawyer in private practice brought suit in federal court and demonstrated that the rights of his clients had been violated. Although the government has from time to time played a constructive role in such matters, the bulk of the litigation has fallen to private practitioners. These lawyers who engage in litigation which enforces important public policies have come to be known as "private attorneys general."

That private enforcement should play such a key role is not necessarily bad. Private attorneys are free to take a variety of positions in litigation, and can offer the courts a diversity of perspective that government attorneys do not have.

The enthusiasm and dedication of private counsel is not affected by changes in national administrations, and they can afford to take positions in court which might imperil the career of political officials or elected prosecutors. Most important, private counsel are primarily responsive to the needs and concerns of their clients, the people whose rights have been violated, and to their sense of professional responsibility.

The effectiveness of such private enforcement depends heavily on the availability of court awarded counsel fees. At present, in civil rights as elsewhere, there are still widespread problems of noncompliance with the law, and the number of law-suits that should be brought greatly exceeds the capacity of the handful of lawyers who now are willing and able to handle such cases. First, there are relatively few lawyers who are willing to handle such litigation at all, since the clients are invariably too poor to pay a fee. Second, even among lawyers who do take such cases, the number of cases each can take is limited by the fact that the attorney must also handle socially unimportant matters, wills or torts, to make a living. Third, when these cases are brought, the defendants and their counsel often persist in conduct of dubious legality and deliberately obstruct a prompt resolution of the case in the hope that in time the unpaid plaintiff's attorney will be unable or unwilling to bear the cost of continued litigation.

In the 1964 Civil Rights Act Congress first began to deal with this problem by authorizing awards of counsel fees to successful plaintiffs in litigation under Title II and VII of the Act. Thereafter the lower federal courts began to expand the approach in the 1964 Act and awarded counsel fees to any successful plaintiff in an action which enforced important public policies. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 44 L.Ed 2d 141 (1975), however, the Supreme Court held that the courts could not, in the absence of an express statutory authorization, award counsel fees to a plaintiff merely because he had acted as a private attorney general in enforcing laws or policies of substantial public importance.

The *Alyeska* decision created two immediate problems which Congress should solve. First, although a number of federal statutes expressly authorize awards of counsel fees, there are many areas to which no such statutes apply. Many of the civil rights problems of substantial public importance are not now covered by such an express authorization, including racial discrimination in prisons, jury selection, allocation of municipal services, public housing, and tax assessments. In a rather crazy-quilt manner counsel fees are provided for in some, but not all, types of sex discrimination, consumer, environmental, other miscellaneous constitutional litigation. It is, of course, true that counsel fees can under certain circumstances be awarded even in the absence of a statutory authorization, but after *Alyeska* it is difficult to predict where and when this will occur. In the long run the absence of a counsel fee provision applicable to these areas will tend to discourage private litigation to enforce the laws involved, a clearly undesirable result.

Even in areas where Congress has expressly authorized counsel fees there are still problems. Frequently there are several statutes under which a plaintiff might sue, some of which authorize counsel fees and some of which do not. Under the court-made "private attorney general" rule prior to *Alyeska* it made no apparent difference which statute was invoked. Thus employment discrimination cases plaintiffs frequently sued under 42 U.S.C. § 1981 or 1983, which do not expressly authorize counsel fees, rather than Title VII, which does. At the time this choice of jurisdictional basis seemed of no significance. In the wake of *Alyeska*, however, these litigants may be deprived of counsel fees solely because of their pre-*Alyeska* decision. Naturally many of these litigants are seeking to amend their complaints to add Title VII jurisdiction, and clearly should be permitted to do so, but it is as yet unclear how the courts will deal with these motions. In future cases, where several jurisdictional bases exist, a litigant may prefer for procedural or substantive reasons to invoke the statute which does not happen to involve counsel fees. Thus in employment discrimination cases a plaintiff might well wish to sue at once under § 1981 rather than wait the 180 days required by Title VII. Such a litigant should not be forced to sacrifice his right to counsel fees in order to invoke the more efficacious remedy.

I believe it would be a mistake to limit the proposed legislation to litigation arising under certain statutes, as in H.R. 9552, H.R. 9368, H.R. 8220, H.R. 8219, or to litigation affecting only certain types of problems, as in H.R. 9093, H.R.

8743, H.R. 8742. The United States Code and Constitution are replete with substantive rules which greatly affect the public interest, and Congress should encourage through counsel fees the active private enforcement of those public policies. It would not be feasible to enumerate every such statutory and constitutional policy; the number involved is great, and a massive amount of legal research would be required. Certain policies, though of great importance, derive from court made rulest rather than particular statutes. Others are embodied in Regulations or Executive Orders. Enforcement of all of these is to be fostered by providing the incentive of counsel fees. Any enumeration tends to lead the courts to believe that Congress wants to bar such counsel fees in areas which may have been inadvertently omitted. Moreover such an enumerative approach would require that the law be amended every time Congress, tthe Regulatory Agencies, or the courts adopt a new rule or policy. That would manifestly be unworkable. I believe that the language of H.R. 8221 is broad enough to cover all litigation which thus advances the public interest.

The statute ultimately adopted should make clear that counsel fees can and should be awarded against the United States or a state the same as a private party. At the present time, particularly in the light of 28 U.S.C. § 2412, the United States is generally immune from an award of counsel fees in the absence of an express provision. This immunity should be abolished. There is no reason why, when the government breaks the law, it should have any special advantage in subsequent litigation. On the contrary, it is particularly important that private attorneys general be encouraged to sue lawless government officials. The court of appeals are currently divided as to whether counsel fees should generally be awarded against a state. Some courts of appeals have concluded that, because of the Eleventh Amendment, they lack the inherent power to make such awards. Others have taken a contrary position. Congress, in any event, has ample authority to require that, where a state or state official is sued in federal court, counsel fees may be awarded against the state. Ordinarily it would be safe to use general language, such as that in H.R. 8221, to accomplish this. The Supreme Court, however, in a recent decision has suggested that it will deliberately construe federal laws *not* to apply to states unless Congress makes a special effort to indicate a contrary intent. See *Employees* v. *Missouri Dept. of Public Health*, 411 U.S. 279 (1973). This is an unfortunate approach which, if continued, may require revision of much of the United States Code, and it is to be hoped that the Court will take a different attitude in view of Congress's decision last year overturning the particular holding in the *Employees* case. See 88 Stat. 61. In the meantime, however, it would be advisable out of an abundance of caution, to make express the intent of Congress to render states liable for counsel fees just like private parties.

Provision should be made to prevent injustice to litigants because of the interval of time between the Supreme Court's decision in *Alyeska* and the adoption of new legislation. Prior to *Alyeska* it was the law in most circuits that counsel fees should be awarded to any successful litigant who advances the public interest as a private attorney general. That will become the law once again with the adoption of the proposed legislation. At the present time, however, counsel fees are being denied in cases where they would have been granted had the issue arisen either before *Alyeska* or after the new statute. Thus in *Bridgeport Guardians* v. *Members of Bridgeport Civil Service Commission*, 43 U.S.L.W. 3625 (1975), counsel fees were denied because of *Alyeska*, although such would not have occurred had that issue not arisen when it did. Once the new statute goes into effect, under the standard announced in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1973), it will apply to all then pending cases. There may, however, be cases in which the counsel fee issue was finally resolved prior to the adoption of the statute, and as to these it is unclear whether the courts will permit the plaintiff to reopen his request for fees. To assure that such caess can be reopened the new statute should be expressly made applicable to all litigation pending as of May 12, 1975, the date on which *Alyeska* was decided. Such a provision would mean that the statute applied, *inter alia*, to the plaintiffs in the *Alyeska* case itself.

Existing statutes authorizing counsel fees have not always been adequately implemented by the courts. Some judges, particularly those indifferent or hostile to the substantive rights being enforced by the private attorney general, have been extremely stingy in fixing the size of the counsel fee awarded. In some cases successful plaintiffs have even been awarded less than was paid to the

lawyers for the losing party, or given a fee which—on a per hour basis—far below the commercial rate paid to private counsel. In computing the counsel fee the court should first multiply the total number of attorney hours by the commercial rate paid to counsel of similar expertise and experience. The resulting figure is then increased by an appropriate amount, often 25% to 100%, because of a variety of factors incapable of quantification, including the contingent nature of the fee, the novelty or difficulty of the issues, the importance of encouraging such litigation, the danger that, because of local hostility towards the rights involved, an attorney who handles such a case will risk loss of clients or social reprisals, and the need for an unusual incentive to handle such cases in view of the fact that many attorneys may be personally hostile to the rights involved.

It is widely recognized that, in applying statutory authorization of counsel fees, a different approach is appropriate according to whether the prevailing party is the plaintiff or the defendant. Where the plaintiff prevails counsel fees are automatically awarded in the absence of special circumstances which would render an award unjust. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). This is appropriate because any success *ipso factor* advances the public interest in compliance with the law, and because it provides the incentive of a reasonably certain award to potential plaintiffs and their counsel. Where the defendant prevails counsel fees are awarded only if the lawsuit was frivolous and maintained in bad faith. Manifestly if counsel fees were awarded to defendants under any other circumstances the prospect of such an award would deter good faith litigation to enforce the laws involved. See *United States Steel Corp.* v. *United States*, 385 F. Supp. 346, 348 (W.D. Pa. 1974).

TESTIMONY OF HENRY L. MARSH III, PARTNER, HILL, TUCKER, & MARSH, RICHMOND, VA., AND VICE MAYOR OF RICHMOND, VA.

Mr. MARSH. Thank you.

Mr. Chairman, and members of the committee, I appreciate the opportunity to speak to you on a very crucial subject. I have been practicing law in a small law firm for 15 years, and most of the practice has been in civil rights litigation.

We have a perspective of a small practicing law firm on some of the problems you have been discussing here this morning. I will try not to repeat what has been said by earlier speakers in the interest of time, and not to repeat many of the comments in my prepared statement. I would just like to reinforce several of the points that have been made.

First, on the need for action by the Congress, I think the state of enforcement of civil rights laws demands action by the Congress. We have a lot of laws, passed over the past 2 decades—a few suits, but very little action to correct the problems that Congress indicated should be corrected.

Title VII, for example. We have just scratched the tip of the iceberg in enforcing the rights of victims of unlawful discrimination, notwithstanding a counsel fee provision in the statute. It is a very difficult job of fighting to eliminate some practices, and to bring justice to people.

I left Richmond to come here from a case that started in 1967, when a man filed charges against the company when he was discharged. This suit was brought in 1968; the case is still going on in lower courts. We are at the stage now where next week we will have backpay hearings, and the company will probably appeal and, also, the interna-

tional union. It will probably be another year or 2 before the clients actually get the backpay.

Most lawyers would not have that kind of tenacity, and they would give up because—there might be fees in the end, but it is an expensive proposition.

I was in the Prince Edward litigation which lasted for many, many years, and finally the schools were reopened after a long effort. My law firm got $19,000 in attorneys fees, and the opponents—in addition to the attorney general's office—the private opponents got between $0.5 million and $1 million for litigating to violate the Supreme Court's decision of 1954. So it is very frustrating practicing law, trying to correct or implement the principles of equality, when you are going up against the powers of the State, large law firms, and the Federal Government.

And yet, in many cases, counsel fees are not even available at the end. In response to one of the questions, someone suggested we limit it to actions against the Government. I think that would be very bad.

Many statutes that Congress has fashioned do not even contemplate that Government would play the primary role. Some statutes rely on the private bar for enforcement. Congress rejected other approaches which would rely on governmental action; I think that is wise, I think it is healthy to have enforcement by the private bar.

I think the effectiveness of this enforcement depends on the availability of court awards of counsel fees. At present there are so few lawyers who would handle these cases that this creates a problem. The fees are contingent—it takes a long time; and the lawyers, most of the lawyers, have to have other cases in order to make a living until these other cases pay off—civil rights cases.

I think the tactics of the defendants also make this important that we create these fees. Congress has started to deal with this. In the 1964 Civil Rights Act they said, "the successful plaintiffs, under Title II and VII, would get attorneys fees." And there has been a fairly good experience in that approach.

The lower courts created a private attorneys general theory, and this was working fairly well until the *Alyeska* decision from the Supreme Court which held that, in the absence of express statutory authorization, an award of counsel fees to a plaintiff merely because he had acted as a private attorney general, would not prevail.

This *Alyeska* decision created two immediate problems which Congress should solve.

First, although a number of Federal statutes expressly authorize awards, there are many areas where such statutes do not apply. As a matter of fact, there are some areas where the right of action does not even depend on the statute. It is very important that we have a comprehensive approach to this.

So we suggest the solution that it would be a mistake to limit in proposed legislation, as the proposed legislation does, the right to counsel fees under certain statutes, as is proposed in various bills before you.

We suggest that the appropriate answer would be to use the language in H.R. 8221. We think that is broad enough to cover all of the

various statutes and the policies which evolve from other substantive rules of the statutes.

This is the language which we would urge the committee to adopt.

Several questions were raised concerning the rights of individuals to bring action—I think Mr. Pattison suggested maybe we should try to put the thrust into governmental agencies. I think that we should not limit the right of individuals to bring actions. Our experience has been that in many cases the Government agency has turned out to be the enemy. He has put the fox in the coop with the chickens.

We have no problems with governmental agencies having power to enforce private rights, but we think private attorneys should also have the right. The competition has been very healthy, and many of the rules that governmental agencies have enforced ultimately were initiated by private counsel.

I can think of a school desegregation fight where the Government was going along with freedom of choice because the court had said it was all right. We brought a case which outlawed freedom of choice and the Government followed suit. The Government is very good sometimes at following the lead and enforcing rules once they have been initiated; but it has not been too effective in creating new rules.

I think the private bar enforcement procedure is needed for this purpose.

On the question of whether or not the prevailing party language should be changed, I do not see any problem with that language. I like the American rule. I think if everyone who went to court received attorneys fees, people would stop going to court.

I think there are some cases, and I would like to read into the record some cases where the courts have interpreted the prevailing party language to cover cases where the action has been mooted, or where the party defendant prevailed, but where substantial relief resulted.

I think it is important to bear in mind here that these are not jury cases where it is a question of win or lose. Most of these cases are equitable; even though technically you might not win in one sense, you still can prevail as courts have interpreted that language. The cases I refer to are: *Hammond* v. *Housing Authority and Urban Renewal Agency of Lane County*, 328 F. Supp. 586 (D. Ore. 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. (1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377 (4th Cir. 1972).

So there are some cases in which the courts have interpreted that language.

The other point I wanted to respond to was, we have had some experiences on the counsel fee language, broad language. The courts have not gone overboard in awarding fees and the appellate courts have not permitted the district courts to act on whim. The district courts are required to state the basis for the award, and that basis has been restricted by the appellate courts.

So we think the experience of the past 15 and 20 years have demonstrated that we do not need to write in a lot of specific guidelines; that the courts themselves are conservative and would not permit lawyers to enrich themselves.

There are also ethics which lawyers are governed by, enforced by local communities of other lawyers, and lawyers who try to misuse them would be subject to appropriate action.

I would be happy to respond to any questions.

Mr. KASTENMEIER. Thank you very much, Mr. Marsh.

You have indicated support for one bill, H.R. 8221, which would authorize discretionary awarding of attorneys fees in civil actions before Federal courts, to prevailing parties, where several constitutional rights were involved. This does not include some of the cases that the preceding witnesses have talked about which go beyond civil and constitutional rights involved.

I take it you prefer a more narrow approach than some of the others where environmental rights and the rights of the poor are being pursued by public interest firms as private attorneys general.

Mr. MARSH. I think the private attorneys general approach is very healthy. I am not opposed to many of the other bills. I have been in politics to a certain extent; I realize what this committee proposes has to get through an entire Congress.

I do not know exactly what is possible. If I had my druthers, of course, I would like to see something broader. But it is a question of something that can get through. I do know, for example, in proceedings against Federal agencies which might not reach litigation there is a strong need for counsel fees.

Many of the rights of people in the country—poor and some not so poor—are controlled by Federal agencies. Agencies are not doing their jobs, and it would be very helpful to have the right to attorneys' fees in those proceedings.

The rule that would be covered in H.R. 8221 ultimately would reach that because a suit would be possible to review the action of the Federal agency. And in that suit, fees would be possible. So some of the things would be accomplished that way.

I would not object to a broader bill if in the judgment of the committee they can get it passed, but I think in this area it is very vital. We have held out to people the promise of equality and justice, and right now the promise has not been realized by millions and millions of people. I think it is the issue of survival affecting the lives of millions of people.

I think it is imperative for Congress to correct some of the injustices that exist in this area. If we can get bills to affect the other areas, of course, I would support those bills.

Mr. KASTENMEIER. I take it from your experience and from your analysis that, in terms of civil rights and constitutional rights cases, that were specifically authorized by law, that is, title II and title VII of the Civil Rights Act of 1964, that this constitutes only a drop in the bucket in terms of specific authorizations for attorneys fees as opposed to the total field of civil rights and constitutional rights cases.

Is that correct?

Mr. MARSH. The voting rights, for example, are extremely important, and unless there is vigorous enforcement of the Voting Rights Act, the entire political system—the promise of it, might not be realized because the rights of minorities can be taken away that way, regardless of the other gains. They would not proceed to equality.

There are many other areas out there. I think that a broad bill such as I have suggested would at least permit persons affected in those areas to have a greater chance of having their rights vindicated.

Mr. KASTENMEIER. In terms of recent legislative history, I think it is the case that such a change was seriously considered in the Voting Rights Act Extension, just approved by the Congress, but for one reason or another it was not in the final version of the bill. It got past both Houses, and therefore it remains to be achieved.

Mr. MARSH. I do not think there are enough lawyers specializing in this area to make a dent in the problem. I think unless it can be attractive enough to induce some of the larger firms into the area, that it will not have any real enforcement. I think the counsel fee provisions are essential to accomplish that.

Mr. KASTENMEIER. I yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Will you comment on whether we should include a provision for payment on account, an interim fee. You have just come from Lynchburg on an 8-year-old case and I wonder if that might affect your opinion.

Mr. MARSH. I have induced the district court to award an interim fee in a title VII case. That award was stayed by the appellate court, so I have not seen the money yet. But I understand that was one of the first times that was done. That is essential, I think. Again it is a problem of whether or not it can get through Congress. I am not that much on top of the political situation. I think that would be extremely helpful to the effort that Congress has indicated it wanted to see happen. But, I am not sure what the politics are of getting that through.

Mr. DANIELSON. With difficult, protracted litigation it would seem to me almost necessary—or are we just having an illusion here.

Mr. MARSH. I think ultimately the courts are going to reach that. They will reach it. We have seen one interesting situation in the *Brown* case. The Supreme Court had three chances to outlaw freedom of choice before it finally did; one as early as 1963, and an Atlanta case again in 1965, a case which I took up. It ducked the question. It was not until 1968 when it disallowed freedom of choice, the very same issue in *Green* v. *New Kent*, another case that we handled.

The court waited 5 years until it thought people would be ready, in my opinion, to accept the outlawing of freedom of choice. So, the courts are very slow to act. I think the principle of fees will come from the courts, but it would be very helpful if Congress would speed that process up by indicating in a sentence that in an appropriate case the courts are empowered to award an interim fee.

Mr. DANIELSON. That would probably have to be postponed to a second year of legislation. You would have to start before you could——

Mr. MARSH. That is why I did not suggest that, I say I have dabbled in politics. I know all things are not possible.

Mr. DANIELSON. The other aspect of that is that at the interim, how do you know who is going to be the prevailing party?

Mr. MARSH. You can usually tell because, if you have been litigating for 4 or 5 years, a lot of times the court says that the defendant has

discriminated, the plaintiffs are entitled to back pay. Still, 3 or 4 years before that, it will come to a conclusion and sometimes there are no findings. The defendants have stipulated the evidence themselves on which their liability is founded.

Still, under present law, you cannot get fees. In many cases it is so clear that you are obviously going to win in the end if you can hold out, when many lawyers are tempted to give in so they can get a fee. I think this would be very dangerous because constitutional rights could be compromised because of the necessities on a particular lawyer. So, I think it is a very important issue. I do not think it would be abused if Congress could get that passed.

Mr. DANIELSON. Thank you so much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. No questions.

Mr. KASTENMEIER. In which case we appreciate your help on this question. We appreciate your coming up from Richmond to help the committee in this regard.

Mr. MARSH. Thank you.

Mr. KASTENMEIER. Next, the Chair would like to call a panel of witnesses; Mr. Peter Schuck of Consumers Union, Joseph Onek, Esq., Center for Law and Social Policy, and Mr. Reuben Robertson, Esq., of Public Citizen Inc.

[The prepared statements of Mr. Schuck, Mr. Onek, and Mr Robertson follow:]

STATEMENT OF PETER H. SCHUCK, ESQ., CONSUMERS UNION OF UNITED STATES, INC.

Members of the Subcommittee: On behalf of Consumers Union,[1] I wish to thank the Subcommittee for inviting me to testify on legislation to authorize the award of attorneys' fees by federal courts in certain types of cases.

Before turning to a discussion of attorneys' fees awards, it may be helpful to the Subcommittee's deliberations to describe briefly the work and funding of Consumers Union's Washington office, which is the component of the organization of which I am the director, for it is a somewhat unique variant of the "public interest law firm"[2] model and approaches the attorneys' fees question from a slightly different perspective.

Consumers Union, as you probably know, primarily engages in publishing a monthly magazine, *Consumer Reports*, as well as many books on subjects of concern to consumers. Essentially all of its revenue is derived from the sale of these publications and almost all of its expenditures are allocated toward these revenue-producing, publishing activities. In years past, Consumers Union enjoyed a modest surplus and expended most of that surplus in various ways designed to advance the interests of consumers generally, most of whom (unfortunately) are not subscribers to our publications and therefore ride "free" on our consumer protection efforts. One such effort was to establish a Washington office

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of *Consumer Reports* (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with a circulation of almost 2 million, regularly carriers articles on health, product safety, market-place economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] The phrase "public interest law firm" is a term of art, suggesting a group of lawyers that represents diffuse, non-commercial interests which traditionally have not received direct representation in the courts, agencies, or legislature. The phrase is certainly not meant to be taken literally or to suggest that such lawyers are representing the "public interest" *per se*.

(now three lawyers, formerly five) whose function it is to advocate the interests of Consumers Union's members and consumers generally, as Consumers Union perceives those interests, before Federal agencies, courts, and, upon invitation, Congressional committees. Thus, the Washington Office is a "public interest law firm," but unlike most such firms, it is funded not by foundations but by a publishing organization which is willing to subsidize "public interest" litigation (among other activities) the benefits of which accrue primarily to persons having no formal tie with the organization.

While the budget of this office for the present fiscal year is well under 1% of Consumers Union's total budget. Consumers Union's ability to divert even this modest level of resources away from the organization's revenue-producing functions and into an ancillary, non-revenue-producing activity which benefits primarily people who do not support it financially, critically depends upon its ability to generate a surplus through its publishing activities. For the past two years, Consumers Union has run substantial operating deficits, primarily caused by the recession and the dramatic increase in the cost of paper.

What is relevant for purposes of this hearing is that the particular type of mechanism for generating "public interest" litigation that Consumers Union has devised is, like the other variants, inherently insecure financially, depending as it does wholly upon the fortunes of Consumers Union's publishing ventures. Even more than foundation-supported "public interest law firms," its ability to survive is constantly in question. In short, the Consumers Union model does not solve the problem which has occasioned these hearings—the need to make "public interest" litigation a viable activity.

In contrast, the greater availability of attorneys' fee awards is a singularly efficient and equitable means for accomplishing this objective. It is *efficient* in that it rewards a "public interest law firm" directly for its role in vindicating the law in a particular situation, in contrast to a system of governmental support for the organization in general, which would be an inefficient approach. The fee award is "targeted" in a way that ensures that incentives will not be distorted but will be properly discriminating.

One need only consider the nature of "public interest" litigation to appreciate that such an approach is *equitable* as well. Typically, such litigation is quite expensive, perhaps even more so than civil litigation generally, which itself is far beyond the means of most individuals and organizations. There are several reasons why "public interest" litigation is so costly. First, much of it is against the Federal government, and the Federal government, at least in my experience, only rarely negotiates settlement of such cases, preferring to litigate them to the bitter end. In part, this reflects the fact that the Justice Department is spending "other people's money" and in part it probably reflects the peculiar type of "client" that the Department is required to represent. Second, the legal standards applicable to judicial review of most governmental action, Federal or state, tend to be highly favorable to the government. For example, one must first exhaust administrative remedies, often a truly exhausting activity. Then, having done so, one must often demonstrate that a Federal agency has engaged in "arbitrary or capricious" behavior before one can establish a violation of law. In considering that question, courts tend to indulge numerous presumptions which favor the agencies, such as the presumption in favor of agency interpretations of their governing statutes. Overcoming these hurdles, particularly in technical and factually-complex cases, often requires great expense. As a related matter, it is particularly difficult to obtain preliminary injunctive relief against government agencies, for they can—and do—always invoke the enormity of their program responsibilities as a compelling reason not to freeze the *status quo*. Third, the government is armed with a distinctive arsenal of technical defenses which, however little merit they may have, are almost always raised and must be met. Sovereign immunity, standing, justiciability, exhaustion of administrative remedies, primary jurisdiction—these are the "shlock in trade" of the government attorney, and they are time-consuming and expensive to overcome. Fourth, "public interest" litigation often gores some rather formidable corporate oxen, well equipped with legions of lawyers, technical support, and the like. When they are parties to the action, the costs of litigation increase dramatically. Examples of this phenomenon abound, and I shall cite only three of our cases. Consumers Union sued the Cost of Living Council in 1973, challenging the legality of the Council's regulations severly limiting public disclosure of corporate data filed with the Council. The Business Roundtable, whose membership consists of

160 of the chairmen of the largest corporations in America and which is, to say the least, well-funded, intervened on the side of the Council and filed lengthy and discursive pleadings, to which we of course had to respond. When the Court of Appeals upheld our position and the Council decided not to seek Supreme Court review of the decision, the Business Roundtable moved to stay the effectiveness of the decision and sought Supreme Court review by itself. While the Supreme Court ultimately refused to review the Court of Appeals decision in our favor,[3] the proceedings in the Supreme Court necessary to reach that conclusion were expensive, and under Supreme Court rules, not even our out-of-pocket costs, much less our attorneys' fees, could be recovered.

In another case, Consumers Union in 1972 challenged the first implementation of the Federal Power Commission's "optional procedure" for pricing natural gas sold in interstate commerce in a case in which the FPC was being asked for a 73% increase over the area rate established just the year before. After very lengthy and expensive proceedings before the FPC itself, including the filing of several briefs and a month of all-day hearings during which Consumers Union had to confine its activities to cross-examination of industry witnesses because it could not possibly afford to put on expert witnesses of its own, the FPC issued its inevitable opinion granting the increase on grounds that appeared to me to be patently illegal under the Natural Gas Act. We then engaged in the obligatory and futile "exhaustion of administrative remedies"—in this case, a petition for the District of Columbia Circuit. A number of major oil companies and interstate pipelines then intervened on the side of the FPC. More than a year later, the Court of Appeals held in our favor and the case was remanded to the FPC.[4] The oil company intervenors then urged the FPC to grant the same, now-invalidated rate increase on a different theory and the FPC proceeded to do just that. We have therefore been obliged to return to the Court of Appeals in order to litigate the validity of the rate increase all over again. In addition, the oil companies, who lost the earlier round in the District of Columbia Circuit, have rolled out their legal battalions to seek to have the second round played out in the Fifth Circuit Court of Appeals in New Orleans, which knows nothing about the case but has traditionally been regarded as sympathetic to the arguments of the industry. The second round promises to be at least as expensive as the first. In yet a third case, Consumers Union has sued the American Bar Association and the Virginia State Bar under the civil rights statutes to challenge one of the legal profession's restrictions on advertising and price competition by lawyers. If we prevail, the benefits to the public in the form of reduced legal fees, more efficient delivery systems, etc., could be substantial and enduring. Unfortunately for us, the case has been expensive and protracted, in part because the defendants could afford to pit four lawyers against our one.

These cases—and dozens of others like them filed by Consumers Union and other "public interest" groups—raise a very critical question directly relevant to these hearings. Why should Consumers Union, or any other such group, have to bear the very considerable cost of compelling Federal agencies to comply with the law? The same question may be asked with respect to compelling state and local governments, or those acting under color of state law, to comply with the law. In our view, there is no satisfactory answer to that question. Certainly, it is not enough to point out that such organizations have, in the past, manifested a willingness to bear the cost of doing so; as discussed above, Consumers Union's willingness is necessarily constrained by its severely limited financial resources, and the same is true of most, if not all, "public interest law firms". And even if this were not the case, equitable considerations would suggest that it is unjust for the larger society to enjoy the benefits of such efforts without bearing the costs necessary to secure those benefits. Statutory fee awards in appropriate cases effect this burden-shifting.

Turning to the particular legislation pending before this Subcommittee, it is possible to group our suggestions for improvement in a form applicable to all of the bills.

1. The statutory award should not be confined to "reasonable attorneys' fees", but should also include the "other costs of litigation reasonably incurred in the

---

[3] *Consumers Union of United States, Inc.* v. *Cost of Living Council*, 492 F. 2d 1296 (T.E.C.A. 1974), *cert. denied sub nom. The Business Roundtable* v. *Consumers Union of United States, Inc.*, —— U.S. —— (1974).

[4] *Consumers Union of United States, Inc.* v. *Federal Power Commission*, 510 F. 2d 656 (D.C. Cir. 1974), rehearing denied, 519 F. 2d 661 (1975).

action". This is the language of the award provision of the Freedom of Information Act Amendments of 1974, Public Law 93-502 and reflects the fact that the other litigation costs—stenographic transcripts, witness fees, telephone, secretarial assistance, photocopying, etc.—are necessary and, in the aggregate, often quite considerable. In the case of a successful suit against a Federal agency or official, the award should also include the same costs reasonably incurred in the course of any agency adjudicatory proceeding from which the appeal or petition for review was taken. These costs at the agency level exceed the costs of court litigation and are often the most important expenditures, for it is at the agency level that the factual record is made and much of the legal research and writing is conducted.

2. The award should not be confined to a "prevailing plaintiff", but should extend to a "substantially prevailing plaintiff". Again, the Freedom of Information Act Amendments adopt this language, in recognition of the numerous circumstances under which litigation, once commenced, may yield favorable results for the public and yet not terminate in a clear-cut "final judgment in favor of plaintiff." A negotiated settlement is just one example. Many courts have awarded attorneys fees in such situations, which are quite common, and the statute should incorporate these precedents by directing the court's attention to the substance, rather than the form, of the outcome.[5]

3. Initially, at least, any statutory award provision should be confined to cases involving suits against Federal agencies or officials and suits under the civil rights statutes. These are the situations in which, for the reasons already suggested, the general public tends to be benefited by litigation and in which, therefore, the financial burden of the successful litigation ought to be shifted to the general taxpayer. H.R. 8221 would go far beyond these situations, authorizing fee shifting in any civil action. It is impossible to predict the consequences of so drastic a change in the "American rule", but I fear that it might well severely inhibit the institution of much meritorious litigation, discourage settlements, and work grave injustices on many plaintiffs and defendants. I therefore urge that H.R. 8221 not be enacted at this time.

4. In the categories of cases in which statutory awards are so clearly justified—suits against Federal agencies or officials and suits under the civil rights statutes—the provision should not simply authorize an award if the court deems it just, but should establish a statutory presumption that an award shall be made to a substantially prevailing plaintiff unless the interests and justice require that no such award should be made. Such a presumption has been judicially-created in certain civil rights cases[6] and should be extended by statute.

5. For the reasons suggested, statutory awards in all successful suits to compel Federal agencies or officials to comply with the law are appropriate, and the limitation of such awards in H.R. 8743 to challenges on certain grounds and not others cannot be justified and will only lead to unproductive litigation of subsidiary issues, such as the meaning of "consumer or environmental interests."

6. The premise of H.R. 9093—that fee-shifting is particularly appropriate where the United States has brought its massive resources to bear upon a citizen or business and has failed to make its case—is sound, but the provision should be re-drafted to reserve discretion in the court to deny such an award in the many conceivable situations in which such an award would be unjust, and to make "substantially prevailed" the requisite standard of success.

In conclusion, we commend this Subcommittee for undertaking legislation in this area of vital need, and we shall be happy to render any assistance in this regard that you may request.

Thank you.

STATEMENT OF JOSEPH N. ONEK, ESQ., CENTER FOR LAW AND SOCIAL POLICY

Members of the Subcommittee: My name is Joseph Onek, and I am the Director of the Center for Law and Social Policy, a Washington-based public interest law firm. The Center was started six years ago to provide representation to previously unrepresented groups in our society. In the past six years, we have represented

---

[5] See, e.g., *McEnteggart* v. *Cataldo*, 451 F. 2d 1109, 1112 (1st Cir. 1971), *cert denied*, 408 U.S. 943 (1972); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d, 421, 429-30 (8th Cir. 1970).

[6] See, e.g., *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

consumers, women's groups, environmentalists, the mentally ill and charity hospital patients in a wide variety of administrative and judicial proceedings.

During these past six years, the Center has never charged clients a legal fee. We have been supported almost entirely by grants from such foundations as Ford and Rockefeller Brothers. It is our hope that we will continue to receive foundation funding in the future. But we cannot be assured of that. Indeed, our primary funder, the Ford Foundation, has made clear that it does not expect to provide us with substantial support after 1979.

The crucial issue, of course, is not what happens to us four years from now. The crucial issue is what will happen to the groups and interests which we have represented. How will they be able to participate in the adversary process if they cannot afford lawyers?

In many circumstances, a liberalized fee award system would enable the clients we are now representing to obtain counsel in the private market. This would greatly benefit our clients, since they would no longer have to rely on the services of a handful of foundation-supported lawyers. It would also benefit the private bar by diversifying its sources of income.

I would like to focus first on fee awards in cases involving the federal government. Much of the Center's litigation and an increasing proportion of litigation generally is against the federal government. But under 28 U.S.C. § 2412 it is impossible to recover attorneys' fees from the federal government.

To my mind, this policy makes no sense. If a person sues the federal government and demonstrates that the government has disobeyed the law, he should be eligible to receive attorneys' fees. After all, it is the government's obligation to see that the laws are obeyed. A person who successfully sues the government has, in a sense, done the government's own work. In the language of recent cases, he has served as a private attorney general. I believe, therefore, that 28 U.S.C. § 2412 should be repealed and that Congress should establish a system under which attorneys' fees can be obtained from the government in appropriate cases.

Now some people may believe it is inappropriate for the federal government to subsidize litigation, particularly litigation against itself. In this regard, I think it is important to emphasize that the government is already subsidizing litigation to an enormous extent. Corporations and individuals deduct legal fees as a business expense. If General Motors sues the Environmental Protection Agency or the Department of Transportation, the federal government is, in effect, subsidizing that suit by almost 50%. Moreover, it makes no difference whether General Motors wins that suit or loses it. Even if General Motors brings the most frivolous suit imaginable, the government will provide a subsidy. And the government exercises no control over the expenses it will subsidize. If General Motors chooses to pay its lawyers $200.00 an hour, the government still pays one half. If General Motors pays its lawyers to stay in the finest hotels and eat in the finest restaurants, that's fine—Uncle Sam will still pay one half. Under an attorneys' fees statute, by contrast, courts could and would exercise close supervision over attorneys' fees and the other costs of litigation.

The second possible objection to more liberal awarding of attorneys' fees is that it would lead to frivolous lawsuits and thus place a burden on our already overcrowded courts. This objection is totally unrealistic. Courts are not going to award attorneys' fees in frivolous cases, and so attorneys will have no financial incentive to bring such cases. The courts may, of course, be burdened by an increase in meritorious cases. But the solution to that problem is more courts, not fewer awards of attorneys' fees.

H.R. 8743 calls for fee awards against the federal government, and I believe it should be given the most serious consideration. Private citizens should not bear the full costs of remedying government lawlessness.

H.R. 8743, however, does not deal with fee awards during the administrative process itself. Yet consumers, environmentalists and other unorganized groups need representation in agency proceedings at least as much as they need it in court proceedings. I believe, therefore, that the Subcommittee should consider legislation which would authorize administrative agencies to award fees to intervenors in license renewals and similar proceedings. Furthermore, the Subcommittee should consider whether all agencies should be authorized to pay attorneys' fees in rule-making proceedings to spokesmen for important interests which would otherwise go unrepresented. Just last year Congress authorized the Federal Trade Commission to pay attorneys' fees in rule-making proceedings; this legislation deserves to be expanded.

I would now like to turn my attention to H.R. 8221. This bill provides for attorneys' fees to the prevailing party whenever the interests of justice require. If the purpose of this bill is simply to overrule *Alyeska* and permit courts to continue to develop a private attorney general attorneys' fees doctrine, it is unobjectionable. But if the purpose of this bill is to change the general American rule and routinely award fees to the prevailing party—whether plaintiff or defendant—it is both unwise and, I believe, unconstitutional.

Without the American rule, only wealthy plaintiffs could dare to institute major litigation. A consumer or environmental group would be risking bankruptcy every time it brought a lawsuit. The judicial forum would be effectively foreclosed.

This result is of dubious constitutionality. In a series of cases, the Supreme Court has made clear that litigation is an activity protected by the First Amendment. The Court has recognized that for many groups access to the courts is as vital, if not more vital, than access to the ballot box or access to the media. See, e.g., *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia*, 337 U.S. 1 (1964). If persons who, in good faith, bring a non-frivolous but losing lawsuit, can be socked with paying the defendant's attorneys' fees, this would have a "chilling effect" on the exercise of their First Amendment right to litigate. They would be paying an excessive price for having wrongly determined the outcome of a lawsuit.

The closest analogy is *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and subsequent cases dealing with the question of whether a newspaper can be sued for libel whenever it makes a false statement about a public figure. The Supreme Court has held that, in order to advance First Amendment values, newspapers can be sued only when they print a statment knowing it was false or with reckless disregard of whether it was false or not. Newspapers cannot be financially punished every time they make an honest mistake.

Similarly, I believe the First Amendment requires that persons who bring lawsuits involving federal rights cannot be forced to pay a heavy financial penalty simply because they made an honest mistake in their evaluation of the law. Only if the plaintiffs file a lawsuit knowing it to be frivolous or with reckless disregard of whether it is frivolous or not, can they conceivably be asked to pay the defendant's attorneys' fees.

The Subcommittee will undoubtedly require a great deal of time to analyze all the issues raised by the many bills before it. But there is one area where I believe the Subcommittee can act immediately—and that is the area of civil rights. Congress' position here is clear: every piece of civil rights legislation since 1964 has provided for attorneys' fees. But the older civil rights legislation—42 U.S.C. 1981, 1982, 1983, 1985 and 1986—does not provide for attorneys' fees. Prior to Alyeska the lower courts were remedying this inconsistency by awarding fees under the private attorney general doctrine. Now this inconsistency should be promptly remedied by Congress, as both H.R. 8220 and H.R. 8742 provide. There is no longer any controversy that civil rights legislation requires fee awards for adequate enforcement.

I wish to commend the Subcommittee for holding these important hearings and to thank you for inviting me to appear.

STATEMENT OF REUBEN B. ROBERTSON III, ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON, D.C.

Mr. Chairman, members of the subcommittee: Last term's *Alyeska Pipeline* decision by the Supreme Court was a devastating blow to the movement for legal reform through "public interest" litigation to vindicate national policy under the private attorney general concept. As the members of this subcommittee and the entire Congress are well aware, he costs of justice through the courts are staggering, far beyond the means of ordinary citizens. The nation's "major" law firms are almost exclusively taken up with the representation of corporate bureaucracies and financial institutions serving only the interests of the super-rich. The government's lawyers—the Justice Department and the legal staffs of the various government departments and agencies—occupy most of their time and resources in defending the actions and inactions of government bureaucracies, however arbitrary, irrational, or politically motivated they may be. Representa-

tion for the common citizen whose interests are adversely affected by government or corporate actions has been virtually non-existent, until the development in recent years of the public interest bar.

At the beginning, public interest law firms have received financial support from foundations and other charitable sources. It has been uniformly recognized, however, that such funding was "seed money" only and would not be available beyond the short term. The best prospect for survival of public interest law practice in the long run has been through the award of attorneys fees to recoup the cost of such litigation that serves the national interest or the legal rights of unorganized and otherwise unrepresented minorities. Now, the Supreme Court has decreed that the "American Rule" bars any such common sense transferring of the burdens of litigation to those who have acted contrary to the requirements of law or public policy, unless there is a *specific* statutory authorization for fee awards. The ball is now in your court. Unless Congress responds promptly and effectively the *Alyeska* decision is likely to bring much private attorney general litigation to a screeching halt.

The various bills before the subcommittee that would provide for attorneys fee awards in antitrust, civil rights, and other types of public interest cases are a good beginning. For example, H.R. 8219 addresses an absurd gap in the antitrust laws, whereby a damage claimant may recover the attorney's fee *in addition* to treble damages, but a plaintiff seeking only injunctive relief from future violations is not statutorily entitled to reimbursement of attorneys fees. If nothing else, this disparity helps to clog the courts with complex issues of fact that are only marginally relevant to basic antitrust policies, as most plaintiffs' counsel add a count for treble damages in order to be eligible for a fee award. This proposal—which of course has already been approved by the full committee in H.R. 8532, the Antitrust Parens Patriae Act—would remedy this situation, and would help to encourage enforcement of the antitrust laws by private attorneys general where the public's attorney general lacks the will or the wherewithall to do so. Hopefully this will be enacted in the very near future.

H.R. 8743 is another important proposal that would provide for attorneys fees in judicial review of agency action where the challenge is based on civil or constitutional rights, or consumer or environmental interests. This bill may be drawn somewhat too narrowly, however, in that agency action which adversely affects these important citizen interests may be just as successfully challenged on other grounds, such as violation of the Administrative Procedure Act or procedures required under the agency's enabling statute. Thus, when a group of Congresspersons successfully challenged Civil Aeronautics Board action to raise air fares by millions of dollars, the "grounds" of the challenge which proved successful were essentially of a procedural nature:[1] here, surely, was a case in which attorneys fees should have been allowed against an agency which had plainly violated the law. The bill should make clear that where such important consumer and citizen rights are at stake, and the party is seeking review on behalf of such interests, fee awards should be allowed whatever the legal "grounds" of the appeal may be. H.R. 8743 also should be clarified to preclude any possible interpretation that attorneys fees should be awarded to the government where public interest challenges are unsuccessful in setting aside agency action, unless the reviewing court makes a specific finding that the challenge was frivolous or malicious. Such an interpretation would have an extremely dampening effect on the willingness of consumer and citizen representatives to challenge agency action of dubious legality, at the risk of paying enormous fees for the Justice Department lawyers defending the agency.

The bills presently before the subcommittee fail to address one entire phase of the attorneys fees problem that urgently needs attention. That is the matter of representation of consumer and citizen interests in proceedings *before* federal agencies, proceedings which involve billions of dollars annually and antitrust, civil rights and other issues of great national importance. As the scope and impact of federal regulation has increased enormously over the past decades, these proceedings have become a major forum for the determination and implementation of public policies of sweeping effect, yet they are laregly dominated by the supposedly regulated firms. The courts have generally forced the agencies to pay more attention to public interest intervenors when they appear on the scene; but the fact is they are rarely present because of the enormous

[1] *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970).

cost of effective participation. For example, the fees for lawyers and expert witnesses to represent consumer interests effectively in a CAB airline rate or route proceeding may easily reach a hundred thousand dollars or more—not to mention the costs of printing and postage for cross-service of pleadings on sometimes hundreds of other parties. Is it surprising, then, that no consumer spokesman is able to participate in any meaningful way in the proceedings before the Federal Communications Commission involving interstate telephone rates, in which hundreds of millions of consumer dollars a year are at stake—proceedings which are now entering their seventh year, with no end in sight.

Before the *Alyeska Pipeline* decision, it had been widely hoped that the regulatory agencies would be able to award attorneys fees as a matter of discretion to public interest and consumer intervenors, and that this would provide the means for more effective representation of these interests in major agency proceedings. However, the Court of Appeals for the D.C. Circuit effectively sounded the death knell for any such hopes in *Turner v. FCC*, 514 F 2d 1354 (June 23, 1975), holding that *Alyeska* precludes the agency from ordering one party to pay a public interest intervenor's legal fees absent specific statutory authorization. Thus no matter how many pretty words may be said about public participation in agency proceedings as necessary to achieve better regulatory results and vindicate the public policies behind the various statutes, such participation is and will continue to be negligible until Congress provides substantial relief from the massive costs involved. Thus it is a matter, in my view, of utmost importance and urgency to enact legislation that will provide for the reimbursement of legal fees and other costs of public interest representation in proceedings before federal agencies involving civil or constitutional rights, or consumer or environmental interests. Such fees might be assessed either against the regulated companies involved on the opposing side in a particular proceeding, or out of the general funds available to the agencies as a necessary cost of the proper conduct of their proceedings. I urge the subcommittee to address this need in the very near future.

TESTIMONY OF PETER H. SCHUCK, ESQ., CONSUMERS UNION OF UNITED STATES, INC.; ACCOMPANIED BY JOSEPH H. ONEK, ESQ., CENTER FOR LAW AND SOCIAL POLICY; AND REUBEN B. ROBERTSON III, PUBLIC CITIZEN LITIGATION GROUP

Mr. KASTENMEIER. I understand, Mr. Robertson, you have recently been appointed to CAB's new advisory committee on procedural forums.

Mr. ROBERTSON. That is right, Mr. Chairman.

Mr. KASTENMEIER. Gentlemen?

Mr. Schuck, would you like to proceed? First, let us see how far we can get before we are interrupted on the floor.

Mr. SCHUCK. Mr. Onek would like to go first.

Mr. ONEK. I have submitted my remarks for the record and I would like just to comment briefly on some of the issues that have already been raised.

Mr. KASTENMEIER. Without objection, your statement and those of Mr. Schuck and of Mr. Robertson and the preceding witness' statement, Mr. Marsh, will be accepted and printed in full.

Mr. ONEK. First, I would like to stress the need for abolishing 28 U.S.C. 2412, which now makes it impossible, except in very special cases, to recover attorneys' fees from the Federal Government. The present policy of barring fees against the Federal Government really makes no sense.

When a person sues the Federal Government and demonstrates that the Government itself has violated the law, he should certainly be

eligible to receive attorneys' fees. After all, it is the Government's primary obligation to see that the laws are obeyed. A person who successfully sues the Government has, in effect, done the Government's own work, the work the Government should do.

This is clearly a situation, in the language of many recent cases, where the person has served as a private attorney general. Therefore, I think, at the very least we should move to abolish the bar on attorneys' fees against the Federal Government and require the Federal Government to pay fees when it has been shown to have violated the law. There may be some objections that the Federal Government should not subsidize legislation against itself, but I would like to point out that the Federal Government already does that.

At the risk of offending Congressman Danielson, I would like to use the General Motors example. That is in my testimony and I cannot change it. When General Motors sues the Federal Government—the Environmental Protection Agency, or the Department of Transportation—its legal fees are deductible from its taxes. Thus the Federal Government is subsidizing General Motors' suit against the Federal Government. The Government subsidizes it whether General Motors wins or loses. No prevailing party there. General Motors can bring the most frivolous suit possible against the Department of Transportation and the Federal Government will subsidize it through the tax laws.

Mr. PATTISON. May I interrupt a second, because I have got to leave, to go to a New York delegation meeting.

I would like to interject at this point that, to some extent, that really is true also in the case of people who make contributions to charitable organizations; to the extent they are not—they are deductible.

Mr. ONEK. I agree to some extent. Obviously, people from public interest law firms are getting subsidized, but I think all of us believe that public interest litigation will not really succeed if we depend on these charitable organizations. We want to get the private attorenys in there who do not receive any tax subsidies. I agree that I and my clients certainly are beneficiaries of a tax subsidy although it is not nearly as large as a General Motors tax subsidy. But we are trying to get the private bar to come in.

Again, just briefly to pursue the General Motors line of reasoning, they can pay their attorneys anything they want. Their attorneys—and I know many of them—live very well. When they go on the road, they stay at very fine hotels, eat at the best restaurants, and the Government pays without questions asked. Under the attorneys' fees system that I am talking about, the court would much more carefully supervise the kind of fee awards that would be available.

To insure that General Motors is not the beneficiary of fee awards, I would favor the two clauses that Mr. Halpern focused on; that a litigant would not receive fees if it has sufficient economic stake—which would always be the case, I assume, with a large corporation—or if it is financially able to bring the suit otherwise, so that the benefits of the change I am suggesting would go to those who could not otherwise be represented in court.

It has been mentioned briefly and I would like to stress again that litigation which just takes place in agencies, such as licensing proceedings, also needs the same kind of fee awards. Mr. Robertson is an

expert on CAB proceedings and can attest that they, too, require awards. The FTC, as one witness pointed out, is now authorized to provide fee awards in rulemaking proceedings. I think that same practice should be generalized and that in every agency there should be a provision for awarding attorneys' fees to groups that otherwise might not be able to participate.

There has been some talk about abolishing the American rule, and I think all the members of the committee seem aware of the grave dangers that this would pose. I would merely like to add—and my testimony goes into this in detail—that I think the American rule, as a general proposition, is constitutionally required. I do not think that under our Constitution, while litigation is protected by the first amendment, you can have a rule which would inhibit plaintiffs from coming into court by threatening them with a $50,000, $100,000, even $1 million bill if they lost.

I remember Mr. Terris said it cost him $15,000 to $40,000 to bring a law suit. That is his bill. You might ask yourself what the private corporations' lawyers are charging the corporations. The bill may be $100,000, $200,000. In the *Alyeska Pipeline* case I am sure it ran into the millions. Obviously, you cannot let environmental and consumer groups be slapped with a $1 million fee award. I do not think the Constitution would permit that.

Finally, I believe that, although I hope we could get a broad bill out, the civil rights provisions deserve immediate attention. Here Congress' position is clear. Every piece of civil rights legislation, since 1964, has provided for fee awards. The problem is that we have earlier civil rights legislation, section 1981, 1982, 1983, passed in reconstruction days that did not provide for fee awards. Since Congress is already on record on this issue, I think there should be no hesitation to moving immediately and passing one of the two bills now pending before the committee, H.R. 8220 and H.R. 8742, which would make sure that these earlier civil rights acts also provide for the award of attorneys' fees. In this area there is no controversy. Congress has already spoken, and I think it should speak again.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Onek.

Mr. Schuck and Mr. Robertson.

Mr. SCHUCK. Thank you, Mr. Chairman.

I will summarize my prepared statement very briefly. First, I discuss the Washington Office of Consumers Union as a model of a public interest litigation vehicle which differs somewhat from that of the previous witnesses, which are primarily foundation funded. I point out some of the reasons why our model is no more economically viable than theirs and why it is not an answer to the problem that this committee is discussing.

It is our belief that the award of fees in the kinds of cases we are discussing is both efficient and equitable. It is efficient in a very real sense, because what it does is to award public interest litigation by targeting incentives to a particular service and vindicating a particular Federal law. It does not subsidize public interest groups. It does not give them generalized support for activities, some of which Congress may support and some of which Congress may not. But, as I

say, it targets it to a particular objective, upon which Congress has spoken.

It is also an equitable means of achieving congressional objectives. In my statement I suggest some of the reasons why public interest litigation, particularly that against the Federal Government, can be peculiarly expensive and protracted. For one thing, the Federal Government rarely settles these kinds of cases. It prefers to litigate to the bitter end.

In addition, the legal standards applicable to Government action are very favorable to the Government. First, a public interest litigant is required to exhaust his administrative remedies. Second, there is an array of technical defenses which Government attorneys routinely raise, most of which have little or no merit in any particular case, but which are routinely raised. They are very expensive to meet. Third, the public interest litigant is met with the appropriate legal standard, normally being the arbitrary and capricious standard. That is, it is not enough to show that the Government agency has erred; one must show a rather extreme violation of the governing principle. Finally, there are a number of judicially developed presumptions which enable the agency to protract and extend litigation.

Furthermore, public interest litigation tends to gore a very formidable corporate oxen. In my statement, I have summarized three examples of this type of litigation in which we have sued Federal or State agencies to compel them to and comply with the law, and in which large corporate interests have been involved as parties, rendering these cases very expensive and very protracted.

These cases and many others like them raise a very critical question, directly relevant to these hearings. Why should Consumers Union or any other such group have to bear the very considerable costs of compelling Federal agencies or State agencies to comply with the law? The same question may be asked with respect to compelling State and local governments, or those acting under color of law to comply with the law applicable to them. In our view, there is no satisfactory answer to that question. It certainly is not enough to point out that such organizations have, in the past, manifested a willingness to undertake the cost of doing so because, as I have suggested, the willingness of these organizations to do this is necessarily constrained by very severe financial limitations.

Even if this were not the case, it seems to me that equitable considerations would suggest that it is unjust for the larger society to enjoy the benefits of such efforts without bearing the cost necessary to secure those benefits. As I have suggested, statutory fee awards in appropriate cases are both an efficient and equitable means of effecting this burden shifting.

Finally, I have tried to summarize six points, comments and recommendations with respect to the bills before this subcommittee. I will go over them briefly.

First, the statutory award should not be confined to reasonable attorneys' fees, but should include also the other costs of litigation reasonably incurred in the action. This is the language of the recent Freedom of Information Act Amendment that was adopted last year, which I think recognizes the reality that frequently the non-attorney cost components of the litigation costs are very, very considerable.

In the case of a successful suit against a Federal agency or official, the award should also include the costs reasonably incurred in any agency proceeding which preceded the invocation of judicial review. These costs, at the agency level, often exceed the costs of court litigation and are often the most important expenditures because it is at the agency that the record is made and much of the legal research is developed. In my statement, I have cited one of our cases against the Federal Power Commission which is a very vivid example of that particular problem.

Second, the award should not be confined to a prevailing plaintiff, but should extend to a "substantially prevailing" plaintiff. I think that point has been developed in other testimony.

Third, initially at least, any statutory award provisions should be confined to cases involving suits against Federal agencies or officials and suits under the civil rights statutes. These are the situations in which the general public tends to be benefited by litigation and which, for the reasons I have suggested, it seems appropriate to shift cost burdens.

And like Mr. Onek and several of the previous witnesses, I am very much opposed to any broad-scale modification of the American Rule.

Fourth, in these categories of cases which I have just mentioned, the provisions should not simply authorize an award if the court deems it just, but it should establish a statutory presumption that an award shall be made, subject to a finding by the court that the interests of justice militate against an award. This type of presumption is not novel in the law. It has been traditionally created in a number of civil rights cases, and one of which I have cited in my statement. It should be extended by statute.

Fifth, for reasons suggested, statutory awards in all successful suits to compel Federal agencies or officials to comply with the law are appropriate, and I would be opposed to the limitations in one of the bills under consideration relating the availability of an award to the grounds on which the law is vindicated.

Finally, I agree with the premise in H.R. 9093 that fee shifting is particularly appropriate where the United States has brought its very considerable resources to bear against an individual or a company, but I believe that the provision should be redrafted to reserve discretion in the court to deny such an award, because one can easily conceive of many situations in which such an award would be unjust.

That concludes my statement. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Schuck.

There is a vote on. The committee will have to recess to make that vote.

Mr. Robertson, we still need to hear from you. I will propose to reconvene the committee in 10 or 15 minutes, to hear from you.

Mr. ROBERTSON. I do have a plane that I have to get to this afternoon.

Mr. KASTENMEIER. Would you prefer to file your statement?

Mr. ROBERTSON. If it will be 10 or 15 minutes, that will be sufficient for me.

Mr. KASTENMEIER. The committee will not, in fact, be able to hear from you until we reconvene.

Mr. ROBERTSON. That would be fine.

Mr. DANIELSON. I think he wants to come back.

Mr. KASTENMEIER. All right.

Mr. DANIELSON. In case I cannot come back, I want the record to reflect I am not offended by the reference to General Motors. I have no interest whatsoever in General Motors. Perhaps the gentleman does. Perhaps that is why he brought it up.

[A brief recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

Mr. Roberston, if you would like to proceed.

Mr. ROBERTSON. Thank you, Mr. Chairman and Mr. Danielson.

I am an attorney with the Public Citizen Litigation Group, which is a type of public interest law firm that is not tax-supported at all, because we do not have the type of tax exemption that permits private contributions or foundation contributions to be made to it on a tax-deductible basis. I have given your counsel a copy of our most recent docket sheet, which lists some of the cases we have been involved in during the last year. I think this might be of some interest to you, seeing the range and variety of cases that public interest firms can get into, and how they affect a broad sector of the public and consumers.

I think that is important for a hearing concerned with this kind of legislation to focus on. We are talking mainly about types of cases where consumer interests are relatively small on a per capita basis, but they may be very broad across a social stratum. The same goes with civil rights cases, and anti-trust issues.

Basically, our cases, just to give a few examples, divide into roughly four categories. We do a lot of work in the area of anti-competitive professional and corporate activities; in other words, anti-trust regulatory matters. A most interesting case we have had in that field was *Goldfarb v. Virginia State Bar Association*, which was decided by the Supreme Court last term, in which it was held that minimum fee schedules set by a bar association constitute price fixing, which is illegal under the antitrust laws.

We do a lot of work in the field of airline regulation, because this is an area where there is no other consumer representation on a coherent, continuing basis. A very interesting case we had there involved the attempt by the Civil Aeronautics Board, illegally we believed, to set minimum prices that airlines could charge for charter flights to Europe and elsewhere. Of course, this was the only area in which competition has prevailed heretofore, and as a result of that competition, charter fares have been fairly low. It has been the only way consumers have been able to get low airlines fares virtually anywhere.

The Civil Aeronautics Board, at the request of some of the major airlines, was acting to establish minimum fares which would be well above the competitive market pricing. When we challenged that, shortly before the matter was scheduled for oral argument in the Court of Appeals, the CAB dropped its proposal. I think they took a look at the case and decided they could not prevail. That would be a situation under the prevailing party concept that we would not be entitled to legal fees. I think that is a case where the challenge of illegal Government actions should be entitled to legal fees if this kind of relief is forthcoming.

Another type of case area we work on a good deal is in the area of health and safety.

Another category, the fourth category, is areas of Government law breaking, where an agency just goes (which it is not supposed to do), or does not do what it is supposed to do, according to Federal statute. One example is the EPA, which was required within a specified time to establish noise control regulations on various types of equipment, and they just failed or refused to do so. They did not do anything. We sued them, and shortly before the case came to a judgment, they did initiate their rulemaking process. They have vigorously protested and opposed the award of attorney's fees to us in that case, even though the statute in that situation does expressly provide for attorneys' fees.

Essentially, I see the public interest law firm as a concept of limited utility for the future. I would think that most, if not all, of these types of cases could and should be handled by the private bar, as a matter of course. Hopefully, in the long run, we would have no special segment of the bar that is set up to handle only the so-called public interest cases, but rather, every lawyer would be available, except for conflict situations, to handle any type of case that involved consumer problems, civil rights or anything else. But this, of course, will never happen, unless attorneys' fees can b awarded in the types of cases that involve the vindication of public policy and national interests.

I would like to focus briefly on two points, one of which I did cover in some detail in my prepared statement. First, I am also concerned about the bill that would rescind the American rule. One point I have not heard discussed here today is the probability of a constitutional problem at least with respect to diversity jurisdiction matters. Under the Federal system, as it was interpreted many years ago by the Supreme Court, in *Erie Railroad* v. *Tompkins*, the Federal courts are supposed to apply State common law in diversity cases.

You have a great deal of litigation involving personal injury, contract, and other matters of that kind I think would be brought into the Federal courts, if the American rule were abolished in the Federal court system. I think that would have a very unfortunate consequence, jamming up the Federal courts and removing those causes from where they properly belong.

On the other hand, it would raise the question as to whether the attorney's fee award would be a substantive or procedural matter that should be decided under State law according to the Erie doctrine. That is one issue I think is worthy of some consideration.

I think that the proposal in H.R. 8221—I would agree with all the other witnesses I have heard—is a radical change that really we are not prepared for at this time, and I would have some very serious reservations about it.

My other point, and this is discussed in more detail in my prepared statement, is that administrative agency proceedings are the focal point of some of the most important public interest litigation that goes on today—utility rates, airline routes, and truck routes, services, and many other industries whose economic, health, and safety are controlled by Federal agencies. Whether or not that is a good idea, it is a reality today, and citizens' rights are being litigated before those agen-

cies in a very major way every day, with virtually no public representation.

This is because, obviously, of the enormous delays and costs that are involved—specifically, the attorney's fee, as well as witness fees, and filing fees, postage and cost of service, and other things that go along with any kind of large-scale litigation.

In a major case before the Civil Aeronautics Board, for example, the cost can run to hundreds of thousands of dollars for a proceeding that might take 8 or 10 years to resolve. But this decision has enormous impact upon the public for many years to come.

The airlines' costs in such a case are all passed along to the consumer through their fare structure. There is a real double whammy here, because the consumer has no representation of his own interests before the agency, and yet he is paying for the entire cost of the airlines to argue against his interests. This is one area which is not covered by the present bills which very much should be addressed, and I hope the committee would take this up in the near future, to provide for recovery of the attorney's fees and costs of public interest intervenors in agency proceedings.

There was some thought until recently that the agencies could do this on their own, through sort of an equitable power. There were significant efforts to have the Federal Communications Commission do this in broadcast license proceedings. The U.S. court of appeals, immediately after the *Alyeska* decision by Supreme Court, ruled the Commission and other agencies had no such power and could not do that, unless there was specific statutory direction to do so.

I think this is one additional thing the committee should focus on. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Robertson.

Presently, none of the bills before us would permit intervenors to be compensated attorneys' fees.

Mr. ROBERTSON. I believe that is right. Among the bills that were provided to me by your counsel, there was no such bill.

Mr. KASTENMEIER. I think you and perhaps one or two other members have raised the question of overturning the American rule. Why would overturning the American rule be unconstitutional? What if there was a suit involved in which what is at stake is either $200,000, or an equitable right equivalent to $200,000. If the plaintiff's legal costs were $20,000, and the defendant's legal costs were $20,000. Why is it that the plaintiff would be permitted to pay $20,000 but not $40,000 or some other amount? The plaintiff might be charged $40,000 by the same attorney, quite arbitrarily. Why is it unconstitutional that somehow he would not have to pay the other $20,000 if he lost the suit?

Mr. ROBERTSON. Several points have been made, and the point I am making is somewhat different from the others; that is, that the American rule is a common law rule that has been developed largely as a matter of State law. In diversity actions, it is State law that should be applied. There is no Federal common law.

My only point is that if a Federal court, in a diversity suit, should be confronted with the demand for attorney's fees, I think there is a question of whether the court should apply State law to that matter. I suppose with the proper kind of constitutional predicate, possibly you

could impose a Federal statutory provision for fee awards to the prevailing party, but this would have important ramifications for our system of federation.

I think Mr. Onek has a different point.

Mr. ONEK. I think the basic point is that if plaintiffs were routinely penalized every time they lost, even if they had a good case——

Mr. KASTENMEIER. They are already penalized, to the extent of their own cost, and the cost of their own attorney.

Mr. ONEK. I think there is difference between burdens that are imposed upon you by the court or by the Federal Government, and burdens you have anyway. Obviously, many of our rights depend on people having private resources to assert them. We have freedom of the press, but we have to have enough money to purchase a newspaper. That does not mean that because it costs money to purchase a newspaper the Government, for example, could say, if you want to publish a newspaper, you have to pay us $1 million a year. As a practical matter, it may cost $10 million a year to publish a newspaper. Indeed it probably costs more than that. That does not mean the Government could then, in addition, impose a rule saying that if you want to publish a newspaper, pay us $1 million.

You are right that there are already burdens on plaintiffs. Obviously, that is why we are here, because even without any governmental burden imposed at all, it costs a great deal of money to bring suits and that hurts plaintiffs. But I think it is different when the Government then steps in and says, plaintiff, if you lose, we are imposing in addition to whatever your original burden was another burden of $50,000 or $100,000.

In addition, in many cases, the plaintiffs may have managed one way or another, by coming to a group like ours, or by getting a lawyer who is willing to do work for nothing, to get his legal services for free. That is fine, but if you abolish the American rule, if the plaintiff then lost the case, he would be subjected to whatever the defendant's costs were.

I argue that the defendant's costs—and this is true in all of our cases—are far higher than the costs of the plaintiff. We often sue either Government or corporate defendants who spend much, much more than we do, because they have more to spend, so that it is possible for our plaintiffs to get socked for a $100,000 or $200,000 fee. And in that case, no plaintiff that I know of, of the type we are talking about, could dare to come into court.

I think that would be such an inhibition to the plaintiff's coming into court, that it would violate the first amendment. As the Supreme Court has said in *NAACP* v. *Button* and in other cases, litigation is protected by the first amendment.

You may ask, what about a case which is so expensive that the defendant would be inhibited. Judge Skelly Wright in the *Alyeska Pipeline* decision in the Court of Appeals addressed that issue. There would be cases in which a court would say to the defendant, you lost, and maybe plaintiffs deserve some attorney's fees, but it would not be fair, because you, too, cannot afford them, and if you thought you would have to pay this attorney's fees, you would not have come in and tried to vindicate your rights.

The difference between plaintiffs and defendants is this: when the plaintiff sues, the defendant has the opportunity of going to the court and saying, look, we have this problem with attorney's fees. But if you have a rule that plaintiffs after they file suit, can be hit for fees, many plaintiffs will never come into court in the first place. Thousands of people who may have sued will never sue.

That is what the Supreme Court means when it talks about the chilling effect of certain rules. There would be a chilling effect on people coming into court. They would never come into court in the first place. You would never have a chance to decide whether or not attorney's fee should be awarded, because they would not dare walk into the courtroom.

Mr. KASTENMEIER. I assume cases are probably settled out of court, because cases may be settled for any number of reasons—the cost of protracting litigation, the time consumed can certainly—there are so many burdens that litigants assume, either as the plaintiff or defendant, so many ways the equity is cut, that to suggest these are constitutional questions seems to me to really open up the entire process to attack.

Is a person any less denied access because the lawyer tells the individual that it would cost on an average of between $15,000 and $40,000 for you to undertake a suit. That has a chilling effect.

Mr. ONEK. I think the question is who——

Mr. KASTENMEIER. A constitutional question?

Mr. ONEK [continuing]. Who imposes—I will go back to a newspaper, for example. Newspapers cost a lot of money. They are going out of business every day. Under our constitutional scheme there is nothing wrong with that, although it may be unfortunate. But supposing the Government came in and said look, five papers out of 10 are going out of business anyway, so we can kick you five out of business. Would you say that is not a constitutional question because five papers out of 10 are going to die anyway? Under our constitutional scheme we distinguish between those things which, although they may be unfortunate, happen because of private action and those which happen because of Government action.

I agree with you, there are all these terrible burdens on litigation which exist without Government intervention. Indeed, as I said earlier, that is why we are here. But I am suggesting that the abolition of the American rule would impose additional burdens by the Government and that this would raise serious constitutional questions.

Mr. KASTENMEIER. I yield to the gentleman from California.

Mr. DANIELSON. Mr. Robertson. To your knowledge, has a situation come up in which more than one person would seek to become a plaintiff in an action? Let us say the Sierra Club, and Friends of the Earth, and Public Citizen Litigation Group, all three decided they wanted you to take on the Alaska pipeline. Has that come to your attention, and if so, how do the courts handle it?

Mr. ROBERTSON. I think in the normal public interest-type litigation, there tends to be a great deal of coordination among the various groups so there is no duplication of effort, because the resources are so slim that they simply cannot afford to duplicate effort.

Mr. DANIELSON. That would be the normal ideal situation. But I can imagine there could be another situation—that is what I am seeking.

Mr. ROBERTSON. Absolutely. I think perhaps the best example of that is in the area of class actions involving antitrust or similar issues. In antitrust class actions you will frequently find a large number of lawyers and law firms competing to get into court first to sue on behalf of the affected class. But the courts have established mechanisms to deal with such situations. They have a judicial panel on complex and multidistrict litigation, for example, that helps coordinate the processing of complex litigation of that nature. Typically they will appoint a particular lawyer or law firm as lead counsel for the class once it has established what the class should be and that there should be a class action. That lead counsel is basically responsible for managing the action. If that problem should arise in the environmental context, I would expect the same kind of resolution could be used.

Mr. DANIELSON. Do you think the court would have the inherent power to decide Friends of the Earth has already come in here, they seem to be well represented. So, rather than have a multiplicity of parties resulting in exposure to multiplicity of attorneys' fees and so forth, they should then carry the action?

Mr. ROBERTSON. I would not want to see a plaintiff's case dismissed on that basis. I do not think that would be proper. As a matter of managing the docket, the courts could consolidate the actions; they could assign them to a particular district court or a particular circuit for processing. Then they could assign the lead counsel. I would not have any problem with that at all.

Mr. DANIELSON. You do not think it has to be covered in any legislation we might report, then?

Mr. ROBERTSON. There is no legislation in the class action area. This is something the courts do as a matter of good practice.

Mr. DANIELSON. Thank you.

Mr. KASTENMEIER. Thank you, gentlemen, on behalf of the committee. Mr. Robertson, Mr. Onek, and Mr. Schuck, I appreciate your appearances today and your further enlightening us on some of the various aspects of legislation under consideration.

We apologize for holding you over so long, but we appreciate nonetheless your appearance.

This terminates the presently scheduled hearings on the question. The record will be held open to the end of this calendar month. We will be soliciting other comments. We expect comments from the Department of Justice, the Judicial Conference and other interested parties as well to add to those already authored by our distinguished witnesses on Monday and today.

Accordingly, this concludes the contemporary hearings on the question. We may reopen for hearings at a later date. But, for the time being, that concludes the hearings on attorneys' fees in Federal cases.

[Whereupon, at 1:30 p.m., the committee was adjourned.]

AWARDING OF ATTORNEYS' FEES

WEDNESDAY, DECEMBER 3, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:20 a.m., in room 2141, Rayburn House Office Building, the Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Pattison, Railsback, and Wiggins.

Also present: Gail P. Higgins, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order.

The committee is here to consider the subject of the awarding of attorneys' fees. I would like, at the outset, to express my apologies to witnesses and others, for the delay in having access to this committee room, which was preempted for a short while by a caucus.

The subcommittee presently has eight different bills pending on the issue. Many of these bills are in direct response to the Supreme Court's May 12, 1975, decision in *Alyeska Pipeline Service Company* v. *The Wilderness Society*. In that case the Court ruled that the private attorney general theory, under which many nonstatutorily authorized awards were made, is invalid. Absent the statutory authorization, the Court stated, the Congress should articulate when attorneys' fees should be authorized.

The American Rule presently makes attorneys' fees the responsibility of each party, with the narrow exceptions of liability of the party who acts in bad faith, where common benefits exists, and where the statute specifically authorizes the awarding of fees.

Today, we welcome as our first witness, Mr. Rex E. Lee, Assistant Attorney General, Civil Division, U.S. Department of Justice.

Our following two witnesses will be Mr. William North, general counsel, National Association of Realtors, and Philip J. Mause, attorney, Environmental Defense Fund.

First, I would like to greet Mr. Lee. Mr. Lee, if you will come forward. I understand Mr. Martin is accompanying you this morning.

Mr. LEE. Yes.

TESTIMONY OF REX E. LEE, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. LEE. Thank you, Mr. Chairman. I appreciate the opportunity to discuss the views of the Department of Justice, with respect to the attorneys' fees, generally, and specifically the eight bills before your subcommittee.

As background, I should note for the record that these bills, H.R. 8219, H.R. 8220, H.R. 8221, H.R. 8368, H.R. 9552, H.R. 9093, H.R. 8742, and H.R. 8743, are, in the main, responses to the Supreme Court's decision last May in *Alyeska Pipeline Service Company* v. *The Wilderness Society*, 421 U.S. 240 (1975).

In that case, the Court held that, absent specific congressional authorization, attorneys' fees could not be awarded to a prevailing party to litigation except in certain circumstances. The "certain circumstances" are described at 421 U.S. 257–260.

In brief, they will be sufficiently rare so as not to substantially affect the general prohibition of *Alyeska*. Before the *Alyeska* decision courts of appeal and district courts routinely awarded such fees in certain types of civil litigation. The foundation for these awards was the belief that the initiation of litigation by a private party implemented a public policy embodied in the substantive statute at issue and that, accordingly, the plaintiff had performed a public service in the capacity of a "private attorney general."

The Court in *Alyeska* acknowledged the usefulness of public policy litigation but, noting the wide range of cases in which the award of attorneys' fees is involved declined, to adopt a general rule, observing instead that:

I am quoting, "it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."

Elsewhere in the opinion, the Court said, "But congressional utilization of the private attorney general concept can in no sense be construed as a grant of authority to the judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." That is the end of the quote.

Since May a series of bills have been introduced in the Congress with the purpose of responding to *Alyeska*. The following is a short summarization of eight of those bills:

H.R. 8219 authorizes, in mandatory language, the awarding of attorneys' fees to a prevailing plaintiff in suits for equitable relief under the Clayton Act. These suits would not involve the Federal Government as a defendant.

H.R. 8220 would authorize the awarding of attorneys' fees to a prevailing plaintiff in actions brought under certain civil rights statutes. Actions under the statutes involved have been brought against both Federal officers and private individuals.

H.R. 8221 authorizes, but does not require, the awarding of attorneys' fees in any civil action. It applies to any prevailing defendant and presumably applies across the board to both Federal officials and private individuals.

H.R. 8368 is a fairly limited bill. It applies only to proceedings to condemn real property for use by the United States. It provides, in discretionary language, that reasonable attorneys' fees and expenses may be awarded the condemnee.

H.R. 8742 permits, also in discretionary terms, the awarding of attorneys' fees to the prevailing party other than a governmental entity in actions to recover damages or to secure other relief "under the Constitution, or any provision of law which provides for the protection of civil constitutional rights * * *."

Thus, H.R. 8742 would permit any private plaintiff or defendant to recover attorneys' fees but would not permit the Government to do so when it is the prevailing party.

H.R. 9552 authorizes the awarding of attorneys' fees as a matter of discretion in certain civil rights litigation. The prevailing party, other than the United States, may recover attorneys' fees.

Thus, H.R. 9552 applies to all plaintiffs or defendants except to the United States to the extent that it is a prevailing party.

H.R. 9093 applies only to the United States and requires in mandatory language that it pay to any defendant who prevails in a civil action in which the United States is a plaintiff, a reasonable attorney's fee.

H.R. 8743 also authorizes the awarding of attorneys' fees only against the United States. It applies to any proceeding to review agency action, quote, "Where the party seeking review challenges agency action on the grounds it adversely affects civil or constitutional rights, or consumer or environmental interests, and the party seeking review substantially prevails * * *." H.R. 8743 is discretionary rather than mandatory in its provisions.

The differences among the bills are significant. Some make the awarding of attorneys' fees mandatory while leaving the decision of whether or not to award such fees to the discretion of the court; some apply only against the United States, while others apply to all parties to litigation; still others apply to specific classes of plaintiffs. Some of the bills are particularly broad in scope, applying to all litigation in the Federal courts, while others apply only to certain areas of the law; and some permit the awarding of attorneys' fees to a "prevailing" party while others limit such awards to parties who have "substantially prevailed."

Traditionally, American courts have, for the most part, resisted the inclusion of attorneys' fees in costs taxed against the losing party.

It is the view of the Department of Justice that in general, the American rule has served us well, and should continue to be the prevailing standard, with exceptions in specific areas, carefully identified and considered, where strong public policy reasons indicate the appropriateness of the exception.

In the overwhelming majority of cases, litigation results because of genuine differences between the litigants concerning issues of law or fact. In the best of circumstances, the process of having one's case determined in court is costly. In a typical case, obtaining a judicial determination is more costly to the loser than to the winner.

Moreover, it is unduly simplistic to assert that since the loser—by asserting an erroneous position—was responsible for the entire costs of suit, he should be required to pay the costs for both sides. The momentum of that position, if accepted, would cause us to impose upon the loser not only his opponent's attorneys' fees, but also the very substantial costs, borne by the Government, of staffing and operating the court.

Under our present system, the monetary and nonmonetary costs of litigation act as a sufficient deterrent to frivolous suits and defenses; they should not be increased.

As the United States Supreme Court stated in *Fleischmann*, supra at 718. "One should not be penalized for merely defending or prosecuting a lawsuit."

An additional consideration was articulated by the Supreme Court in *F. D. Rich Company* v. *Industrial Lumber Company*, 417 U.S. 116, 129 (1974) : quote, "There is the possibility of a threat being posed to the principle of independent advocacy by having the earnings of the attorney flow from the pen of the judge before whom he argues."

Another factor which must be considered in connection with any proposed attorneys' fees legislation is the impact on an already burdened Federal judicial system. While we have no empirical data indicating the extent of the additional burden, it is logical to assume that awarding attorneys' fees to successful litigants would result in some increase in the courts' caseload.

Theoretically, if A sues B in a case which goes to trial, A's assessment of A's own case is more optimistic than B's assesment of A's case, or the suit would have been settled. Given this fact, offering attorneys' fees as an additional inducement to the winner should increase the number of cases that go to trial.

The more severe aspect of the additional burden on the judicial system, however, is the court time that would be consumed in determining in particular cases whether fees should be awarded and what is a reasonable fee under the circumstances. These issues can only be resolved in a further court proceeding, superimposed upon the trial of the merits, and additionaly consumptive of court time.

One current of thought contends that whatever the properties of the American rule in the private litigation setting, the considerations are different as they apply to suits involving the Government, either as plaintiff or defendant.

The theory is that the Government's adversaries in litigation are merely forcing Government to obey the law, that in this capacity they are performing a public service as private attorneys general, and are, therefore, entitled to be paid for it.

Once again, this argument assumes an overly simplistic notion of litigation. The proposition that the Government as a matter of policy or practice goes into court for the purpose of asserting frivolous positions simply cannot be sustained.

In the isolated instance where this may occur, the proper corrective is not the assessment of attorneys' fees' awards, but rather appropriate discipline of the wrongdoers, in the particular case.

Moreover, frivolous positions are also asserted by the Government's adversaries in litigation. We are not asking that the Government be awarded attorneys' fees in such cases, and in general the proper corrective for frivolous litigation positions is not to assess attorneys' fees against the loser.

Attorneys' fees paid by the Government do ont come from some anonymous monolith. They come from the pockets of the taxpayers. In the great majority, if not in all suits, against the Government, there are some taxpayers who favor the Governments' position and some who favor its opponents'.

Further, attorneys' fees awards against the United States necessarily reduce available resources, with concomitant impact on other Government programs.

For these reasons, we do not favor broad-brush departures from the traditional American rule. There are two areas in which the policy

underpinnings of Federal statutory law are so strong and private enforcement plays such a necessary part of the entire statutory scheme, that exceptions are warranted, and have traditionally been afforded in specific statutory application. These two areas are the civil rights and antitrust laws.

Thus, under current law, attorneys' fees are awarded to a prevailing plaintiff in treble damage actions under the Clayton Act, but there is no provision for attorneys' fees in private actions for injunctive relief under section 16, of the Clayton Act against threatened loss due to a violation of antitrust laws.

Section 16, not only protects endangered persons but also promotes private enforcement of the antitrust laws, thereby supplementing efforts by the Department and the Federal Trade Commission.

Accordingly, the Department would favor permitting the discretionary awarding of attorneys' fees in section 16 cases.

In the civil rights area, there are several statutes in which Congress has made explicit provision for the allowance of fees. Some of the civil rights statutes enacted during the 1960's and 1970's, which contain attorney fees' provisions, include title II and title VII of the Civil Rights Act of 1964, title VIII of the Civil Rights Act of 1968, the Education Amendments of 1972, and the 1975 Amendments to the Voting Rights Act.

The Department concurs in the view that the awarding of attorneys fees in appropriate civil rights enforcement actions is desirable. We believe that each type of action should be closely examined to determine the justification for the awarding attorneys' fees after careful consideration of the specific application involved in each case prototype.

This procedure would be consistent with the Supreme Court's suggestion that Congress exercise "the power and judgment to pick and choose among its statutes," and determine where, again quoting, "enforcement must be encouraged by awards of attorneys' fees."

Additionally, we think that even when generally justified, the actual awarding of attorneys' fees should be discretionary with the court in light of the equities and facts of the particular case.

In applying these general principles to the pending bills before this subcommittee, the Department takes the following positions:

No. 1, support for H.R. 8219, awarding of attorneys' fees to a prevailing plaintiff in section 16 suits under the Clayton Act, provided the awarding of attorneys' fees is made discretionary. Under the present bill, it is mandatory.

No. 2, support in principle for H.R. 8220 and H.R. 9552, awarding of attorneys' fees to a prevailing party in civil rights actions under the revised statutes (sections 1981, 1982, and 1983, 1985, and 1986, of title 42, United States Code).

We recommend, however, that recovery be discretionary with the Court and be restricted to the prevailing plaintiff, in order to prevent a possible chilling effect on these actions.

In addition, we believe that actions under 42 U.S.C. 1983 need further study in view of the type of action involved.

We do have a particular problem with 1983, which I will mention in a moment.

I say, support in principle, in the sense that these are fairly specific applications of civil rights actions. Congress could well consider that attorneys' fees awards are appropriate with the exception of suits under 1983. We believe that attorneys' fees should not be awarded for all actions under 42 U.S.C. 1983, because of the great breadth of that section. Congress may wish to consider specific actions which could be brought under this section which are appropriate for attorneys' fees awards, but this should not be done, in our view, by broad-brush generality.

No. 3, opposition to H.R. 8742, which authorizes the court in its discretion to award attorneys' fees to the prevailing party, other than the Government, in civil actions, quote, "Under the Constitution, or any provision of law which provides for the protection of civil or constitutional rights," we feel this bill is unacceptably vague.

No. 4, opposition to H.R. 8743, which authorizes awarding of attorneys' fees only against the United States in certain cases. We see no justification for this broad change in current law, for reasons discussed earlier.

No. 5, opposition to H.R. 8221, which authorizes the awarding of attorneys' fees in any civil action. We consider it much too broad.

No. 6, opposition to H.R. 8368, to award attorneys' fees in condemnation proceedings concerning real property. We feel this bill would unnecessarily encourage litigation.

No. 7, opposition to H.R. 9093, which would mandatorily award attorneys' fees to any defendant who prevails in a civil action in which the United States is a plantiff. We see no justification for this departure from present law.

This concludes my formal statement. We will, of course, be happy to submit for the record, more detailed comments if the committee would find this helpful. In addition, I will be glad to attempt to answer any questions which you may desire to ask.

Mr. KASTENMEIER. Thank you, Mr. Lee, for a well-organized presentation, and a presentation right on the point. Do you have any empirical evidence that the American rule is more beneficial to the public than the English rule?

Mr. LEE. I have not, Mr. Chairman, I am not aware of the existence of any.

Mr. KASTENMEIER. When you analyzed this question, did you explore whether or not attorneys' fees generally charged or assessed in litigation covered by the bills involved, are appropriate? Are you satisfied, if indeed you have analyzed the question, that attorneys' fees generally charged in cases such as those before us, in legislation, are appropriate today, or do you find they are excessive?

Mr. LEE. To answer your question, Mr. Chairman, we did discuss this, and necessarily, all that we had to go on was the personal experience of the people who were involved in the discussion.

Needless to say, attorneys' fees today, based on my own experience as a former private practitioner, are considerably higher than they were 10 or 20 years ago. My own experience is that the fees that are charged and the kinds of litigation many of these bills are concerned with, are not as high as they are in the private context.

On the other hand, it is my opinion that in those instances where attorneys' fees are awarded, then the testimony that is presented to

the courts in support of an attorney's fees awarded would approach the generally prevailing hourly rates, generally prevailing in the community.

So, I think you would probably be looking at the $75 to $100 an hour range, or whatever it is that prevails in the particular community.

Mr. KASTENMEIER. In other words, you found nothing to indicate that we are dealing with what might be excessive charges in any particular area.

Mr. LEE. Well, we proceeded, Mr. Chairman, on the assumption that the charges that would be made would be fair, and that the courts would exercise their responsibility of assuring that they were fair.

Mr. KASTENMEIER. To the extent that the court may award fees that may or may not have a depressing effect on the actual transaction of fees, do you think they would be less than those that would be charged by attorneys to a client unsupervised by the court?

Mr. LEE. In response to that, Mr. Chairman, I would prefer to respond, based on my own opinion, and based on my own experience as a private practitioner. They would certainly not be more, and my guess is, if anything, they would be slightly less.

Mr. KASTENMEIER. I ask this question because, it is perfectly obvious that if attorneys' fees are nominal, this legislation probably would not be necessary.

Mr. LEE. Precisely.

Mr. KASTENMEIER. Obviously, attorneys' fees are sufficiently costly to warrant rethinking about the award of them. That is the reason that I ask this question.

Mr. DRINAN. Will the chairman yield?

Mr. KASTENMEIER. Yes.

Mr. DRINAN. I wonder if the witness has any precise facts as to what the U.S. courts awarded in a given year, prior to the *Wilderness* case? What are we talking about? How much money is involved? I think this is an essential, key thing, before we say we can't resume it or couldn't resume it or shouldn't resume it. What are we talking about?

Mr. LEE. Mr. Congressman, I really do not have any facts that would be helpful.

Mr. DRINAN. Would you agree it is an essential element to your case? You do have to have the exact figure. You do not even have a ballpark figure.

Mr. LEE. No. That is not essential to the points that I tried to make. It is a factor that this subcommittee might want to take into account. Well, I do not know if it could be ascertained or not. I really do not know.

Mr. DRINAN. Of course it could be ascertained. It is all a public record. The judicial conference would have it. I would request that you furnish it to us.

Thank you. I yield back.

Mr. KASTENMEIER. You, of course, have concluded the civil rights and antitrust laws are appropriate areas for discretionary awards of attorneys' fees. Might it be the case—obviously this is fairly arbitrary—that several years from now a reassessment might indicate that there are other areas which have a compelling public interest in providing awards. Is that not the case, Mr. Lee?

CONTINUED

2 OF 5

Mr. LEE. Not only is that the case, Mr. Chairman, this entire area in which we are dealing is a very difficult area. It is not an area in which the answers are clear one way or the other.

On balance, it is the Department of Justice's position that the American rule has served us well, and we should proceed carefully, considering each specific application and proceed with a rifle rather than a shotgun.

We feel, for openers, that the most appropriate areas for this careful kind of action under consideration are in the civil rights and antitrust areas.

Mr. KASTENMEIER. Does the Justice Department also conclude that Alyeska was correct insofar as it suggested that such awards should be articulated by the Congress statutorily rather than rely upon judicial discretion?

Mr. LEE. I do not know if we really addressed that question specifically. I think we simply took Alyeska as a given fact—and that would represent my personal view.

Mr. KASTENMEIER. I will yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I pass.

Mr. KASTENMEIER. Perhaps I should ask one more question, and take note of the fact that I do have a letter here from the U.S. Commission on Civil Rights. I think my recollection is they differ only insofar as they would make attorneys' fees a mandatory award rather than discretionary, and you are probably aware of that difference they have with your position.

Mr. LEE. I was not aware until this morning, Mr. Chairman.

Mr. KASTENMEIER. Without objection, I would like to include, for the record, the letter of November 28, 1975, from the U.S. Commission on Civil Rights, a 3-page letter, signed by John A. Buggs, staff director.

[The letter referred to follows:]

U.S. COMMISSION ON CIVIL RIGHTS,
Washington, D.C., November 28, 1975.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In the recent decision of *Alyeska Pipeline Service Company* v. *Wilderness Society*, 95 Sup. Ct. 1612 (1975), the Supreme Court of the United States held that "the circumstances under which attorney's fees were to be awarded and the range of discretion of the courts in making those awards were matters for Congress to decide" (p. 1624). This rather narrow view of delegating court costs and fees abruptly ended a noticeable movement by the Federal courts to facilitate more private citizen access to and participation in judicial and administrative hearings by removing the obstacle of cost. In awarding attorneys fees to prevailing plaintiffs, the Judiciary made the courts accessable to many citizens heretofore excluded because of expensive costs and fees.

In these "private citizen" suits, the courts have viewed the plaintiffs as "private attorneys general", forcing compliance with the law, and thereby providing a "common benefit". As a result, many courts did not feel it was proper to make these private citizens pay attorney fees when they had brought such important issues to the court's attention.

"When a plaintiff brings an action under . . . Title (II), he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a 'private attorney general', vindicating a policy that Congress considered of

the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunction powers of the federal courts . . ." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

The awarding of attorney fees has been especially beneficial to minority groups and women because many of the statutes enacted by the Congress protecting these groups from discrimination have largely been enforced through litigation by private citizens. The denial of equal educational opportunities and employment discrimination have historically limited, and continue to restrict, the ability of minorities and women to earn the necessary funds to effectively utilize our court system. Over the past decade, then, the awarding of attorney fees by the courts has had a significant impact on these groups in terms of civil rights enforcement.

The U.S. Commission on Civil Rights pointed out in *The Federal Civil Rights Enforcement Effort—1974* that in the areas of housing, education and employment in particular, the federal enforcement mechanism cannot be relied upon as the sole protector of the rights of women and minorities.[1] For example, in "To Eliminate Employment Discrimination" (Volume 5) the Commission noted that under Title VII of the Civil Rights Act of 1964, where litigation is time-consuming and expensive, the Equal Employment Opportunity Commission (EEOC) filed only 84 lawsuits in FY 74, and for the first three-quarters of FY 75 filed only 95 suits seeking to enforce Title VII. Similarly, during fiscal year 1973, a total of only 58 suits were filed by the Department of Justice to enforce Title VIII's prohibition against racial and ethnic housing discrimination. The Federal Government's limited ability to enforce civil rights statutes, coupled with the adverse effect of *Alyeska*, could seriously hamper enforcement of civil rights legislation enacted by Congress. Clearly, the government is unable to litigate the many private complaints which are not being presented in our courts.

Without the award of attorney fees for a prevailing plaintiff, few private citizens, if any, will be able to bear the cost of lengthy litigation against large corporate defendants. As recently as October 9, 1975, in testimony before the House Judiciary Subcommittee on Civil and Constitutional Rights, Commission Chairman Flemming recommended that "Congress should provide a private right of legal action, including the award of attorney fees, to enforce the prohibition against discrimination" and eliminate discrimination in programs funded by revenue sharing. Chairman Flemming further noted that statutes which include a provision for the payment of legal fees have stimulated effective administrative enforcement of various federal laws.

As a result of the *Alyeska* decision, we are pleased that numerous Representatives in Congress have introduced bills which follows the Supreme Court guidelines of legislatively determining which statutes should expressly provide for attorneys fees. We are pleased to support this legislation, especially those bills which would assist in civil rights enforcement: H. R. 8220, 8742, 8743 and 9552. It should be noted however, that these bills differ in their language with respect to the granting of attorneys fees. That is, some of the bills use the discretionary wording "may award" (H. R. 9552, 8742), while others use the mandatory words "shall award" (H. R. 8220). Prior to *Alyeska*, case law on the subject of attorneys fees indicated courts were construing all civil rights statutes allowing a "discretionary" award of attorneys fees as calling for an award of fees as a matter of course. As a result of *Alyeska*, the Commission favors elimination of the discretionary award with respect to litigation involving civil and constitutional rights, and making the award of fees mandatory. In this way, those private citizens, especially minorities and women, who feel compelled to sue to enforce a civil rights statute will have some assurance that attorneys fees will not be another expense they will have to face after the litigation is completed.

Sincerely,

JOHN A. BUGGS, *Staff Director.*

---

[1] *The Federal Civil Rights Enforcement Effort—1974*, "To Provide For Fair Housing", Volume II (December 1974) at 126; ("To Ensure Equal Educational Opportunity", Volume III (January 1975) at 133–134; "To Provide Fiscal Assistance", Volume IV (February 1975) at 114–119; "To Eliminate Employment Discrimination", Volume V (July 1975) at 455, 456 [Equal Pay Act], at 539–541 [Title VII]; and "To Extend Federal Financial Assistance", Volume VI (November 1975) at 744.

Mr. KASTENMEIER. I would like to now yield to the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

There is a bill, to which you take exception, and I have a slight interest in it, since it was filed by myself, you say it is unnecessarily vague. May I read the language of the bill to you, and ask you to prove your contention. The bill is H.R. 8742, reads so:

> In any civil actions to recover damages or to secure equitable or other relief under the Constitution, or any provision of law, which provides for the protection of civil or Constitutional Rights, the Court, in its discretion, may allow the prevailing party, . . .

and so on.

What is vague about that?

Mr. LEE. Vague, Mr. Congressman, in the sense, perhaps "overbroad" may have been a better term, but regardless of which adjective should have been suggested——

Mr. DRINAN. Why is it overbroad?

Mr. LEE. The reason is, that it sweeps in too much, we feel, for the kind of approach that we feel should be taken by the Congress, at this time.

Mr. DRINAN. Do you want to protect civil and constitutional rights and how does that differ from civil rights? You have approved another bill, I filed, for which I am grateful. But why do you object to this?

Mr. LEE. The reason is, Mr. Congressman, that it simply sweeps in too much. As I stated in my statement, we feel that the American rule has served us well, that, for the reasons I set forth, we should proceed cautiously in identifying those areas which we depart from the traditional American rule.

In a civil rights area, rather than simply a broad approach which would sweep in everything, we should identify, as Congress has done in the past, those specific civil rights areas in which attorneys' fees should be awarded.

For example, the language of H.R. 8742, referring to any civil or constitutional rights, would necessarily include inverse eminent domain actions that are brought by large landholders complaining that in certain police power legislation, local and state and perhaps Federal government bodies have in effect deprived them substantively of their property without due process of law.

Mr. DRINAN. I do not think that is within the contemplation of this bill, at all. It is an amendment to the Civil Rights Act of 1964, and when you raise this "horror show," I think that is a misinterpretation of the bill.

All that I am trying to do in this bill, with several co-sponsors, is to say the protection of civil rights should be guaranteed and ought not inhibit suits that the prevailing party does in fact get reasonable costs in the discretion of the court.

It is not intended, I do not see how any construction of the words, can bring about what you just suggested.

Mr. LEE. If I just might just respond. The fifth amendment to the U.S. Constitution specifically guarantees against the taking of property without due process of law. As a consequence, a suit in an inverse

eminent domain proceeding which does involve an alleged taking of property, without due process of law, would necessarily be a constitutional——

Mr. DRINAN. Why is that less sacred than treble damages? By what norms do you say these two categories that the Justice Department will give its blessing to, the question of civil rights and antitrust.

Why are they more sacred than consumer or environmental interests or the interests under the fifth amendment?

Mr. LEE. Mr. Congressman, as I indicated to the Chairman, we are dealing here in an area whose solutions are not easy.

Mr. DRINAN. I am just asking for your major premises.

Mr. LEE. The major premises are that maybe over the long run we will conclude that certain areas are more important than the ones we have identified. We have selected these because traditionally, Congress has selected these areas for the award of attorneys' fees and consistent with the cautious approach we believe ought to be taken and any additional inroads upon the American rule.

Mr. DRINAN. Why do you want to be cautious in encouraging private attorneys general, why do you want to be cautious in the enforcement of the law?

Mr. LEE. Because as I mentioned in my statement, Mr. Congressman, it is not always that readily apparent that what is occurring here is simply, quote, "The enforcement of the law." Litigation typically results because of a genuine, good faith disagreement concerning some legal issue. We should not discourage any party, either governmental or non-governmental, from sticking to his guns and asserting that position in court, by increasing the costs to the loser.

Mr. DRINAN. Well, sir, Mr. Lee, in your testimony, at the very first page, you say, "Before the *Alyeska* decision. Courts of Appeal and District Courts routinely awarded such fees in certain types of civil litigation."

What was so terrible about the "routine awarding." You have not shown any damage that was done, and I think this was an encouragement to private attorneys general. You say that "The foundation for this action, of course, was the belief that the initiation of litigation by a private party implemented a public policy."

So, what was so horrible about that? You want to cut off a great tradition.

Mr. LEE. They are the reasons that were set forth in my statement. Query, what is the great tradition. Is it the American rule itself? Is it the——

Mr. DRINAN. You keep talking about the American rule, but you contradict yourself. What was the American rule. You say that in your opening page. And then, you refer to the American rule as if it is something different. It is not different.

Mr. LEE. The American rule is a term of art that refers to the traditional view, generally followed with certain exceptions in American courts not awarding attorneys' fees to the winner.

Mr. DRINAN. When you say the American rule, do you include the practices of the Federal courts' routinely awarding such fees. Was it or was it not a part of the American rule, whatever the American rule is?

Mr. LEE. Words are what you mean them to be.

Mr. DRINAN. You are taking the American rule and saying it is sacrosanct. I am saying that is a distortion. In private litigation where two people have differing interests there is no reason why the Federal Government should reimburse the prevailing party. But this is different. You want to snuff out a great tradition. Before *Alyeska*, how many cases were there where the Government lost to private attorneys general and how much did it cost the Government?

Mr. LEE. As I indicated——

Mr. DRINAN. You do not know. Well, why is it so horrible? You do not have any facts why we can't go back to that tradition which frankly, the Supreme Court eliminated and said it is up to Congress. They practically told us to write a statute and give some guidance. They did not want to terminate it. Why does the Department of Justice want to?

Mr. LEE. For the reasons that I have set forth in my statement.

Mr. DRINAN. Thank you.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you.

The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Mr. Lee, you indicated support in principle, for several bills which authorize the awarding of attorneys' fees to prevailing party in certain civil rights actions. You hedged a little bit, but 1983, because in your words, those actions would be further studied in view of the type of actions involved.

Would you explain what considerations prompted you to assert that caveat?

Mr. LEE. Once again, Congressman Wiggins, 1983 is by its nature so broad, that this would be tantamount to virtually saying in all civil rights actions attorneys' fees would be awarded.

Our recommendation is that rather than that, Congress proceed on a specific case-by-case basis, identifying the kinds of civil rights actions it feels, as to which it feels attorneys' fees should be awarded.

The language of 1983, applies to any rights, privileges, or immunities secured by the Constitution and laws. Again, it gets you back into one example I have given of the inverse emminent domain action which is a right secured by the Constitution. 1983 is not even limited to the Constitution: it also applies to rights secured by the laws of the United States. It would be a general private attorney general piece of legislation if it were enacted.

Mr. WIGGINS. Has there been much litigation under 1981 and 1982 or has 1983 been the vehicle for litigation historically to enforce those rights protected by statute?

Mr. LEE. Well, of course, 1982 has been a very important statute in the limited area to which it applies. The famous *Jones* v. *Mayer* case with its application of the 13th amendment was brought under 1982 in 1968, but it is limited to leasing, selling, holding, and conveying real and personal property.

Mr. WIGGINS. I want to go back to a point you made earlier and indicate my support for it. This legislation assumes an easy division of parties as good guys and bad guys or wrongdoers and virtuous

litigants. That is seldom the case although occasionally it is true. Generally speaking, matters do not proceed to trial unless there are serious disagreements and a winner and a loser is determined on the basis of the preponderance of evidence only in civil litigation which may be a 51-percent factor.

Even the loser—losers and winners in those cases, unless otherwise authorized by statute, bear certain economic burdens in pursuing their point of view in court.

This legislation suggests that the loser should reimburse the winner on the theory that the loser has perhaps improperly asserted his position to the economic detriment of the prevailing party. I cannot believe that is true in most cases, but occasionally it is so.

If we were to give the court some discretion in awarding attorneys' fees in appropriate cases, do you think there is any need for the statute to establish guidelines for the exercise of that discretion. That is to say, some appropriate language which would authorize the court to exercise its discretion to award fees in such a case only if there was a great likelihood of success or small likelihood of the difference would prevail. Perhaps, not using the word "frivolous," but the point is that permitting the discretion to be exercised by the court in a routine sort of a way, but to award fees to successful plaintiffs which might well happen in practice if that discretion were granted.

Mr. LEE. I think your comment is a thoughtful one, Mr. Congressman. I would offer this response. Guidelines, I think, would be helpful. You may want to refer in that connection to a Supreme Court decision, *Newman* v. *Piggy Park*, and that citation is 390 U.S. 400, which indicates, absent those kinds of guidelines, "discretionary" tends to be interpreted to require award except in the exceptional case. That may be what you want, but that is one thing that ought to be taken into account.

The only other observation I would make—and this is not to suggest that I come out for it, but merely a suggestion that you may find helpful—is that these proceedings, in my experience, to determine attorneys' fees can be enormously consumptive of time. They are not traditionally as long as the trial itself, but they can consume time, and that is another factor that should be taken into account.

Mr. WIGGINS. I know they consume a great deal of judicial time, but not necessarily court time. The court typically will let the matter of fees stand submitted on the basis of written evidence submitted by counsel and then will pore over this voluminous record in his chambers for hours and hours trying to decide what is right and fair and ultimately will be pretty arbitrary, but no one is in a position to challenge him, and it is all over. There is a public policy in not providing a chilling effect upon plaintiffs, particularly on their assertion of constitutional rights. But on the other hand, there must also be a public policy of not chilling the defense of such actions because it is not to be assumed that the plaintiff is correct, especially at the outset, and the public must recognize the propriety of a person asserting a good faith defense, and clearly the awarding of attorneys' fees to a prevailing party only has the dual chill to both parties. That is a factor to be considered in settlement negotiations, and perhaps produces another public policy issue.

Mr. KASTENMEIER. Well, Mr. Lee, I do not have a specific question, but your testimony is provocative, and thank you for your appearance this morning.

The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I suppose we will all admit there are times when the Government makes a grievous kind of error, in bad faith and in good faith, but very stupidly. I am wondering how you would feel about some other mechanism rather than a judicial mechanism which would treat those types of cases, assuming you could sort those out, treat those sorts of cases as almost tort by the Government and to which a person might well be entitled to some kind of compensation because he has suffered great losses. I am not talking about the loss of his business. I am talking about this particular area of his losses; that is, attorneys' fees.

Some mechanism where we would draft legislation to establish a procedure whereby a person who felt they came within these categories, they could apply to the court, and the court could refer the matter to some kind of a board that would be created for that purpose, that could afford some guidelines as to who should sit on that kind of a board, setting forth some guidelines which would cover a variety of different kinds of cases and would not be definitive, but essentially say to that board, they would be able, in using these guidelines, to exercise some judgment and decide the person who was subjected to this kind of a situation should be compensated for at least attorneys' fees and his costs. That would not come near covering many of the situations that we are talking about, there are horrendous sorts of situations that occur in the best of organizations and which could occur in a law firm when you have some young junior partner, who all of a sudden you discover has done something that you are very embarrassed about. You are subject to malpractice insurance or claims for that.

I am wondering if there should not be some sort of a similar mechanism that we could design for that.

Mr. LEE. Congressman Pattison, I am very sympathetic with that kind of approach. I also am bothered by the occasionally grievous case, as you say, that is just going to occur.

Mr. PATTISON. Right.

Mr. LEE. Whether it is in a law firm or the Government or whatever. There is this—this isn't really responsive—but I just might add that there continues to be the bad faith exception to the general rule. Maybe that takes care of it. I think your suggestion is a bit more comprehensive, and I do not think it should simply be put aside because of the existence of that bad faith exception.

I think, as Mr. Wiggins indicated earlier, the key would be, as you said, guidelines.

Mr. PATTISON. Thank you.

I have no further questions.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Yes, I want to thank you for your testimony. I appreciate the fact that you are supporting some of the bills as opposed to some of the others. Let me just express an interest in the Crane bill

which deals with the Government and would permit a prevailing defendant to recover damages in certain cases. I think, as I recall the bill, it is mandatory. I am not sure I would go that far, but I wonder how you feel about a case where perhaps a Government agency, for instance, would be found or could be found by a court to have really pursued some kind of a spurious action or a very unfounded charge that would perhaps cost, say, an individual or a business a great deal of money to defend.

Do you have any feelings about that?

Mr. LEE. Yes, I do Congressman Railsback, and that is, as I indicated to Mr. Pattison, that is the kind of a thing that bothers me, and I am sure bothers the Department of Justice. I think once again we are talking about the unusual and extreme, but as Mr. Pattison pointed out, the fact it is unusual or extreme does not mean it will not occur, because it will as long as the Government is populated by human beings and has the range of activity that it has.

My view is that, on balance, the Crane bill would be one solution with discretion in the court to award attorneys' fees.

Mr. RAILSBACK. Without making it mandatory?

Mr. LEE. Without making it mandatory.

Mr. RAILSBACK. Perhaps requiring the court to actually determine or find it really was a spurious charge, yes, and even in the nature of a malicious prosecution. Not going that far, but in the nature of harrassment or intimidation. I am convinced there have been situations where we have had Government people that have harrassed and literally intimidated because of their great authority.

Mr. LEE. Yes. If you do elect to go that direction, my feelings on the matter would be that you follow the kind of an approach Mr. Pattison was discussing earlier, and that is, you be very careful about the guidelines, maybe, in the harrassing situation and the intimidating situation.

Mr. RAILSBACK. Let me mention just one letter which I received from a colleague, Congressman Kasten, from Wisconsin who sent me a letter from the head of a firm called Outdoor Advertising, Inc., which really relates a series of incidents where the individual firm apparently prevailed at every single stage, had to spend a great deal of money just trying to defend against what, at least they say, were very spurious charges.

This citizen asked his Congressman what recourses there were for a very small company as far as attorneys' fees and costs at every step of the way. The answer is there was none.

So, I am just inclined to think that perhaps we ought to include not necessarily the Crane language but tightening it up a great deal and make it discretionary instead of mandatory.

Mr. LEE. The mere fact of making it discretionary, while on its face would appear to handle the kinds of problems we have been talking about, in practice, does not. And I would urge the Congress that if it goes in that direction, to put in the kind of language that Mr. Pattison was referring to.

Mr. RAILSBACK. Right. Thank you.

Mr. KASTENMEIER. If there are no further questions from the committee, we thank you for your appearance this morning, Mr. Lee.

Mr. LEE. Thank you, Mr. Chairman.

[Edited letter to Mr. Lee follows:]

DECEMBER 10, 1975.

Hon. REX E. LEE,
Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C.

DEAR MR. LEE: Thank you for appearing before the subcommittee on December 3, to discuss the issue of the award of attorneys' fees. Your testimony was very elucidating, and offered positive direction for the members in the areas of civil rights and antitrust laws. However, I would appreciate it if you or other Justice Department representatives could respond in writing to supplemental questions. If it is possible to do so by January 16, 1976, then your written statements will be part of the record. * * *

The specific questions of the subcommittee include the following:

1. What amount of money was distributed for the award of attorneys' fees in Federal cases from May 1973, until May 12, 1974? Please specify the number and type of cases involved, as well as those brought under the "private attorney general" theory? In which of those cases was the award made without specific statutory authorization? If you have statistics available for a longer period of time, for example, the 3 years prior to May 1974, those would be appreciated.

2. Is the Justice Department presently studying the issue of which other areas, in addition to civil rights and antitrust cases, serve a compelling public interest and merit discretionary awards of attorneys' fees under the "private attorney general" theory?

3. How many cases have been brought under 42 U.S.C. sections 1981, 1982, and 1983? How many have resulted in judgments for the plaintiff? Have any of these cases included the issue of adverse eminent domain?

4. Can you produce any statistics on the amount of judicial hours which are spent determining the issue of attorneys' fees in federal cases?

5. On December 3, 1975, you stated some measure of support for H.R. 9093, if it would allow discretionary, not mandatory, awards against the federal government.

(a) Would the Justice Department limit those awards to bad faith, harassment, or intimidation situations, or would you extend the awards to other situations? If the latter case, what guidelines would the Justice Department suggest for allowing awards against the United States?

(b) Since H.R. 9093 only covers cases in which the United States is the losing plaintiff, would you agree that an attorney fee award against the United States would be appropriate in certain cases when the United States was the losing respondent? If so, what guidelines would you suggest?

(c) What is your position on the liability of the United States for attorneys' fees when it intervenes in a case, on either side?

Your consideration of these questions will be highly valued by the subcommittee.

Sincerely yours,

ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice.

[Edited response of Mr. Lee follows:]

DEPARTMENT OF JUSTICE,
Washington, D.C., January 23, 1976.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of December 10, 1975, regarding my testimony on December 3 and including some further specific questions of the subcommittee.

The Department of Justice has no known statistics in answer to questions 1, 3, and 4. To be of help, I requested the Administrative Office of the United States Courts for assistance. They have supplied some statistics as to question 3 but do not have all the statistics requested. I have attached their statistics for the committee's use.

At the present time, we cannot suggest any areas other than civil rights or antitrust where a compelling public interest may merit discretionary awards of attorneys' fees.

As to question 5(a), I would not recommend beyond discretionary awards for bad faith, harassment, or intimidation situations. As to 5(b), I would only agree with a discretionary award of attorneys' fees if our original prosecution was frivolous or otherwise arbitrary or capricious. As to question 5(c), I would say our position would be against the awarding of fees, unless some of the specific exceptions mentioned in my prepared statement existed.

* * * * * * *

May I also express my appreciation to you for the courteous manner in which you conducted the hearing.

Sincerely,

REX E. LEE.

Attachment.

CIVIL RIGHTS CASES COMMENCED IN U.S. DISTRICT COURTS[1]

Type of civil rights cases	Fiscal year— 1973	1974	1975
Total	7,679	8,443	10,392
Civil rights, general	5,146	5,207	5,532
Voting rights	163	116	106
Employment discrimination	1,787	2,472	3,931
Public accommodations	438	485	601
Welfare	145	163	222

[1] Excludes prisoner petition civil rights cases.

Source: Statistical Analysis and Reports Branch, Division of Information Systems, Administrative Office of the U.S. Courts, Washington, D.C., January 1976.

Mr. KASTENMEIER. Next the Chair would like to call Mr. William North—William D. North, general counsel, National Association of Realtors.

TESTIMONY OF WILLIAM D. NORTH, ESQ., GENERAL COUNSEL, NATIONAL ASSOCIATION OF REALTORS

Mr. NORTH. Thank you, Mr. Chairman. I would like to introduce Douglas Caddy. He is legislative counsel for the National Association.

Mr. Chairman, members of the subcommittee, my name is, as the chairman has indicated, William D. North. I am general counsel of the National Association of Realtors.

As we indicated in our prepared statement, which I would like to summarize, the National Association of Realtors is one of the largest trade associations in the United States and has a combined membership of nearly 500,000, but at the same time, it is perhaps the largest association of small business in the country.

I say small business because real estate brokerage, appraisal, management, counseling, and other services have historically been provided by small enterprises, and according to the Bureau of Census report on business patterns for 1971, 87.6 percent of real estate brokers, agents and managers, have less than eight employees, and 73 percent have less than four.

We have prepared a statement, and it was somewhat distressing to me in hearing the testimony of the Department of Justice that they should dismiss so out of hand H.R. 9093, which is referred to in our statement as H.R. 4675. They are identical bills. We are convinced and feel extremely strongly that H.R. 9093 is the solution to a great deal of the difficulty and problems and pressure which is being experienced by our citizens across the country.

We believe H.R. 9093 should be enacted for three basic reasons. First, the bill will assure all citizens of the ability to defend their legal rights against unwarranted attack by the Federal Government. There is a saying in Chicago, you can't fight city hall. If that is true of Chicago, it is even more true that you cannot fight the Federal Government. At least, you cannot if you are an enterprise of between three and eight people.

There can be no civil or property rights if those rights cannot be exercised, and there can be no exercise of such rights if the legality of such exercise cannot be defended. The high cost of engaging in litigation with the Federal Government has rendered it impossible for anyone other than the most affluent members of the community to mount a defense on the merits.

The national association does not believe that the rule of law can long prevail in this country if the existence of legal rights comes to depend on a private citizen's ability to match litigation dollars with agencies of the Federal Government. By its terms, H.R. 9093 would minimize the coercive power of Federal agencies to extort settlements and concessions which they could never obtain through litigation. It has done this by reimbursing only those persons who are determined, after due process of law, to be victims of over-zealous, misguided, or erroneous legal action by a Federal agency.

If this committee is uncertain as to whether or not the Government is aware of its power to coerce settlements and consent decrees, I can tell you that we frequently, very frequently, receive the consent decree or settlement agreement before we are given a copy of the complaint. I think this is a very serious matter.

Second, H.R. 9093 will assure better understanding of and compliance with the law by all citizens.

As long as Federal agencies can use the cost of litigation to coerce settlements and consent decrees without a trial on the merits, the merits of the issue which would have been raised remain unknown and unknowable. The great value of decided cases is that they serve as a precedent which lawyers can use to guide the conduct of their clients. No such value attaches to settlements and consent decrees which are manifestly the result of the defendant's inability to finance his defense on the merits.

Thus, to the extent that H.R. 9093 would encourage close questions of law to be litigated to a decision, it tends to produce a better understanding of the requirements of the law and thereby encourages compliance by all citizens and not merely by those whom the Government singles out to attack.

The third point with respect to H.R. 9093 would be that it would be a significant step toward restoring the system of checks and balances among the branches of Government.

The Constitution, as we read it, contemplates that the Congress will enact laws, the executive branch will execute the laws, and the judicial branch will interpret the laws in a manner consistent with the intent of Congress and the Constitution.

This system of checks and balances, so vital to the protection of constitutional rights, breaks down totally and finally if the executive branch can effectively foreclose or at least limit review of its interpretations by the courts.

The issue in essentially every case threatened or brought by the Federal Government is not merely the propriety of the conduct of the defendant. This is something that we so frequently ignore. The more significant issue is the propriety of the agency's rule, regulation or interpretation of law which prompts the action. If the agency is wrong, then the defendant is not guilty. If however, the economics of litigation preclude a trial on the merits, it must follow that the rules, regulations, and interpretations of the administrative agencies will not be reviewed by the courts.

But now what this means is that the rules, regulations, and interpretations of law which are contrary to both your intent—and you enact the law—and the Constitution will remain unknown, and hence, unremedied.

It seems to us that the arguments in favor of H.R. 4675 or H.R. 9093 are so overwhelming that it is difficult to conceive of any arguments which could be raised against it, but we tried, and we came up with two which appear to us to be equally specious.

The first argument against H.R. 9093 could be that it is too costly. We cannot believe that this argument can be seriously taken for the following reasons. First, it is inconceivable that this Nation would be willing to spend billions of dollars to enable the Federal bureaucracy to protect the rights of citizens from violations from other citizens and at the same time, be unwilling to spend a small sum, relatively, to protect the rights of its citizens from infringement by the Federal bureaucracy.

Second, the only way H.R. 9093 could be costly to the Government is if the Government is guilty of bringing too many suits on improper or erroneous interpretations of the law. Under such circumstances, the Government has the power to reduce such costs by merely preparing its cases better or conforming the theory of their cases more closely to the intent of Congress and the requirements of the Constitution.

Third, if through a trial on the merits, a Federal agency is determined to have misconstrued the law or exceeded its power, such determination protects and benefits all citizens. It seems appropriate that the Government, representing all citizens, should reimburse at least the legal costs of obtaining such a determination and a clarification of the law.

The second argument against H.R. 9093 might be that it will incite litigation and discourage settlements.

It seems to me that the fallacy of this argument is manifest. In the first place, the only settlements it can possibly discourage are those settlements won by the economic force majeure of the Federal Government. We believe these are not settlements but coerced capitulations involving the surrender of legal rights.

For the same reason, the only litigation which H.R. 9093 is apt to incite is the litigation that would have existed had the defendant had the resources to fight and the opportunity to avoid a Pyrrhic victory.

The legitimate arguments in favor of settlement remain unaffected by H.R. 9093: the risk of loss, the time and energy involved in the defense, the out-of-pocket costs other than legal—and these are very significant. The only argument in favor of settlement eliminated by H.R. 9093 is the argument that if you don't settle, the legal fees will

bankrupt you even if you win. Now, if you think that argument has not been used, I think you had better check with people in the field because it has.

The national association is aware that various other bills have been introduced relating to the awarding of attorneys' fees. We have reviewed these bills with care and interest.

At this time, however, the national association believes that H.R. 9093 is the most realistic approach to the problem which all of these bills properly recognize.

We believe that H.R. 9093 is realistic in limiting compensation of attorneys' fees by the Federal Government to defendants. Any increase in litigation it generates would not, in our opinion, constitute an unreasonably added burden on the judicial system. We do not believe that this would be true if plaintiffs suing the Federal Government were entitled to legal fees and costs.

However, the experience of H.R. 9093, if enacted, should provide some helpful insights into the effect of broadening the right to compensation.

We also believe that H.R. 9093 is realistic in making payment of reasonable legal fees and costs mandatory as opposed to discretionary.

The vagaries and uncertainties of the outcome of litigation are sufficient deterrents to defending a suit without adding the uncertain generosity of a judge.

In summary, as an association of small businessmen, the national association believes that justice should not be measured by the depth of a citizen's pocket.

The association knows that through the experience of its members, the enormous costs of litigation with the Federal Government and the pressures created by those costs to settle on any terms, regardless of the price.

We believe that the enactment of H.R. 9093 will, beyond question, reaffirm this Congress belief in the rule of law, the constitutional system of checks and balances, and the inalienable right of every man, be he rich or poor, to a trial on the merits of his case.

I thank you very much for the opportunity to present our position on this matter, and I would be very pleased to answer any questions which the committee may have.

Mr. KASTENMEIER. Thank you, Mr. North. I just have two or three questions.

If enacted, how much would this cost? You indicate an argument against the bill is that it may be too costly. If enacted, we would have to tell the Congress how much this would cost the Government and how much would be authorized or budgeted for this purpose.

And, of course, Mr. North, you may not have any specific figures in mind, but in the ball park, how much would this cost the Government?

Mr. NORTH. Well, I view this as a basically specious argument. I believe that the cost would have to come out of the agency's budget, and as I indicate in my prepared statement, it is a controllable cost.

In other words, if the cost is too great, if the agency is losing too many cases, then the agency would be prompted to look at the type of cases that are being filed, the quality of the cases, the theories which are being pursued and adjust its thinking to minimize the cost.

So, I think that as a practical matter this would be something which could be reviewed almost on an annual basis, and we would have, within a relatively short period of time, some empirical data which would be instructive. He would know right now how much is being spent by the Federal Government on losing cases. I do not think they are even reporting to the Congress on the cost of their losers.

Out of this type of legislation, we would have a measure of the enforcement effectiveness of agencies of the Federal Government, and I think that this would have a salutory budgetary value.

Mr. KASTENMEIER. I appreciate that comment, but it does not help us in the sense that if we were to pass this bill tomorrow, we would have to tell the full committee and the House what the effect of this bill would be on next year's budget. While I am sure you would not have any precise figure in mind, I thought you might be helpful in terms of at least advising us how we would be able to ascertain what figure we might suggest to the Congress.

Mr. NORTH. It would be extremely difficult for me to prepare such estimates since basically the information is primarily in the hands of the Federal agencies involved. It really is. They know what their cases are, their losers. They know what cases they would press if they could not get settlement without exposing themselves to legal liability.

Mr. KASTENMEIER. Would you be satisfied if we surveyed the Government agencies and asked them what enactment of this bill might cost?

Mr. NORTH. I would be satisfied that it is imperative that they be surveyed, but I also would suggest the information you get be very carefully analyzed.

Mr. KASTENMEIER. What is the particular interest of the National Association of Realtors in the proposal as opposed to the Association of Manufacturers, the U.S. Chamber of Commerce and the Association of Small Businessmen? Why would the National Association of Realtors particularly be interested in this proposal?

Mr. NORTH. Well, there are several reasons. First, the National Association of Realtors historically has had a general interest in the relationship between Government and business, number one. We think this is a healthy proposal from the standpoint of this relationship. It puts business and Government on more of a parity.

If there is one thing which is desperately needed today, it is a working cooperative relationship between business and Government and not one of leverage.

Mr. KASTENMEIER. In other words, it is only a general interest. You have no interest in the bill as it relates to suits involving real estate?

Mr. NORTH. That is not the broad and overriding interest. We also have——

Mr. KASTENMEIER. Yes, I yield to Mr. Wiggins.

Mr. WIGGINS. If you would yield briefly, I have been concerned about that too. I could very well understand the Small Business Association's coming forward, but realtors in particular is kind of a strange selection, it seems to me. Realtors, for example, have an interest in land-to-land transactions. You are supporting a bill which provides for mandatory reasonable attorney's fees to prevailing parties in civil litigation. Who is the prevailing party in a condemnation action?

Mr. NORTH. We are supporting a bill—we are talking about H.R. 9093. We are supporting a bill to pay reasonable attorneys' fees to the defendant in civil actions brought by the Federal Government.

Mr. WIGGINS. The defendant must prevail.

Mr. NORTH. He must prevail under this.

Mr. WIGGINS. I am concerned in who prevails in a condemnation action. That is one problem that realtors have a more active interest in.

Mr. NORTH. Probably, and we did not specifically comment on the proposal on a condemnation procedure. Probably H.R. 9093 would not materially affect condemnation proceedings. The right to recovery would not usually produce a winner and a loser in a condemnation proceeding, but some of the areas we are concerned with would. We have considerable exposure under the civil rights laws. We have considerable exposure under the antitrust laws.

In fact, I would say this. One of the things that realtors, the real estate association, have discovered is that the real estate industry sits at the center of a great number of problems and is the focal point of a great deal of legislative activity in a wide variety of areas, such areas as financing, taxation, civil rights, real estate condominium litigation, all of this. In all these areas we are subjected to regulation by agencies of the Government.

If the Government's regulations are correct and they support the intent of Congress and are constitutional, then H.R. 9093 would have no effect. It would have no cost at all to the Federal Government. We would not be entitled to anything. If we are in the wrong, then it just does not benefit us at all.

But if, as can happen, the Federal Government adopts regulations which are overreaching or engages in overzealous litigation, if in essence, it does not fulfill your will and the will of the Congress, then we believe that we have the right to rise and challenge the Government—not the Government actually——

Mr. WIGGINS. I understand that.

Mr. NORTH. Right.

Mr. WIGGINS. I am concerned in the area of condemnation litigation only. My question was whether or not a defendant in a condemnation case would always be entitled to, since the matter at issue is the amount to be awarded——

Mr. NORTH. I do not believe so.

Mr. WIGGINS. Thank you.

Mr. KASTENMEIER. Do you take a position on H.R. 8368?

Mr. NORTH. We take the position that this may have some merit, but it needs to be essentially refined because as drafted, in our view, there is no question that every effort by the Government to obtain property would be subject to a form of condemnation proceeding. There is nothing to lose. Why not go after a proceeding? You have also guaranteed the lawyers attorneys' fees. So in advising his client, he is going to say, what do you have to lose?

So, we are sympathetic to the concept of a condemnee receiving compensation where he takes on the Government to protect his interest in his property, but we feel that this bill, as it is written, does not provide sufficient safeguards. We are fearful that as written, it would just delay Federal efforts to condemn property forever and ever and ever.

Mr. KASTENMEIER. I have just one other question. Would you oppose making the awards under this bill discretionary with strict standards insofar as when the award should be made and have standards as to the amount of the award?

Mr. NORTH. In the context of this bill which is narrowly restricted to a situation where the Federal Government has brought an action, picked its time, its place, theory, its forum, and for that matter, its defendant, and loses, we feel that the defense award should be mandatory.

In other words, you just cannot persuade an attorney, for example, to take on a defense in such a situation even though he says, I think you have a 60–40 or 70–30 chance of winning, you cannot persuade an attorney to take on that case and help you defend it unless you can give him something more than the hope that a judge may award him some fees down the line.

Mr. KASTENMEIER. At this point, I will yield to the gentleman from California, Mr. Wiggins, so he can continue his colloquy.

Mr. WIGGINS. The bill that you support is a very simple bill, and it states as follows, that the United States shall pay to any defendant who prevails in a civil action in which the United States is the plaintiff, a reasonable attorney fee and so forth. Now, that is what you support.

If Congress were to follow your advice and enact that bill and a civil action is filed—as you know, an offer must be filed to fix valuation if nothing else—could the court carve out an exception in that case in light of the clear and mandatory language of the statute which you support?

Mr. NORTH. Well, I think that we would not be opposed to a refinement of the bill to resolve that particular point.

Frankly, we did not contemplate the application of this bill to that particular situation.

Mr. WIGGINS. Would you extend an exception if the Congress would consider it, in the case of condemnation cases and extend a similar exception to cases where the only matter at issue is damages? The liability is stipulated, but the controversy swirls around how much.

Mr. NORTH. Yes, I think I would do that.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Your statement on page 2 says the Crane bill does this by reimbursing those persons who are determined through due process of law to be victims of overzealous, misguided, erroneous legal action by a Federal agency. It would be my hope that the Crane bill does too. However, the Crane bill just simply prescribes one criteria. But whether the Government is overzealous, misguided, or erroneous is certainly not part of the Crane bill.

I am sure you will admit there are many cases where the Government brings actions which are justified, where good lawyers would agree they should be brought and they are close questions. But they should be brought where there is a substantial question. Where the Government does lose for one reason or another, and not always justifiably—perhaps because people on a jury are sympathetic or perhaps people fail to testify and so forth, is it really justified or good policy that the attorneys' fees be paid.

Would this not also have the effect of sometimes encouraging the Government to appeal in a case where they would not ordinarily appeal?

In other words, in a case where they lose narrowly, and it could arguably be reversed, and maybe they take their licks in a case because it is not of great significance, but since they lost the case and, therefore, the attorneys' fees, they would be under a lot of pressure to appeal.

Would that not have a countereffect upon the small businessman?

Mr. NORTH. May I respond to the first question.

Mr. PATTISON. Yes.

Mr. NORTH. Frankly, if it would further the interest of the enactment of this bill, I would be delighted to delete from our statement the words "overzealous and misguided" and settle for "erroneous" because I did not intend the words "overzealous" or "misguided" to jeopardize the integrity of our position.

We feel it is precisely in those close questions that the issues must be litigated. It is precisely because they are close questions that the lawyers in the field need to know how to advise their clients.

Mr. PATTISON. A close question of fact.

Mr. NORTH. A close question of fact. The facts always have to be applied to the law, and no matter how you slice it, there is no way to avoid the application of the facts to the law.

Mr. PATTISON. In a close question of facts as applied to the law, it is a question of the facts supplied to it that determines in many cases if you win or lose.

Mr. NORTH. Well, we are presently engaged in a lawsuit, the National Association, one of our members is engaged in a lawsuit which you could call a question of fact. It is in the Detroit area, and it involves the question of what facts in the aggregate constitute steering. Now steering is not found in the civil rights law. It is a concept of the Civil Rights Division of the Department of Justice. We are concerned with the development of facts.

Over $350,000 has been spent in this effort to develop a concept of what facts equal steering.

Therefore, I cannot really accept the proposition that you can assume that the law is clear, and all you have to do is find out what the facts are——

Mr. PATTISON. The proposition you described is a question of law.

Mr. NORTH. No.

Mr. PATTISON. The question of law is which facts put together constitute a particular concept of law. That is essentially a legal question, not a factual one.

Mr. DRINAN. Will the gentleman yield on that?

Mr. PATTISON. Yes.

Mr. DRINAN. I wonder if you would comment on this. If the defendant in a particular case was going to be reimbursed by the Federal Government for all his fees, would he not inevitably be attempting to prolong this to go on and appeal every decision in the hope that he would prevail?

Mr. NORTH. Absolutely not. Not when you have $350,000 invested and more on the way with no assurance that he is going to win, because if he loses, he is out not only the $350,000, plus the appellate money plus the other money. Under no circumstances would this incite

further appeals. It might induce the Federal Government to appeal, but then again, the Federal Government has to look at the financial risk.

Right now, the Government has nothing to lose. It has absolutely nothing to lose, and I have heard it said, we are going to take it up on appeal, and from there, we are going to try for the Supreme Court.

In other words, what we are trying to say is that we should equate responsibility with authority. The Government has the authority, but in much of the litigation it brings, it has no responsibility.

Mr. DRINAN. Well, I would suggest that is also true in other kinds of litigation also. The realtor himself might be very wealthy and decide he is going to sue somebody, and you would have disparity there also at some time. It works the same way in those instances.

I support basically the concept of the Crane bill—the mandatory part of it. However, leaving no room for discretion in cases such as described by Congressman Wiggins and other cases, I think leaves the bill essentially one which is unpassable, and we could not justify it.

Mr. NORTH. In response to that I think the problems posed by Mr. Wiggins can be resolved within the context of the bill. We are talking about how much as opposed to whether or not——

Mr. PATTISON. I do not think Mr. Wiggins was being all that inclusive. He was using one example, and I think you could think of a lot of examples which would be equally compelling, where it would not be good public policy to pay the attorneys' fees to the defendant because it would encourage, in the same way condemnation cases would encourage, as you said, a person to go ahead with a case on the basis that he had nothing to lose.

I do not think that is generally the case, but I think there are plenty of examples that would require some sort of discretion.

Mr. NORTH. I would say that if the mandatory element is omitted, you would seriously impair the value of this act in the areas that we feel are of most concern, and that is to somehow neutralize the coercive costs of litigating with the Federal Government, which are very significant because they seem to have almost unlimited quantities of money.

Mr. PATTISON. Oh, I have seen that——

Mr. NORTH. These are very, very significant deterrents to doing anything more than just saying, take me, I am yours.

Mr. PATTISON. You see the same thing in criminal cases. There are many cases where people have pleaded guilty to crimes where they got the right kind of offer on plea bargaining, even though they were not guilty, simply because they could not afford to go to court, or to take the risk that they may go to jail for 10 years, on some part of the charge that was not justified but which they could be found guilty on.

Mr. NORTH. Here we are talking about the person who says, well, I am willing to take the risk. I feel very strongly that if a person is willing to take the risk of losing, he ought to be able to do so, but he ought at least to be able to be in some parity with his adversary. Now this is not the same as litigating with a private party, a private opponent. It is quite different to take on the Federal Government and try to match it dollar for dollar.

I think this is why, from the public policy standpoint and a due process standpoint, whatever error you have in situations like those you suggested might well be in favor of the ability to defend oneself as opposed to the other side.

Mr. PATTISON. I have just one other question. How about the area of criminal law? Suppose a government agency has a choice of going civil or going criminal, and the law only applies to civil cases. Would this not encourage the government to go criminally in a certain number of cases? Is another threat that they would have over your head?

Mr. NORTH. This is true, but also the burden of proof for the Government to go that route, that direction, is significantly greater and, I think, an abuse in the criminal area would be viewed with a great deal more dismay by the community and by the Congress generally than the type of action where only money is involved, even though it may be your whole life's savings.

Mr. PATTISON. Thank you. I agree with you on that. I think people are much more concerned about the civil cases than the criminal cases. I think we have a lot of examples of criminal cases where once you start to charge a man with a crime, people feel he must be guilty. In the civil case, I do not think it is the same.

Mr. NORTH. Please do not misunderstand me. The criminal cases frightened me ever since I discovered, in one case I had occasion to review, that there are no executive suites in the Federal penitentiary. It is very, very serious, and I do not in the slightest minimize the coercive element in a criminal case, but frankly, we are presenting our case and our position on this bill, and we would prefer to take up the criminal aspects some other time.

Mr. PATTISON. Thank you.

Mr. KASTENMEIER. Mr. Railsback.

Mr. RAILSBACK. I want to welcome a fellow Illinoisan. Mr. North, let me ask you this. Under the 1968 Fair Housing Act, are there provisions for conciliation?

Mr. NORTH. Yes.

Mr. RAILSBACK. I thought there were. It would seem to me realtors could be forced or could be subjected, if there was an overzealous Government to reach agreement on charges of discrimination under the Civil Rights Act because, as you have pointed out or suggested, the expenses of going through litigation, all the way through the appellate process, could involve a tremendous burden on some rather small business people. Is that correct?

Mr. NORTH. There is simply no question about it. The usual payment in a civil rights case will be somewhere between $4,000 or $5,000 or $6,000. Now, frankly, that does not even get a good lawyer started in a civil rights case. The legal research alone just to be in a position to answer the complaint and raise the appropriate motions and just prepare discovery will run substantially in excess of that.

The pattern throughout the industry is that these cases—this is what I had reference to—the settlement agreement, complaint, often is presented even before the complaint is filed or even gotten into.

Mr. RAILSBACK. Let me say, I am sympathetic with that problem, but referring to your statement, on page 5, about the middle of the page, you indicate the national association is aware that various other bills have been introduced relating to the awarding of attorneys' fees. We have reviewed these bills with care and interest.

Then you go on to say, at this time, however, the national association believes that H.R. 4675 is the most realistic approach to the problem which all of these bills properly recognize.

Actually, the other bills do not address, in my judgment, do not address themselves to this same problem. The other bills address themselves more to the *Alyeska* decision involving a private attorney general bringing a suit in the public interest or the interest of society.

That is again, in my opinion, far different from the Crane bill which deals with Government. Would you concede that or a——

Mr. NORTH. I think, again, it is all a question of how you view the problem. The problem in the context that I was viewing it is how to equalize the leverage to prevent overreaching in establishing the ability to prosecute or defend or assert your legal rights. That is the broader view of the problem than just *Alyeska.*

I believe you will probably be hearing in your next witness a comprehensive analysis of the implications of the private attorneys' general concept.

We have very, very mixed emotions concerning this concept. There are some significant values to be realized, but there are some very, very enormous dangers, not the least of which is that you may very well legalize massive champerty and barratry. This concerns us a great deal.

So, what we are really saying is that H.R. 9093 is a first step. It will provide a great deal of empirical data as to how people react. What is the effect on the courts? What suits are going to be brought? What are the amounts of legal fees? How do you establish reasonable legal fees? All of these areas will be developed in, you might say, a limited way, in a microcosm, through the enactment of H.R. 9093.

Now, this may provide some very meaningful lessons which will suggest either that the private attorneys' general concept is valuable or is not valuable.

Mr. RAILSBACK. Let me just for a moment disagree with you in what you are saying. I think that there has been a precedent, without a doubt, for permitting discretion in attorneys' fees in certain other areas. I think to limit, to completely discount that in favor of something as limited as the Crane bill is not really solving the problem as these other bills are addressing themselves to.

Let me just suggest to you, and I hope you understand from my previous questioning, I am sympathetic, at least, with the problem the Crane bill seeks to address, whether it is OSHA or arbitrary actions in the area of enforcing the Fair Employment Practices Acts or sex discrimination or fair housing or any of those areas where there is room for, and I believe, there has been abuse by the Government.

On the other hand, we do not want to also create a frustration for the Government that is seeking to implement and carry out what is announced and enacted Government policy in those areas.

So, I agree with my colleague. We probably should address ourselves to the problems you are concerned about. But, on the other hand, in my opinion, we do not want to mandate something that is going to have a chilling effect on carrying out legitimate, determined, announced Government policy.

Mr. NORTH. I am hard-pressed to see why it would have any chilling effect.

Mr. RAILSBACK. For this reason, as you suggested, there are cases—this is new ground—where perhaps you think there is not steering, where perhaps there is a legitimate question about it, perhaps it is marginal, perhaps it involves the interpretation of the law, perhaps we have not been as specific as we could have been, Maybe it was impossible to be so specific so as to determine what is in fact discrimination.

Suppose there are close questions, and in a case where there is a close question, where the litigant happens to prevail, perhaps the judge feels that there was certainly every bit of good faith exercised in bringing the suit in the first place. In that case, there should not be an award of attorneys' fees.

Mr. NORTH. But you see, the problem is you are tying this to good faith, and I am not tying it to good faith. I think this is right.

Mr. DRINAN [presiding]. The time for the gentleman has expired. Go ahead.

Mr. NORTH. I think the good faith is irrelevant. I think the key point is that the resolution of that issue depends on the defendant's willingness and ability to raise the issue on the merits. We will never get to a decision on that close question—is it right or is it wrong—unless the defendant is in a position to raise the issue with the Government. Otherwise, the Government will merely go ahead, take a consent decree, take a settlement agreement, what it will, and you will never know, and we will never know what the law is.

Now I think an organization, a defendant who aids the Government in determining what is the law, what is the scope of the law, serves a public service sufficiently to warrant reimbursement of legal fees incurred.

Mr. DRINAN. Mr. North, the chairman, Mr. Kastenmeier, regrets he simply had to go to another duty. I have several questions, but if you will just let me conclude in the interest of time, with one comment.

I am afraid I am not sympathetic to your proposition that we have been discussing here, the role of the private attorneys general and what compensation or indemnification should they get, if any.

You are bringing up an entirely new thing, that the rich and the wealthy associations should get counsel. I simply am not sympathetic to the Crane bill.

In any event, I appreciate your coming. The chairman and I apologize for the tardiness this morning and once again, I thank you and I welcome the next witness, Mr. Philip J. Mause. If you will come forward.

I notice you have a very extensive statement. I apologize for the length of the hearing. You may proceed in any way possible, any way you like. This will, without objection, be made a part of the record.

[The prepared statement of Philip J. Mause follows:]

STATEMENT OF PHILIP J. MAUSE

THE AWARDING OF ATTORNEY'S FEES

I want to express my appreciation for the opportunity to testify on a matter I consider to be of great importance. I am testifying as an individual who has done research in this area, and not on behalf of my current employer, the Environmental Defense Fund. My remarks, therefore, do not necessarily represent the position of the Environmental Defense Fund.

I first became interested in the merits of awarding litigation expenses (including attorney's fees) to the winner in civil litigation (a system which will hereinafter be identified as the "indemnity system") instead of allowing each party to bear his own litigation expenses (a system which will hereinafter be described—for purposes of convenience only—as the "American system") while teaching at the University of Iowa Law School. I published an article called, "Winner Take All: A Re-Examination of the Indemnity System," 55 Iowa L. Rev. 26 (1969). Since then, I have testified before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee (on October 5, 1973). My most recent work in the area is a paper (attached as appendix A to this testimony) which I delivered in May of this year to a joint Law and Economics Seminar at the University of Chicago School of Law.

Because this is an area in which confusion is rampant, let me try to state the issues I consider most revelant and briefly summarize how my work bears on them. These issues are:

1. What are the advantages and disadvantages of moving from the American system to a system of automatic indemnity in every case?

2. Is there some form of limited, or discretionary, indemnity which is preferable to complete indemnity and/or the existing system?

3. Should the Government be treated differently from other litigants with respect to indemnity?

4. Is there an identifiable category of "public interest" litigation which should be treated differently—and, if so, how can it be defined?

Although I am not addressing any of the bills before this Subcommittee directly, I hope that my analysis of these underlying issues will be useful in evaluating pending legislation.

1. The Merits of Enacting Automatic Indemnity

This is the focus of the paper I have attached as Appendix A. My analysis did not enable me to provide a definitive answer, but a listing of the advantages—and disadvantages—of this change in American procedure is still useful.

Advantages.—Paradoxically, I found that the most important advantage of indemnity would be its effect on disputes which never reach the court system, but are settled without litigation. In such cases, indemnity guarantees a settlement close to the expectations shared by the parties to the dispute of the result which would have occurred had the case been litigated. The American system, on the other hand, allows for the substantial possibility of a settlement widely different from the result both parties agree would occur were the case to be litigated.

This can be illustrated with an admittedly oversimplified example. Let us assume that you lend me $10,000, the note becomes due, and I realize that there is no defense to an action on the note. In a system in which attorney's fees are automatically awarded to the winning party it is relatively likely that we will settle for $10,000. You have no reason to settle for less and I will lose considerably more unless I am willing to pay $10,000. Under the American system, if your expected attorney's fee is $2,000, you will actually be better off by accepting an $8,500 settlement than by litigating and winding up with a net of $8,000. I will realize this, if I have information concerning your probable attorney's fees, and I may be able to persuade you to accept such a settlement. Of course, it is impossible to predict where—between $8,000 and $10,000—we will settle the case under the American system. One of us may be better at "bluffing." The advantage of indemnity is that a settlement at $10,000 is more certainly assured than under the American system. The basic problem is that in a system in which each party must pay his own litigation expenses regardless of the result of the litigation, some parties may be able to escape obligations which the legal system clearly imposes upon them because opposing parties have the prospect of large attorney's fees. This difference, of course, becomes more and more significant as the potential litigation expenses becomes large in relation to the amount at stake in the dispute. This is consistent with the observation that small, but meritorious, claims may often be unenforceable under the American system.

Disadvantages.—Automatic indemnity would probably lead parties actually in litigation to spend more—although it is impossible to quantify how much more. It would also create a disadvantage for the relatively "risk averse" litigant—and litigants of modest means are likely to be more risk averse than the rich or large corporations.

This latter effect may be especially acute in the United States because of the existence of the contingent fee. The contingent fee, combined with the absence of

indemnity, at present allows a plaintiff to bring a lawsuit and not to run any risk of substantial out-of-pocket expenses in the event of defeat. Automatic indemnity would change this.

Conclusion.—Because all of the above-described effects elude quantification and because indemnity would also result in a change in the "mix" of cases actually litigated (and it is difficult to determine whether this change is an advantage or a disadvantage), it is very hard, perhaps impossible, to determine whether a change to automatic indemnity would be advantageous.

2. What Form of Limited—or Discretionary—Indemnity Might Be Desirable?

As the attached paper suggests, a form of discretionary indemnity might achieve most of the advantages of automatic indemnity while minimizing the dangers of the possible disadvantages. If indemnity were awarded whenever the trier of fact determined that the loser should—in the exercise of reasonable diligence and judgment—have foreseen that he had a very low probability of success, the most important advantage of complete indemnity would be largely achieved while the disadvantages would be minimized.

Advantages.—In the case discussed above—in which two parties each believe in advance that litigation is certain, or almost certain, to result in a given outcome, discretionary indemnity is likely to guarantee a settlement which closely approximates the outcome. This occurs because the parties will realize that if the case is litigated, it is very likely that indemnity will be awarded. By hypothesis, a case in which both parties perceive a particular outcome as certain or almost certain is very likely to be a case in which both parties anticipate that, if litigation occurs, the trial of fact will rule that the loser should have foreseen the lack of merit in his position and will therefore compel him to indemnify the winner. Thus, the potential winner will have no reason to settle for less than the expected outcome, and the potential loser will see little chance of persuading the winner to accept less—because both know that, if litigation occurs, the winner will ultimately receive the actual amount due—not the amount due minus his attorney's fees.

Disadvantages.—Discretionary indemnity is unlikely to have a great effect on litigation expenditures once litigation is actually commenced. If the parties are actually in litigation, each probably assumes he has a significant chance of success, and thus assumes that he will be able to persuade the trier of fact that his refusal to settle was not unreasonable. Thus, the litigants will behave under the assumption that each will pay his own expenses.

The impact of discretionary indemnity on the risk averse will be less than the impact of automatic indemnity. In many cases, the potential litigant will foresee little or no chance of being compelled to pay indemnity so that his position will not be appreciably changed. On the other hand, it is conceivable that some risk averse potential litigants with colorable positions (which are nevertheless so weak that the litigant himself foresees a significant chance that after the trial the trier of fact will hold that he was unreasonable) will be put at a disadvantage.

Conclusion.—Discretionary indemnity—along the lines described above—seems to be a sensible measure. Some specifics of its application should be defined.

Timing.—The expenses indemnified should be those incurred by the winner from the time the loser should have realized the lack of merit in his position. Since we are interested in influencing the behavior of two litigants, both of whom share a common perception of a certain outcome, indemnity should apply only after such perception was, or should have been, shared by the parties.

Definition of defeat.—Some care must be given to the definition of "winner" and "loser" for the purposes of awarding indemnity. I think that the definition should be based upon the most attractive offer to settle the case made by the opposition: if the result is equal to or worse (from the point of view of the party who rejected the offer) than this offer, then the party who rejected the offer should be considered the "loser" and indemnity awarded if his rejection was unreasonable.

3. Should the Government Be Treated Differently from Other Litigants?

There seems to be no reason for treating the Government (as a plaintiff or a defendant; as a winner or a loser) differently from other parties to civil litigation. All of the arguments above. Would seem to apply to the Government officials who decide to litigate or to settle will not be affected by the prospect of indemnity because it does not come from their pockets (the hand that signs the pleadings does not pay the indemnity). But, this is a questionable assertion. If the indemnity comes from the budget of the agency which acted unreasonably (either

as a plaintiff or a defendant) in forcing a matter to litigation, the prospect of indemnity would appear likely to affect the agency's behavior. Even if it does not have any effect on the Government's behavior, the prospect of indemnity will encourage the party litigating against the government to seek what he is entitled to under the law; and the government officials will realize that there is no point in trying to persuade the opposing party to settle for less.

The argument for including the Government is more compelling when viewed in the context of the American structure—under which the three branchs are to act as checks and balances to prevent abusive behavior by a single branch. The Judicial Branch and Congress can set rules for behavior by the Executive Branch, but often the rules are ineffective unless some private party is willing (either as a plaintiff or a defendant) to contest the violation of such rules in court. Even in clear cases of abuse the Executive Branch may be insulated from outside controls, unless some individual or group affluent enough to expend the substantial funds necessary to mount a court challenge decides to attack the abuse. It would seem that discretionary indemnity, while not by any means a panacea, might significantly increase the adherence of the Executive Branch to rules and policies established as law by the Congress or the Judiciary.

The issue is somewhat different in criminal cases—indemnity in favor of the Government[1] might invade a criminal defendant's constitutional rights by deterring him from demanding his day in court—and would therefore seem undesirable. On the other hand, indemnity against the Government would not raise such a difficulty and should be governed by the considerations set forth above.

4. "Public Interest" Cases

There has been a great deal of discussion (especially in the wake of the *Alyeska* decision) concerning the possibility of awarding indemnity under some form of "public interest" standard. I have always been somewhat disturbed by the self-congratulatory title of "public interest" lawyer, law firm, or lawsuit. Although many of us are guilty of using this term in common parlance, it is important to remember that it is the court and the Congress (and, ultimately, the voters) who have the ultimate responsibility for deciding what is in the public interest. The relevant standard in this area is not "public interest" but whether a given organization or attorney is representing an interest which is so diffuse that it is unlikely to receive economic support. For example, we all have an interest in preserving the ozone in the stratosphere. If some people work for such preservation, it benefits everyone—but those who do not contribute to the expenses of the work become "free riders"—somewhat similar to non-union employees who benefit from a wage increase which a union has obtained only after the expense and sacrifice involved in a long strike. If such diffuse interests are left to the marketplace, there is likely to be an inefficient under-representation and a systematic bias in decision-making against such interests.

Thus, if a decision must be made between two policies and, as compared to the alternative, the result of one policy choice is that one private party will benefit by $2,000,000 and everyone in the District of Columbia metropolitan area will lose $10 each (either in dollars, inconvenience, health, or annoyance), economic efficiency would indicate that the costs of the policy choice outweigh the benefits. Our system for allocating legal resources guarantees that the interests of the one private party are likely to be represented competently, but does not guarantee that the diffuse interests of the large number of people will receive any competent representation at all. Thus, public policy decisions may be distorted toward economically inefficient undervaluation of such diffuse interests. This is not to say that those advocating the protection of such diffuse interests are always acting in the "public interest." What is—or is not—in the public interest can be determined only after advocates of various policies competently present the case for those policies. Under appropriate circumstances the award of attorney's fees, may further such representation and thereby present a court with a more balanced record on the basis of which to make a decision. Such an award should not depend upon whether recipients acted "in the public interest" but rather whether (1) they represented an interest which is unlikely to be economically supportable under our system, and (2) their representation was such as to improve the decision-making process.

[1] To be sure, such indemnity would very rarely be awarded. A judge would have to find that a losing criminal defendant should have foreseen that he had little or no chance of persuading the jury of a reasonable doubt of his guilt.

Against the Government.—The award of fees against the government seems to raise few problems of economic efficiency or justice. A decision to award such fees simply represents the judgment made by legislators and/or courts that such an expenditure of public funds is cost-effective because of the improvement in the decision-making process which it is likely to guarantee. As long as the value of the improvement in the decision-making process is greater than the funds expended for such awards—it would appear that such a rule would be an intelligent appropriation of public funds. When extremely important decisions are being made, marginal improvement in the decision-making process may be worth a rather large expenditure.

Against private parties.—The problem is a bit more complicated with respect to litigation involving private parties. While the rule of discretionary indemnity based upon reasonableness of the loser's position may result in a number of awards in the so-called "public interest" area, the extension of indemnity beyond this point raises certain questions. The factors that would seem to be crucial are the following:

1. The degree of improvement in the decision-making policy which would result from such awards;
2. The degree to which the prospect of such awards would inefficiently distort either the primary conduct or the conduct of litigation by private parties to lawsuits; and
3. The degree to which the actual awards would distort prices and investment decisions as between various private parties.

An example may illustrate this problem. Suppose the rule is that any party who takes an unreasonable position and ultimately loses must pay indemnity and, in addition, any party who loses (regardless of whether or not his initial position was unreasonable) to a group which is representing a diffuse interest must pay indemnity to that group. Now let us suppose there are two steel companies, each of which has identical processes and produce identical quantities of identical pollutants. For some reason, steel company A is sued by the United States Government to abate the pollution, but steel company B is sued by a private group representing the interest of citizens in improving air quality. At the close of both cases, the steel companies are ordered to abate the pollution, but both judges decide that the steel companies were not unreasonable in fighting the case because the issues were so complex that they could not have reasonably foreseen at the outset that they had a very low probability of victory. Steel company A would not be forced to pay the government's cost of prosecuting the case, but steel company B would be forced to pay the private group. If the amount steel company B was forced to pay is very large in relationship to the cost of producing steel, then steel company B (depending on market structure and pricing policies) may be forced to raise its prices or to reduce its return to its investors—thereby causing decisions to purchase steel or to invest to be influenced by what is probably an economically irrelevant factor.

Consumers of steel or investors would be given an economic signal that steel company A is more efficient. This may result in some inefficient economic distortion. The degree to which this is a problem depends, of course, on the degree to which the amount of fees awarded against company B was significant in relation to the total costs of producing steel. If it is trivial in relation to total costs, the economic distortion may be trivial or non-existent.

A second problem can be illustrated by the example as well. Before the lawsuit, both steel company A and steel company B must decide whether to settle. Each will probably do a cost-benefit analysis of continuing with litigation versus settling on the best terms offered by the other party. Steel company B must include in its cost-benefit analysis the increased likelihood of having to pay the attorney's fees to the private group. Steel company A, on the other hand—opposed only by the government—has a lower probability of having to pay attorney's fees. If the cost of attorney's fees is large in relationship to the cost differential of continuing to pollute and abating the pollution, there may be situations in which steel company B will cease polluting and steel company A will continue rather than settling with the government.

I have attached as an appendix (B) to this testimony a simple model that tends to show that such awards would be unlikely to lead a defendant sued by a plaintiff representing a diffuse interest to refrain from litigation in any situation in which the social benefits of litigation are likely to outweigh the social costs. It would seem that the danger of an inefficient over-attention to externalities due to the potential of awards of litigation expenses to groups representing diffuse interests is a trivial one.

These possibilities of economic distortion must be balanced against the very real possibility that in a given case a privately financed group representing diffuse interests will be enabled (by the prospect of winning attorney's fees) to prosecute an action which results in a change of public policy in which the benefits of the change dramatically outweigh the costs. Of course, any case which is won by such a group would appear to be one in which some public policy decisionmaker (Congress or the courts) has decided that the benefits of the policy which ultimately result from the lawsuit outweigh the costs—and such awards would presumably be made only in favor of winners.

One way to minimize the possible, but probably insubstantial, difficulties would be to limit such awards to the following circumstances:

1. Situations in which the amount of the fees in relationship to the total cost structure of the losing party was such as to have a trivial effect upon the prices charged by or return on investment of the losing party;

2. Cases in which the losing party's behavior before and during the case was unlikely to be affected by the prospect of having to pay attorney's fees so as to cause an inefficient reluctance to litigate; and

3. In the absence of the prospect of an award of attorney's fees, it is unlikely that the interests represented by the winner would be regularly (and sufficiently) represented in such proceedings because of the fact that the benefits of the winner's victory are diffuse.

Such a standard would obviously require considerable discretion on the part of the federal judiciary, but I would suspect that in many cases all three determinations would be relatively easy to make.

Appendix A

Allocating the Costs of Civil Litigation

This paper will analyze the merits of various procedural devices to allocate the costs that civil litigation imposes upon society and upon the litigants themselves. The focus will be upon proposals to require the loser in a civil lawsuit to reimburse the winner for his litigation expenses, including attorneys' fees (a system which will hereinafter be designated as the "indemnity system"). As I hope this paper will demonstrate, an analysis of the desirability of the indemnity system raises some perplexing problems. I hope this paper serves as a "first cut" at some of these problems and that further analysis—including, perhaps, some empirical work—is done.

In the course of evaluating indemnity, it was necessary for me to consider the desirability of decreasing (or increasing) the total volume of litigation. In so doing, I think I have reached some tentative conclusions indicating the possible desirability of a system of court fees—to ensure that litigation is resorted to only when the benefits are equal to or exceed the marginal costs. Although I have not examined this problem in detail, I will include a preliminary analysis of it in this paper.

I. A Description of the Effects of Idemnity

A. The Application of Decision Analysis to the Activities of Litigants

In order to evaluate the impact of indemnity upon the legal system, it is necessary to analyze its effects upon the behavior of litigants.[1] Although an experimental or comparative approach to this problem may someday yield interesting results, the difficulty of comparing different jurisdictions and the political, economic, and possibly constitutional difficulties of conducting an appropriate experiment suggest that it is useful to start off with an attempt to model the behavior of litigants. This is intuitively appealing because civil—unlike criminal—litigation is usually [2] a dispute about money.

The discipline which suggests itself as most appropriate to describe the behavior of litigants appears to be Decision Analysis.[3] Litigants must make a series

[1] It is possible to argue that indemnity is desirable simply out of considerations of justice—regardless of its impact upon the behavior of litigants. This paper addresses such an argument only obliquely.

[2] Of course, injunctions, child custody battles and civil commitment proceedings are all exceptions. Although it may appear artificial, it is probably possible to assign a dollar value to the parties' stakes in such cases. I do not think that the analysis I suggest here is inapplicable because of the difficulty and seeming artificiality of such an exercise.

[3] *See* H. Raiffa, Decision Analysis, Addison-Wesley, 1968.

of decisions—most importantly whether to settle, to offer one's opponent a proposal for settlement, or to continue to litigate. Although litigants are perplexing (perhaps, more so than a random cross-section of the population), these decisions must reflect an attempt to maximize some set of utilities—which, if discernible, would enable one to predict the response of litigants to changes in the procedural system.

Rather than list all of the caveats and difficulties of modeling—in precise detail—the behavior of litigants, I have included the ones which have occurred to me (I am sure that more experienced or inventive minds than mine can imagine others) in an Appendix (A) and propose here to provide an admittedly oversimplified model and to discuss the tentative conclusions it may allow us to draw.

Although the perceptions of potential litigants concerning the possible results of litigation are rarely expressed in mathematical probabilities with confidence intervals, no one commences litigation or makes a decision about a pre-trial settlement without at least some reflection upon the likely results of litigation. Analysis of the impact of indemnity on decisions to settle—or go to court—should begin with simple models of the impact of indemnity on litigants who have various perceptions about the outcome of litigation. After developing a simple model, an attempt will be made to build in complicating factors.

The initial assumption is that often potential litigants disagree about the probabilities of different outcomes of litigation—indeed, it is probably the case that if potential litigants agreed in their perceptions of the result of litigation they would rarely go to court, but instead would achieve a settlement based upon their shared perceptions of the outcome of litigation.[4] The starting point will be a simple model with which we can analyze the impact of differing probability assessments concerning the outcome of litigation upon the behavior of potential litigants.

Assume a plaintiff sues a defendant and the amount at issue is $10,000. The only disagreement between the parties is concerning the probability of a plaintiff's victory. If the plaintiff wins, he gets $10,000; if he loses, he gets $0. Each party has discovered that he must spend $2,000 to go to trial. Each party's expectations can be expressed in terms of an "estimated monetary value" [hereinafter *EMV*]—a concept frequently used in decision analysis. The estimated monetary value of a claim is simply the average amount recovered by the plaintiff if the case were litigated over and over and the results followed the predictions. That is, a plaintiff who placed a probability of 50 percent on victory would assign an estimated monetary value (not taking attorney's fees into consideration) of $5,000 to his claim.

Now let—

EMV_p=the expected monetary value the plaintiff calculates the trial will produce for him after both lawyers are paid;

EMV_d=the expected amount the defendant calculates he will be out of pocket after the trial is over and the lawyers are paid;

$\triangle = EMV_p - EMV_d$;

P_p=the probability the plaintiff places on a plaintiff's victory;

P_d=the probability the defendant places on a plaintiff's victory.

Now, it is clear that litigation is most likely when $\triangle$ is positive—that is, when the plaintiff feels litigation will bring him more than the defendant feels litigation will put him out. It is also clear $\triangle$ depends on P_p and P_d—when P_d exceeds P_p it should be clear that $\triangle$ will be negative and litigation will be unlikely.

Now, how far part must P_p and P_p be in order for $\triangle$ to be positive?

Under the American system—[5]

$EMV_p = 10{,}000.P_p - 2{,}000$

$EMV_d = 10{,}000.P_d + 2{,}000$

$EMV_p - EMV_d = 10{,}000P_p - 2{,}000 - (10{,}000P_d + 2{,}000)$

$\triangle = 10{,}000P_p - 10{,}000P_d - 4{,}000$

[4] There is evidence that some individuals in some situations are risk prone (see H. Raiffa, *supra* at pp. 94–95), and this may result in litigation between parties who assign the same probability to the outcome. However, in an environment in which "fair" gambles are available, one would expect such parties to be "risk neutral" with respect to the lawsuit, and to invest the settlement in such fair gambles. (Id., pp. 96–67) This is especially true in this context because the transactional costs connected with the litigation gamble are almost certainly higher than the transactional costs connected with alternative gambles.

[5] The system in which each party pays his own litigation expenses will be described (solely for purposes of convenience) as the "American" system.

for Δ to be positive:

$$10{,}000P_p - 10{,}000P_d > 4{,}000$$

or

$$10P_p - 10P_d > 4$$

or

$$P_p - P_d > .4$$

That is, whenever there is more than a .4 difference in the probability estimates of the parties about the outcome of the trial, Δ is positive, EMV_p is higher than EMV_d and there is reason to believe litigation is likely.

There are obviously some series limitations to a model of litigation in which litigants are EMVers and there are only two possible outcomes to the litigation. Probably the most serious is the phenomenon of risk aversion and its possible effect on litigants. Different people and institutions have different degrees of risk aversion. A very wealthy person may be risk neutral over considerable ranges—some people may even be risk prone (prefer the small probability of a large windfall to the more modest sure reward even when the EMV of both alternatives is the same). In addition, the attitude of people toward risk almost always tends to change depending upon the range of outcomes under consideration. I may be risk neutral and therefore indifferent between paying $1 and running a 1/20th chance of losing $20. I may become risk averse when a payment of $100 is compared to a 1/20th chance of losing $2,000.

Risk aversion promotes the settlement of claims because it leads both parties to prefer a sure outcome which is somewhere between the extreme outcomes which may result from litigation. Thus a plaintiff may prefer a sure $5,000 (or even $4,000) to a 50 percent chance of receiving $10,000 and a defendant may prefer to pay out $5,000 (or even $6,000) rather than run a 50 percent chance of having to pay out $10,000.

In order to take account of risk aversion, a risk premium should be subtracted from EMV_p (and added to EMV_d) to result in CME_p (certainly monetary equivalent for the plaintiff) and the CME_d. At this point, it can be seen that when CME_p exceeds CME_d, the parties are more likely to litigate, because the plaintiff perceives litigation as more attractive than the acceptance of any offer that the defendant will be willing to make.

Another complicating factor is the impact of parties' discount rates. If parties are deciding between settlement today and litigation five years hence, the present value of their CME's will be substantially affected by their discount rates. Assuming positive discount rates, both present values will be lower than the CME's—the higher the discount rate, the greater the reduction. (A) 14 percent discount rate cuts the CME in half.) Whenever the plaintiff has a higher discount rate than the defendant, this factor will encourage settlement (regardless of the rule concerning or the amount of interest awarded in the judgment). It would appear that the opposite would also be true—that in cases in which the defendant has a higher discount rate than the plaintiff, the operation of this factor would lead to more litigation—but this is probably not the case. The parties can, of course, settle at the courthouse door—the day before the trial. Unless the bulk of the litigation expenses must be incurred long before the defendant is actually compelled to pay damages, the parties may simply wait—as the trial approaches, the defendant's present worth CME increases faster than the plaintiff's until a settlement becomes optimal.

When the present worth CME_d exceeds the present worth CME_p a settlement is likely—at some amount between CME_d and CME_p—because the defendant would prefer to pay any amount up to CME_d (and the plaintiff to accept any amount in excess of CME_p) rather than go to court. It is impossible to determine just where between CME_p and CME_d the settlement will occur. Indeed, skillful gamesmanship, "bluff," cunning, and Turkish barter tactics may characterize the attempt of each party to appropriate the "settlement surplus" (the excess of CME_d over CME_p) to himself.[6] It is conceivable that overzealous pursuit of the "settlement

[6] The best analysis of this problem of which I am aware is T. Schelling, The Strategy of Conflict, Harvard University Press, 1960. His analysis suggests that parties will attempt to delegate decisions to inflexible subordinates, to contend that their honor is at stake, or to assert that their behavior in one case will affect other cases in order to make a "threat" credible. Parties whose threats are most credible are at an advantage in these situations—one example may be an institutional litigant who may convincingly argue that his posture in each case serves as an example to other potential litigants and who therefore "must" litigate even when his opponent's offer is more attractive than the net benefits of litigation (thus compelling his opponent to offer to settle at an amount equivalent to the opponent's CME and appropriating the "settlement surplus" to himself).

surplus" will cause some litigants to blunder into actual litigation—but it is such an outcome that lawyers are presumably amply compensated to avoid.[7]

It is important to note that under the American system these models indicate that even when both parties agree that there is a one hundred percent probability of the plaintiff recovering a given amount from the defendant, the precise amount of the settlement is uncertain because of litigation expenses. In such a situation, the plaintiff will be able to obtain a settlement for some amount of money between EMV_p and EMV_d (risk aversion is irrelevant when the result is certain). EMV_p however, is the predicted outcome minus the plaintiff's anticipated litigation expenses. Thus, when litigation expenses are large, the plaintiff may wind up with much less than the amount both parties anticipate a court would actually award him (unless he can convincingly create a "threat" to sue). When the plaintiff's anticipated litigation expenses exceed the expected recovery, the plaintiff may wind up with nothing at all.

Conversely, it is possible that defendants may be convinced to pay potential plaintiffs some amount less than the defendants anticipated litigation expenses—even when both parties estimate the plaintiff's chance of success as zero. This is probably most likely to occur when a plaintiff can create a convincing "threat" to sue—and this "threat" is likely to be most convincing when the plaintiff's anticipated litigation expenses are much lower than the defendant's.

B. A DESCRIPTION OF THE EFFECTS OF INDEMNITY

1. *The Total Volume of Litigation*

There has been considerable discussion concerning the tendency of indemnity to increase or decrease the total quantity of litigation. An examination of the model discussed above illustrates that it is probably impossible to resolve this debate without some kind of empirical data. This is because indemnity has two opposite effects on the willingness of opposing litigants to settle potential lawsuits. It is impossible—in the abstract—to discern the net impact of these two effects.

First of all, taking the simple model discussed above—and putting aside for a moment all considerations of risk aversion—indemnity clearly reduces the disparity in probabilities between the two parties necessary for EMV_p to exceed EMV_d. As we saw above in the simple example with \$10,000 at stake, for EMV_p to exceed EMV_d the difference in probability assessments had to be at least .4 under the American system.

Now under the indemnity:

$$EMV_p = 10{,}000\,P_p - 4{,}000\,(1-P_p) = 14{,}000\,P_p - 4{,}000$$
$$EMV_d = 10{,}000\,P_d + 4{,}000\,P_d.$$

Now

$$\Delta = EMV_p - EMV_d = 14{,}000\,P_p - 4{,}000 - (10{,}000\,P_d + 4{,}000\,P_d) = 14{,}000\,P_p - 14{,}000\,P_d - 4{,}000.$$

Now for Δ to be positive $4{,}000 < 14{,}000\,P_p - 14{,}000\,P_d$

$$4/14 < P_p - P_d$$
$$.28 < P_p - P_d$$

Thus, for Δ to be positive under indemnity, the probability estimates must be only .28 apart.

An example illustrates the operation of this effect assuming that $P_p = .7$ and $P_d = .4$

Under the American system:

$$EMV_p = .7 \cdot 10{,}000 - 2{,}000 = 5{,}000$$
$$EMV_d = .4 \cdot 10{,}000 + 2{,}000 = 6{,}000$$
$$\Delta = EMV_p - EMV_d = -1{,}000$$

under indemnity:

$$EMV_p = .7 \cdot 10{,}000 - 4{,}000 \cdot .3 = 5{,}800$$
$$EMV_d = .4 \cdot 10{,}000 + .4 \cdot 4{,}000 = 5{,}600$$
$$\Delta = EMV_p - EMV_d = 200$$

Thus, there are some cases in which Δ is negative under the American system, but positive under indemnity.

It can be shown that the difference probabilities $(P_p - P_d)$ necessary to produce a positive Δ varies with the amount at issue and the size of the attorney's

[7] Unless they are less than scrupulous in guarding their clients' interests, in which event the lawyers may seek to influence the decision to litigate or to settle in order to maximize their own financial interests—a possibility I discuss in Appendix A.

fees. More precisely, where X=the amount at issue and F=the fee for each attorney (assuming the fees are equal): under the American system: $P_p - P_d$ must be greater than $2F/X$ for Δ to be positive. Under indemnity, $P_p - P_d$ must be greater than $2F/X + 2F$ for Δ to be positive.[8]

This means that under the American system whenever $2F$ is greater than X, Δ must be negative and settlement likely. It also illustrates that the degree of the impact of indemnity, as compared with the American system, depends upon the relationship between F and X. The impact becomes very significant when F is large in relation to X. For example, if the above example were changed so that X=5 then under the American system, $P_p - P_d$ would have to equal 4/5 or .8 in order for there to be a positive Δ; but under indemnity, $P_p - P_d$ would have to equal 4/9 or .44 for there to be a positive Δ.

Now, all of this tends to show that if litigants are EMVers (people who act to maximize the EMV), then indemnity will tend to increase the volume of litigation.

But indemnity is also likely to magnify the settlement-inducing impact of risk aversion by making the possible outcomes of litigation more extreme. In the above model, under the American system the two possible outcomes (after paying the attorneys) are:

(1) Plaintiff's victory: plaintiff gains $8,000, defendant loses $12,000.

(2) Defendant's victory: plaintiff loses $2,000, defendant loses $2,000.

Under indemnity, the outcomes change:

(1) Plaintiff's victory: plaintiff gains $10,000, defendant loses $14,000.

(2) Defendant's victory: plaintiff loses $4,000, defendant loses $0.

Thus, both parties' possible outcomes are spread further apart by indemnity. This is likely to increase the impact of risk aversion,[9] and therefore to promote settlement, cancelling out some of the tendency of indemnity to encourage litigation as described above.

It is impossible, without more information, to calculate the net impact of indemnity on the total volume of litigation; but indemnity is very likely to change the mix of cases.

Some cases, litigated under the American system, are likely to be settled under indemnity. This is most likely to occur when one party or both parties are very risk averse. Other cases, settled under the American system, are likely to be litigated under indemnity. This is most likely to occur when the parties have extreme differences concerning the probability of the outcome, are not very risk averse, and the outcome is not large in relation to the anticipated litigation expenses.

I have included a sketchy analysis of how indemnity would operate in cases in which parties disagreed about the amount of recovery rather than the question of liability as Appendix B to this paper.

---

[8] Under indemnity:

$\Delta = (P_p \cdot X - (1-P_p)2F) - (P_d X + P_d \cdot 2F)$

$= P_p X - P_d X + 2P_p F - 2P_d F - 2F$

$\Delta = X(P_p - P_d) + 2F(P_p - P_d - 1)$

setting $\Delta = 0$:

$-X(P_p - P_d) = 2F(P_p - P_d - 1)$

$-X(P_p - P_d) = 2F(P_p - P_d) - 2F$

$-X(P_p - P_d) - 2F(P_p - P_d) = -2F$

$X(P_p - P_d) + 2F(P_p - P_d) = 2F$

$(P_d - P_d)(x + 2F) = 2F$

$$P_p - P_d = \frac{2F}{X + 2F}$$

Under the American system:

$\Delta = X \cdot P_p - F - (X \cdot P_d + F)$

$\Delta = X \cdot P_p - F - X \cdot P_d - F$

$\Delta = X(P_p - P_d) - 2F$

setting $\Delta = 0$: $P_p - P_d = 2F/X$

[9] Indemnity "raises the stakes" in litigation and therefore is likely to increase the risk premiums of risk averse litigants. Assume, for example, that I am permitted to play a game in which a coin is flipped. If it is heads, I receive $8,000. If it is tails, I lose $2,000. Being somewhat risk averse, I sell my rights to you for $2,500 (my CME). As the game is about to commence, it is announced that the rules have been changed. If the coin is heads, I receive $10,000—if it is tails, I lose $4,000. Your rights are unaffected by the change in rules. Thus, the net impact of the change upon me is that I pay $2,000 if the coin is tails and I receive $2,000 if it is heads. If I am risk averse, this change in the rules has a negative value for me.

2. The Range of Possible Settlements

Indemnity's tendency to lead to the litigation of some cases that would have been settled under the American system and to settlement of some cases that would have been litigated under the American system is perplexing, probably ultimately unresolvable, and probably less significant than its effect on the possible range of settlements in cases settled under either system. As illustrated above, in cases that are settled there is usually a "settlement surplus" which makes it impossible to predict precisely the amount of settlement. Still, it is possible to calculate ranges within which the settlement will fall, and it is very interesting to compare the ranges of possible settlements under indemnity with ranges under the American system.

Starting by excluding considerations of risk aversion, it can also be shown that indemnity dramatically changes the relationship of the *EMV's* of the parties. Let us take a series of cases in which the parties agree on the probability of the outcome under each system.

Case 1

Amount at issue	$10,000
Mutual probability of P's victory (percent)	100
Attorney's fees	$2,000
American system:	
EMV_p	$8,000
EMV_d	$12,000
Range	[1] $8,000 to $12,000
Indemnity system:	
EMV_p	$10,000
EMV_d	$14,000
Range	[2] $10,000 to $14,000

Case 2

Amount at issue	$10,000
Mutual probability of P's victory (percent)	80
Attorney's fees	$2,000
American system:	
EMV_p	$6,000
EMV_d	$10,000
Range	$6,000 to $10,000
Indemnity system:	
EMV_p	$7,200
EMV_d	$11,200
Range	[2] $7,200 to $11,200

Case 3

Amount at issue	$10,000
Mutual probability of P's victory (percent)	30
Attorney's fees:	
EMV_p	$1,000
EMV_d	$5,000
Range	$1,000 to $5,000
Indemnity system:	
EMV_p	$200
EMV_d	$4,200
Range	$200 to $4,200

Case 4

Amount at issue	$1,000
Probability of recovery (percent)	100
Attorney's fees	$2,000
American system:	
EMV_p	$1,000
EMV_d	$3,000
Range	[2] $1,000 to [1] $3,000
Indemnity system:	
EMV_p	$1,000
EMV_d	$5,000
Range	$1,000 to [1] $5,000

[1] Figures above the amount at issue are probably artificial in this situation because the defendant can always offer to pay the plaintiff's claim and end the case.
[2] Similarly, negative numbers are probably irrelevant because the plaintiff can simply refrain from suing and, in effect, settle for zero.

This tends to show that in comparison with the American system, (1) indemnity tends to guarantee settlements closer to the mutual expectations of the parties when both parties agree that the outcome is certain; (2) indemnity tends to produce an asymmetrical range which favors the party who is agreed by both sides to have a greater than 50 percent chance of success; and (3) with respect to the mutual expectations of the parties in some cases in which there may be no effective remedy at all under the current system.

Risk aversion does not affect cases (1) and (4) above, but introduces some complications. First of all, indemnity will tend to change the range of settlements to the disadvantage of the party with the higher risk premium (his CME deviates more from his EMV than does his opponent's). This has significance for two reasons; (A) it may diminish effect (2) listed in the above paragraph[10] and (B) in the aggregate, it may tend to disadvantage certain economic classes of litigants. The very poor, of course, may never have to pay indemnity, and if allowed to receive it, may reap a considerable advantage.[11] But the middle class may be substantially more risk averse concerning the relevant ranges of money than large corporations[12] or the very rich. Generalizations based upon intuitive judgments are disfavored, and it would be desirable to study risk aversion of different potential litigants, but it is important to point out the possibility that indemnity could have some significant distributional consequences.

The most striking effect, however, is the effect upon relatively small claims in which both parties agree that recovery is certain. In such cases, indemnity guarantees that the settlement will more closely approximate the parties' mutually perceived expectations of the result were the case to be litigated.

3. The Expenditures of Parties in Cases Actually Litigated

a. In either system, one would expect the parties to continue spending extra resources until the marginal benefit of an increased expenditure equaled the marginal cost. Indemnity tends to increase the benefits and decrease the costs of litigation expenditures, and therefore will probably increase total expenditures.

The benefits of an expenditure can be calculated by multiplying the probability that the expenditure will lead to a change of the outcome in the favor of the litigant (minus the probability that it will lead to an adverse change in the outcome) times the difference in value between a favorable and an unfavorable outcome. By increasing this difference, indemnity enhances the benefits of extra expenditures in litigation.

The cost to a litigant of an expenditure in litigation is the price of the service rendered times the probability that the litigant will ultimately pay the price. Under the American system, the probability is 100 percent; under indemnity, it is somewhat less (probably considerably less for litigants actually in trial).[13] This is all complicated by the fact that, under indemnity, we must add the probability that the expenditure will lead the opponent to spend more times the amount of such expenditure times the probability that the first litigant will have to pay the opponent's expense. It would seem that the net impact of these effects would be to increase litigation expenses in cases actually tried. Even if every litigation expense by one party is bound to produce an equal response by his opponent, the total expected cost to a litigant about to spent more is still greater under the American system whenever the first litigant's probability of victory is greater than 50 percent. The cases actually litigated are—under either system—as shown above, the cases in which the parties disagree about the probability of the outcome in a pattern in which each assigns a higher probability to his own victory than does his opponent. Thus, under indemnity each party's

[10] When one side's probability of victory is recognized by both sides as being very high, then the likely loser's EMV is probably greater than the amount at issue (if the plaintiff is likely to win) or less than zero (if the defendant is likely to win). Such numbers are probably artificial because the amount at issue acts as a "ceiling" and zero as a "floor" on settlements. Thus, an increase in the risk premium for both parties disadvantages the likely victor because it adversely affects his CME while the adverse effects on his opponent's CME is irrelevant.

[11] If they are judgment proof, and if a bond for indemnity is not required before filing suit. Such a requirement would raise serious constitutional problems.

[12] The risk aversion of corporations is complicated by the need to analyze the relevant decisionmaker within the organization and his attitude toward risk with respect to a given lawsuit in terms of his stakes within the organization.

[13] As indicated above, each of two litigants must disagree about the probability of the outcome (and therefore assign a greater than zero probability to his own success) to make litigation attractive.

expected cost for a litigation expenditure will necessarily be reduced. This lower cost, plus the greater marginal benefit described above, should lead to greater expenditures in cases actually tried.

b. "Procedural" indemnity may furnish relief—regardless of the ultimate outcome—to parties forced to undergo expenses because of "abuses" of the procedural system by their opponents. While such a system may reduce total litigation expenses and is probably desirable whether or not indemnity based on the final result is adopted, its efficacy is limited by the subjective, and therefore unpredictable, nature of the determination, made in hindsight, that a given procedural maneuver was "abusive."

c. Some expense will be caused by the calculation of litigation expenses, and controvery over the "reasonableness" of various expenses.[14]

II. Evaluating Indemnity

A. THE CRITERION FOR EVALUATION; DETERMINING THE DESIRABILITY OF SETTLEMENTS

Aside from indemnity's tendency to increase expenditures in cases actually litigated, its primary effects appear to be (1) to cause some cases to be settled which would be litigated under the American system and vice versa; and (2) to change the nature of the settlements in many of the cases settled under either system. In order to evaluate these effects, it is necessary to develop some standards for determining:

(1) when settlement is preferable to litigation; and

(2) when one settlement is preferable to another.

Although these generalizations are subject to a number of caveats,[15] let me start with two propositions:

1. Comparing two settlements, the one which more closely approximates the result which would have been produced by litigation is preferable;

2. Settlements are more or less desirable than litigation depending on the extent to which the settlement approximates the result that would have been produced by litigation.

The second proposition can be sensibly discussed only after the examination of the total social costs of litigation—and such costs are not limited to the litigation expenses incurred by the parties.

Unfortunately, these propositions appear to depend upon knowledge of the result litigation would have produced; knowledge which, by hypothesis, is denied us when a case is settled. However, the models used in this paper do include the probability of assessments of the parties (who have strong incentives to investigate thoroughly and predict accurately), and these probility assessments can be used to reach some conclusions about the result litigation would have produced. For example, when both parties assess the plaintiff's probability of recovering $1000 as 99 percent, we can draw some conclusions about the results litigation is likely to produce.

B. SETTLEMENT VERSUS LITIGATION; DETERMINING THE TRADEOFFS

As indicated above, it is impossible to predict whether indemnity will result in more or less litigation—although it is likely to change the mix of cases that come to trial. Cases in which at least one party is very risk averse are more likely to be settled under indemnity. Relatively small cases involving sums of money concerning which parties may be relatively risk neutral and in which the probability assessments of the parties are far apart may be litigated under indemnity. For example, when P feels he had a 95 percent chance of winning $1000 from D, D feels P has only a 5 percent chance of victory, each party's anticipated litigation expense is $2000, and each party is risk neutral.

Under the American system; EMV_p=—$1,050; EMV_d=$2,050; and the case is almost certain to be settled.

[14] To my knowledge, it has never been suggested that the winner's attorney simply bill the loser. Such a system might encourage some abuses. Instead, a procedure for determining which litigation expenses were reasonable would be necessary.

[15] *See* L. M. Friedman, Legal Rules and the Process of Social Change, 19 Stan. L. Rev. 786, 798–810 (1967) for a discussion of the system of "reciprocal immunities" (immunity from lawsuit over a minor matter) created by the costliness of litigation (and, logically also, by the absence of indemnity in America. As a general proposition, if it is desirable for settlements to deviate from the results litigation would have produced rather than to mirror them, this would indicate that a change in the substantive law is necessary. It would seem unlikely that a system which consistently led to settlements at sharp variance with the results litigation would have produced would be desirable.

Under indemnity: EMV_p=\$750; EMV_d=\$250. And, depending upon the risk aversion of the parties, the case may be litigated.

Although there are frequent public comments to the effect that public policy favors settlement or that the courts have become overcrowded, there has been—to my knowledge—little analysis of the degree to which public policy favors settlement or of what measures might be appropriate to encourage settlement of certain cases litigated under the existing procedural system.

I think it is important in analyzing this problem to focus on the marginal costs and benefits of litigation and settlement. No one has suggested, to my knowledge, that settlement is favored by public policy to the extent that the court system should be abolished. Instead, the inquiry should be whether there are pricing and other procedural devices likely to reduce litigation at the margin, and, if so, whether that marginal reduction is desirable.

C. THE COSTS OF LITIGATION

The marginal costs of litigation will be divided here into two categories—private and public. The private costs are the litigation expenses (attorney's fees, etc.) borne by the parties, and the parties' expenditure of their own time in the case. The public costs are the costs imposed upon society by a marginal use of the court system.

The private costs are generally the product of bargaining between client and attorney—although the existence of minimum fee schedules makes it likely that the attorney is able to charge his client more than marginal cost. Thus, the price the client pays probably includes a surplus appropriated by the lawyer and may be in excess of the lawyer's opportunity cost. Busy trial lawyers may charge a price close to oppo tunity cost—of course, opportunity cost may be inflated by the minimum fee schedule. With exploding numbers of lawyers, various prepaid insurance plans,[16] attacks on minimum fee schedules, and the possibility of advertising by lawyers, the distortions described above may become less significant.

Looking solely at private litigation expenses, it appears that neither indemnity nor the American system guarantees against inefficient overutilization of the court system.

In a case in which a plaintiff (P) determines that he has a 95 percent probability of recovering \$5,000 and 5 percent probability of recovering \$0 and a defendant (D) determines that P has only a 5 percent probability of recovering \$5,000 and each anticipates attorneys fees of \$2,000.

Under the American system: EMV_p=\$2,750; EMV_d=\$2,250.

Under the indemnity system: EMV_p=\$4,550; EMV_d=\$450.

Depending upon risk aversion, the parties may litigate under either system. They will spend \$4,000 to determine whether D owes P \$0 or \$5,000.

If there were a way to coerce them to settle for \$2,500, we would be guaranteed a settlement which was only \$2,500 more or less thas the outcome litigation would have produced and save \$4,000 in expenses.[17] It should not be assumed that in the above case the \$2,500 settlement is necessarily a preferable outcome to litigation. In a case in which the parties have widely different probability assessments concerning the outcome, there may be substantial benefits in clearing up an uncertainty in the law. But the relationship suggests the possibility of an inefficient overutilization of the court system. Indemnity's effect here is interesting. In the purely hypothetical case in which the plaintiff is 100 percent certain of recovering \$10 from the defendant, and the defendant is 100 percent certain that the plaintiff will lose, indemnity guarantees that the parties will litigate even if the litigation expenses are infinite. Of course, this effect—suggested by the simplified model we have been using—is mitigated by the parties' unindemnified expenditure of their own time on the case (see Appendix A). In the extreme case in which each party is certain of victory, it is interesting that the only way to guarantee a settlement when the difference between a settlement for "half" and either parties' "certain" outcome is less than the combined litigation expenses is to require both the winner and the loser to pay the combined expenses of both—and administratively unworkable[18] and politically unacceptable rule.

The comparison between indemnity and the American system under these circumstances is interesting. When there is extreme disagreement between the

---

[16] Presuming price competition between the insurers is permitted.

[17] Not taking into account the public costs of litigation. *See infra.*

[18] The parties would be encouraged to collude and understate expenses, and then to make "side payments" to their attorneys.

parties about the probability of different outcomes, indemnity tends to make litigation possible (depending, of course, upon risk aversion) in cases in which the difference between the outcomes is minute compared with the expenses of litigation—cases certain to be settled under the American system. I am afraid this may be an inescapable companion to indemnity's benign tendency to ensure that cases in which both parties share a high probability assessment of a certain outcome are settled for an amount equal to or close to that outcome.

Public costs are even harder to assess. Of course, we are not concerned with average costs (the total cost of operating the court system divided by, for example, the days of litigation) but with marginal costs (the cost imposed upon society by an added trial). Marginal costs, in this context, depend very heavily upon the relationship between demand and capacity. In a system in which there is chronic excess capacity which cannot be retired,[19] and therefore periodically idle facilities and personnel and no waiting time (except for the time necessary for trial preparation) marginal costs are probably low. They probably consist of marginal running costs—the filing expenses; perhaps, the cost of lighting a courtroom which would otherwise be closed.

In a system in which demand is pressing upon or actually exceeds capacity, marginal costs are a very different matter. They can be described as either (1) queueing costs incurred due to the additional waiting time imposed upon other cases by a marginal decision to litigate; or (2) capacity costs incurred due to need to add new capacity to the system in order to accommodate the caseload.

Queueing costs are extremely difficult to measure. They probably consist of: (1) accuracy costs due to the reduced likelihood of an accurate determination of facts as the time between the events at issue and trial increases and memories fade and witnessess become unavailable; (2) discount rate costs—whenever the plaintiff's discount rate is higher than the defendant's, waiting time imposes a greater loss on the plaintiff than benefit upon the defendant;[20] (3) incorrect signal cost—increased waiting time will mean that legal issues which must be resolved to give correct signals to the market will remain unresolved longer;[21] (4) distributional costs—to the extent that interest on judgments differs from parties' discount rates, increased waiting time increases the distortion of settlements.[22] Although these costs are impossible to quantify, there is frequently expressed a dissatisfaction with court congestion, delays, and the consequent social costs.[23] In response, periodically new capacity is added to the system. It would be politically naive to assume that new capacity is added to the system only to the extent that marginal benefits of new capacity exceed costs.[24] On the other hand, it is much easier to calculate these capacity costs than the queueing costs described above. And such a calculation is useful at least as a starting point in calculating the marginal costs imposed upon the public by litigation.

---

[19] The District of Columbia Federal District Court system may be an example. In recent cases, the excess capacity in the District of Columbia has been cited by various litigants as a ground for choosing it as the appropriate forum. The impact of price differentials upon choice of forum issues is a question which must await further analysis.

[20] Regardless of the interest rate calculated from the date of the cause of action or the filing of the lawsuit to the final judgment, delay results in a net loss. When the interest rate is higher than either parties' discount rate, the benefit of delay to the plaintiff is less than the cost to the defendant.

Of course, the opposite is true if the defendant has a higher discount rate than the plaintiff.

[21] This depends upon whether the resolution of important legal issues can be accomplished through cases "in the pipeline." For example, a court that wants to adopt comparative negligence need not wait for an appropriate case. The expeditious adoption of such a rule is probably not dependent upon the waiting time in the court system. On the other hand, the construction of an ambiguous section of a new statute may be postponed due to court congestion.

[22] This result is avoided only in the serendipitous circumstance in which the plaintiff and the defendant have the same discount rate and that rate is equal to the interest rate applied from the filing of a lawsuit until the rendering of a judgment. Because it is impossible to tailor interest rates precisely to the discount rates of parties, there is almost always a disparity between parties' present worth CME's and the expected result of litigation. This disparity increases with the anticipated waiting time and systematically disadvantages plaintiffs with high discount rates—or plaintiffs opposing defendants with high discount rate—in settlement negotiations. As waiting time increases, the distortion between the range of possible settlements and the expected outcome of litigation increases.

[23] *See, e.g.*, 62 L. Soc'y Gaz. 152 (1965) [remarks of Chief Justice Warren].

[24] In the federal court system, the addition of new capacity seems to depend upon the coincidence of the same party controlling the Presidency and Congress. I would assume that were a large period of time to pass in which one party controlled both, substantial excess capacity would be built up—on the other hand, if years go by without single party control, in some parts of the country an inefficient shortage of capacity may occur.

D. THE BENEFITS OF LITIGATION

Litigation is a negative sum game. Except insofar as parties' utilities for money may differ, litigation—looked at solely from the point of view of the sum of the utilities of the plaintiff and the defendant—always produces a result inferior to *any* settlement. The net benefits of litigation, viewed simply in terms of these utilities, are thus similar to the net benefits of any gambling transaction—zero minus the transactional expenses. Risk prone individuals are likely to be able to find situations in which they can enter into gambling transactions beneficial to them at far lower transactional costs than those incurred in the court system.

The social benefits of litigation are a different matter. They fall into a number of categories: (1) providing the correct economic signal to guide primary behavior; (2) providing guidance so that other cases can be settled in closer proximity to the result litigation would have produced; (3) making it possible for individuals to bind themselves in contracts and other arrangements; (4) discouraging the utilization of various methods of private enforcement of obligations, some of which may produce undesirable externalities; (5) promoting social cohesion by maintaining the appearance of justice; and (6) (in certain situations) awarding relief which produces benefits which are not reaped by the winning party.

It is difficult to be more specific about the marginal benefits of litigating or settling specific cases. A few points can be made, however.

As we demonstrated above, under either the American or the indemnity system, if we calculate the benefit of litigation as compared to a settlement to be equal to the difference between the dollar value of the settlement and the dollar value of the result of litigation, neither system guarantees that cases will be settled, even when it is clear in advance that the private litigation costs borne by the parties (not including the public costs of litigation) will exceed the benefits. Although this method of calculating the benefits of litigation in comparison with settlement is a crude one, the result is still striking. There is likely to be a systematic overutilization of the court system—especially in the absence of any user charge to reflect the public cost that the litigation of an extra case imposes due to increased waiting time and the need for additional capacity.

If one of the benefits of litigation is to provide guidance to ensure accurate settlements; it is also important that the procedural system ensures that settlements approximate the results that would have been reached had cases been litigated. Indemnity seems to have some notable advantages over the American system in this regard.

The litigation of certain cases creates benefits which are not realized by the prevailing litigant. A citizen who succeeds in convincing a court has been illegally excluded from a jury probably marginally benefits society by ensuring that juries accurately reflect the community—even if his case does not influence any other jury selection decisions. "Public interest litigation"—especially in cases in which the benefits are diffuse (environmental, civil liberties, and some consumer cases) clearly produces benefits (and costs) affecting members of society other than the actual litigants. To the extent that certain classes of cases tend to produce results which are not reflected in the transfer of money between the opposing parties, such cases should probably be treated differently with respect to both indemnity and court fees.[25]

The American system may have produced a situation in which a class of important claims has become unenforceable—claims which are small in relation to the litigation expenses necessary to enforce them. Small claims courts—depending upon their jurisdictional limits and the relationship between these limits and the litigation expenses required to enforce various size claims—may create a partial solution. But it is interesting to speculate about the relationship between the unenforcibility of small claims in the United States and various possible secondary effects; (1) the popularity of repossession as a remedy for failure to meet payments; (2) the availability of credit in small amounts; (3) various

[25] There has been considerable discussion—and litigation—concerning the propriety of awarding attorney's fees in "public interest" litigation. I think that this problem should be analyzed separately from the question of across-the-board adoption of indemnity. Some useful principles to start with may be: (1) such awards should occur only when the public interest litigant has had a significant effect upon the outcome of the case which creates benefits not realizable by the litigating organization or its members; (2) such awards should be structured to minimize the "chilling effect" they may have upon defendants in asserting their position; and (3) governments should not be immune from having to pay such awards.

systems of private enforcement of debts—collection agencies' activities and violence; (4) the need for a complex credit rating system; (5) the need for and disputes concerning security deposits required of tenants.

E. CONCLUSIONS CONCERNING THE MERITS OF INDEMNITY

As demonstrated above, indemnity clearly produces settlements closer to the mutual expectations of both parties when both parties are relatively certain of the outcome. In other cases—cases in which the parties assign the same probability is considerably more than zero or less than one hundred percent and cases in which the parties disagree about the probability of a plaintiff's victory—indemnity will produce settlements that (a) advantage the side which both parties agree has a greater than 50 percent chance of recovery; and (b) disadvantage the more risk averse of two opponents in litigation. Without more information, it is impossible to quantify any further, to determine how many cases fall into the different categories, which litigants tend to be risk averse, or the net effect of indemnity's various impacts.

It might be desirable to have the first effect without having (1) indemnity's tendency to disadvantage the risk averse and (2) indemnity's possible tendency to encourage higher expenditures in cases actually litigated. It is therefore useful to examine some possible forms which limited indemnity might take in order to obtain the desirable effects while avoiding the undesirable—or at least dubious—effects. The objective is to determine whether there is a formula which will influence the settlement negotiations of parties in cases in which both sides agree that the result is relatively certain without causing parties who have actually commenced litigation to incur additional expenses or disadvantaging the risk abuse.

1. Indemnity Only When Both Parties (One Party) Agree(s) To It In Advance of Litigation

Allowing one party to select indemnity would invite the less risk averse of two opponents to change the rules to his own advantage. Allowing both litigants to select indemnity by mutual consent would invoke indemnity only when the two parties were relatively far apart in their probability assessments of the outcome,[26] and would be unlikely to effect the settlement negotiations of two parties who shared the expectation that the result was relatively certain. When both parties were relatively certain that the plaintiff would succeed, they would both realize that, were the case to go to trial, the defendant would be very unlikely to agree to indemnity. Thus, they would conduct the settlement negotiations under the assumption that, were the case to be tried, the American rule would be applied.

2. An Announcement by the Judge, Prior to The Trial, Whether Indemnity Would Apply

The difficulty with this alternative is that it would require a prejudging of the merits of the case by the judge. Such a determination could probably be made only after the parties had expended considerable resources on pre-trial proceedings. The judge would, in effect, announce that one party was so unlikely to succeed that his refusal to settle was unreasonable.[27] The compulsion to determine the merits before the trial would appear to run counter to the requirement that the judge be unbiased.

3. A Discretionary Determination by the Judge, After the Trial, that Indemnity Should be Awarded Because the Loser Should Have Foreseen the Lack of Merit in His Position

This has certain advantages. It would be very likely to effect the settlement negotiations between two parties, both of whom agreed that one is relatively certain to succeed. These parties would probably consider it likely that if the case were to be litigated, indemnity would be applied, and would conduct their settlement negotiations accordingly.

---

[26] Even with respect to risk neutral litigants, indemnity, as compared to the American system, is advantageous only to the litigant who estimates his chances of success at greater than 50 percent. Risk aversion probably means that a higher probability of victory is necessary before a litigant will voluntarily choose indemnity.

[27] The judge would have to determine—before the trial—that the result was relatively certain. Obviously this involves a prediction of which side will win; a result cannot be relatively certain both ways.

It would be unlikely to have a great deal of effect on litigation expenses in cases actually tried because in such cases each party has a relatively high opinion of his own chances of success, and would probably assign a relatively low probability to the outcome that the loser of the lawsuit would be unable to persuade the judge that his position was not unreasonable. There might be the somewhat perverse effect that each of two litigants would predict that even if defeated, he could convince the judge of the reasonableness of his position, but that his adversary would be very likely to have to pay indemnity. This could lead to an escalation of legal expenses under some circumstances.

The impact on the risk averse is less clear. Some probability less than one would be assigned by a potential litigant to the prospect of having to pay indemnity in the event of defeat. The very risk averse litigant might be placed at a disproportionate disadvantage even by a relatively remote probability that he would lose and be compelled to indemnify his opponent.

A possible variation on this form of limited indemnity would be to permit a pre-trial determination that indemnity would not be awarded—if no such determination were made, the judge would retain discretion to award or not to award indemnity. This might alleviate the tendency of indemnity to escalate litigation expenses when the parties have an extreme disagreement about the probability of the outcome. It would influence settlement negotiations after the determination (and probably, therefore, after a considerable expenditure on each side).

Discretionary indemnity appears to offer the prospect of achieving indemnity's advantage of guaranteeing that the settlement of cases in which both parties agree that the outcome is relatively certain approximates the result which both parties predict would occur were the case to be litigated. It may reduce the tendency of automatic indemnity to disadvantage the risk averse and to cause parties to increase their litigation expenditures.

There are serious problems involved in applying discretionary indemnity. It is difficult to enunciate a standard for determining whether indemnity should be applied and even more difficult to apply such a standard to individual cases. Judges will differ in their application of any standard, and there will be expenditures on litigation over the applicability of indemnity. If the goal is to influence the nature of the settlement of cases in which both parties agree that the outcome is relatively certain, it will be difficult to assess the impact of discretionary indemnity even after it is implemented. Data concerning the cases in which judges have decided to award indemnity reveals little about the cases which never reach the courts—and it is the influence of the possibility of indemnity upon the nature of the settlement in such cases, which appears to be most important. Theoretically, at least, discretionary indemnity could have an important effect even if it were never actually awarded.

Although its implementation raises some perplexing problems, it appears that a rule of discretionary indemnity based upon a legal standard limiting its application to cases in which the loser should have placed a very low probability upon his chances of success prior to the trial would have some very important advantages over the present system and would be likely to minimize some of the possible disadvantages of automatic indemnity.

In preparing this paper, it was necessary to analyze the marginal costs of litigation. In an overbuilt system with no significant delays, marginal costs are probably very low, and the essentially free provision of the court system to litigants may be sensible. In such a situation the administrative costs of a system of court fees may outweigh the benefits. But in systems with substantial excess demand and long delays (defined as the duration between the time when a case would have been concluded were there no other cases on the docket and the time when it was actually concluded), serious consideration should be given to a system of court fees. When a computer company battle ties up the federal court system in Minnesota for a year, when a donneybrook between electric utilities and electrical equipment manufacturers threatens to swamp the federal court system, it is very questionable whether the essentially costless provision of the court system at taxpayer expense makes sense. Are parties who are on the margin of deciding to use arbitration rather than the court system being given the right signal? Should automobile liability insurance rates reflect the litigation-intensive character of automobile travel more accurately?

If consideration is given to a system of court fees, certain exceptions are probably appropriate. It may be possible to define classes of cases in which there are likely to be significant benefits external to the parties of litigation (as compared

to settlement). Such cases should probably be exempted from any court fee scheme. Because of the difficulty of defining classes of such cases in advance, it may be appropriate to authorize the trial judge to exercise some discretion in determining whether or not to assess court fees. It is also probably desirable to create exceptions for litigants of modest means.

Because it is marginal costs with which we are concerned, it would be irrational to attempt to utilize a system of court fees to make the court system self-supporting. Such an attempt would almost certainly lead to inefficient under-utilization of overbuilt systems. With respect to systems with excess demand, it would produce the efficient result only by coincidence. Although there would be serious questions concerning desirability of the use of the revenue generated by a system of court fees to establish a "judicial trust fund" to be used to add new capacity to the system, the response of litigants to a system of court fees is bound to provide information useful in determining whether to add capacity.

The method of assessment raises some interesting problems. "Filing fees" are almost certainly useless as a means of assessing marginal queueing costs. Cases can be filed (often to protect against a statute of limitations defense) and subsequently settled. Often, no queueing cost is imposed upon the system at all. The determination of queueing cost can be made only at the conclusion of litigation; the best approximation is likely to be a fixed charge based upon the amount of court time devoted to the case. Such charges should be published and, although periodic revision may be necessary, relatively stable and therefore based upon long-term projections to present parties considering a settlement with the proper signal.

The loser should be made to pay the entire court fee. If the winner were required to share it, court fees would contribute to the pernicious impact of the American system upon the settlement of cases in which both parties agree that the result is relatively certain.

Supplement A

Limitations on the Models

1. Non-reimbursable litigation costs

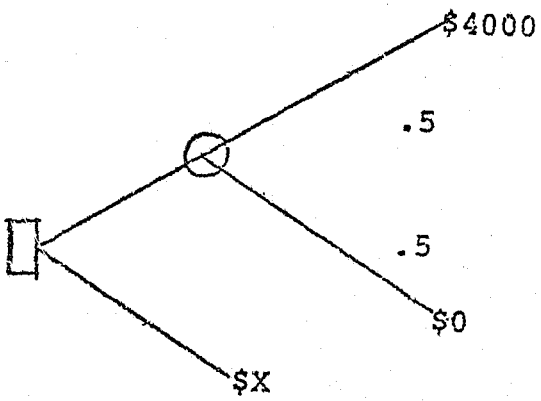
Even under an indemnity system, there will be certain costs of litigation for which the winner will not be reimbursed by the loser. These probably fall into two categories (a) out-of-pocket expenses not found to be "reasonable" in the post-trial assessment of costs; and (b) the intangible costs of the parties' own time and effort in preparing the case. While these are important considerations, they probably change only the magnitude, and not the direction, of the effects of indemnity. Thus, these factors result in a situation in which, under indemnity, X percent rather than 100 percent of litigation costs are reimbursed: where X= (litigation expenses held "reasonable"/intangible costs+total out-of-pocket litigation expenses) · 100.

2. The contingent fees

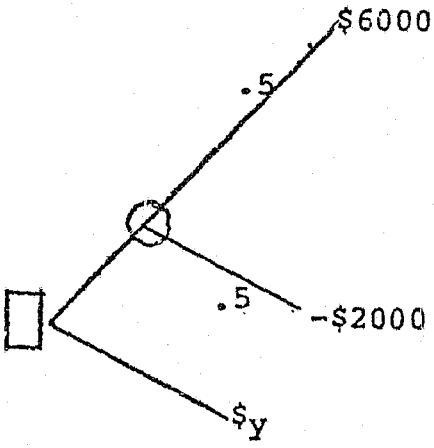
The contingent fee (*see* M. Schwartz and D. Mitchell, An Economic Analysis of the Contingent Fee, 22 Stan. L. Rev. 1125 (1970)) introduces some interesting complications. Its presence means that under the American system a losing plaintiff may lose nothing (out of pocket). With the introduction of indemnity, a worst outcome of zero is changed to a negative number (the payment of the defendant's litigation expenses). This may significantly increase a potential plaintiff's risk premium.

It is possible that some people may be relatively risk neutral when comparing a certain fixed sum (a proposed settlement) to a lottery in which one outcome is zero and the other is a positive number, and yet become relatively risk averse when the game is changed and the possibility of a negative outcome is introduced.

Thus, a potential litigant may be relatively risk neutral when faced with this decision tree



but risk averse when the rules are changed to produce this decision tree



The contingent fee also raises interesting problems concerning: (1) the interactions between the plaintiff and his lawyer; and (2) the determination of the amount of the fee to be reimbursed by a losing defendant. A great deal depends upon the specific terms of the contingent fee contract—for example, upon whether the percentage of the plaintiff's recovery which is reserved for the attorney varies depending upon whether the case is tried. An analysis of these problems is beyond the scope of this paper.

3. Vendetta cases

It is possible that some disputes which wind up in litigation involve deep emotional conflicts with respect to which models which assume that litigants are rationally attempting to maximize a set of utilities appear artificial. It may be possible to refine the models to reflect these disputes more accurately. For example, in some cases, P may put a higher value on dollars extracted from D than upon dollars obtained from other sources, and may also place a positive value on inconvenience to D and on the expenditure of dollars by D on legal expenses. D, similarly, may prefer to pay dollars to any recipient other than P, and may place a positive value on inconvenience to P and costs incurred by P. There may also be pathological litigants who place a positive value on time spent preparing for and participating in litigation because they view it as a form of entertainment. The complexities created by these situations are beyond the scope of this paper.

4. The incentives of lawyers

Lawyers advise clients and are often delegated broad decision-making power. If they act to maximize their clients' utilities, then their presence does not require a modification of the models used in the text, unless they systematically misperceive those utilities (e.g., the degree of their clients' risk aversion). If, however, they act to maximize their own utilities, then the process becomes more complicated. If they are charging more than their opportunity cost, they will be biased toward litigation and toward increased expenditure once litigation is commenced. The incentives of lawyers on contingent fees are an even more complicated matter.

5. The timing of expenses

The models used in the text assume that a decision is made at a point before any expenditures are incurred either to settle or irrevocably to become committed to litigating the case. In reality, both expenditures and settlement negotiations can occur continuously from (and even before) the first time a lawyer is consulted until (and even after) the final verdict. A more detailed representation of this process would be obtained by the use of dynamic programming and extensive decision trees. However, at any given time, a litigant probably has (1) an expected probability of victory; and (2) an expected cost of litigation, that will influence his response to settlement offers. The timing problems complicate the settlement negotiation strategy issues discussed above as each party tries to convince the other that his current offer is "top dollar" or "my last offer." I don't think timing considerations change the nature of the effects of shifting to indemnity.

SUPPLEMENT B

CASES IN WHICH THE AMOUNT OF DAMAGES IS AT ISSUE

The models used in the text assumed that both parties agreed in advance that if the defendant were liable to the plaintiff, a fixed amount of damages would be awarded. In reality, many cases involve primarily a dispute about the amount of damages; others involve disputes about both damages and liability.

In applying indemnity to this situation, it would seem necessary to establish a "tender offer" rule under which the plaintiff and defendant could each record in court a pre-trial offer to settle. Whenever the verdict was less than the defendant's offer, the defendant would be considered the winner for purposes of indemnity. Whenever the verdict was more than the plaintiff's offer, the plaintiff would be considered the winner. When the verdict was between the two offers, the rule could be either that each party paid his own costs or that total costs were divided in proportion to the distance of the verdict from the respective offers (e.g., when the plaintiff offered to settle for $20,000; the defendant for $10,000; and the verdict was $18,000—the defendant would pay 80 percent of the combined expenses of the two parties.)

At first blush, it would appear that this would not drastically change the propositions above concerning the impact of indemnity upon the total volume of litigation. Each party would simply "offer" or "demand" his certainty monetary equivalent. The relationship between differences in CME's would determine whether the case went to trial.

Actually, the maneuvering of two parties under this modification of indemnity might become considerably more complicated. A short model helps indicate the nature of the bargaining process which would emerge under this system.

Let us assume that two parties to a potential lawsuit each anticipate attorney's fees of $2,000. The plaintiff predicts that there is a .1 probability of each of the following verdicts: $10,000, $12,000, $14,000, $16,000, $18,000, $20,000, $22,000, $24,000, $26,000, $28,000. The defendant predicts that there is a .1 probability of each of the following verdicts: $2,000, $4,000, $6,000, $8,000, $10,000, $12,000, $14,000, $16,000, $18,000, $20,000. The EMV (not taking attorney's fees into account) is $19,000 for the plaintiff and $11,000 for the defendant. The EMV taking attorney's fees into account depends upon the final offer and demand of the defendant and the plaintiff, because the obligation to pay attorneys' fees depends upon the relation of the verdict to the final offer and demand. There are three possible results: (1) Each party pays his own attorney (if the verdict is beween the final offer and the final demand); (2) The plaintiff pays both attorneys (if the verdict is equal to or lower than the final offer of the defendant); and (3) The defendant

pays both attorneys (if the verdict is equal to or greater than the offer of the plaintiff).

Putting risk aversion aside, assuming the defendant has yet to make an offer; the plaintiff will demand his EMV ($19,000) minus the estimated attorney's fee. In this case, his estimated liability for attorneys fees equals .5 (the probability of a verdict below $19,000, his "tentative" offer) times $2,000 (since the defendant has yet to make an offer there is no risk of having to pay both attorneys). Thus, the plantiff's demand will be $18,000. The defendant will offer his EMV ($11,000) plus his anticipated liability for attorneys' fees ($4,000) times .2 (the probability of a verdict of $18,000 or more) plus $2,000 times .3 (the probability of a verdict between $11,000 and $18,000) =$1,400 or $12,400. He will actually only offer $12,200 because once he offers over $12,000 the anticipated liability for attorney's fees is reduced by $200. Now the plaintiff will reduce his demand because his estimated liability for attorney's fees has gone up because of the defendant's offer. If the verdict is $10,000 or $12,000, he will have to pay $4,000 in attorney's fees, not $2,000. So his estimated liability goes up $2,000×.2 $400 and his demand comes down to $17,800. At demands of $18,000 and below, the plaintiff has reduced his estimated liability for attorney's fees by $200—or $2,000×1, (the probability of a verdict of $18,000).

This model illustrates some interesting aspects of the tender system. First of all, ignoring risk aversion, the offer and demand ($12,200 and $17,800) are still further apart than they would be under the American system ($13,000 and $17,000). Secondly, when a party makes an offer or demand of an amount to which his opponent attaches a probability of outcome of greater than zero, then the offer or demand changes the estimated monetary value of the case for the other party. Finally, there may be an incentive for each party to make offers or demands which he hopes will not be accepted (e.g., in the model, an offer of $16,000), in order to improve his position on the attorney's fee issue. It is possible that this kind of game playing may lead the parties to "stumble" into a settlement in some situations. This model tends to indicate that if each party offers his estimated monetary value, indemnity with the tender rule will not encourage settlement more than the American system.

Because the model does not take risk aversion into account and because there is no way to estimate the impact of "game playing" (making offers or demands in the hope that they will not be accepted, but in an attempt to lessen the probability of paying attorney's fees), the model indicates that the net impact of indemnity with the tender rule on the volume of litigation is unclear.

Appendix B

A model of litigation concerning externalities

This model will treat the analysis of the costs and benefits of litigation as a problem of the "cost of information." Before the lawsuit, we have prior probabilities concerning the outcome; by going through the litigation, we can obtain perfect information about the outcome. But this perfect information is not costless—the expenses of the litigation must be weighed against the value of the information.

There are two ways of approaching this information problem—one is by viewing the outcome of the litigation as the relevant fact about which we will have perfect information at the end of the lawsuit; the other is by viewing the litigation process as one which allows us to estimate more perfectly (but still imperfectly) other probabilities than we were able to before the litigation. In order to maximize the benefits of litigation, we will use the former model here.

Thus, we will assume (unrealistically) that litigation will produce absolute certainty concerning a fact (e.g. whether exposure to a certain substance will produce a human health harm) about which we have only a probabilistic estimate before the litigation. This tends to magnify the benefits of litigation; in the real world, litigation probably allows the trier of fact to make a more reliable, but not absolutely certain, probability estimate concerning a disputed factual issue. Because we assume that absolute certainty (rather than merely a more reliable estimate) is the result of the litigation—the value of the information produced by—and thus the benefits of—litigation is overestimated in this model. [See H. Raiffa, Decision Analysis, pp. 157–180.]

Let us assume that a polluter is sued to abate a certain source of pollution. The cost of pollution abatement equipment is $1,000,000. If the case goes to trial,

the defendant will incur $100,000 in legal expenses, the plaintiff will incur $100,000, and the marginal cost to the court system (see appendix A) will be $25,000.

The costs created by the pollution are in dispute. It is known that there are $500,000 in costs due to damage to the fish population. It is unclear whether there is an additional $1,000,000 in costs due to a hazard to human health. All parties are reasonable and their experts tell them that there is a .7 probability that such human health costs exist and a .3 probability that they do not. The decision rule is that the pollution will be abated if the benefits of abatement exceed the costs, and litigation is such an efficient information gathering process that it will allow the decision-maker to resolve the uncertainty.

In the interests of clarity and brevity, a number of simplifying assumptions will be made. Most of these are very unlikely to have any substantial effect on the conclusion; some of them tend to result in an overstatement of the benefits of litigation (and thus an overstatement of the danger that the prospect of an award of attorneys' fees will induce socially undesirable settlements). The model assumes:

(1) that the defendant is risk neutral (probably a safe assumption—or at least a useful approximation—with respect to large corporations);

(2) that the litigation expenses of the plaintiffs are equal to those of the defendant (it is likely that the plaintiffs' expenses will be less because the lawyers working for the plaintiffs may receive some of their compensation in the form of psychic gratification—to the degree that they are less, the conclusion of this section is even stronger);

(3) that choosing to litigate—rather than immediately abating the pollution—will not produce a benefit for the defendant in the form of delay (if the defendant litigates and loses, he will be in as bad a position—ignoring litigation expenses—as if he had complied at the outset). Normally, there is a considerable prospect of a benefit due to delay—once again, to the extent that there is, the conclusion reached is stronger;

(4) that the plaintiffs will settle for nothing less than—or different from—an abatement of the pollution (a monetary payment is impossible because of the diffuse nature of the harm);

(5) that there are no externalities caused by the abatement of the pollution;

(6) that there is no advantage (due, perhaps, to the benefit of having an authoritative decision) to a decision in favor of the plaintiff after litigation as opposed to a prelitigation decision by the defendant to abate the pollution;

(7) that the defendant correctly estimates the probability of various outcomes of the litigation (if he overestimates his own chance of success, the conclusion reached in this section is stronger).

Under these assumptions, we can examine the key question—will a defendant ever be induced immediately to abate the pollution and refrain from litigating in any case in which it would be better—from society's point of view—for him to defend the case, rather than give in? Since, by hypothesis the plaintiff will not give in, the decision between immediate abatement and litigation is solely the defendant's. If his probability estimates are accurate (and there is no reason to believe that defendants will systematically underestimate the chances of their own success), a comparison of the defendant's cost-benefit analysis should enable us to answer the question: is it likely that the net benefits of litigation from the defendant's point of view will ever be negative when the net benefits of litigation from society's point of view are positive?

The first question is—what will the defendant do—under existing law and under a rule under which he must indemnify the plaintiff, if the plaintiff wins?

Under existing law, his litigation costs are $100,000. His litigation benefits are a .3 chance of saving $1,000,000 or $300,000. Thus, the expected benefits of litigation exceed the costs and he will litigate. The suggested change will increase his litigation costs by .7 (the probability the plaintiff will win) times $100,000—or $70,000, raising total costs to $170,000 but still making litigation attractive.

From society's point of view the costs of litigation are $225,000 (all the social costs of the case).

The benefits are the benefit of having the decision about abatement made after trial rather than now. This can be defined as the net benefit of a different decision times the probability of its occurrence. The net benefit (if it is determined that a human health hazard does not exist) is $1,000,000 (the

savings by not introducing abatement equipment) minus $500,000 (the fish kill cost of not abating) or $500,000. The probability of a different decision is .3—so the total net expected benefit of litigation is $150,000—less than the costs.

This model is admittedly very over-simplified, but I think it tends to show that there is little danger that we will (under any system of awarding attorney's fees) experience an inefficient under-litigation of such cases.

This is for a number of reasons:

1. The firm's calculation of the costs of litigation will result in a number lower than the social costs of litigation because:

(*a*) it does not include the costs the case imposes on the court system;

(*b*) it may include the costs of the plaintiff's litigation expenses but always multiplied by a probability of less than one (unless the firm is absolutely certain of losing);

2. The firm's calculation of the net costs of abatement will almost always be higher than the net social costs because the external benefit will not be subtracted from the internal cost.

In addition:

3. The firm may litigate because the benefits to it of delay swamp the litigation costs, even when ultimate defeat is inevitable—such benefits are overstated because they do not include the net social costs of delay; and

4. The firm may tend to overestimate the chances of success and thus overestimate the benefits of litigation and underestimate the costs.

Of course, it can be shown that in cases in which—from society's point of view—litigation is preferable to abatement (e.g., if the probability of a health harm is .2 rather than .7)—it is also preferable (in fact, the benefits exceed the costs by more) from the defendant's point of view. The interesting implication of the model is that—even with a rule under which litigation expenses are awarded to victorious plaintiffs—defendants are likely to litigate, rather than settle, some cases involving externalities, in which—from society's point of view—it would be (based upon what is known before the case starts) better for them to give in.

This does not fly in the face of experience (an economist I know once said, "When the Japanese government promulgated environmental rules, the Japanese industrial firms hired engineers. When the American government promulgated such rules, the American firms hired lawyers.")

PHILIP J. MAUSE

QUALIFICATIONS

A.B. (Cum Laude), 1965: Georgetown University.

LL.B. (Magna Cum Laude), 1968: Harvard University (Served as an Editor of the Law Review).

M.P.P. (Master in Public Policy), 1975: Harvard University (A Program consisting of Economics, Operations Research, and Statistics).

1968–1973: Assistant Professor. (From 1971: Associate Professor) College of Law, University of Iowa.

1971–1972: Russell Sage Resident in Law and Social Science, John F. Kennedy School of Government, Harvard University.

1973–1974: Attorney, Arnold and Porter.

1974–Present: Washington Counsel, Environmental Defense Fund.

Publications:

"Winner Takes All" (See testimony).

"Harmless Constitutional Error: The Implications of *Chapman* v. *California*," 53 Minn. L. Rev. 519 (1969).

TESTIMONY OF PHILIP J. MAUSE, COUNSEL, ENVIRONMENTAL DEFENSE FUND

Mr. MAUSE. I will make just a few brief comments. I have tried to examine the question of indemnity or awarding for litigation expenses from the loser to the winner in light of the experience of other countries, and also, in light of what we know about decision

analysis and microeconomics; that is, what effects it would have to change the general rule that we have in the United States under which each party bears his own fees.

I have generally concluded, first of all, that it is impossible to tell whether a complete change would increase or decrease litigation.

I agree with Mr. Lee's comment to the effect that litigants appear in litigation because of mutual optimism, each party having a higher estimate of his own chance of success than his opponent, but his analysis of that issue failed to take into account the fact that risk aversion might balance things off and therefore, it is simply impossible to tell if there would be an increase or decrease in litigation.

I generally, in my statement, express my conclusions. I generally feel, first of all, there is no reason to treat the Government, whether it is a plaintiff or a defendant or whether it is a winner or loser, differently from other litigants. I feel it probably makes sense with respect to all civil litigation and probably criminal litigation in which the Government is a loser to have a rule under which litigation expenses are awarded by the loser to the winner if it is found that the loser either did have or should have had a perception that he had a very low probability of winning, and this would apply to the Government regardless of whether it was a plaintiff or a defendant.

I see no reason at all to distinguish situations in which the Government is a plaintiff from situations in which the Government is a defendant: where such a distinction is random and irrelevant.

For example, my understanding of the tax area is that it is often completely a matter of the parties' decisions whether the Government is suing the citizen for more taxes or whether the taxpayer brings the suit against the Government for a refund. There are a number of other instances where the Government simply will take action and force the private party to sue the Government, in which case the Government is the defendant.

With respect to the discussion about Alyeska—and it is interesting in looking back on Alyeska—the first round of Alyeska was the *Wilderness Society* v. *Morton*. One of the problems in the *Alyeska* case was that the general rule did not apply to the Government in that there was no opportunity to get fees from the Federal Government so all of the fees had to come from the private intervenor defendant, the Alyeska Pipeline Service Co.

I would generally support a provision which would try to identify those interests and classes of cases in which legal representation is not likely to be or not actually supplied economically under the current system of allocating legal resources in the United States. I would assume these would be largely cases in which either very diffuse interests were being represented or interests incapable of economic quantification; and therefore, damages could not be awarded at the close of the litigation out of which the plaintiff's attorney would have a prospect of receiving a fee.

In those cases, I would support the creation of a rule in which judicial discretion would be exercised to award attorneys' fees to the prevailing party.

Let me just very briefly make some comments upon what has been said earlier today.

I think it is very important whenever you think about this problem to be very careful about how we define "winner" and "loser". I think that definition should be based on the recorded, pretrial positions of the parties. So, in a condemnation case, if the Government offers $75,000, the defendant says, "No, I will not take anything less than $100,000," and the court awards $65,000; even though there is an award to the property owner, the Government is really the winner in that case because the award was lower than its offer.

I think here care must be taken to define "winner" and "loser" in terms of those pretrial positions.

Second, I think the amount of fees must be left to some discretionary determination of the judge. I do not think I have seen anyone writing in this area who contemplates the situation in which Covington & Burling simply sends its bill to the losing party in a case in which its client won. I think the judge would have to retain some discretion to determine the degree to which the fees were reasonable.

Presumably the winning party might, under a contract with his own attorney, pay money in addition to that which was awarded from the loser.

I think that is a fair summary of what I have found in my analysis of the problem, and rather than continue, I will open myself to questions.

Mr. DRINAN. Thank you very much, Mr. Mause. I will yield to the gentleman from New York in a moment. I wonder if you feel that the ordinary defendant in an eminent domain case should be rewarded by the Government if, in fact, he prevails. What is wrong with a contingency fee? Lawyers are available on contingency. It is not as if this person is without representation.

Mr. MAUSE. What I would advocate is that the award be made if a finding was made that the Government could actually foresee or actually should have foreseen there was a very low probability of its winning, not an automatic award in such cases.

The purpose of the award and the relevance of the award is its effect on the parties' conduct; that is, the degree to which it discourages inefficient litigation, and affects settlement in situations in which the parties share a perception of what the outcome would be.

Mr. DRINAN. That goes far beyond the reversal of the Wilderness rule, does it not? That goes into a whole new area on which we have not had hearings and which we have very little information. Just getting back to the narrow question of reversing the Wilderness rule and doing what the U. S. Supreme Court says in its majority opinion under H.R. 8743, I filed, would that be sufficient or commendable in your view?

It says, "any action or proceedings of an agency action where the party seeking"—and it charges the agency action on the grounds that it adversely affects civil or constitutional rights or consumer or environmental interests. Do you think that is sufficient to reverse the *Wilderness* case?

Mr. MAUSE. That is 8750?

Mr. DRINAN. H.R. 8743.

Mr. MAUSE. I do not have it in front of me. It sounds as if it would.

Mr. DRINAN. You would endorse that as being sufficient to care of the acute problem for which these hearings were originally initiated?

Mr. MAUSE. Yes, It sounds as if it would.

Mr. DRINAN. Do you have any thoughts on the key language? It says the party seeking review substantially prevails.

Mr. MAUSE. Is this 8743?

Mr. DRINAN. Yes, I am just wondering if that "substantially prevails" would that meet the criteria you have in your very learned paper?

Mr. MAUSE. I have no——

Mr. DRINAN. It is at the top of page 2, line 1.

Mr. MAUSE. I have it now. I think the courts will, with respect to the—let me deal with the word "prevail" first and then go to "substantially." I think the courts will intelligently read the word "prevails" along the lines I suggest in my paper and probably, if at a pretrial conference one party makes an offer, that they will take this into account in determining who actually prevailed. I suppose "substantially prevails" could be read both more broadly and more narrowly than "prevails." There are cases where one prevails, and perhaps wins a Phyrric victory. There are cases where one will say he does not substantially prevail. There are cases where one, I suppose, may technically be a loser but wins some substantive victory. I am not positive how that would be read by the courts.

Mr. DRINAN. It has very limited applicability really because a lot of cases are won or lost at the agency level, and this bill would not provide for reasonable attorneys' fees there.

I have one additional question, or I would personally like to have additional information, but I assume you do not have it now. I will yield to Mr. Pattison. Would you have any suggestions as to a method of examining the costs of all the bills the Federal Government would be paying if, in fact, your suggestion prevails?

Mr. MAUSE. Certainly one way to resolve it would be to simply appropriate an amount of money that was based on the best, although admittedly imperfect, estimates of the appropriators and allow courts to award fees during the year and keep records, but not actually pay out the fees until the end of the year and then award each party a portion of the amount of fees that were awarded to him based on the ratio of the total amounts that were awarded to the amount appropriated.

For example, if you appropriate, say, $10 million, and at the end of the year, it turns out that you guessed wrong and $20 million was awarded, each party would simply get half, and then in all subsequent years, you can base the appropriation upon actual experience rather than face the difficulty of making a guess. I think this is more of a problem in the first year.

In the first year, it would be important. You would not exceed 100 percent obviously, and if you appropriate $10 million and the courts only award $5 million, you do not want a windfall to occur.

Mr. DRINAN. We do this on the criminal side on an hourly basis, and it is millions of dollars on an hourly basis with some other costs.

Mr. Pattison?

Mr. PATTISON. That is an ingenious suggestion about prorating the fees on an annual basis. I guess you would hold your breath, and at the end of the year if you got a big award and hope nobody else received any enormous one, to put you over the top. I think the greatest

concern everyone has about this kind of legislation is not so much the cost of it—although it is a factor—but the issue you addressed yourself to here to some extent, and that is the issue as to whether or not the awarding of attorneys' fees on a mandatory basis, and perhaps on a discretionary basis, would encourage litigation which not only would not have occurred before but perhaps should not have occurred.

We have had some experience, I think, in this area, in the stockholder suits for instance, and they have been traditionally brought on behalf of the class and attorneys' fees are awarded. As I recall, strike suits are brought and settled very quickly really, based upon all the interests of the people who make up the class, not on the interests of the attorneys.

In other words, you bring the lawsuit that has some color or merit, and the company says, "Well, you know we possibly could lose this. If we do lose this, it is going to cost us a bundle of money. What would you settle for? Would you settle for $100,000, $90,000 of which is the attorney fee?"

Now, that is a substantial concern. I am wondering how you feel. You studied this matter very carefully, apparently. I wonder how you feel about it or if you studied that particular area.

Mr. MAUSE. Well, I have looked in general, and the real focus of my work has been on what impact the awards will have on the behavior of litigants.

In terms of the H.R. 8743 provision in which the party gets the award of the attorneys' fees, only if the party substantially prevails. Obviously, as the party's perception of success decreases, the chance that this will encourage him to bring a suit decreases also because if he has a very low probability of success, he therefore has a very low probability of receiving attorneys' fees.

In addition, it could, it may, in some cases, induce the Government to take a different position when the Government was quite certain it was about to lose. Rather than have to be dragged into court and have to pay attorneys' fees, the Government might simply cave in when it was clear that it was behaving illegally.

It is simply ——

Mr. PATTISON. If it was not necessarily clear it was behaving illegally they might conclude, just as a defendant would conclude, that they have a substantial chance of losing even though they should not lose.

Mr. MAUSE. Right. Right. They might be cowed by this to be overly attentive to these types of interests. It is simply impossible to tell what the net effect on the total number of cases would be. I tend to think when we move out of the strictly private disputes between parties about amounts of money, and we move into the public law area where the Government is involved, a very important effect of indemnity is the kind of invisible effect it has on things which will never get to court. And indemnity against the Government, I think, will tend to make the Government's behavior be more closely in line with what the Government perceives the courts would order the Government to do. And where the Government's behavior is not in line with those policies, then it tends to make it more likely that the Government will be sued and forced to behave in such a way the courts would order it to behave.

Sometimes arguments are made against the indemnity for that very reason. The individual arguing may say the courts ordered the Government to do a bad thing—something we really do not want the Government to be doing, and therefore, we do not want to give indemnity because it will encourage people to come in and force the Government to obey the substantive law which is the particular point he disagrees with.

It seems to me that this is an argument against the substantive law itself and not against the rule of indemnity.

Mr. PATTISON. How about the problem of ambulance chasing, I guess you would call it, a sort of watching for errors on the part of the Government and bringing suit and something that could have been solved, perhaps, by pointing it out to the Government, and they might have proceeded from a position where they made an error, but rather than settle with them, or accomplishing that and not getting paid for it—how about the problem of a professional litigator just looking for these kinds of things and landing on the Government the minute he has some sort of violation so he could generate some kind of attorneys' fee. He does not have to settle, for instance.

Mr. MAUSE. I suppose, if I understand your hypothetical correctly, I do not see it as a problem for the following reason. He would sue the Government, and the Government would realize it was wrong. They would put in court an offer to settle. If he went on with the lawsuit and won, he would not be defined as the "winner" because the Government's pretrial position was identical to the result of the lawsuit, so the Government is not a loser.

Mr. PATTISON. I do not see it as much of a problem either. I only use it as an illustration to point out the necessity of having some sort of a mechanism whereby different kinds of cases could be judged by rational people, and as a result, come up with a judgment which would either award or deny attorneys' fees. I am trying to define it precisely in the statute, saying who wins or loses.

The minute you say "substantial," as a matter of fact, you are doing that. You are really adding a judgmental factor. I think that is necessary.

Mr. MAUSE. Yes.

Mr. PATTISON. It makes for a good deal of uncertainty.

Mr. MAUSE. Yes. I think that is right. I think some judicial discretion—I do not view the hypothetical that you gave as a serious problem unless we were very wooden about our definition of who prevails in a case so that even if you would sue me for $20, and I would say, yes, I owe you the $20, but you would drag this on through major litigation, deposing all sorts of witnesses so that to insure yourself of employment, and at the end of the trial announce that you were the winner, even though I offered you that amount at the beginning.

I think we have to retain the discretion of the judiciary to deal with problems of that kind.

Mr. PATTISON. Perhaps not necessarily in the judiciary. Perhaps somewhere else.

Mr. MAUSE. Perhaps.

Mr. PATTISON. There is a problem within the judiciary. All of a sudden the lawyer is pleading his case before the judge who later on is going to make a determination as to whether or not he should get a fee or not. I think that might inhibit you a little bit if you wanted to take issue with the judge about the authority of things. In representing your client, you might want to use sharp words, for instance, during a case—which we all do from time to time. You might be quite inhibited if the judge later on was going to have something to say about the attorney's fee, about just how much——

Mr. MAUSE. Generally, though, the attorney's fee would be awarded to the party and not directly to the attorney. The attorney's arrangement with the party would be independent. We know that often prospects of receiving compensation would, to some extent, depend upon what the judge's decision was.

Mr. PATTISON. Where I come from, a great deal more than just to some extent.

Thank you.

Mr. DRINAN. Thank you.

Mr. Mause, I wonder if you have any thoughts on a bill that was filed in the Senate by Senator Kennedy and several others that would extend the recovery of lawyers' fees to administrative procedures. Senator Kennedy, in introducing it on November 20, notes over 50 Federal laws provide parties that secure compliance with national policies through litigation do, in fact, get awarded attorneys' fees. This extends it to the Federal regulatory agencies, with precautions and so on.

I wonder if you have any thoughts on that.

Mr. MAUSE. I do because my major practice has been in regulatory matters, although not before Federal agencies, but largely before State utility commissions. This proposal has been debated on the State level in a number of States. I generally would favor it, bearing in mind the kinds of considerations I indicated in my filing.

One of the difficulties when you move to regulatory agencies is the definition of "winner" and "loser" becomes, perhaps, even more unclear. We intervene in a number of regulatory cases and advocate the adoption of peak load pricing for public utility rates. We have an array of changes we think should be made in the rate structure, and some of these are made and some of these are not made, and sometimes, the Commission concludes it will study the problem or commence a generic proceeding to deal with the question.

I think the test would have to be whether the impact of the party's intervention was to provide a decisionmaker with a more complete and balanced record on which to make the decision. I think that defining "prevailing" and "losing" in a number of administrative proceedings with which I am familiar, at least, is a very difficult thing.

Mr. DRINAN. The proposed bill would operate this way, that a person, whether it is a class or an individual, would qualify for fees and costs where he substantially contributed to a fair determination of that proceeding in the light of the number and complexity of the issues presented, the importance of widespread public participation and the need for representation on the part of the consumers in order to get a fair balance of interest.

Mr. MAUSE. That would be very close to it.

Mr. DRINAN. Someone has to determine that, I suppose, in this agency.

Mr. MAUSE. That is right. It would leave discretion within the agency to make the determination. I assume there would be judicial review of an abuse of that discretion, and then you could get an argument over whether you receive attorneys' fees after you convince the court the agency was wrong in not giving you the attorneys' fees within the agency.

Mr. DRINAN. For the appropriation for 1976, this bill proposes a sum of $10 million, and such funds as may be necessary for each fiscal year thereafter.

I thank you, Mr. Mause.

Does counsel have any questions?

Ms. HIGGINS. None, thank you.

Mr. DRINAN. I thank you for your very, very good testimony, Mr. Mause. Once again, I apologize about the delay, and your testimony has been very helpful. Thank you.

The meeting is adjourned.

[Whereupon, at 12:50 p.m., the subcommittee recessed to reconvene at the call of the Chair.]

APPENDIXES

APPENDIX 1

H.R. 7826 (identical to H.R. 8221), H.R. 7827 (identical to H.R. 8219), H.R. 7828 (identical to H.R. 8220), H.R. 7968 (identical to H.R. 8743), H.R. 7969 (identical to H.R. 8742), H.R. 8368, H.R. 9093 (identical to H.R. 4675, H.R. 8378, and H.R. 8821), and H.R. 9552.

94TH CONGRESS
1ST SESSION

H. R. 7826

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 1975

Mr. SEIBERLING introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to authorize the awarding of attorneys' fees in civil actions before the Federal courts where the interests of justice so require, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Court Attorneys' Fees Act of 1975".

SEC. 2. Chapter 123 (respecting fees and costs) of title 28 of the United States Code is amended by adding at the end the following new section:

"§ 1930. Attorneys' fees in certain civil actions

"If in a civil action the court determines the interests

of justice so require, the court shall award reasonable attorneys' fees to the prevailing party. The United States shall be liable for such fees the same as a private party.".

SEC. 2. The table of sections for chapter 123 of title 28 of the United States Code is amended by adding at the end the following new item:

"1930. Attorneys' fees in certain civil cases.".

94TH CONGRESS
1ST SESSION

H. R. 7827

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 1975

Mr. SEIBERLING introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To authorize the awarding of attorneys' fees in actions for injunctive relief under the Clayton Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.), is amended by adding at the end of section 16 (15 U.S.C. 26) the following sentence: "In any action under this section, the court may award reasonable attorneys' fees to a prevailing plaintiff.".

I

80-603 O - 77 - 16

94TH CONGRESS
1ST SESSION

H. R. 7828

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 1975

Mr. SEIBERLING introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To authorize the awarding of attorneys' fees to prevailing plaintiffs in actions brought under certain civil rights laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1977, 1978, 1979, 1980, and 1981 (sections 1981, 1982, 1983, 1985, and 1986 of title 42, United States Code) of the Revised Statutes are each amended by adding at the end of each the following new sentence: "In any action under this section, the court shall award reasonable attorneys' fees to a prevailing plaintiff.".

I

94TH CONGRESS
1ST SESSION

H. R. 7968

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 1975

Mr. DRINAN (for himself, Mr. RODINO, Mr. EDWARDS of California, and Mr. OTTINGER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 7 (relating to judicial review of agency action) of title 5 of the United States Code to provide for the recovery of attorney fees as a part of costs in certain civil actions to obtain judicial review.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 7 of title 5 of the United States Code is amended by adding at the end the following new section:

"§ 707. Attorney fees and costs

"In any action or proceeding to review agency action, where the party seeking review challenges agency action on the grounds it adversely affects civil or constitutional rights, or consumer or environmental interests, and the party seeking

review substantially prevails, the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred.

SEC. 2. The table of sections for chapter 7 of title 5 of the United States Code is amended by adding at the end the following new item:

"707. Attorney fees and costs.".

94TH CONGRESS
1ST SESSION

H. R. 7969

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 1975

Mr. DRINAN (for himself, Mr. RODINO, and Mr. EDWARDS of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Civil Rights Act of 1964 to provide reasonable attorney fees in cases involving civil and constitutional rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title XI of the Civil Rights Act of 1964 is amended by adding at the end the following new section:

"SEC. 1107. In any civil action to recover damages or to secure equitable or other relief under the Constitution, or any provision of law which provides for the protection of civil or constitutional rights, the court in its discretion may allow the prevailing party other than a governmental entity or any officer thereof acting in an official capacity, reasonable attorney fees as part of the costs, and the governmental en-

tity or officer shall be liable for such costs and fees the same as a private person.".

94TH CONGRESS
1ST SESSION

H. R. 8368

IN THE HOUSE OF REPRESENTATIVES

JULY 8, 1975

Mr. ANDREWS of North Dakota introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 2412 of title 28, United States Code, to provide in a condemnation proceeding the discretionary award of fees and expenses of attorneys to the condemnee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2412 of title 28, United States Code, is amended by inserting "(a)" before the last sentence, and by adding at the end thereof the following new subsection:

"(b) In a proceeding to condemn real property for the use of the United States or its departments or agencies, a judgment for costs as enumerated in section 1920 of this title and reasonable fees and expenses of attorneys may be awarded to the condemnee. A judgment for costs and rea-

sonable fees and expenses of attorneys when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the condemnee for the costs incurred by him in the litigation. Payment of a judgment for costs and reasonable fees and expenses of attorneys shall be as provided in section 2414 of this title for the payment of judgments against the United States.".

SEC. 2. The amendment made by the first section of this Act shall apply to condemnation suits commenced on or after its enactment.

94TH CONGRESS
1ST SESSION

H. R. 9093

IN THE HOUSE OF REPRESENTATIVES

JULY 31, 1975

Mr. CRANE (for himself, Mr. DUNCAN of Oregon, and Mr. CLEVELAND) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide that in civil actions where the United States is a plaintiff, a prevailing defendant may recover a reasonable attorney's fee and other reasonable litigation costs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States shall pay to any defendant who prevails in a civil action in which the United States is a plaintiff a reasonable attorney's fee and other reasonable litigation costs, which shall be assessed by the court in the manner provided by law for the assessment of costs, whether or not other costs are awarded or awardable against the United States.

94TH CONGRESS
1ST SESSION

H. R. 9552

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 11, 1975

Mr. DRINAN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

The Civil Rights Attorney Fees Act of 1975.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title XI of the Civil Rights Act of 1964 is amended by adding at the end the following new section:

"SEC. 1107. In any action to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney fees as part of the costs.".

I

APPENDIX 2

STATEMENT OF HON. STEVE SYMMS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. Chairman, since the beginning of the legal system that we know today, litigants have been required to furnish their own legal counsel in action brought against that party by the sovereign. As the laws of this land continually become more numerous and complex, the costs of defense grow.

The federal government has a multitude of agencies at the disposal of the Federal litigant to provide investigation, research, and legal advice that benefits the United States in its pursuit. Normally, the citizen is limited in the monetary resources available for his defense. The basic principle of our system of justice calls for innocence until proven guilty but when the costs to prove one's innocence is greater than the cost of the assessments or fine, there is a temptation to simply pay the fine. I have seen a number of cases in which the defendant has taken this position.

A good many states have enacted laws that allow for the recovery of attorney's fees and costs in certain civil actions where the costs to the defendant may be greater than the recovery by the plaintiff. This places the burden upon the plaintiff to win his cause or be charged the fees of the defendant. As a result the plaintiff tends to give serious analysis to his complaint before he institutes suit. It seems only reasonable that citizens wrongfully charged by the United States should be entitled to this same benefit.

We hear from time to time of situations in which a particular citizen falls into the disfavor of a certain agent or agency of the United States. That agent may choose to cause as much hardship as possible to that citizen by citing every conceivable violation with hopes of success on only a few—sort of playing the law of averages. Naturally, the costs to the defendant multiply with the number of charges. One can readily see the psychological result, leading to hasty payment by the defendant.

This country has always set an example of justice and fair play to the rest of the world. Efforts by any agent of the United States to achieve the alleged aims of his agency through this backdoor use of intimidating judicial power should be prevented by the enactment of H.R. 8378.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., November 6, 1975.

HON. ROBERT W. KASTENMEIER,
House of Representatives,
Washington, D.C.

DEAR BOB: As you know, I had the pleasure of testifying before your subcommittee on October 6th concerning my bill (HR 4675) to compensate successful defendants in civil suits filed by the federal government. As it is my understanding that further hearings on the subject of attorney's fees are contemplated in November, I would like to take this opportunity to send you a detailed information sheet on my bill which outlines what it will and will not do as well as the advantages that would accrue from its enactment.

Also, in case you have not had the opportunity to see them, I am enclosing some other items that discuss or analyze my proposal. In particular, I invite your attention to the statement I made on "compensating for IRS" since it explains, in some detail, the remarks I made on page three of my prepared testimony to the subcommittee, a copy of which is also enclosed.

As I indicated before, the Subcommittee on Courts, Civil Liberties and Administration of Justice is to be congratulated for its initiative in this area and I personally want to reiterate my thanks for the opportunity to explain my bill. I might add that, since the October hearings, a nationwide poll, conducted by the National Federation of Independent Business, indicates that 85% of independent businessmen responding favor enactment of HR 4675. Likewise, Congressional support has continued to grow, with 37 Members now listed as co-sponsors.

If either I or my staff can be of any further assistance to you as your deliberations on attorney's fees continue, please let me know. Also, I would be more than happy to testify further on this subject if that would be helpful.

Cordially,

PHILIP M. CRANE,
Member of Congress.

[From the Congressional Record, vol. 121, No. 148, Oct. 3, 1975]

COMPENSATION FOR THE IRS

Mr. CRANE. Mr. Speaker, last March, I introduced a bill, which has been referred to the House Judiciary Committee, that would compensate successful defendants in civil actions filed by the U.S. Government for reasonable attorneys' fees and other litigation costs. In the months that have followed, the response has been tremendous indicating the growing concern many Americans share about the adverse effects of governmental over-regulation. While most of the comments have been directed at regulatory agencies such as the EEOC, the EPA, the FDA, the ICC, and the CAB, the FTC, and the SEC, this measure is also intended to act as a restraining influence on the agency that affects the life of every American—the Internal Revenue Service—IRS.

Under existing law, if an individual is audited by IRS and IRS claims additional taxes are owed, that individual can either appeal the case within the framework of the IRS's inhouse appellate procedure or take the case to one of three courts. However, if he chooses to do the latter, he must either pay the tax and file for a refund, which makes him eligible to go to the Court of Claims or the Federal District Court, or he can hold off paying the tax, thereby running the risk of paying additional interest penalties, and take the case to the U.S. Tax Court. But, if he elects to go to either the Court of Claims or the Federal District Court, he becomes the plaintiff in a case against the IRS by virtue of having filed for a refund, and if he goes to Tax Court he becomes the petitioner on the grounds that he is challenging the IRS's findings as set forth in its 90-day notice of discrepancy—which is sent out before one can petition to go to Tax Court. Thus, the burden of proof has shifted. Although the taxpayer is, in essence, the defendant by virtue of the fact he is contesting an IRS finding, in reality he must prove that the Government has made a mistake rather than the Government having to prove that he has made a mistake. In short, the common law tradition that the taxing authority is presumptively correct takes precedence over the more familiar concept of "innocent until proven guilty."

As it stands now, the only civil cases in which the IRS is the plaintiff are those in which the ability to pay, rather than the liability itself, is in question. Included in this category are cases such as summons enforcement, suits to collect taxes and erroneous refund suits. However, in view of the fact that those who go to Tax Court, the Court of Claims, or a Federal district court are just as much on the defensive as those contesting their ability to pay, it seems only fair, logical and consistent to me that they also be compensated for their legal fees and litigation costs when they win the case. Accordingly, I plan to introduce, at the appropriate time, perfecting language to my bill making it clear that it applies to victorious taxpayers in IRS cases as well as to successful defendants in other types of civil action filed by the Federal Government or any of its departments, agencies, or commissions.

In response to the obvious question, that being how does one define "victorious" in an IRS case, it is my feeling that, in cases where the court rules that the IRS is entitled to only a small part of what it has claimed, then the taxpayer should be compensated in direct proportion to the extent of his victory. Thus, if a taxpayer was able to prove 95 percent of the IRS's claims were unjustified, he would get back 95 percent of whatever the court determined was a reasonable amount for attorney's fees and other litigation expenses. Of course, there is always the question of how far this proportional compensation should be carried, and I think this should be explored further in subsequent hearings and discussions, but I feel the basic concept is sound, particularly since the IRS not only has all the resources of the Federal Government behind it but is also entitled, by law, to a presumption of correctness at the outset.

While on the subject of difficulties facing taxpayers who wish to contest claims being filed by the IRS, it should also be noted that, if a person takes an eligible

case—one involving less than $1,500—to the small tax case division of the Tax Court, he will save money in terms of attorney's fees and other costs but, by doing so, he gives up his right of appeal. Given the fact that roughly 25 percent of all decisions appealed by contesting taxpayers are eventually decided in their favor, it is important that the taxpayer, no matter how small his case, know that he can take his case to another court and, without sacrificing his right to appeal if he loses, be reimbursed for his legal expenses if he wins.

Of course, the argument will be raised that such compensation will open the floodgates to litigation with the resultant swamping of our court system. However, I would like to again point out that, by sending the 90-day notice of discrepancy, which gives the taxpayer the option of either paying up or going to court, the IRS is actually determining who can go to court. Moreover, such compensation would make the IRS prepare their cases better, to say nothing of encouraging them to drop those where internal or perhaps political pressures are the primary motivating factor. Finally, those taxpayers who do not have a good case, will still have reason to doubt the wisdom of taking matters to court; if they lose it will cost them more than if they settled their accounts.

However, as things stand now, the circumstances are such that most taxpayers doubt the wisdom of contesting matters no matter how strong they feel their position is. Therefore, it is not at all surprising to discover that, of the audited cases where underpayments have been alleged, 97 percent are settled without recourse to the courts, a percentage which has remained constant over the past 10 years. Likewise, it is little wonder that, of the cases that are petitioned to the Tax Court, 85 percent are settled before going to trial. Not only do most people want to avoid the trouble and expense of haggling with the Internal Revenue Service, but many are positively afraid of the IRS and its practically unlimited resources. In particular, people hesitate to "fight city hall" so to speak because they believe that, regardless of how accurate their returns are, making waves will irritate the IRS into using its power to audit their returns year after year, causing them further worry and expense. Thus, the IRS often gets its way by subtle coercion rather than on the merits of its claims—as the comments of many an aggrieved taxpayer attest.

The consequences of this subtle coercion can be seen better by looking at some more figures. In fiscal 1974, the IRS claimed that over 1.3 million out of nearly 2.2 million audits showed tax underpayments totaling $5.9 billion while, during the same year, the IRS reported it settled cases, without involvement by the courts, for roughly $3.1 billion in additional taxes and penalties. While only a rough approximation—since some audit cases are not resolved in the year they are raised—these figures suggest that challenged taxpayers agreed to pay 53 cents on every dollar the IRS claimed rather than go to court. By contrast, in the same 12-month period, the IRS got just under 40 cents of every dollar it sought when the case was decided by the Tax Court and, if you count in cases that were settled after being petitioned to Tax Court but before actually coming to trial, the IRS success rate dropped to just over 28 cents on the dollar.

Taking a look at the other two courts, the picture is not all that much different. In the Court of Claims, where the taxpayer pays the disputed tax and petitions for a refund, court decisions resulted in IRS refunding almost 65 percent of the money in dispute in fiscal 1974. In the district courts, the IRS had to give a whole lot less money back but, on the other side of the coin, a greater percentage of taxpayers won outright victories there than in either of the other two courts.

Speaking of who won and with what frequency, taxpayers won complete victories in 1.9 percent of the 1974 Tax Court decisions and partial victories in another 36.4 percent of the cases. In the Court of Claims, in the same year, taxpayers won 10.6 percent of the cases outright and were partially successful in another 8.5 percent of the cases—despite an even higher standard of proof. And, in the district courts, as indicated, the taxpayer had his best chance for success, winning total victories in 27.1 percent of the cases and partial triumphs another 12.8 percent of the time.

Given all these figures, and the obvious indications that it pays to fight if you think you are in the right, one would expect far more than 3 percent of all challenged taxpayers to take their case to court—all other things being equal. However, what these figures really suggest is that things are far from equal when it comes to the taxpayer dealing with the IRS and that, as a result, he is often paying tax that he should not have to pay on a lesser-of-two-evils basis. Such a hypothesis not only coincides with the 1974 testimony of U.S. Tax Court Commissioner Joseph N. Ignolia, who told a Senate Appropriations Subcom-

mittee that while taxpayers can save money by going to Tax Court many do not go for fear of the cost, but it also dovetails with the statements of the chief judge of the U.S. Tax Court before the same subcommittee the year before. In answer to a question concerning the propriety of allowing the taxpayer to recover reasonable costs incurred in challenging the IRS, Judge W. M. Drennen not only acknowledged the problem but endorsed a solution by saying that such compensation would be more equitable. The judge added that even if it cost more, which he thought it would—". . . it still seems to me to be a fair thing to do."

Judging from the case histories that are available, I think most Americans will agree that such a system would not only be fairer to the taxpayer but would cut down on abuses by the IRS. Take, for instance, the case of the couple that was accused of owing almost $55,000 in back taxes over a 3-year period. At their own expense, of course, they took the case to Tax Court and, when the decision was entered, it turned out their liability amounted to only $169.88. Sure they saved the $55,000 the IRS wanted but still they were out attorney's fees and other costs with no hope of ever seeing that money again. Likewise, when the IRS made an effort to collect an excise tax from both the manufacturer and the retailer of a given product, the manufacturing firm decided to take the case to the Court of Claims and was vindicated when the decision was handed down (*Sarkes Tarzian* v. *U.S.*, 412 F. 2d, 1293). However, the legal fees involved in fighting the case came to over $25,000 and, as in the first example, that money was gone for good.

Compensating both the couple and the manufacturing firm for legal expenses incurred in fighting an action not of their own choosing, as Judge Drennan has suggested and as my proposal will do, would not only make good the mistakes of one agency of Government but would encourage that agency to make fewer mistakes. By virtue of the fact that such compensation would become a matter of public record, thus providing a quantitative measure of IRS error, IRS personnel would have a positive incentive to avoid some of the temptations that are leading to so much trouble today.

Getting down to specifics, there are a number of pressures that, if not checked, could cause the IRS, or any Federal regulatory agency for that matter, to take legal action against an individual or business. For one thing, internal pressures, such as job performance ratings and promotion considerations, encourage IRS personnel to press forward with claims whenever possible. After all, the IRS and the other regulatory agencies are in business to punish abuses and, regardless of their public statements to the contrary, there is a natural tendency for them to want to be as aggressive as possible in carrying out their assigned function. But, while such aggressiveness might look good within the IRS, all too many Americans are aware that it is capable of making a mockery of the system of justice their organization is supposed to enhance.

A second consideration is that once a taxpayer wins a case there is a natural tendency for the IRS personnel involved to seek vindication through further auditing of the taxpayer's return. And, even if this does not hapen very often, there is a fear in the minds of most Americans that it could happen to them if they challenge an IRS finding. Enactment of this legal compensation proposal should make people rest easier however; if vindictiveness rather than fact is shown to be the basis for the case, the taxpayer will be reimbursed for the costs of defending himself.

Finally, there is the matter of political pressure. While it was the intention of Congress in establishing the independent regulatory agencies and in giving the IRS the power it has, to keep politics out of their proceedings, there is reason to suspect that, instead of achieving insulation, the political pressure points have simply been changed. Rather than being at the whim of Congress, the IRS and the regulatory agencies are now most likely to be influenced by the White House or by the political predilections of their own personnel people who, for the most part, are protected by Civil Service.

Unfortunately, some of the most recent examples of this have involved the IRS and the Special Services staff it operated from 1969 to 1973. While evidence accumulated by the Joint Committee on Internal Revenue Taxation suggests that the practice of focusing special IRS attention on political groups began during the Kennedy administration, the practice continued during the Johnson administration, and reached a peak during the Nixon administration when IRS investigations were allegedly suggested, not only of political organizations, but of political figures associated with the Democratic Party and some of its candidates.

According to evidence released by the House Judiciary Committee, allegations have been made to the effect that in 1972 the White House attempted to have the IRS investigate former Democratic Party Chairman Lawrence O'Brien, staff members of Senator George McGovern and contributors to Senator McGovern's campaign. In addition, there are allegations that the White House also tried to turn off IRS investigations of certain friends of the administration.

While these charges have never been brought, much less proven, in a court of law, the very fact that IRS was allegedly contemplated as a political tool is a matter of most serious concern. One cannot ignore the fact that some 8,000 individuals and 3,000 organizations were on what has been popularly referred to as an IRS "enemies list" and the suspicion lingers that, not only has IRS been used to bringing political pressure on people in the past but, unless corrective measures are taken, it could be used for such a purpose in the future.

One corrective step that should be taken is to tighten the procedures regarding the inspection and confidentiality of IRS records, and I have previously cosponsored a bill that would do just that. Another remedy, and one which I have also cosponsored, would require the IRS to notify the taxpayer before an audit of his return begins, giving him the reason for the audit and advising him of his rights during the audit procedure. But, for these steps to be fully effective, and for the IRS to be discouraged from engaging in political or other types of harassment tactics, both the American public and the IRS personnel need to know that IRS will have to pay for the errors of its ways.

Regardless of political affiliation, I think we can all agree that politics should play no part in actions initiated by the IRS or any other Federal regulatory agency. Unfortunately, there is no reason to expect that the IRS is the only agency that has been subjected to political pressure, making it imperative for us to enact legisiation that puts the responsibility for approriate conduct where it belongs—on the bureaucrats themselves.

While the best long-term solution for political pressure on regulatory agencies may well be a reduction in their size and number, under present law we will continue to need an effective Internal Revenue Service. However, for it to be truly effective, the IRS must be an organization that people respect both for its fairness and for its ability to bring tax evaders to justice. Unquestionably, reimbursing a victorious taxpayer for legal expenses incurred in a dispute with IRS will contribute towards the first objective and, contrary to what some might think, it should not interfer with the second. Tax evaders will not be encouraged to flaunt the law because, if they get caught, they will have to pay for their own defense as well as whatever tax they owe. Nor will they be encouraged prematurely to take their case to court, hoping to stall, clog the court dockets and eventually get off the hook, because they cannot get into court without having sent the 90-day notice of discrepancy and because it will cost them more money if they try it and lose. What compensation will do, however, is assure every American that if the IRS, for whatever reason, wrongly seeks more taxes from him, he can come out on the long end in court without coming out on the short end at his bank.

In conclusion, Mr. Speaker, I would like to point out that this idea is not without precedent. In April 1973, Senator BELLMON, joined by 11 of his colleagues, reintroduced a bill calling for the reimbursement of attorney's fees, accountant's fees, and court costs to victorious taxpayers in cases involving the IRS. Subsequently, the National Federation of Independent Business did a poll on the bill and 86 percent of those who responded indicated they were in favor. And still later, the same suggestion was made in the 1974 Senate hearings on taxpayer assistance and compliance programs on several occasions.

When you get right down to the heart of the matter, the basic issue at stake here is justice. To make appeals from IRS or regulatory agency findings contingent on one's ability to pay or on one's willingness to take a loss is hardly fair. Nor is the cause of justice served by having people comply with agency verdicts, even though they believe those verdicts wrong, simply because it is the lesser of several evils. If a proper balance is to be maintained between the citizen and his Government, the tremendous resources of the Government agencies must be offset by a commitment to reimburse people when the agencies force people into court and then cannot prove their case. This commitment is the essence of my proposal and I hope that my colleagues will not only study it carefully but give it their wholehearted support.

HR 4675—Information Sheet

A. WHAT THE BILL WILL DO

1. It will require (make mandatory) that reasonable compensation be paid to successful defendants in civil suits filed by the U.S. government. Making the compensation mandatory, instead of discretionary, represents a significant reversal of the American Rule.

2. It is intended to cover all agencies, departments and commissions of the U.S. government (as well as all the employees of each), not just those who have the Department of Justice file suit in their behalf. Thus, agencies such as the Equal Employment Opportunity Commission (EEOC), which can file its own suits, would be covered.

3. Also, it will cover IRS "ability to pay" suits, which include such things as summons enforcement cases, suits to collect taxes, and erroneous refund suits. But, as presently drafted, HR 4675 does not cover IRS "tax liability" cases (where the amount of tax owed is in question).

4. However, since people accused by the IRS of paying insufficient taxes are, for all practical purposes, defendants just like people accused of violating an agency rule or regulation, they are equally deserving of compensation. Therefore, perfecting language will be offered at the appropriate time to include them within the scope of the bill.

5. The term "prevailing defendant" that appears in the bill title is intended to apply to all those who win a case brought by the federal government. However, the question of compensation in the case of split verdicts has intentionally been left open for the consideration of the Subcommittee. One possibility, of course, would be proportional compensation based on the extent to which the defendant emerged victorious in a split verdict.

6. The phrase "defendant who prevails in a civil action" is intended to apply to the ultimate victor in the case. Thus, if a defendant wins a case in district court but loses in the appeals court, he would not be compensated. But, if that same defendant were to win the case on appeal, he would be compensated for his legal expenses at both the district and appellate levels.

7. The phrase "reasonable litigation costs" in lines 6 and 7 of the bill, is intended to cover not only court costs (as billed by the Clerk of the Court) but also witness fees, transcript fees, fees for parties of discovery under federal rules of civil procedure, and travel expenses for expert witnesses. Also, in IRS cases (presuming that tax liability cases are included within the scope of HR 4675) accountants fees would also be covered. In short, the idea is to make the successful defendant whole insofar as his legal expenses are concerned.

8. However, the decision as to what constitutes a reasonable sum for each category of legal expenses would be left up to the judge. Thus, while compensation for a wide range of legal expenses would be mandatory, the amount of compensation involved would be discretionary.

9. Finally, while it is not in the bill, there has been a lot of support for requiring (1) that any award of compensation come out of the budget of the specific agency filing suit and (2) that the award be made in the same year the suit is settled. Since these ideas simply reinforce the objectives of the bill, additional language incorporating them could be added during markup.

B. WHAT THE BILL WILL NOT DO

1. It will not cover successful defendants in criminal cases.

2. It will not apply to successful plaintiffs in suits filed against the federal government. Thus, it will not overturn the Aleyska case.

3. It will not compensate successful defendants in civil suits not involving the government, nor will it cover the prevailing party in non-governmental suits.

4. It will not permit the government to be compensated should it file suit against a defendant and win (as legislation awarding compensation to the prevailing party in any suit involving the government would do). To permit this would not only unduly reward government for carrying out its assigned function, but it would also completely nullify one positive effect of HR 4675. Instead of discouraging bureaucrats from filing unjustified suits, compensating the government when it brought suit and won would give the bureaucrats extra incentive to file suits. Furthermore, compensation by unsuccessful defendants to the gov-

ernment (for its legal expenses) could be looked upon as an added fine, or double taxation, or both. It would certainly lead to more instances of "compliance by coercion" rather than decisions based on the merits of the case.

5. It will not cover administrative actions before either the regulatory agencies or the IRS unless they result in the case going to court, in which case compensation could be awarded under the heading of pre-trial legal expenses. The reason for this is the fact that the bill is basically intended to encourage people to take their case to court, when they believe they are right, rather than submit to some compromise settlement that is less than satisfactory but would otherwise be viewed as the lesser of two evils.

6. It will not provide for the recovery of damages (loss of time, loss of business etc.) suffered by an individual or business that is sued by the government. While a strong case can frequently be made for reimbursing successful defendants for these kind of losses, they are above and beyond what legitimately might be considered reasonable attorney's fees and other litigation costs. Furthermore, determining what would constitute fair compensation for these losses would be difficult and, even if this obstacle were not present, such compensation might have an unduly adverse effect on both the federal budget and the willingness of the government to pursue cases that do have merit.

7. It will not require that bad faith be proved in order for the successful defendant to collect compensation. Just the fact that the government brings the case and loses should be adequate grounds for mandatory compensation; regardless of the motives, the negative effect on the successful defendant is the same.

8. Finally, and most importantly, it should not increase costs to the American taxpayer. In fact, the costs of compensation should be more than offset by (1) a reduction in the number of unjustified suits being filed by the federal government and (2) by the fact that the cases which are filed should be better prepared and will therefore not result in compensation being required.

C. BENEFITS ACCRUING FROM PASSAGE OF THE BILL

H.R. 4675 would remove the unjust financial penalty presently imposed on those who successfully exercise their right to defend themselves in court.

H.R. 4675 would encourage individuals and businesses to challenge federal civil suits and IRS claims that they believe to be unjustified.

By virtue of the fact that the amount of compensation would become public knowledge, H.R. 4675 would give the American people a quantitative measure of agency error.

Having created such a yardstick, H.R. 4675 would give federal agency personnel an incentive not to become overzealous or to engage in harassment tactics for personal or political reasons.

H.R. 4675 would give federal departments, agencies and commissions encouragement to simplify their rules and regulations and to drop those that are unreasonable or unnecessary.

H.R. 4675 would reduce the incidence of compliance by coercion and would restore faith in our system of justice by restoring the balance between the powers of government and the rights of the individual.

D. SOME ADDITIONAL THOUGHTS

In recent months, there has been a burst of interest in the subject of regulatory reform. Ironically, liberals and conservatives, Republicans and Democrats, often agree that, in certain areas at least, the federal government is too involved in regulating the lives of its citizens. The problem is, they often do not agree on the areas in which the regulation has been excessive. However, this bill does not require such agreement; it simply offers a way for those who believe that overregulation poses a danger to effect a workable remedy. Furthermore, that remedy is, to a large extent, self-enforcing in that it does not require the repeal or reform of a single regulatory agency to become effective.

Thus, H.R. 4675 may be considered a bipartisan measure. Moreover, it has the advantage of simplicity in that it deals with just one basic injustice—that of having economics, rather than facts, determine the course of justice in many civil proceedings initiated by the federal government. Unlike criminal proceedings, the civil defendant who cannot afford to contest a case has no choice but to give in and/or pay the fine. And, even if one can afford to go to court, what justice is

there in penalizing him for proving his innocence. After all, he did not initiate the case and he should not be discouraged from exercising his right to defend himself in a court of law.

In essence, this bill seeks to redress a development that could not have been foreseen by either our Founding Fathers or the builders of our system of jurisprudence—the rise of a powerful fourth branch of government, the bureaucracy. With 12 departments and 75 agencies (20 having been created in the last 8 years) now regulating many aspects of American life, it becomes more and more difficult for people to stay clear of disputes with the government and to stand up for their rights against the government. In short, the burgeoning of the bureaucracy has caused the balance of power between the individual and the federal government to tip markedly in favor of the latter. Enactment of H.R. 4675 would swing the pendulum back in the other direction.

With that in mind, it should be noted that there are many proposals extant that would expand upon the basic concept of legal compensation presented here. Some are tempting, others less so, but the one thing each seems to have in common is that it is controversial. So, while the evidence indicates that H.R. 4675 has broad-based support (a recent nationwide poll of independent small businessmen indicated 85% were in favor), each addition that broadens its scope risks alienating its backers. Therefore, from both a practical and a philosophical standpoint, it would seem logical to make H.R. 4675 the basis for legislation dealing with attorney's fees and to deal with different issues arising out of more sweeping or controversial proposals separately. This approach would also have the advantage of giving Congress the opportunity to wait and see how limited legal compensation works out, an advantage that might be most helpful in developing further legislation concerning attorney's fees.

STATEMENT OF HON. PHILIP M. CRANE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman. Before I begin, let me extend my thanks to you and all the members of the Subcommittee for inviting me to be here this morning. The opportunity to testify on what I believe to be a most timely subject is certainly appreciated; all I ask is your indulgence if, at times, my phraseology is less legalistic than these walls are normally accustomed to.

What brings me here this morning is a deep seated concern that the rise of the independent and the semi-autonomous federal regulatory agencies—agencies like the EEOC, the FDA, the EPA, the SEC, the FTC, the CAB, the ICC and yes even the IRS—are bringing about a decline in the calibre of justice in this country. While contesting civil suits initiated by these agencies seems to be a relatively easy matter in theory, in practice it is often more expensive than it is worth. Many individuals or businesses find that it is cheaper to plead "no contest," or to negotiate some sort of a compromise, than it is to stand up for their rights in a court of law while others are afraid that if they fight and win, they will be subject to future harassment from the agency involved. As a consequence, compliance by coercion rather than compliance based on the merits of the case is becoming the rule rather than the exception.

Let me cite two case histories that illustrate the problem—one an antitrust case, the other a tax case. In the first instance, three rocksalt companies were accused of price fixing, the maximum fine for which was, at the time, $150,000. However, believing themselves innocent, they decided to fight the case, which took two and one half years for them to win, and when it was over, the legal battle had cost them $775,000—over five times what it would have cost them to capitulate. In the second example, the IRS tried to collect an excise tax from both a manufacturer and a retailer, prompting the manufacturer to take the case to the Court of Claims. After over $25,000 had been spent in legal fees, the Court decided in favor of the manufacturer (*Sarkes-Tarzian* v. *U.S.* 412 F. 2nd, 1203) but, as in the case of the rocksalt firms, the company lost a significant amount of money even though totally innocent.

I could cite other examples, but I think these are sufficient to underscore the injustice that is developing, an injustice which works a particular hardship on the little man who is far less able to absorb such losses than a bigger company. In fact, more than a few small businessmen can't afford to either fight the agency or succumb to its dictates, so they are simply going out of business and putting more people out of work.

What makes all this particularly galling is that these same people are paying taxes every year to help support the very agency that is trying to make life

miserable for them. Not surprisingly, more and more Americans are coming to feel that they are digging their own graves and there is nothing they can do about it.

Well, I believe that there is something that can be done about it, something that will not only be more equitable but will give the regulatory agencies and the IRS an incentive not to file unwarranted civil actions, or claims (in the case of IRS) in the first place. My proposal, which is incorporated in a bill I introduced last March (HR 4675), calls for the automatic awarding of reasonable compensation for attorney's fees and other litigation costs to successful defendants in civil actions filed by the U.S. Government. Admittedly, the awarding of attorney's fees goes contrary to common law as well as existing statutes and the mandatory award feature runs counter to the discretionary provision in 28 U.S.C., section 2412, but unless the compensation is both adequate and guaranteed, it is not likely to have the desired effect.

In order that there may be no doubt as to precisely what I have in mind and who will be covered by it, and to what extent, let me go over the language of HR 4675 more carefully.

First of all, the reference to the United States as a plaintiff is meant to cover all departments, agencies, and commissions of the United States and not just those which file suit under the auspices of the Department of Justice.

Second, since persons contesting IRS claims of deficiency are, for all practical purposes, defendants in a civil action being filed by a government agency, it is my intention that they be covered by this bill as well. At present, the IRS is the plaintiff only in cases where the person's ability to pay is in question, so extending compensation to taxpayers who successfully rebut tax liability calims made against them will require the addition of some perfecting language. However, under the circumstances, I feel such an addition is both consistent and justified.

Third, the term "other litigation costs" should be construed as meaning not only the court costs as billed by the Clerk of the Court (such as jurors pay and marshal's fees), but also such actual costs as: witness fees, the cost of transcripts of evidence and testimony; travel expenses, room and board for witnesses listed by the defendant in compliance with the pre-trial orders of the court; the costs for parties of discovery under federal rules of civil procedure and, in IRS cases, accountant's fees.

Fourth, the phrase "who prevails in a civil action" is intended to refer to the party who is the ultimate victor in the case. Thus, a defendant who was in a district court but lost in the appeals court would not be entitled to compensation. But if the defendant's victory in the district court was upheld in the appeals, he would be entitled to compensation for his legal expenses throughout the entire process. Without stifling the government's right to appeal a case it thinks has merit, this procedure should make them think twice about how strong the merits are.

Fifth, and finally, compensation for reasonable legal fees would be mandatory, and the court's role would be limited to determining the amount of the ward.

Before leaving that topic, I might also note that the British have been using a legal compensation system for years and, as a consequence, they have developed some guidelines for determining what constitutes a reasonable compensation award. Such guidelines, to the extent they are applicable or deemed wise, could be most useful in helping our judges award amounts should this bill be enacted into law.

Having said that much, let me move on briefly to some of the advantages that would be derived from passage of this legislation.

First, it would remove the financial penalty for those who successfully exercise their right to defend themselves in court.

Second, it would encourage businesses and individuals to challenge (federal) civil suits and IRS claims they believe to be unjustified.

Third, by virtue of the fact that the amount of compensation paid out each year by any given agency or commission would become public knowledge, the American people would, for the first time, have a quantitative measure of agency error.

Fourth, such a yardstick would give agency personnel an incentive not to become overzealous or to engage in harassment tactics for personal political reasons.

Fifth, the knowledge that an agency would have to pay for its mistakes would give it encouragement to simplify its rules and regulations and drop those that are unreasonable or unnecessary.

And sixth, the reimbursement of defendants unsuccessfully sued by the government would not only reduce the incidence of compliance by coercion but would give people renewed faith in our system of justice.

In the seven months that have passed since this bill was first introduced, the response has been little short of amazing. Twenty members of Congress have now co-sponsored this legislation and expressions of support have poured in from individuals and businesses all around the country. In many instances, these communications have included case histories illustrating the need for the legislation or suggestions for improving it.

While many of these suggested improvements have a lot of merit and should, I think, be looked into during future hearings, let me, in the interest of brevity, limit myself to discussing one that, without expanding the scope of my bill, seems to effectively complement it. More specifically, the idea presented by several people was that both fairness and accountability would be enhanced if the agency directly responsible for the unjustified suit were required to pay the compensation awarded out of its own budget during the same fiscal year the suit was settled. Upon reflection, I could not agree more; not only would successful defendants be assured of recouping their losses in a reasonable time, but the agencies would have all the more reason to be as objective as possible in their proceedings.

In conclusion, let me just reiterate that, with the federal bureaucracy having evolved into what is often called the fourth branch of government, the citizens can no longer sand up for his rights as easily as government can accuse him of wrongs. Therefore, it seems only logical to assume that the American judicial process is in need of revamping, at least insofar as civil suits involving the federal government are concerned. But, while I believe recent history clearly indicates the need for mandatory compensation of defendants in suits filed and lost by the government, I am adamantly opposed to any provision that would force the defendant to compensate the government for its costs should it win. Such an expansion of the legal compensation concept would not only give the government an undeserved reward (on top of the fine it would collect) for doing what it is supposed to do anyway, but it would give the agencies and their personnel added incentive to pursue unsubstantiated cases. In short, given the growing power of the federal government, legal compensation should be limited to a mandatory one-way street going in the direction of the defendant and I hope that these hearings will be the first step in that direction.

Again, Mr. Chairman, I wish to thank you and the Subcommittee members for hearing me out this morning. Now, if there are any questions, I'd be happy to try and answer them.

LAW OFFICE,
Washington, D.C., November 7, 1975.

ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: This letter is intended to supplement the testimony of Bruce J. Terris on the subject of attorneys' fee statutes which was presented to your subcommittee on October 8, 1975. As was mentioned in that statement, there is a need for payment of attorneys' fees by the United States in proceedings before administrative agencies including grievance hearings of federal employees. We would like to expand those comments and to submit model legislation designed to remedy this situation.

Such legislation is extremely important. It is extremely costly for an employee to defend himself against unjustified and illegal personnel actions. Consequently, many employees do not seek to remedy actions taken against them. Others are successful in obtaining remedies for improper personnel actions but are never made whole for the improper action against them because they have had to spend thousands of dollars to obtain relief.

Four cases handled by our office should suffice to make this point:

(1) In the first case an employee was denied his in-grade salary increase by his supervisor on the grounds that his work was incompetent. Through submission of affidavits prepared by his attorney during the administrative review of the decision, it was shown that the supervisor had prevented the employee from carrying out his functions and that therefore the individual had been injustifi-

ably denied his in-grade salary increase. While he obtained the in-grade increase, this decision cost him $1,200.

(2) In a second case, a Foreign Service officer was notified that she was to be fired because she had been in grade too long. She submitted a lengthy and detailed complaint prepared by an attorney showing that her failure to be promoted was the result of biased and unjustified evaluations which she had received earlier in her career. As a direct result of this detailed complaint, the agency reversed its decision prior to the hearing, voided her selection-out, gave her a new position, completely cleansed her personnel file of the improper evaluations, and promoted her. This proceeding cost the officer $2,500.

(3) A supervisor refused to allow a Foreign Service officer to carry out her duties and then wrote an evaluation covering a one-year period in which he criticized her abilities and her failure to do her job. This evaluation contained numerous untrue statements regarding the officer's abilities and his supervision of her. This same supervisor also improperly influenced her subsequent supervisor who gave her poor assignments and supervision because of his erroneous opinion of her abilities. He then similary wrote an extremely critical evaluation concerning a seven month period. As a result of the evaluations of both of the supervisors the officer was low-ranked by the Selection Board. USIA relied upon these evaluations and refused to assign the officer overseas. Instead, she was placed in an unsuitable position which was lower graded than her personal grade and underutilized her skills. The result of this assignment would almost certainly have been that she would have received a second low ranking which would have resulted in her dismissal.

This dispute was presented to the Foreign Service Grievance Board in a three-day hearing in which the officer was represented by counsel. The Board ordered that the officer's files be cleansed of all of the evaluations about which the officer had complained, that her low-ranking be nullified, and that her record not be submitted to a Selection Board for another year. It further urged that she be reassigned and she thereafter obtained a suitable assignment overseas. This decision cost the officer $8,000.

(4) In the fourth case, an employee of one of the security agencies had not been given a promotion in seven years. She had been receiving poor evaluations because of her supposed lack of skill in her job. Despite this criticism, the employee had been left in that job for five years. She had, through her own efforts, been unable to obtain transfer to another position. The poor evaluations had resulted in her being placed in the lowest-ranked category of employees, thus making her vulnerable to dismissal. Her attorney filed an EEO complaint on the employee's behalf, supported by a 50-page affidavit, contending that the employee had been subjected to sex discrimination. After investigation of the complaint, the Agency reassigned the employee to a different position, agreed to give her the necessary training to give her the opportunity to advance, removed her from the lowest-ranked category, and agreed not to competitively rank her until she had been in the new job for one year. This proceeding cost the employee $6,200.

In each of these cases, it was necessary for the employee to be represented by an attorney in order to protect his or her rights adequately. This is graphically demonstrated in the first example. The agency's decision had been internally reviewed twice. The employee was not legally represented during the first review which resulted in a decision affirming the agency's decision. He was represented during the second review which overturned the agency's decision. In the other three cases the employees had previously attempted to solve their problems on their own without help of counsel. In each instance they received no relief.

Often an employee's grievance is centered upon complex factual issues too difficult for the untrained individual to marshal and present. In the two Foreign Service Officer cases, the complaints were 18 and 31 pages, respectively, and concerned events which occurred over periods of two years. In the security agency case, the complaint was 50 pages long and concerned events which occurred over a seven-year period of time.

Many employee grievance cases involve complex legal issues. For instance, in the security agency case, the agency attempted to limit the employee's claim to the year immediately preceding the complaint, despite the fact that the courts had ruled that an agency could not limit a discrimination claim in this fashion. In that same case, the agency refused to allow the employee to see numerous memoranda about herself which had been available to the panel which had low-ranked her. After her attorney turned the agency's attention to several Civil

Service Commission regulations, she was finally given access to these extremely relevant and important documents.

Moreover, the employee is usually confronted by the agency's use of its legal staff to defend its position. Any grievant, without his own attorney, is thus at an extreme disadvantage.

The complexity of discrimination cases and the inequitable representation of the parties at the administrative level was recognized by the Court of Appeals for the District of Columbia Circuit when it considered whether employees claiming discrimination had a right to a trial *de novo* in district court. In *Hackley* v. *Roudebush*, 520 F. 2d 108, note 130 (1975), the court stated:

Although nothing precludes a complainant from selecting an attorney as his representative during agency proceedings, Congress was cognizant of the fact that Federal employees often needed counsel in these complicated areas, but seldom could afford such expenses * * *. It therefore provided for discretionary appointment of counsel once a Title VII case reaches a court. * * * Thus, it may be particularly oppressive to bind legally unsophisticated employees to complex and difficult choices made without adequate assistance at the agency level; indeed the fact that the complaints examiner and EEO counselors need have no legal training exacerbates these problems since they are not therefore sensitive to the problems of preventing an unintentional or, uninformed waiver of rights by Complainants. Of course, the agency representative (whose primary loyalty is to the agency) will more than likely be an attorney, thereby aggravating the differential between the resources of the agency and those of the complainant.

The same analysis equally applies to employee cases not involving discrimination.

We believe that, under these circumstances, it is clearly proper to require that the government must pay the attorney's costs of a successful grievant. In addition, we believe that discretion should be given to award fees where a grievant has not been successful, but as a result of bringing the grievance, produces a result beneficial to the government, other employees, or the public. In such situations, we do not believe that it is equitable to impose the high costs of participating in administrative and judicial proceedings on the individual employee.

We have submitted a model statute which would provide for such awards. We request that it be considered by this subcommittee.

Sincerely,

HELEN COHN NEEDHAM.
BRUCE J. TERRIS.

Enclosure.

ATTORNEYS' FEES FOR FEDERAL EMPLOYEES

SECTION 1. Definitions

(a) "Administrative determination" means the initial decision made by any agency, department, board, complaints or hearing examiner, or commission to which an employee dispute is first referred in accordance with a formal internal grievance procedure or other procedure established by statute or regulation to be followed when protesting specific personnel actions or employment grievances.

(b) "Administrative appeal" means the appeal within or to an agency, department, board, complaints or hearing examiner, or commission from either an administrative determination or a prior appeal from an administrative determination.

(c) "Employee" means any person permitted to file a complaint or an appeal in accordance with the applicable procedure established to settle employment disputes between an employee and the federal agency or department involved in the dispute.

SECTION 2. An employee of a federal agency or department who, on the basis of an administrative determination, an administrative appeal, or a court proceeding subsequent to either the administrative determination or administrative appeal, is found under applicable law or regulation to have undergone an unjustified, unwarranted or illegal personnel action, or to have presented an otherwise justifiable grievance regarding any condition of employment, shall be awarded costs incurred in preparation for and conduct of the entire administrative and judicial proceedings.

SECTION 3. An employee of a federal agency or department who on the basis of an administrative determination, an administrative appeal, or a court proceeding subsequent to either the administrative determination or administrative

appeal, is found under applicable law or regulation not to have undergone an unjustified, unwarranted or illegal personnel action, or to have presented an otherwise justifiable grievance regarding any condition of employment, may nevertheless be awarded so much of the costs incurred in preparation for and conduct of the administrative and judicial proceeding as are deemed appropriate, if the proceeding is deemed beneficial to other employees of the agency, to the United States Government, to the public, or in other appropriate circumstances.

SECTION 4. Costs shall be awarded against the employing federal agency or department by the ultimate decision maker upon application of the employee after the grievance or other protest has been finally determined. The award of costs shall cover costs incurred during the entire administrative and judicial proceeding from the initial filing of the administrative complaint to, and including, any and all appeals.

SECTION 5. Costs shall include, but are not limited to, reasonable attorneys' fees, expert witness fees, costs of obtaining evidence, costs of deposition, costs of printing and reproduction, and other costs. Attorneys' fees shall be based on the prevailing commercial rate for an attorney in the area in which the attorney practices, the adequacy of representation of the grievant, and such other factors as may be deemed relevant.

SECTION 6. Whenever costs and fees are awarded to a federal employee under this statute, the United States as represented by the appropriate federal agency or department, shall be liable for those costs and fees.

APPENDIX 3

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
Washington, D.C., December 9, 1975.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: We are writing concerning the bills pending before your Subcommittee relative to the award of attorney's fee in cases where such fees may not be granted because of the Supreme Court's decision in the *Alyeska Pipeline* case.

We recognize that many of these bills have merit, but we wish at this time to request speedy action on H.R. 9552. We do this because we believe that the legislative situation is such that this bill could pass quickly and with little controversy.

As you know, H.R. 9552 would allow fees to be awarded in what have traditionally been considered civil rights and civil liberties cases. Such legislation in the past has faced little opposition in the Congress. Several of the specific civil rights bills contain a provision similar to H.R. 9552, including the Voting Rights Act extension of 1975, which passed both Houses of Congress by overwhelming margins.

You will recall that an amendment was adopted in the Senate Judiciary Committee that would have added this provision to the Senate version of the Voting Rights Act extension. This amendment met little opposition in the Committee. However, because the parliamentary situation precluded consideration of the Senate bill and the offering of the amendment on the floor of the Senate, it was not considered by the full body. There was no indication that it would have encountered serious opposition had the parliamentary situation been more favorable.

The other bills offered on this subject have not been as fully considered. Therefore, delay in their consideration in the Judiciary Committees and on the floor of both Houses may be expected. Therefore we could urge that H.R. 9552 be considered separately and expeditiously.

There is an urgency in this matter. Many civil rights cases were either pending when the *Aleyeska* decision was rendered or have been filed since. Of those pending, many were filed in the expectation that lower court decisions favorable to the awards of fees would prevail. The failure of the Congress to act will have a chilling effect on the prosecution of these tyeps of actions, which are truly in the public interest.

The Leadership Conference on Civil Rights calls on you to favorably report H.R. 9552 from your subcommittee, in the expectation that Congressional enactment will follow in due order.

Sincerely yours,

CLARENCE MITCHELL,
Legislative Chairman.

U.S. COMMISSION ON CIVIL RIGHTS,
Washington, D.C., Aug. 4, 1975.

Hon. PETER W. RODINO, Jr.,
Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: This is in response to your letter of June 27, 1975, in which you request Dr. Arthur S. Flemming's views on the proposed legislation, H.R. 7828, to authorize the awarding of attorneys' fees to the prevailing plaintiffs in actions brought under certain civil rights laws.

Your request was forwarded to Dr. Flemming for his consideration and I have been asked to prepare this response.

A major criterion for effective enforcement of the civil rights laws in the right of individuals, acting as "private attorneys general," to have access to the Federal courts in order to litigate their grievances. It would be unconscionable for persons to be deprived of this right because of difficulty in absorbing attorneys' fees.

Consistent with the aforementioned, this Commision has repeatedly stated that the expense incurred by the individuals and organizations who are parties to protracted civil rights litigation often proves to be an overwhelming burden. As recently as January, 1975, the Commission recommended that Congress provide for the awarding of attorneys' fees where appropriate in private litigation to enforce the Voting Rights Act or rights guaranteed by the fifteenth amendment.

Therefore, in keeping with the suggestion of the United States Supreme Court in the recently decided *Alyeska Pipeline Service Company* v. *Wilderness Society*, 95 S. Ct. 1612 (1975), that it is within the province of the legislature to distribute litigation costs, I fully suppor the aforementioned legislation.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

JOHN A. BUGGS,
Staff Director.

WASHINGTON, D.C., *November 3, 1975.*

HON. ROBERT W. KASTENMEIER,
House Committee on the Judiciary,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I very much appreciate your request that I comment on the attorneys' fees bills pending before the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

To move toward achieving the goal of "equal justice," I think it very important that (at the least) federal courts be given clear authority to require the United States to pay attorneys' fees. This could be done simply by amending 28 U.S.C. § 2412 by substituting the word "and" for the words "but not" in the first sentence, which now reads:

"Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action."

This modest amendment would accomplish the purpose of making it possible for those who prevail in suits involving the United States to be compensated for attorneys' fees, but only in the discretion of the court. I think this is preferable to H.R. 8221, which also would allow the imposition of fees against the private litigant, plaintiff or defendant; this would increase the government's power and discourage the assertion of claims.

If the amendment I suggest were made, it would be well to make clear that the court's discretion is not limited to the few accepted exceptions to the "American rule." This could be done by adding the phrase "wherever the interests of justice so require" after the phrase "fees and expenses of attorneys." Without this addition, the amended sentence might be read to allow attorneys' fees against the government only where the "common fund" or "bad faith" exceptions apply—that is, only where attorneys' fees would be allowed against a private party. This would be of only slight utility, as the courts already are moving in that direction. (See, e.g., the October 20, 1975 decision of the United States Court of Appeals for the District of Columbia Circuit in *National Treasury Employees Union* v. *Nixon*, No. 74–1891, and two decisions of the United States District Court for the District of Columbia, *National Association for Mental Health, Inc.* v. *Weinberger*, C.A. No. 1812–73 (September 4, 1975), and *National Association of Regional Medical Programs* v. *Weinberger*, C.A. No. 1807–73 (May 19, 1975).)

It may be helpful for me to illustrate why I think such an amendment important. In 1973, with Lee P. Reno, Esquire, General Counsel of the Rural Housing Alliance, I represented the plaintiffs in a suit challenging the Department of Agriculture's refusal to implement two subsidized housing programs for rural areas. The suit was decided in our favor; the decision resulted in the release of several billions of dollars for subsidized housing. I have received no financial compensation for my work on that suit. We have moved for attorneys' fees, but the government argues that § 2412 is a bar. The motion is pending before Hon. Charles Richey, United States District Judge here. (The case is *Pealo* v. *Farmers Home Administration*, reported at 361 F. Supp. 1320.)

In another case, *Cole* v. *Hills*, I and several other attorneys represent tenants in a HUD-held project that HUD attempted to demolish. Judge Gerhard Gesell of the United States District Court here issued a preliminary injunction against demolition, writing an opinion indicating several legal deficiencies in HUD's actions. (The opinion is reported at 389 F. Supp. 99. For your convenience, I enclose a copy.) In September, Judge Gesell ruled in our favor on the question whether the Uniform Relocation Assistance and Real Property Acquisition Policies Act applied in this situation; I enclose a copy of his order on that point. The case now has been remanded to HUD, at its request, for a re-determination. Most of the time I have spent on this case has been uncompensated financially.

I offer these two illustrations of cases brought—successfully—to vindicate important Congressional policies. There are countless other situations in which executive and administrative agencies defy Congressional mandates, most often to the detriment of individual citizens who are not wealthy or organized. Many attorneys do what I have done in these cases—contribute time without fee. But, obviously, there is a limit to the amount of work any attorney or group of attorneys can do without fee.

Federal judges are not as a class ill-disposed to the federal government. They are not likely to be profligate with the taxpayers' money. Where a private party prevails in litigation involving the government, and a federal court determines that the interests of justice require that the United States pay an attorney's fee, that imposition ought to be allowed.

Yours respectfully,

FLORENCE WAGMAN ROISMAN,
Attorney at Law.

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Civil Action No. 74–1872)

SADIE E. COLE, ET AL., PLAINTIFFS,

v.

CARLA A. HILLS, ET AL., DEFENDANTS.

ORDER

Upon consideration of the complaint, the motions of the parties for partial summary judgment respecting plaintiffs' claim for relief based upon the Uniform Relocation Assistance and Real Property Acquisition and Policies Act of 1970,

42 U.S.C. 4601 *et seq.* (hereinafter referred to as "the Act"), the memoranda of points and authorities, exhibits and argument of counsel in support thereof and in opposition thereto and the Court being advised in the premises, it is by the Court this 12th day of September, 1975, pursuant to 28 U.S.C. 2201,

Declared and adjudged that by having come into possession of the Sky Tower Apartment project as the result of a mortgage default, HUD was "the acquiring agency" within the meaning of the Act; and it is further

Declared and adjudged the notices of September 27, 1974 advising Sky Tower tenants to vacate the "written order of the acquiring agency to vacate real property" within the meaning of the Act; and it is further

Declared and adjudged the notices aforesaid were "for a program or project undertaken by a federal agency" within the meaning of the Act, to wit, the demolition of Sky Tower; and it is further

Declared and adjudged that all persons who were tenants at Sky Tower as of September 27, 1974 and vacated their apartments on or after that date and prior to August 1, 1975 are "displaced persons" to whom the Act's benefits are available; and it is finally

Declared and adjudged said tenants who vacated their apartments as a result of the notice of September 27, 1974 are entitled to a prorated portion of the benefits provided under Section 204 of the Act for the period commencing upon the date of their move from Sky Tower and terminating August 1, 1975 (or the date on which any such person returned to Sky Tower, if earlier than August 1, 1975), by which dates the availability of apartments at Sky Tower for tenants shall be deemd to constitute provision of comparable relocation housing as required by sections 205(c)(3) and 204(1) of the Act, so as to waive the provision of any other benefits under the Act to said tenants; and it is

Ordered that, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court hereby directs entry of a final judgment as to this one of several claims of the plaintiffs, there being no just reason for delay.

The reasons for the certification under Rule 54(b) (see *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 3rd Cir., July 10, 1975), are as follows:

1. The adjudicated and unadjudicated claims are separate and distinct.
2. There is no possibility that the need for review will be mooted by future developments in the district court.
3. There is no possibility that the reviewing court will have to consider the issue a second time.
4. No claim or counterclaim has been presented which could result in set-off against the judgment sought to be made final.
5. The issue defendants have raised is of general public importance warranting prompt appellate disposition, and is certainly not frivolous; to some extent this is a case of first impression; and the needs of plaintiff class warrant reaching a final disposition of this issue without awaiting determination of the other issues in the litigation.

The Court accepts defendants' understanding that, because this order provides for declaratory rather than injunctive relief, defendants are not required to make payments hereunder pending final decision on appeal.

GERHARD A. GESELL,
United States District Judge.

U.S. DISTRICT COURT, DISTRICT OF COLUMBIA.

Civ. A. No. 74-1872

SADIE E. COLE ET AL., PLAINTIFFS,

v.

JAMES T. LYNN ET AL., DEFENDANTS

FEBRUARY 7, 1975.

Present and former tenants of multifamily housing project brought class action challenging decision of Secretary of Department of Housing and Urban Development to demolish the project. On plaintiffs' application for preliminary injunction, the District Court, Gesell, J., held that Secretary, in deciding to demolish buildings built with government funds that were serving an undisputed housing

need, was required to act for a rational reason related to the achievements of the statutory objectives, should have considered alternatives to demolition which were available and afforded a hearing to tenants, and that preliminary injunction would issue to prevent further demolition and to require affirmative action in restoring project to standards existing before demolition started.

Order accordingly.

1. *United States* ⟸*53(9)*

Secretary of HUD in deciding whether to demolish buildings serving an undisputed housing need was required to act for a rational reason related to the achievements of the statutory objectives. National Housing Act, § 236, 12 U.S.C.A. § 1715z–1; United States Housing Act of 1937, § 1 et seq. as amended 42 U.S.C.A. § 1401 et seq.

2. *United States* ⟸*53(9)*

The objectives of HUD to dispose of all acquired multifamily properties at the earliest possible date at the highest price obtainable in the current market was an inappropriate premise for decision to demolish housing project that was built with government funds and that was serving an undisputed housing need. National Housing Act, § 236, 12 U.S.C.A. § 1715z–1; United States Housing Act of 1937, § 1 et seq. as amended 42 U.S.C.A. § 1401 et seq.

3. *United States* ⟸*53(9)*

Discretion of Secretary of HUD in determining whether to demolish housing project acquired through foreclosure was not absolute but was subject to court review when it was responsibly challenged by tenants affected and a prima facie showing was made that Secretary might have acted arbitrarily and irrationally. National Housing Act, § 236, 12 U.S.C.A. § 1715z–1; United States Housing Act of 1937, § 1 et seq. as amended 42 U.S.C.A. § 1401 et seq.

4. *United States* ⟸*53(9)*

Congress did not intend HUD to be a commercial lending agency but rather to achieve housing objectives. National Housing Act § 207(*l*), 12 U.S.C.A. § 1713(*l*); Housing and Community Development Act of 1974, 88 Stat. 633.

5. *United States* ⟸*53(9)*

Although court could not substitute its judgment for that of Secretary of HUD who decided to demolish multifamily housing project acquired through foreclosure, it could require that Secretary proceed with regard for due process and that he consider alternatives to demolition and proceed under a meaningful procedure which would assure appropriate court review. National Housing Act, § 207(*l*), 12 U.S.C.A. § 1713(*l*); Housing and Community Development Act of 1974, 88 Stat. 633.

6. *United States* ⟸*53(9)*

With respect to decision of Secretary of HUD to demolish housing project acquired through foreclosure, tenants and other affected interests were entitled to be heard and to present proposals. National Housing Act, § 236, 12 U.S.C.A. § 1715z–1; United States Housing Act of 1937, § 1 et seq. as amended 42 U.S.C.A. § 1401 et seq.

7. *United States* ⟸*53(9)*

Hearing to be accorded tenants and other interests affected by decision of Secretary of HUD to demolish multifamily housing project was not required to comply with all requirements of the Administrative Procedure Act, nor was an adversary proceeding required. National Housing Act, § 207(*l*), 12 U.S.C.A. § 1713(*l*); Housing and Community Development Act of 1974, 88 Stat. 633; 5 U.S.C.A. § 701.

8. *United States* ⟸*53(9)*

For hearing accorded tenants and other interests affected by decision of Secretary of HUD to demolish multifamily housing project to satisfy minimum requirements. HUD must first indicate the principal considerations that should affect the Secretary's determination and the resources available, and a rational statement of the ultimate decision and the reasons for it must be provided which will then be reviewable by the courts for abuses of discretion. 5 U.S.C.A. § 701.

9. Health and Environment ⇐ 25.10

That no environmental impact statement had been prepared with respect to decision of Secretary of HUD to demolish multifamily housing project and that the "special environmental clearance" worksheet incorporating a finding of no adverse environmental impact was not drawn up until after demolition had begun and lawsuit challenging Secretary's decision had been filed raised substantial questions with regard to compliance with National Environmental Policy Act. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

10. Municipal Corporations ⇐ 323(1)

Inasmuch as public interest required that tenants in multifamily housing project which Secretary of HUD had decided to demolish be kept in place until there had been a full and proper determination of their rights, preliminary injunction against further demolition and requiring restoration of tenants to their status before the challenged demolition was undertaken would issue. National Housing Act, §236, 12 U.S.C.A. § 1715z–1; United States Housing Act of 1937, § 1 et seq. as amended 42 U.S.C.A. § 1401 et seq.

Florence Wagman Roisman, Ann K. Macrory, Washington Lawyers' Committ. for Civil Rights, Washington, D.C., for plaintiffs.

Robert M. Werdig, Asst. U.S. Atty., Washington, D.C., for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

GESELL, District Judge.

This is a class action brought by present and former tenants[1] challenging the decision of the Secretary of the Department of Housing and Urban Development (HUD) to demolish Sky Tower, a multifamily housing project, renovated with federal funds at substantial expense, for low-income families in this city. The matter came before the Court on plaintiffs' application for preliminary injunction. A hearing was held and after considering the testimony, affidavits, briefs and arguments of counsel, the Court issued a Temporary Restraining Order on January 28, 1975, to prevent further demolition pending the preparation of findings of fact, conclusions of law and an appropriate form of preliminary injunction. The Court's detailed findings and conclusions are set out herein and present the basis on which the Court has concluded that a preliminary injunction is required.

Background of the Project

Sky Tower was built in the mid-1950's as a 217-unit garden apartment complex consisting of 19 sturdy brick buildings located in the far Southeast area of the District of Columbia. In 1971, the complex was purchased by a non-profit corporation which proposed to rehabilitate it and transform it into a 150-unit complex of larger units to serve low- and moderate-income tenants with large families. A $2.9 million mortgage to cover the acquisition and rehabilitation costs was insured by HUD pursuant to Section 236 of the National Housing Act, 12 U.S.C. § 1715z–1. Pursuant to Section 236, HUD also subsidized the interest rate on the mortgage. In addition, HUD undertook to pay rent supplement benefits on behalf of up to 60 households and 20 of the units at Sky Tower were to be leased to the National Capital Housing Authority (NCHA), which would re-lease them, at public housing rents, to households eligible for public housing under the United States Housing Act of 1937, as amended, 42 U.S.C. § 1401 et seq.

Rehabilitation work began at Sky Tower in May of 1971. By November, 1972, two contractors had defaulted in their performance of the rehabilitation work. At that time, eight buildings had been completely rehabilitated, three were approximately 50 percent rehabilitated, and work had not yet begun on eight

[1] The class consists of all present tenants of Sky Tower Apartments and all former tenants who moved out of the project after June 15, 1973, the date HUD acquired title. The Court certified the class pursuant to Fed. R. Civ. P. Rule 23(b)(2) in a separate order.

others. Although the non-profit sponsor wished to complete the rehabilitation work, and the mortgagee was prepared to allow that, HUD insisted that the property be foreclosed. *See* 24 C.F.R. § 236.56. Title was transferred to HUD on June 15, 1973.

When HUD took title to the property, the eight rehabilitated buildings had new air-conditioning and heating systems, new kitchens, laundry facilities and other amenities. These buildings, all of which remain standing, comprised 63 units: 18 two-bedroom; 15 three-bedroom; 21 four-bedroom; 1 five-bedroom and 8 six-bedroom. Rents ranged from approximately $75 to $225. Approximately 70 families were residing at Sky Tower.

After acquiring title to the property, HUD employed a management firm, Urban Management Services, Inc., to operate the project and new leases were executed with the tenants. The lease with NCHA was continued and the public housing tenants continued in possession. Urban Management Services executed new rent supplement leases with the tenants who had been receiving rent supplement benefits. HUD then began to consider what to do with the property.

HUD considered several alternatives to demolition consisting of various permutations of partial rehabilitation and rent supplements. In each case, insufficient subsidies were available to insure economic feasibility without risks that "would not be in the best interests of the Secretary" and therefore it was decided that there was "no alternative" to demolition. On September 17, 1974, HUD concluded that the property would be cleared and the vacant land made available for sale to developers for the construction of single-family homes for the middle class. The cost of demolition will exceed $150,000, but the gross return from sale of the land is projected at only approximately $58,000.

When HUD demolition plans became known, tenants were under increasing pressure to leave, vandalism increased and gradually the whole project became moribund except for a few families that still remain, presumably due to inability to find comparable living arrangements. Those who felt obliged to leave have found inferior quarters at higher rent. Indeed, no comparable low-income housing of equal quality was available to any of the tenants at the time the demolition decision was made. In fact, at all relevant times, there has been an acute housing shortage in the District of Columbia, which has been particularly serious for low-income persons with large families, the very class Sky Tower serves. Thus, NCHA has a current waiting list of over 4,000 families, concentrated in the four-bedroom and larger category. Only one other HUD-assisted project in the District of Columbia metropolitan area has any six-bedroom units whatsoever.

HUD's Obligations

This litigation has brought into sharp focus a most anomalous situation. HUD, an agency directed by Congress to implement national housing policy by creating decent, sanitary housing for low-income families and generally authorized to foster improved living conditions in slum-like areas, proposes to wreck and demolish eight low-income apartment buildings containing 63 apartments which were recently renovated at a net "sunk" investment of over $2 million in Government money and are now occupied by low-income tenants. It is planning to take this action against the expressed wishes of the Government of the District of Columbia, and squarely in the face of an acute low-income housing shortage which causes much distress in this community. HUD is proceeding without published demolition regulations,[2] without providing even minimum notice and rule-making hearings, and without any statement of its reasons adequately explaining why other alternatives short of demolition expressly provided by federal statutes are disregarded or deemed impractical. *See* 12 U.S.C. §§ 1715z–3(a)(2); 1713(*l*).

HUD was created by Congress to carry out a national housing policy which Congress has developed, refined and implemented over a period of years by a series of enactments. In brief, that policy is designed to remedy acute shortages of decent, sanitary housing for low-income families and to preserve rather than destroy existing housing by rehabilitation and other measures. *See* 42 U.S.C. § 1441a, as amended by § 801 of Pub. L. 93–383, 88 Stat. 633 (1974). "HUD is obliged to follow these policies. Action taken without consideration of them,

[2] *But see* 5 U.S.C. § 552(a)(1)(D).

or in conflict with them, will not stand." Commonwealth of Pennsylvania v. Lynn, 501 F. 2d 848, 855 (U.S. App. D.C., 1974).

[1] Assuming, although it is far from clear,[3] that the Secretary is authorized to demolish useful buildings built with Government funds that are serving an undisputed housing need, he must yet act in an appropriate manner and for a rational reason related to the achievement of the statutory objectives. It is apparent he has done neither in this instance.

[2] The decision to demolish was apparently substantially influenced by a single, broad, sweeping policy determination not made with any particular property in mind, certainly not Sky Tower, which, by its very nature, perforce eliminated a need to hear tenants, consider alternatives or proceed to a rationalized judgment consistent with national housing policy. HUD has declared that it is "HUD's primary objective to dispose of all acquired multifamily properties at the earliest possible date at the highest price obtainable in the current market." HUD, Property Disposition Handbook for Multifamily Properties, HM 4315.1 (Feb. 17, 1971) ¶21 at 3.[4] This is an oversimplified and inappropriate premise. The Secretary's stautory mandate to seek to better housing conditions for low-income groups does not evaporate when a Section 236 project comes into his hands through foreclosure.[5]

[3] Not only has the Secretary's discretion thus been unfortunately placed in a straitjacket on his own design, but the Secretary has proceeded in a fashion that prevents meaningful judicial review because minimal due process requirements and many sections of the entire statutory scheme from which the Secretary derives his overall authority have apparently been disregarded. The Secretary has apparently interpreted his authority as a grant to proceed in his absolute discretion in whatever manner he may, for convenience, choose. This is a fundamental mistake. While he has no doubt attempted to act in good faith, his discretion is not absolute. The exercise of his discretion is subject to court review when, as here, it is responsibly challenged by tenants affected and a *prima facie* showing has been made that he may have acted arbitrarily and irrationally.

HUD's Omissions

The Secretary did not consider alternatives available to him and failed to afford a hearing.

There were, in fact, a number of alternatives which, as far as the record shows, HUD never considered, although available to it. HUD never considered continuing to operate the eight fully rehabilitated buildings as a rental property under its own management, and specifically maintained at oral argument it lacked the authority to do so. *But see* 12 U.S.C. § 1713(*l*). HUD never considered the impact of the new Section 8 subsidy program on its decision, although that program was enacted by the Congress on August 22, 1974, several weeks before the final decision to demolish the project was made on September 17, 1974, as part of the Housing and Community Development Act of 1974, Pub.L. 93-383, 88 Stat. 633. It never considered selling the property at a loss, or indeed giving it away,[6] to a responsible private or public group which might operate it, with or without rent supplements. Finally, HUD did not consider selling only the rehabilitated buildings with full rent supplements.

[4] Congress did not intend HUD to be a commercial lending agency. Rather it provided a series of options and alternatives which HUD might follow to achieve housing objectives. The Secretary cannot avoid giving full consideration to all available options to effectuate national housing policy. This is

---

[3] Once the property is acquired by the Secretary, Section 207(*l*) of the Act, 12 U.S.C. § 1713(*l*), authorizes the Secretary "to deal with, complete, reconstruct, rent, renovate, modernize, insure, make contracts for the management of, or establish suitable agencies for the management of, or sell for cash or credit or lease in his discretion any property acquired by him under this section. . . ."

[4] Reinforced recently by HUD. Notice HM 74-57 (Sept. 11, 1974), at 1: "The primary objective of the Property Disposition program is to reduce the inventory of acquired properties in such a manner as to ensure the maximum return to the mortgage insurance funds."

[5] HUD has already acquired 276 multifamily projects throughout the country by foreclosure, and more can be expected to come into its hands as the years go by. Cf. Commonwealth of Pa. v. Lynn, 501 F. 2d 848 (U.S. App. D.C. 1974).

[6] HUD determined it was "required" to receive a "minimum offering price" of $418,000 for the property "as is." Since it believed no one would pay that much, rather than lower the asking price, it determined to destroy the property, at a net loss of an additional $90,000.

especially the case where a demolition of usable housing is proposed with absolutely no prospect or definite plan for providing new comparable housing to meet the continuing housing needs of the area.[7] It is simply not a housing policy to tear down housing, not replace it and thus create more vacant land, a process that has been taking place in this city for far too long.

[5] It is not for the Court to weigh the merits of the statutory alternatives available. The Court must not, should not, and cannot substitute its judgment for that of the Secretary, but it can require that he proceed with regard for due process. He must consider these alternatives and he must proceed under a meaningful procedure that will assure appropriate court review.

[6, 7] Tenants and other affected interests must be heard and the Secretary's decision must be expressed rationally thereafter in a manner consistent with statutory alternatives and the various factors operating in each particular situation. An adversary proceeding is not required nor are all requirements of the Administrative Procedure Act a prerequisite. But HUD must at a minimum give the District of Columbia and the tenants who may be irreparably injured, as well as private interests involved in low-income housing construction and renovation, opportunity to be heard and to present proposals: *See* Thompson v. Washington, 497 F.2d 626 (U.S.App.D.C.1973); Marshall v. Lynn, U.S.App.D.C., 497 F.2d 643, cert. denied sub nom., 419 U.S. 970, 95 S.Ct. 235, 42 L.Ed.2d 186 (1974); Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973); Caramico v. HUD, 509 F.2d 694 (2d Cir. 1974).

As Judge Leventhal wrote in Thompson v. Washington, *supra*, 497 F.2d at 638: "The propriety of affording due process protection requires an assessment of the issues presented for decision * * * and the capacity of tenants to present material relevant to resolution."

This case demonstrates how HUD's in-house decision-making process can become fatally infected by crucial factual errors which could easily have been cured by public hearings at which tenants, local officials, and other interested groups participate. HUD believed on the strength of a consultant's report citing unnamed sources that the District of Columbia Government wanted the project destroyed and acted in part on that basis. The uncontradicted public testimony of the representative of the District of Columbia Government was to the contrary. Moreover, HUD concluded that because each heating system served two buildings, it would not be feasible to demolish only incompleted buildings since the remaining fully renovated buildings would be left with no heating system "in many instances." In fact, uncontradicted affivadits from those familiar with the property maintain that the eight rehabilitated buildings either have their own heating systems or share heating systems with one another. Finally, HUD's internal memoranda repeat the conclusion, initially valid, that Sky Tower is part of a "high density neighborhood" without regard for the fact that between June, 1973, and September, 1974, density was substantially reduced by the destruction of multifamily projects on either side of Sky Tower. Such factual errors, which may well have influenced HUD's final decision by causing it to act on false premises, could have been corrected if an appropriate public hearing had been held.

[8] For the required hearing to satisfy minimum requirements, HUD must first indicate the principal considerations that should affect the Secretary's determination and the resources available. A rational statement of the ultimate decision and the reasons for it must be provided which will then be reviewable by the courts for abuses of discretion. *See* 5 U.S.C. § 701; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). As Justice Harlan expressed it in the Permian Basin Area Rate cases, 390 U.S. 747, 792, 88 S.Ct. 1344, 1373, 20 L.Ed 312 (1968): "The court's responsibility is not to supplant the [agency's] balance of * * * interests with one more nearly to its liking, but instead to assure itself that the [agency] has given reasoned consideration to each of the pertinent factors.

[9] Finally, very substantial questions exist with regard to HUD's compliance with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., in that no Environmental Impact Statement has been prepared and the "special environmental clearance" worksheet incorporating a finding of no adverse environmental impact was not drawn up until after demolition had begun and this lawsuit

---

[7] The land purchaser, if one is found, would, it is hoped, sometime build "single family" homes for middle-income families. In today's world, this is "pie in the sky."

had been filed. *See* HUD, Circular 1390.1 (July 16, 1971); Hiram Clarke Civic Club v. Lynn, 47 F.2d 421 (5th Cir. 1973); Maryland-Nat. Capital Park & Planning Comm. v. U.S. Postal Service, 159 U.S. App. D.C. 158, 487 F.2d 1029 (1973).

The Need for a Preliminary Injunction

Since HUD has clearly failed properly to weigh the human values it was created by Congress to protect, closest judicial scrutiny into HUD's procedures and legal authority is required before the bulldozers and wrecking crews can be allowed to proceed further. The issues raised affect the well-being of the plaintiff class and this city. The public interest requires that tenants be kept in place until there has been a full and proper determination of their rights. Edwards v. Habib, 125 U.S. App. D.C. 49, 366 F.2d 628, 630 (1965) (Wright, J., concurring).

[10] A preliminary injunction is required to prevent irreparable injury to the tenants and to restore the situation to that which existed at the rehabilitated buildings before the challenged demolition was undertaken. *See* Virginia Petroleum Jobbers Ass'n. v. FPC, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958); Westinghouse Elec. Corp. v. Free Sewing Machine Co., 256 F2 806, 808 (7th Cir. 1958). A very substantial and persuasive showing has been made by the tenants that the action of HUD was procedurally defective, that it proceeded on mistakes of fact and errors of law and that the likelihood that plaintiff will prevail is very high. *See* Dorfmann v. Boozer, 134 U.S. App. D.C. 272, 414 F.2d 1168, 1173 (1969).

The preliminary injunction entered herewith is designed to restore the tenants to their prior status and to take reasonable and necessary steps for their safety and sanitary living conditions *pendente lite*. These affirmative directives are ordered in the Court's discretion since a mere order maintaining the existing situation would defeat the public interest and the need to do equity in that vandalism, empty apartments and continuing unsafe conditions would, as a practical matter, effectively accomplish demolition by a process of erosion. Only by filling the buildings with qualified needy tenants can the project remain viable pending final determination. This is one of those distinctive cases referred to by Judge, later Chief Justice, Taft in which "the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict irreparable injury." Toledo RR v. Pennsylvania Co., 54 F. 730, 741 (CC Ohio 1893). Mandatory, not merely prohibitory, relief is required at this preliminary stage to prevent continuing injury to plaintiffs, irreparable in nature. The additional expense and inconvenience to defendants is far outweighed on any balancing of the equities by the continuing serious threat of harm to the plaintiffs.

The Court assures defendants that it will proceed to final resolution expeditiously and will schedule that matter for trial on the permanent relief, if any, as soon as the parties can be ready.

Conclusion

In brief, the standing apartment buildings shall remain undemolished. They shall be restored to the standards existing before demolition started. The apartments in these buildings shall be made available immediately to prior tenants dispossessed. The existing rubble caused by demolition should be removed. Affirmative steps shall be taken to halt vandalism. Plaintiffs' motion for preliminary injunction is granted to the extent indicated in the attached Order entered this day on the basis of these findings of fact and conclusions of law.

ORDER OF PRELIMINARY INJUNCTION

Upon consideration of the testimony, affidavits, briefs and arguments of counsel and upon findings of fact and conclusions of law filed herewith, and the Court having determined that a preliminary injunction should be entered to be effective pending final decision of this case or further order of the Court, now therefore it is

Ordered that defendants their officers, agents servants and employees be, and they hereby are, enjoined

(1) from demolishing the building located at 1016 Wahler Place, S.E. and demolishing or seeking permit to demolish the buildings located at 1022, 1029 1034, 1040, 1064 1070 1051 1057 and 1075 Wahler Place, S.E., in the District of Columbia;

(2) from removing or permitting the removal of any appliances, fixtures or other items from any of the buildings above designated; and

(3) from evicting, removing or otherwise interferring with the tenancy of any tenant at Sky Tower, except in accordance with law for grounds arising subsequent to the date of this Order, and except that they shall, not later than February 28, 1975, arrange, permit and enable, at defendants' expense, the removal of the three families occupying 1070 Wahler Place, S.E., to comparable apartments in one of the rehabilitated buildings, and such apartments shall first have been put into decent, safe and sanitary condition; and it is further

Ordered that defendants are directed

(4) promptly to erect fences around the demolition site to complete the demolition now in progress on 1063 and 1060 Wahler Place, S.E., in a prompt and safe manner, and promptly to remove at all demolished buildings all foundations and footings, old materials, debris, rubble and demolition equipment, grade the site to fill in holes and effectuate a safe condition and normally presentable appearance;

(5) to restore with reasonable diligence each of the units and common areas in the eight rehabilitated buildings to a condition at least as decent, safe and sanitary as that existing as of September 17, 1974, such work to begin immediately and proceed expeditiously with priority given apartments presently occupied and to include, though not be limited to, immediately replacing into the rehabilitated units the refrigerators, bathtubs and other appliances, and assuring a constant and reliable source of heat to all occupied buildings;

(6) to attempt immediately to locate all former tenants who left Sky Tower subsequent to September 17, 1974, and to permit any such tenant family to return to Sky Tower, such return to be arranged as promptly as their repair work and the schedules of the returning families may permit, and to pay all moving and lease termination penalties incurred by such tenants who decide to return (all previous tenants are to return under the terms of their previous tenancy, including rent supplements); provided, however, that this Order shall in no way limit the right of the defendants to rent space to persons other than such former tenants if space is available after the needs of former tenants have been met, giving priority to other members of the class; and

(7) promptly to arrange security services on a continuous basis in a manner reasonably adequate to prevent vandalism to the buildings; provided, however, that when the buildings are reoccupied to an extent the defendants deem adequate to make provision of security unnecessary, they may move the Court to be relieved from this obligation; and it is further

Ordered that defendants shall file with the Court and serve upon plaintiffs' counsel at the end of each week commencing February 17, 1975, a progress report stating with particularity the steps taken to carry out and implement this Order, and that counsel for the parties shall appear in open court at 9:30 a.m. on March 3, 1975, to determine a schedule for further proceedings in this cause.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., April 14, 1976.

HON. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This will refer to your letter of July 1, 1975 transmitting for comment H.R. 7826, authorizing the awarding of attorneys fees in certain civil actions as well as similar bills, H.R. 7827 and H.R. 7828, transmitted on June 27, 1975.

The Judicial Conference of the United States, at its session on April 7, 1976, considered these and similar bills which have been introduced in the Congress following the decision of the Supreme Court last May in the Alyeska Pipeline case (421 U.S. 240), which held that absent specific congressional authorization attorneys fees could not be awarded to a prevailing party to litigation except in certain circumstances. At the April 7 session, the Conference was agreed that the question of statutory authorization is a matter of public policy for the determination of the Congress on which the Conference should express no view. The Conference did, however, note two problems involved in such legislation: (1) the potential impact on the workload of the courts which may be small or exceedingly large depending on the type of legislation and the judicial resources

provided for handling such legislation, and (2) the constitutionality of awarding attorneys fees to prevailing plaintiffs in suits against state officers due to the restrictive provisions of the XI Amendment to the Constitution, a question now pending before the Supreme Court.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

BALDWIN, MD., *November 13, 1975.*

Hon. ROBERT KASTENMEIER,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I am writing to urge the Judiciary Subcommittee to report out legislation providing for attorney's fees for successful plaintiffs in citizens' suits.

As you are probably aware, the Supreme Court's decision in the Alaska pipeline suit will have a limiting affect on public interest litigation and citizens' suits.

Therefore, I urge the Congress to provide legislation that would allow attorney's fees in citizens' suits. By providing for attorney's fees, Congress would be encouraging citizens' suits and public interest litigation, both of which can be considered forms of law enforcement to aid the Justice Department.

Sincerely,

THOMAS E. CLAWSON.

PAUL G. AUCOIN,
ATTORNEY AT LAW,
Vacherie, La., May 21, 1976.

Hon. GILLIS LONG,
Cannon House Office Building,
Washington, D.C.

DEAR CONGRESSMAN LONG: On May 14, 1976 I had the pleasure of speaking to your legislative assistant, concerning current legislation which would authorize awards of reasonable legal fees and costs to attorneys involved in public interest and other litigation (S. 2278 et al.; H.R. 7825 et al.). As best as we could determine, the proposed legislation is only intended to provide for attorney's fees in mineral (environmental) cases and civil rights cases.

Having just attempted and failed to collect attorney's fees in a long, drawn-out, complicated case against the Department of Health, Education and Welfare, I would be interested in seeing legislation introduced which would provide for the award of attorney's fees in any type of public interest litigation in which the United States or any of its agencies are defendants.

The case I was involved with concerned a hospital situated in Vacherie, Parish of St. James, which was built in large part with Hill-Burton funds (DHEW grant). For various reasons (political and other) the hospital remained unopened for over a year after construction was completed. I filed a class action suit against the DHEW and other defendants asking the court to order the defendants to take steps to open the hospital or return the grant money. All other defendants except DHEW were dismissed from the suit.

Partly because of the pressure which my suit applied on the DHEW and because of the pressure DHEW in turn applied on the local authorities, many obstacles to opening the hospital were resolved and the hospital eventually opened. Needless to say, this type of litigation would come under the heading of public interest litigation, for many lives were saved as a result of the hospital being opened, not to mention the savings of hundreds of thousands of taxpayer dollars which were used to build the hospital.

As mentioned above, after the hospital opened I made an attempt to collect legal fees from the defendant, the DHEW (the suit was filed in August, 1973, and the litigation continued until October, 1974). My claim for attorney's fees was denied because 28 U.S.C. 2412 bars recovery of attorney's fees against the Government unless a specific statute provides for their reward. The case is cited as Poirrier vs. St. James Parish Police Jury, et al., 372 F. Supp. 102 (E.D. La., 1974).

As I hope you will agree, a public interest case of this type is just as important as any case which deals with the environment or civil rights. I hope, therefore, that you would accept my suggestion that legislation be introduced to provide for the award of attorney's fees in all public interest litigation in which the United States or any of its agencies are defendants.

I can assure you that I do not regret the time and effort I put forth in representing the plaintiffs in this case, but I feel that justice would be better served if attorneys were provided with monetary motivation to perform their services. Looking back, I am not sure I could afford to do it all over again.

I would be happy to appear before any committee looking into this matter and thank you for your assistance and consideration. I am writing a letter similar to this one to Senator J. Bennett Johnston, so that he also may be appraised of my thoughts on this subject.

Very truly yours,

PAUL G. AUCOIN.

THE DISTRICT OF COLUMBIA BAR,
Washington, D.C., February 26, 1976.

HON. JOHN SEIBERLING,
Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: In response to your letter of August 20, 1975, requesting the views of the District of Columbia Bar concerning proposed legislation to broaden the power of Federal courts to award attorneys' fees, the Board of Governors of the District of Columbia Bar has adopted the attached report prepared by one of its Divisions.

The attached report responds to each of the questions posed in your letter. To summarize, the D.C. Bar strongly supports the principle that fee awards generally should be available to prevailing plaintiffs in "public interest" cases—those where the plaintiff has acted as a "private attorney general," bringing litigation to vindicate important public policies for the benefit of others besides the plaintiff. We believe that such awards can play an important role in ensuring that citizens do not lose their fundamental constitutional or statutory rights simply because they cannot afford access to the courts designed to enforce those rights.

As you will see, our report focuses primarily on questions relating to fee awards in "public interest" cases. This should not be interpreted as taking any position either pro or con on the issue of fee awards in non-public interest cases, such as the question of whether fee awards should be made to acquitted criminal defendants.

We hope that this report is of assistance to you and other members of Congress who are addressing these extremely important questions. If we can be of any further assistance in regard to this matter, please do not hesitate to contact us.

Sincerely yours,

DANIEL A. REZNECK,
President.

Attachment.

DIVISION FOUR STEERING COMMITTEE REPORT ON ATTORNEYS' FEE AWARDS IN PUBLIC INTEREST CASES

The following is a report of the Division Four Steering Committee concerning attorneys' fee awards in "public interest" litigation. This report is designed, inter alia, to assist the D.C. Bar's President, Daniel Rezneck, in responding to a letter of August 20, 1975, from Congressman John F. Seiberling. In that letter, Mr. Seiberling solicited the D.C. Bar's views as to legislation which would vest federal courts with broader authority to award attorneys' fees. More particularly, Congressman Seiberling referred Mr. Rezneck to 12 questions which he had formulated and directed to other leaders of the legal profession. In an attempt to be as responsive as possible to the matters raised by those questions, the Division Steering Committee has cast this Report in a question-and-answer format.

The body of this Report reflects certain basic views on which the Steering Committee has reached consensus. These views can be summarized as follows:

A. Notwithstanding some unavoidable definitional difficulty, it is possible to identify the characteristics shared by true public interest cases.

B. After *Alyeska*, there is a need for legislation establishing the power of federal courts to award attorneys' fees in public interest cases.

C. The standard under which judges should exercise their discretion whether or not to award fees should include a strong presumption in favor of such an award to a prevailing plaintiff in a public interest law suit.

D. Federal judges should also have discretion to award attorneys' fees to plaintiffs who do not technically prevail in public interest cases where the original goals of the litigation have been satisfied.

E. In its role as a defendant in public interest cases, the United States, individual states and governmental agencies should be treated equally with private defendants.

F. To the extent that fee awards may encourage additional public interest litigation, such a result should be regarded as an expected and desirable outcome of the proposed legislation.

Question 1. Is the American Rule (which generally bars recovery of attorneys' fees as a "cost" of litigation) in the public interest and in the interests of justice? Would overturning *Alyeska* be in the public interest and in the interests of justice?

Answer. We are not prepared to say that the American Rule should be reversed for all types of litigation. We do note, however, that the United States is the only developed country except Belgium which generally denies attorneys' fees to the prevailing party. Thus, it cannot be said that a rational system of justice necessarily requires that each party bear his own attorneys' fees. Indeed, it may well be that a general rule allowing attorneys' fees to the prevailing party—with due consideration of the ability of the non-prevailing party to pay, the amount of money at stake and other factors—might be reasonable and just. On the other hand, abruptly reversing a rule that is so ingrained into our jurisprudence would be bound to provoke considerable controversy and lead to consensus only after a long period of readjustment in attitudes and practices. At this time, such a consensus would more readily be achieved by a partial reversal of the American Rule in public interests cases, as outlined in subsequent responses.

Question 2. Should the awarding of attorneys' fees be (a) prohibited, with the few exceptions remaining after *Alyeska*, (b) made mandatory, (c) left to the discretion of the courts, with or without general statutory guidelines?

Answer. We favor the awarding of attorneys' fees to prevailing parties in cases which can be identified as true "public interest" cases (see question and answer 3(a) below). In such cases the awarding of fees should be subject to judicial discretion but with a statutory instruction that there be a strong presumption in favor of a fee award. And the level of the fee awarded should be comparable to fees collected in commercial cases of like complexity and duration.

Question 3. Should the awarding of attorneys' fees be permitted or required for plaintiffs who prevail in "public interest" cases, i.e., those prevailing "private attorneys general"?

Answer. Yes. Such awards should be permitted and there should be an explicit presumption in favor of fee awards in public interest cases.

Question 3(a). If so, how should the concept of public interest cases be defined?

Answer. While some measure of discretion must be left to the courts, it is desirable that judges have specific statutory guidance. The Steering Committee recommends a test similar to that identified by the Court of Appeals majority in the "Alyeska" case, *Wilderness Society* v. *Morton*, 495 F.2d 1026 (D.C. Cir. 1974) (en banc), *rev'd sub nom Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Under this test, there would be four elements which characterize public interestt cases:

(1) The litigation is designed to, and does, vindicate important public policies;

(2) The litigation is designed to, and does, confer substantial benefits on others besides the plaintiffs;

(3) The litigation imposes a heavy burden on the party or parties prosecuting it; and

(4) The burden of litigation was undertaken for no substantial economic gain to the prosecuting party or parties.

Question 3(b). Should the awarding of attorneys' fees be the rule or the exception for plaintiffs who prevail in public interest cases? For plaintiffs who prevail in purely private cases?

Answer. We believe the awarding of attorneys' fees should be the rule for plaintiffs who prevail in public interest cases. We do not at this time recommend allowance of fees to plaintiffs who prevail in purely private cases.

Question 4. Is public interest litigation a significant tool for making the Government and private parties obey federal law?

Answer. Yes.

Question 4(a). Without remedial legislation, what effect will *Alyeska* have on public interest law?

Answer. A substantial amount of public interest practice is financed by foundations which have served notice that they cannot be counted on for permanent funding of public interest litigation. Prior to *Alyeska*, public interest lawyers had high hopes that court-awarded fees would become an important, if not the most important, source of financing. In the wake of *Alyeska* this hope now depends on legislation.

Question 4(b). How should public interest law be financed? How should other pro bono litigation be financed?

Answer. We assume that "public interest law" means cases meeting the definitional tests outlined in our answer to question 3(a); and that "other pro bono litigation" refers more generally to unpaid representation of the poor in criminal and civil cases. We believe that fee awards could well become a principal source of financing for the bringing of public interest cases, and that such a result is both workable and just.

At this time, we would encourage other methods of funding "other pro bono litigation," such as by Government agencies (e.g., the new Legal Services Corporation, sections of the Justice Department, etc.), and by contributions of money and services from foundations, bar associations, private individuals, etc. In particular, government funding of programs such as NLSP, the Legal Services Corporation and the Criminal Justice Act program should be increased beyond present levels.

Question 5. Should the courts be given the discretion to award attorneys' fees to parties which technically have not prevailed, e.g., to plaintiffs whose meritorious cases are mooted by Government action?

Answer. We favor according judges the discretion to award attorneys' fees in such cases, but without the presumption in favor of an award which would operate where a plaintiff prevails. While there is some problem in trying to categorize cases where the court should have such discretion, we would suggest two guidelines. First, the basic public interest purpose of the litigation should be satisfied before a fee award is made. Second, the plaintiff's failure to prevail should be for reasons which do not relate to the merits of the public interest issues in the case.

Question 6. Is the "interest of justice" standard of H.R. 7826 and H.R. 8221 appropriate? If so, what general factors should the courts consider in making such a determination?

Answer. The standard is not inappropriate, but should be further refined to include factors such as those outlined in the answer to question 3(a).

Question 7. Under what circumstances should attorneys' fees be awarded to prevailing defendants? Should the standards be different from those for awards to prevailing plaintiffs?

Answer. There could be cases where a defendant might qualify for a fee award under the tests set forth in our answer to question 3(a). However, we feel that as a first step fees should only be awarded to prevailing plaintiffs, and, if a problem of gross unfairness develops, fee awards to defendants can be considered at a later time. Thus, except to the extent that fees are allowable to defendants under present law—which would be where the losing plaintiff had acted in bad faith, or vexatiously, or oppressively—we would not at this time recommend fee awards to prevailing defendants.

Question 8. Under what circumstances should the United States (either as a plaintiff or as a defendant) be required to pay attorneys' fees when it loses a civil action? Should the United States be required to pay attorneys' fees to acquitted criminal defendants?

Answer. The Steering Committee does not believe it advisable to recommend special rules for governmental litigants. Accordingly, in non-public interest cases, we do not at this time favor fee awards against the United States or a state. In public interest cases, however, our general recommendations—as set forth in prior and subsequent answers—should apply to governmental litigants.

Question 9. Are there any circumstances under which the United States should be entitled to recover attorneys' fees (or some other measure of legal costs and expenses) when it prevails?

Answer. Other than those instances now permitted by law, we cannot think of circumstances for which a new general rule should be established.

Question 10. Should attorneys' fees be awarded to private parties who prevail in administrative agency proceedings?

Answer. Yes, in judicial-type proceedings where the requisites of a public interest case are found and the private party is acting in the position of a plaintiff.

Question 11. Are there any specific laws which should be amended to permit or require the award of attorneys' fees to prevailing plaintiffs or parties?

Answer. There are a number of statutes which provide for award of attorneys' fees in restricted circumstances. (See Hearings, Senate Judiciary Subcommittee on Representation of Citizen Interests, 93d Cong., 1st Sess., September and October, 1973, at pp. 1266–1278, and see also the existing Act dealing with court costs, 28 U.S.C. § 2412, and a liberal attorneys' fee provision in condemnation cases, 42 U.S.C. § 4654.) However, rather than attempt to put an attorneys' fee provision in every statute to which it might be applicable, we would favor an omnibus bill approach.

Question 12. Is there any significant danger that non-meritorious cases will be filed for purposes of obtaining "blackmail settlements" or that any cases are filed primarily to obtain attorneys' fees without regard to benefiting the real parties in interest? What remedies are available in such cases?

Answer. There is some danger that non-meritorious cases will be filed for the purposes of obtaining "blackmail settlements." It does not necessarily follow, however, that the possibility of a fee award will increase substantially the volume of such complaints. Where the lack of merit is manifest, the chance of an award is negligible because awards are made only to prevailing parties. If a party prevails, the result is conclusive of the non-frivolousness of the complaint. In the margin between these two categories of cases, there indeed could be some extra incentive to file innovative public interest lawsuits. In our view, however, the whole point of the proposed legislation would be to reduce present disincentives to such lawsuits.

DIVISION FOUR STEERING COMMITTEE, DISTRICT OF COLUMBIA BAR
By: ALLEN R. SNYDER,
Chairperson.
BARRY O. CHASE.
HENRY F. GREENE.
ROBERT S. ROPER.
RICHARD J. SCUPI.
MARNA S. TUCKER.

FEBRUARY 2, 1976.

WARWICK, R.I., *November 22, 1975.*

Hon. ROBERT KASTENMEIER,
Chairman, Judiciary Subcommittee,
House of Representatives,
Washington, D.C.

DEAR MR. KASTENMEIER: I strongly urge you to report out legislation that would provide for the payment of legal fees for successful plaintiffs in citizens' suits.

When such suits are successful, I believe we all gain.

Very truly yours,

WILLIAM P. ALDRICH.

LIVINGSTON, N.J., *November 15, 1975.*

DEAR MR. KASTENMEIER: May I urge you to report out legislation providing for attorney's fees for successful plaintiffs in citizens' suits. This would encourage the latter and aid the Justice Department in law enforcement.

Sincerely,

MS. PATRICIA JORALEMON.

BELLEVUE, WASH., *November 24, 1975.*

ROBERT KASTENMEIER,
Chairman, Judiciary Subcommittee,
House Office Building,
Washington, D.C.

DEAR SIRS: I am writing to urge that you report out legislation providing for attorney's fees for successful plaintiff's and citizens' suits. This will make it easier for citizens groups to fight for public interest litigation.

Sincerely,

JOSEPH SCHUSTER, M.D.

NASHVILLE, TENN., *November 10, 1975.*

DEAR REPRESENTATIVE KASTENMEIER: I wish to express to you, and the other members of your subcommittee, my support for legislation providing for attorney's fees for successful plaintiffs in citizen's suits.

As experience has proven, especially in the last few years, citizen suits are, many times, the only way the executive branch (and private industry) of government has been compelled to carry out the will of Congress. Since citizen's organizations are almost always desperately short of funds, I feel it only fair that, when judged to be acting contrary to law, federal agencies and corporations defray expenses used to counteract their financial resources and influence.

Thank you.

HARLAN SANDBERG.

NEW CARLISLE, OHIO, *November 23, 1975.*

HON. ROBERT KASTENMEIER,
Chairman, Judiciary Subcommittee,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. KASTENMEIER: Please report out legislation providing for attorney's fees for successful plaintiffs in citizen suits, namely, H.R. 8221 and H.R. 8743. This will aid citizens in trying to protect their environment. Thank you.

Sincerely yours,

HENRY PECK.

CENTER FOR LAW IN THE PUBLIC INTEREST,
Los Angeles, Calif., October 14, 1975.

MR. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and Administration of Justice of the Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: I am chairman of the newly formed Subcommittee on Public Interest Advocacy of the California State Bar Committee on Legal Services.

Harry Hathaway, Chairman of the ABA Special Committee on Legal Services, has suggested that I keep you informed of any significant developments in California relating to awarding of attorneys' fees in public interest litigation. There have been two recent developments.

The Conference of Delegates of the California State Bar passed the following resolution at its September 1975 annual meeting:

"*Resolved*, That the Conference of Delegates recommends to the Board of Governors of the State Bar of California that the State Bar adopt the following policy statement: 'The State Bar of California finds it to be in the public interest that attorneys' fees to be awarded in all public interest litigation to those litigants who for no monetary gain prosecute an action that confers wide public benefit.'"

The Board of Governors of the State Bar of California will soon be considering this resolution.

You may also be interested to know that the Judiciary Committee of the California State Senate has recently held hearings on SB 664 (copy enclosed) providing for attorneys' fees in public interest litigation. I shall keep you informed of its progress as it works its way through the California Legislature.

Very truly yours,

JOHN R. PHILLIPS.

Enclosure.

AMENDED IN SENATE SEPTEMBER 11, 1975

SENATE BILL No. 664

Introduced by Senator Song

March 31, 1975

An act to add Section 1021.5 to the Code of Civil Procedure, relating to attorney's fees; ~~and making an appropriation therefor~~.

LEGISLATIVE COUNSEL'S DIGEST

SB 664, as amended, Song. Attorney's fees.

Under existing law there is no general statutory requirement that costs of an attorney's fees be awarded to a successful plaintiff ~~in a taxpayer's suit~~.

This bill would require ~~costs and reasonable attorney's fees to be awarded to a taxpayer who successfully prosecutes a suit against public entities, as defined, when the judgment confers a substantial benefit on the public entity~~ *a court, upon motion, to award attorney's fees, costs, and expenses to a prevailing plaintiff against a defendant in any action which has resulted in the enforcement of an important right, if a significant benefit upon a large class of persons and the necessity and financial burden of private enforcement make the award essential*.

~~The bill appropriates an unspecified amount to the State Controller for allocation and disbursement to local agencies for costs incurred by them pursuant to this act.~~

Vote: ~~2/3~~ *majority*. Appropriation: ~~yes~~ *no*. Fiscal committee: ~~yes~~ *no*. State-mandated local program: ~~yes~~ *no*.

The people of the State of California do enact as follows:

SECTION 1. *The purpose of this act is to hold both public and private parties or entities accountable to the public for their acts or omissions. It is the intent of the Legislature that this purpose be carried out by the award of attorney's fees, expenses, and costs to prevailing*

plaintiffs who bring actions which confer a substantial benefit upon the public.

SEC. 2. Section 1021.5 is added to the Code of Civil Procedure, to read:

~~1021.5. In the event a taxpayer institutes suit or other proceedings as provided by law against a public entity or against an officer or employee of any of such public entity in the name of such taxpayer on behalf of such public entity which is the subject of such suit, if judgment is entered in his favor conferring a substantial benefit on such public entity he shall be allowed his costs and also reasonable compensation for attorney's fees in an amount to be fixed by the court, which costs and fees shall be paid by the public entity.~~

~~As used in this section, "public entity" means the state or any office, department, division, bureau, board, commission, or agency of the state, the Regents of the University of California, a county, city, district, public authority, public agency, or any other political subdivision or public corporation in this state.~~

~~If any provision or clause of this section or application thereof to any person, public entity or circumstances is held invalid, such invalidity shall not affect other provisions or application of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.~~

~~SEC. 2. The sum of / / / / dollars (\$/ / / /) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.~~

1021.5. Upon motion, a court shall award attorney's fees, costs, and expenses to a prevailing plaintiff against a defendant in any action which has resulted in the enforcement of an important right, if a significant benefit has been conferred on a large class of persons and the necessity and financial burden of private enforcement are such as make the award essential.

As used in this section, "significant benefit" includes a nonpecuniary, as well as a pecuniary, benefit.

STATEMENT OF H. DOUGLAS LAYCOCK, ATTORNEY

My name is H. Douglas Laycock. I am a private attorney engaged in a practice devoted, to the greatest extent feasible, to the public interest as I perceive it. That practice is possible at all only because of existing provisions for the award of attorneys' fees; it is substantially limited by the limitations of existing attorneys' fees provision.

These comments are not intended to be a comprehensive discussion of the present issue. I wish to make four discrete points, and I wish to describe the economics and unusual structure of my own practice.

First, in any dispute where the amount at stake is small, it is simply impossible to effectively prosecute a claim for a cost proportionate to the amount at stake. When clients with small grievances come into my office, the viability of their case always depends upon whether there is a theory which would justify the award of attorneys' fees. If it is not possible to make the defendant pay attorneys' fees, then I must decide whether to take the case, knowing I will lose money, or to turn the client away with the sad advice that he has a good claim, but it's not worth the cost to prosecute it. I take as many of these cases as I can, with resulting loss of income to myself; unfortunately, there is a limit to my ability to absorb these losses, and many attorneys are unwilling to absorb any. The result is that individuals are without effective remedy for small wrongs.

When I expend $500 worth of my time to prosecute a $100 claim, for which I receive $33 and my client $67. I wonder whether I would not have done better to simply give my client $67 or $100 of my own money and leave the defendant alone.

Second, except for the very wealthy, no individual can afford to prosecute a claim of any complexity whatever the amount at stake. The prosecution of such claims is completely dependent upon the possibility of collecting attorneys' fees from the defendants, either as a fee award, or out of a damage judgment. The Truth-in-Lending Act and Title VII of the Civil Rights Act are enforceable only because they provide for attorneys' fees. SEC Rule 10b–5 is enforceable only in class actions, and only because of the doctrine awarding attorneys' fees out of the award to the class. Nonderivative, individual suits under Rule 10b–5 invariably involve very large investments made by plaintiffs who must necessarily have been very wealthy to be able to sink so much money in a single investment.

When the claim is for injunctive relief, no fund out of which to award attorneys' fees is created, and no judgment from which a contingent fee can be collected is awarded. A complex claim for injunctive relief is practical only when there are provisions for attorneys' fees.

Third, do not be distracted by the canard that it is impossible to define the public interest. In a general sense this may be true, but in the context of litigation, the public interest is clear. Our society is historically and constitutionally committed to an adversary system of justice. Unless and until that system is abandoned, it is in the public interest that all the adversaries be fully represented. Accordingly, attorneys' fees should be awarded whenever one party is substantially less able to bear the cost of the litigation than the other.

There are at least two types of situations where this condition exists. The most obvious is where an individual is litigating against a government, or a large private collective entity, such as a corporation or partnership. The second is where the interest represented by one side is non-economic, as in environmental litigation and civil rights litigation. Indeed, environmental law and the post Civil War civil rights acts are the two areas of federal law most in need of expanded attorneys' fees provisions.

In whatever legislation the Congress enacts, the factor of ability to bear the cost should be addressed prominently and explicitly.

Fourth, the problem is not limited to civil litigation. This week I had the sad experience of allowing a client in a criminal case to plead nolo contendere, even though I thought the odds of an acquittal were very high. The reason was that because of his weak case, the prosecutor offered a very small fine and probation. It was cheaper for my client to pay the fine than it was to pay me to represent him, even though I was representing him for a substantially reduced

fee. Had he been completely unable to pay, I would have represented him for free, whether or not I were paid by the government. But since this client could afford the low rate I agreed to charge, I had to decide whether the chance of acquittal should be worth the cost to me when it was not worth the cost to him. Reluctantly, I decided that it should not be.

Finally, I wish to describe my own practice. It illustrates one unusual response to the economics of attempting a public interest practice, and also illustrates the difficulties of the attempt. When I entered law school in 1970, many of my classmates and I had visions of a public interest practice. Very few of us have been able to try it; most of my classmates were forced, at least in part by economic pressure, into the large corporate defense firms.

I avoided that, but just barely. It was important that I graduated near the very top of my class at the University of Chicago Law School. I worked during law school for a Chicago firm whose practice is largely devoted to representation of individuals in complex litigation against large companies and institutions, under laws that provide for attorneys' fees. The two most important areas of the firm's practice are the Truth-in-Lending Act, and class actions under the securities laws.

The first year after law school, I served as law clerk to a United States Circuit Judge, while my wife finished her Ph.D. She received a faculty appointment from the University of Texas at Austin, which was far superior to any other job opportunity opened to her. Accordingly, we decided to move to Austin.

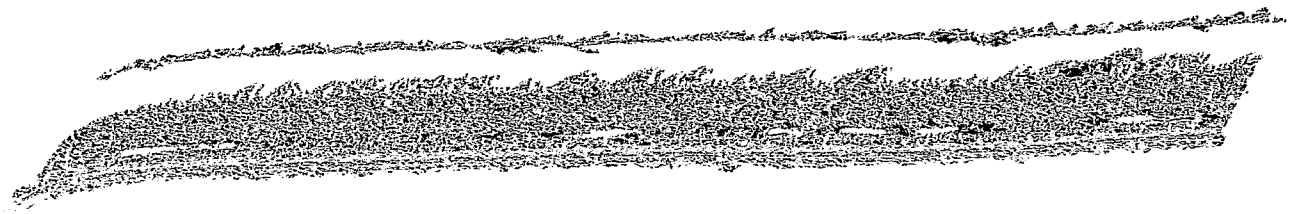
There were no public interest firms in Austin, and the legal aid office and the State Attorney General had no openings. I thought it impossible to open my own office in a new city where I knew almost no one. There are many small law firms in Austin which hire new associates only intermittently. I knew of no available openings. The only sure source of employment was the large corporate defense firms; I was being steered in exactly the same direction as my classmates, despite everything I could do to resist.

My salvation lay with the Chicago law firm I had worked for during law school. I entered into an agreement with that firm whereby I opened my own office in Austin, and they guaranteed a sufficient amount of referral and subcontract work to keep me in business while I developed an Austin practice. The work I am doing for them is not centered in Austin. Instead, I mail a great deal of work to Chicago, and travel there occasionally. There are a number of essential factors which combine to make this arrangement possible. First, the cases in the Chicago office are so complex, and take so long to prosecute, that it is possible to identify large projects within a case which can be farmed out to me to be done in Austin. Second, the Chicago firm is sufficiently pleased with my work to be willing to put up with the inconvenience and additional costs of this arrangement. Third, as mentioned, existing attorney's fees provisions make the Chicago practice possible in the first place.

I have also entered into an of counsel relationship with an Austin firm, and my Austin practice is slowly growing. It is quite varied, but includes substantial amounts of work on behalf of persons who cannot pay a full fee, on behalf of consumers, and on behalf of civil rights plaintiffs. Between the Austin and Chicago practices, I have all the work I can handle. Indeed, I am working far more evenings and weekends than I would like.

Even so, I am only paying myself a net salary of $750 per month. Much of my Austin work is done for reduced fees, no fees, or uncollectible fees. All of the Chicago work is done for substantially reduced fees, because the Chicago firm has its own cash flow problems and because it is absorbing the travel and telephone costs of my being in Austin.

In short, because I was very strongly committed to public interest practice, because I had excellent credentials, and because a number of other things fell into place for me, I have been able to do what I want to do for very long hours for $750 per month. This sufficiently sums up the current state of public interest practice. More widespread and more generous attorneys' fees provisions are necessary to attract more lawyers to this kind of work, to assure them fair compensation, and to assure adequate representation to those persons and interests now unable to participate in the adversary system.



CONTINUED

3 OF 5

STATE OF WISCONSIN,
Madison, Wis., November 25, 1975.

Hon. ROBERT KASTENMEIER,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: By providing for attorney's fees for successful plaintiffs in citizens' suits, Congress would be encouraging public interest litigation. I strongly support such action as a form of law enforcement by the public to aid the Justice Department.

I urge you and the other members of the Judiciary Subcommittee to report out legislation providing for the attorneys' fees for successful plaintiffs in citizens' suits.

I am looking forward to hearing your opinion of this matter.

Sincerely,

DOUGLAS LAFOLLETTE,
Secretary of State.

Chelsea, Mass., November 20, 1975.

Hon. ROBERT KASTENMEIER, *Chairman, House Judiciary Subcommittee on Courts, Civil Liberties, and Administration of Justice, House Office Building, Washington, D.C.*

DEAR SIR: In regard to H.R. 8221 and H.R. 8743, I urge that the subcommittee report out legislation which would provide for attorney's fees for successful plaintiffs in public interest litigation and citizen's suits. Justice should not just be only for those who have the money to afford it.

Thank you for your time and attention.

Sincerely yours,

ELLIOTT KREFETZ.

MARTIN BARON,
Evanston, Ill., November 5, 1975.

Representative ROBERT KASTENMEIER,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: The Supreme Court has ruled that attorney fees in successful public interest lawsuits may not be granted without specific legislation.

Let's have it. There have been many occasions when class action suits were the only challenge to practices forbidden by law. Citizen groups should be encouraged to continue to watch out for the public interest by at least permitting them to recover the costs of mounting a successful suit. This encouragement will not be lost on government agencies, who, to avoid being shown up, will pursue their responsibilities more diligently.

What's needed is blanket legislation which authorizes the courts to grant attorney fees unless denied by specific legislation.

Please encourage your fellow members of the Judiciary Subcommittee to report out legislation providing for attorney fees for successful plaintiffs in citizen suits.

Regards,

MARTIN BARON.

NATIONAL URBAN LEAGUE, INC.,
Washington, D.C., October 10, 1975.

Hon. JOHN F. SEIBERLING,
U.S. House of Representatives,
Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: Thank you for soliciting the views of the National Urban League with regard to the awarding of attorneys' fees by a court to a successful litigant. We believe that there are categories of cases in which attorneys' fees should be awarded, but probably won't be in light of *Alyeska*. In addition to creating a right to such awards, the courts should be given further guidance as to when attorneys' fees are warranted under existing laws so that the conservative approach of *Alyeska* does not result in a contraction of such awards.

It is the League's view that attorneys' fees should be awarded to the successful private civil plaintiff who enforces a statutory or constitutional right against a governmental unit. The plaintiff could be an individual or organization. It is clear that the Wilderness Society was dealt an injustice by the Supreme Court for lack of a statute authorizing award of attorneys' fees because it was so right on the law that Congress had to amend the statute to bring an end to the case on its merits. If award of attorneys' fees cannot be made in such a clear-cut case, what chance does an individual, impecunious plaintiff have of successfully prosecuting his or her rights against powerful governmental defendants?

In those cases where attorneys' fees can be awarded against governmental units under existing statutes, Congress should give consideration to modifying the statutory authorization to *encourage* the award unless it would be unjust to do so. The range of discretion given the courts in the recently enacted extension of the Voting Rights Act of 1965 might lead to fewer awards under the conservative philosophy of *Alyeska* unless the courts are given additional guidance by Congress. That particular award statute also leaves the private litigant exposed to liability for the attorneys' fees of any governmental unit other than the United States if the plaintiff *loses*—not the best method of encouraging vigorous enforcement of the laws by individuals. It would seem that a better balance could be struck between local governments and its citizens which would expose to liability only those bringing frivolous claims against their governments.

Although my comments have been restricted to those cases in which a governmental unit is a defendant, there are undoubtedly cases involving wholly private litigants where attorneys' fees awards may be appropriate. Private discrimination complaints, such as the one in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), should be covered by a statutory attorneys' fee provision. A general rule that might be drawn from that case is that a court should award attorneys' fees to the prevailing party in a case where the prevailing party has asserted a constitutional right which is ultimately enforced by the judicial process. Certain categories of statutory rights grounded in public law could probably be identified for similar protection.

Although it would affect state law more than federal, I have long thought that contracts of adhesion in consumer and landlord-tenant law requiring payment of attorneys' fees by the consumer or tenant should, as a matter of law, create a reciprocal duty on the part of the seller, holder in due course, or landlord to pay attorneys' fees when the consumer or tenant successfully opposes a collection effort. This would serve to discourage the assertion of spurious claims, the opposition of which would cost more than the claim itself.

Sincerely,

RONALD H. BROWN,
Director.

WASHINGTON STATE BAR ASSOCIATION,
Pasco, Wash., December 4, 1975.

Hon. JOHN F. SEIBERLING,
U.S. House of Representatives,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: On August 20, 1975, you wrote to Mr. Kenneth B. Short, who was at that time president of the Washington State Bar Association, with regard to H.R. 7826 and H.R. 8221 which are, as I understand it, designed to overturn *Alyeska Pipeline Service Company* v. *Wilderness Society* by providing that in civil actions as the court determines the interests of justice will require, the court shall award reasonable attorney fees to the prevailing party, and that the United States shall be liable for such fees the same as a private party.

At a meeting of the Washington State Bar Board of Governors on November 21, 1975 the Board of Governors resolved to support H.R. 7826 and H.R. 8221 in principle provided, however, that the government shall have no right to recover fees from a private party; that H.R. 7826 and H.R. 8221 are limited to the Federal Courts and not to any State actions; and that H.R. 7826 and H.R. 8221 be limited to suits between private parties and a government or state.

It was the consensus of the Board of Governors of the Washington State Bar Association that although the awarding of attorney fees along the basis of the "interests of justice" when the "interests of justice so require," is a laudable

one, that the fear of imposition of attorney fees might have a very chilling effect on litigation by private parties who are not financially able to absorb the burden of paying the opposing party's attorney fees in addition to their own attorney fees. Therefore, the Board strongly favors that the proposition that H.R. 7826 and H.R. 8221 be limited to suits between private parties and governments or states, and that the government or state have no right to recover fees from the private party.

Thank you for the opportunity to have informed you as to the feeling of the Washington State Bar Association on this litigation which is certainly of very great interest to all attorneys in the United States.

Very truly yours,

ROBERT S. DAY.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., December 3, 1975.

Re Consortium on Legal Services and the Public—Recommendation for Recoupment of Attorneys' Fees.

KARL C. WILLIAMS, *Esq.*,
400 Talcott Building,
Rockford, Ill.

DEAR MR. WILLIAMS: The officers and council of the Section of Litigation have considered your letter of September 22, 1975 and the specific questions which the Consortium propounded. We have also considered Congressman Seiberling's proposal to amend Title 28 of the United States Code to add the following section:

"Section 1930. If in a civil action the court determines the interests of justice so require, the court shall award reasonable attorneys' fees to the prevailing party. The United States shall be liable for such fees the same as a private party."

Before turning to the Consortium's questions and Congressman Seiberling's proposed legislation, some general comments might make our responses more meaningful.

We began our consideration of the proposal to permit judges to award attorney's fees to the prevailing party by recalling that one of the areas of greatest concern to the Section of Litigation is the rising cost of litigation. One of the principal charges to our Litigation Management and Economics Committee has been to review methods for reducing the cost of litigation. We share the concern of the American Bar Association and Congressional leaders that the courthouse has been closed to a broad segment of middle class America.

Because of our concern for litigation costs, we believe careful consideration should be given all proposals directed to the attorney fee system in America. Accordingly, we have been sensitive to proposed curtailment of contingency fee arrangements. We are also interested in reviewing plans for prepaid group legal services. We would support changes in the tax laws to permit attorneys to deduct time spent on charitable cases. It was not surprising, therefore, that a number of the council members expressed disappointment that we had been given such a short time within which to consider the adoption of a form of the English system of permitting prevailing parties to recoup legal fees. This is particularly so because many of us have had an initial reaction that the proposals might well result in closing the courthouse doors to an even larger number of deserving litigants.

Our reaction was conditioned in part by a trip to London last Spring when a number of our members observed first-hand a court system in which a small number of articulate and well-trained barristers try a small volume of cases before extraordinarily well-qualified judges. We were impressed, but it was obvious that the comparatively light civil dockets resulted not from any lack of English litigiousness, but rather from the practice of taxing attorney's fees as costs against the losing litigant. There is no question in our minds that meritorious litigation has been kept out of courts as a result of the consequences of losing the litigation. Most of us felt that were it not for the English Legal Aid System, access to the courts would be severely limited. We have no comparable legal aid program in this country, and we believe that with all its faults and abuses, our system has provided greater access to a greater number of litigants than the English system has. We should not embrace the English system until we are certain that it will discourage only unmeritorious litigation and that it is adaptable to our system.

Although not as important a consideration, we also noted that in England the bar appears to be much more restrained and disciplined in its fee practices than we. To apply the English mode to American fee practices undoubtedly would produce significantly different results which we doubt have been carefully considered.

Another concern of our council is that the proposals of the Consortium and Representative Seiberling may have a chilling effect upon plaintiffs who espouse novel theories of recovery and diminish the rate of growth of various areas of common law.

Finally, we believe that the form of the proposals grant entirely too much unguided judicial discretion. We are deeply concerned by the absence of legislative standards and the utilization of open ended phrases such as "interest of justice" and "those cases in which the prosecution or defense is unreasonable".

Both proposals, of course, are far more than simply a legislative enactment of the conventional broad view of "private attorney general" fee awards that the Supreme Court has limited by its decision in *Alyeska.*

In summary, the Section of Litigation is prepared at this time to support legislation at both state and federal levels which would give courts discretion to award attorneys' fees in a number of established exceptions to the usual American rule that litigants pay their own fees. Such exceptions arguably include instances where:

1. The opposing party has acted in bad faith or objurately;
2. The opposing party has filed frivolous pleadings;
3. The litigation has conferred substantial benefits upon a losing party or absent persons; or
4. The private attorney general doctrine is applicable because the litigation protected basic far-reaching substantive rights and accomplished important therapeutic purposes.

The above statement is not meant to convey the precise language to be used in any legislation, but the operative phrases of this statement are preferable to those proposed by the Consortium or Congressman Seiberling because the state and federal courts have developed a body of case law supporting these exceptions to the American rule prior to the *Alyeska* opinion. Because of these common law bases, we believe that the four suggested categories offer some certainty to litigants, potential litigants and to their counsel. They provide a curb on unbridled judicial discretion and mitigate the discouragement of meritorious litigation.

The substantial benefits and private attorney general doctrines are primarily methods for financing and expanding the availability of legal counsel. The frivolous pleadings and objurate behavior bases for awarding attorneys' fees speak to another concern. That is, the concern that courts are used for improper purposes, adding unreasonable burdens to an already overburdened judiciary and increasing the time the courts have for resolving non-frivolous disputes. Permitting courts to award attorneys' fees in such instances would discourage such actions. There is, of course, an arsenal of weapons available to discourage sham actions, including verification, certificates of counsel, motions to strike, summary judgments, pretrial conferences, requests for admissions and sanctions, including the awarding of attorneys' fees for improper utilization of discovery.

We turn now to the responses we are now prepared to make to your specific inquiries.

1. Should courts be empowered to determine by rule, order, or decision what expenses, if any, should be awarded against parties litigant in those cases in which the prosecution or defense is unreasonable?

Response: Yes, but only if the enabling legislation contains a definition of "unreasonable". "Unreasonable" should be defined with reference to the four judicially developed exceptions to the American rule (which we have described above).

2. Should courts be empowered to require the payment by government of expenses of litigation involving matters significantly benefitting public policy and the common good when government is a party or when it is not?

Response: Yes, when public policy is benefitted or the common good is aided. Again, reference must be made to the applicable judicially established exceptions to the American rule.

3. Should the American Bar Association declare its support of the principle of encouraging broad discretion for judges to award all reasonable litigation expenses to litigants, prevailing or not, in order that the foregoing objectives be achieved?

Response: No. Developed standards are required. It should be noted that we are clearly sympathetic with the objectives set forth in subparagraphs (a) through (e), but as stated above, we have serious question that the granting of broad judicial discretion in this area will achieve those objectives.

4. What effect will these policies have on the administration of justice?

Response: Generally, if properly defined and limited, the effect should be salutory.

We are enclosing for your information and possible use a portion of a legal memorandum prepared by Ronald Olson, Chairman of our section's Litigation Management and Economics Committee. We would welcome an opportunity of discussing our thoughts with you and suggest that both the Consortium and Representative Seiberling hold open hearings or meetings before any further action is taken.

Sincerely,

ROBERT F. HANLEY.

Enclosure.

B. LEGAL BACKGROUND

You are doubtless aware that, under the "American Rule" each party typically bears his own attorneys' fees unless a statute expressly provides for fee shifting. This rule is verbalized in the *California Code of Civil Procedure*, Section 1021, as follows:

"Except as . . . specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. . . ."

Increasingly, this rule has been criticized on the grounds of public policy.[1]

Federal courts, as well as a number of state courts, have used their equitable powers to develop a number of exceptions to this rule. One exception, the "obdurate behavior" doctrine, allows courts to shift fees when one party has litigated in bad faith. Another traditional exception is the "common fund" doctrine, where a party creates a "fund" through his litigation in which a class of persons shares the benefit. Here the courts shift fees essentially to prevent "unjust enrichment;" rather than being allowed to be "free riders," those who receive the pecuniary benefits of the litigation must share their *pro rata* portion of the costs (i.e., attorneys' fees) of obtaining the fund.

The "common fund" doctrine has recently evolved into the "common benefit" or "substantial benefit" doctrine. In the latter case, the litigation need not necessarily create a "fund" *per se*, or even result in identifiable "tangible" benefits; it is sufficient merely that there has been an important intangible benefit in which a class of persons share, and that assessing fees against a party will shift the costs, *pro rata*, to those obtaining the benefits.

A third basic exception, known as the "private attorney general" doctrine, has rationalized the award of attorneys fees to successful plaintiffs in instances where their lawsuit protected basic, far-reaching substantive rights and accomplished important therapeutic purposes.

Becaue of their importance and relevance to the proposals of the Consortium and Congressman Seiberling, the "substantial benefit" exception and the "private attorney general" doctrine will be discussed in greater detail below.

1. The "substantial benefit" doctrine

The "common fund" rationale evolved in early cases where a litigant had, by the prosecution of his lawsuit, created a monetary fund on behalf of others as well as himself. (See, e.g., *Trustees* v. *Greenough*, 105 U.S. 527, 536 (1881).) The courts reasoned that it would be unfair to permit others to benefit from a fund created by plaintiff's efforts without also imposing on them their share of the costs associated with creating that fund. (*Trustees* v. *Greenough*, *supra*, at 532.)

The "substantial benefit" doctrine expanded the grounds for awarding attorneys' fees to accommodate additional equitable considerations. In *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161 (1939) the United States Supreme Court held that the "common fund" rationale for fee-shifting does not depend upon the

[1] See, e.g., Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202 (1966); Kuenzel, *The Attorneys Fee: Why Not A Cost of Litigation*, 49 Iowa L. Rev. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619 (1963); Stirling, *Attorney's Fees: Who Should Bear the Burden*, 41 Calif. St. Bar J. 875 (1969).

existence of a formal class on whose behalf plaintiff sued or upon the actual creation of a "fund." The Court noted that where plaintiff succeeded in establishing a lien on the proceeds of bonds in deposit with defendant bank, a fund "for all practical purposes" had been created for the benefit of others (fourteen other trusts tied to the same bonds), and ruled that the "formalities" of the litigation "hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." (307 U.S. at 167.) The Court stressed the equitable roots of the "common fund" doctrine:

"Plainly the foundation for the historic practice of granting reimbursement for the costs of litigations other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. . . . As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." (307 U.S. at 166–67.) [2]

With *Mills* v. *Electric Auto-Lite*, 396 U.S. 373 (1970), the substantial benefit doctrine was decisively established. In that case the plaintiff minority shareholders of Auto-Lite had succeeded in establishing that "proxies necessary to approval of the merger [of its company into another] were obtained by means of a materially misleading solicitation" in violation of the proxy provisions of the Securities Exchange Act of 1934. (396 U.S. at 386.) The "benefit" conferred on the shareholders by the lawsuit was thus decisively non-pecuniary. Nevertheless the Court held that:

"[P]etitioners have rendered a substantial service to the corporation and its shareholders. . . . To award attorneys fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class who has benefitted from them and that would have had to pay them had it brought the suit." (*Id.*, at 396–97.)

Clearly, the "substantial benefit" doctrine, growing out of *Sprague* and *Mills* is one based on the unjust enrichment principle, i.e., that those who benefit from a lawsuit should share proportionately in its costs. The U.S. Supreme Court's recent decision in *F.D. Rich Co.* v. *United States, ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129–30 (1974), thus summarizes the doctrine to apply to all situations "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class."

It should be noted, however, that in some cases the courts have allowed attorneys' fees to be imposed on parties who did not benefit directly from the litigation. Thus the *Mills* decision explicitly states that the burden of the attorneys' fees award could be imposed upon the *successor corporation* (396 U.S. at 240) notwithstanding the fact that the only benefit to the preexisting shareholders of the acquiring company was the general benefit to all shareholders everywhere from the enforcement of honest corporate suffrage. Apparently, the equitable considerations that underlie the fee award in *Mills* were broader than "simply unjust enrichment." In fact, the court was using its equitable powers to effectuate the strong Congressional policy of "fair and informed corporate suffrage," and to effectuate "corporate therapeutics." *Mills* expressly observed that in many cases "it may be impossible to assign a monetary value to the benefits" which may consist of "simply vindicating the statutory policy," but nevertheless renders "a substantial service to the corporation and its shareholders." (396 U.S. at 396.)

The "substantial benefit" doctrine has provided the basis for attorneys' fee awards in the federal courts and in many state courts in a wide range of cases including a lawsuit under section 102 of the Landrum-Griffin Act, 29 U.S.C. § 412 vindicating the First Amendment rights of union members, even though neither the plaintiff nor the union received monetary damages (*Hall* v. *Cole*, 412 U.S. 1 (1973)); an action eliminating improper practices in union affairs (*Gilbert* v. *Hoisting & Portable Engineers, Local Union No. 701*, 390 P. 2d 320 (Ore. App. 1964)); litigation preventing the consummation of an *ultra vires* mortgage transaction (*Abrams* vs. *Textile Realty Corp.*, 97 N.Y.S. 2d 492 (1949)); an action resulting in a determination that a purported election of directors and adoption of a proposed by-law amendment was illegal (*Bosch* v. *Meeker*

[2] See also, *Hall* v. *Cole*, 412 U.S. 1, 4–5 (1973):
"[F]ederal courts in the exercise of their equitable powers may award attorneys' fees when the interests of justice so require. . . . [F]ederal courts do not hesitate to exercise this inherent equitable power wherever 'overriding considerations indicate the need for such a recovery.' [citing *Mills*, *supra*, 396 U.S. at 391–92]."

Cooperative Light & Power Ass'n, 257 Minn. 362, 101 N.W. 423 (1960)); an action benefiting taxpayers by halting disbursement of funds under an unconstitutional statute and protecting the right of all citizens to the separation of church and state (*Weiss* v. *Bruno*, 83 Wash. 2d 911, 523 P. 2d 911 (1974)). The "Substantial benefit" doctrine has also been applied by a host of other state courts. (See, e.g., *Saks* v. *Gamble*, 154 A. 2d 767 (Del. Ch. 1958); *Aaron* v. *Parsons*, 139 A. 2d 365 (Del. Ch.), *aff'd*, 144 A. 2d 155 (Del Sup. Ct. 1958); *Georgia Veneer & Package Co.* v. *Florida Nat'l Bank*, 198 Ga. 591, 32 S.E. 2d 465, 478–79 (1944); *Yap* v. *Wah Ken Ki Tuk Tsen Nin Hue*, 43 Hawaii 37, 42 (1958); *Carbajal* v. *Candelaria*, 65 N.M. 159, 133 P. 2d 1058, 1060 (1958); *City of Hammond* v. *Darlington*, 241 Ind. 536, 162 N.E. 2d 619, 621–22 (1959). Cf., *Howard* v. *City of Cleveland*, 32 Ohio App. 2d 500, 200 N.E. 2d 349, 352–53 (1964).

In most of these cases, the benefit conferred was not monetary in nature. In *Bosch* v. *Meeker*, *supra*, the court stated that a mere "*correction or straightening out of corporate affairs*" provided sufficient benefit to warrant the fee award. Such actions "may have a wholesome effect on the corporate management in *keeping it within the limits of its legal responsibility* and at the same time act as a deterrent to arbitrary, unreasonable, and harmful conduct." (101 N.W.2d at 426.)

The "substantial benefit" doctrine has been adopted by the California courts. For example, in *Fletcher* v. *A. J. Industries*, 266 Cal. App. 2d 313 (1968), a pre-*Mills case*, the Court of Appeals shifted fees to the defendant corporation where the plaintiff shareholder had obtained a favorable settlement resulting, *inter alia*, in a restructuring of the company's board of directors. In *Knoff* v. *City and County of San Francisco*, v. Cal. App. 3d 184 (1939), the doctrine was applied against a public entity. There, the plaintiff taxpayer had sued to require the City to conduct an independent study of past tax assessment practices (the current assessor was under indictment for accepting bribes for undervaluing property), with a view to determining the extent of abuse and possibly to make reassessments. Reasonable attorneys' fees were awarded because the substantial benefits resulting from the litigation were shared by all taxpayers in San Francisco equally, so they should equally share the successful litigation's costs. In *D'Amico* v. *Board of Medical Examiners*, 11 Cal. 3d 1 (1974), the California Supreme Court approved the doctrine as applied in *Fletcher* and *Knoff*, but determined it was inapplicable to the case before it. There, certain osteopaths had successfully sued to require the California Medical Board to allow them to take the medical exams. The Supreme Court reasoned that fee-shifting would force the state taxpayers (who funded the Medical Board) to pay the costs of litigation benefiting not themselves but the osteopaths, so the "common benefit" doctrine was not applicable.

2. Development and Termination of the "Private Attorney General" Doctrine in the Federal Courts

The momentum to recognize the need to protect basic, far-reaching substantive rights and to accomplish important therapeutic purposes (enforcement necessity rationale) as a separate and independent equitable consideration upon which to base an award of counsel fees began in response to the United States Supreme Court's decision in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). There the plaintiff had successfully sued a private company for various civil rights violations. It was impossible to argue that an award of attorneys fees against the private company would in any way spread the costs of the litigation proportionately among the benefited class. The United States Supreme Court, in setting forth the manner in which a statutory-based discretion to award fees was to be exercised, stressed the necessity of fee awards to effectuate the vital national policy of non-discrimination in public accommodations:

"When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.

* * * * * * *

"It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (390 U.S. at 401–02; footnotes omitted.)

Piggie Park thus was the United States Supreme Court's directive to all federal courts that, where a statute expressly authorized the shifting of fees because Congress had recognized the "enforcement-necessity rationale," the courts should be vigorous in implementing that Congressionally-declared policy. But, after *Piggie Park* many federal courts interpreted the *Piggie Park* doctrine to extend to cases not only where Congress had expressly recognized the enforcement-necessity rationale but also to situations where Congress was silent on fee-shifting, and the courts themselves independently recognized the need to shift fees to promote enforcement of the important legislative purposes embodied in the statutes being litigated.[3] These federal courts ceased to focus on whether the various equitable criteria required for fee-shifting under the "substantial benefit" doctrine were met (as was the situation in cases like *Mills* v. *Electric Auto-Lite, supra*), or on whether the statute involved expressly authorized fee shifting even if the criteria for application of the "substantial benefit" doctrine had not been met (as was the situation in cases like *Piggie Park*). Instead, they began focusing simply on whether, in their judgment, the "enforcement-necessity" rationale was sufficiently present to justify fee shifting. The rapid development by the federal courts of this separate theory for shifting fees was quickly dubbed by the commentators as "the private attorney general doctrine."[4] The doctrine was summarized by Judge Peckham in *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), as follows:

"The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney general' should be awarded attorney's fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." (*La Raza Unida* v. *Volpe*, 57 F.R.D. at 98.)

Noting that the award is a matter within the discretion of the court, Judge Peckham explained that the decision "turns on such factors as the strength of the Congressional policy, the number of people benefited by the litigants' efforts, and the necessity and financial burden of private enforcement." (57 F.R.D. at 99.)

Further development of the "private attorney general" doctrine in the federal courts was abruptly terminated, however, in May of this year when the United States Supreme Court issued its opinion in *Alyeska Pipeline Service* v. *Wilderness Society*, — U.S. —, 44 L.Ed.2d 141, 95 S.Ct. — (1975). There plaintiffs had litigated the legality of various permits issued by the Secretary of the Interior to a private oil consortium which were required for construction of the Trans-Alaska pipeline. Plaintiffs contended that the issuance of the permits violated both the Mineral Leasing Act of 1920 and NEPA, and on the basis of both contentions the District Court granted a preliminary injunction. Subsequently, the

---

[3] Federal courts recognized a "private attorney general" rationale for awarding attorneys' fees in the absence of specific Congressional authorization in suits to enforce the right to nondiscrimination in employment (*Cooper* v. *Allen*, 467 F. 2d 836 (5th Cir. 1972); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd* 493 F. 2d 614 (5th Cir. 1974)), in the rental of housing (*Knight* v. *Auciello*, 453 F. 2d 852 (1st Cir. 1972); *Brown* v. *Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971)), in the sale of real estate (*Lee* v. *Southern Home Sites*, 444 F. 2d 143 (5th Cir. 1971)), and in the selection of juries (*Ford* v. *White*, No. 1230(N) (S.D. Miss., Aug. 3, 1972)).

Similarly, in appropriate circumstances, federal courts recognized the enforcement-necessity or "private attorney general" rationale for awarding attorneys' fees to private litigants who have vindicated other basis statutory and constitutional rights not involving racial discrimination, including: the right of involuntarily committed mentally retarded and mentally ill patients to adequate treatment (*Wyatt* v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom*, *Wyatt* v. *Aderholt*, No. 72–2634 (5th Cir. 1974)); the constitutional rights of prisoners (*Incarcerated Men of Allen Cty.* v. *Fair*, No. 74–1052 (6th Cir. Nov. 13, 1974)); the right to free speech under the First Amendment (*Stolberg* v. *Members of the Bd. of Trustees*, 474 F. 2d 485 (2nd Cir. 1973)); and the right against unreasonable searches under the Fourth Amendment (*Stanford Daily* v. *Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973)).

[4] See generally King and Plater, *The Right to Counsel Fees In Public Interest Environmental Litigation*, 41 Tenn. L. Rev. 27 (1973); Nussbaum, *Attorneys' Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301, 303–11 (1973); Note, *Awarding Attorney and Expert Witness Fees In Environmental Litigation*, 58 Cornell L. Rev. 1222 (1973); Comment, *The Allocation of Attorneys' Fees After Mills*, 38 U. Chic. L. Rev. 316 (1971); Note, *Attorneys' Fees: Where Shall The Ultimate Burden Lie?*, 20 Vand. L. Rev. 1216 (1967); Note, *Awarding Attorney's Fees to the "Private Attorney General": Judicial Green Light To Private Litigation In The Public Interest*, 24 Hastings L. Rev. 733 (1973).

private oil consortium intervened. After further study, the Secretary announced his decision to grant the permits. The District Court denied plaintiffs' request for further relief and dismissed the complaint. The Court of Appeals then reversed, basing its decision solely on the Mineral Leasing Act (and ruling that too-wide a right-of-way for the pipeline had been granted under the Act). Congress then enacted special legislation amending the Mineral Leasing Act and declaring that no further NEPA action was necessary.

Plaintiffs thereupon requested an award of counsel fees under the "private attorney general" doctrine. Because 28 U.S.C. § 2412 expressly barred any award of attorneys' fees against the U.S. Government (no comparable statute exists in California barring fee awards against either state or local governments), the Court of Appeals could not shift the fees to the citizens and taxpayers of the United States.[5] Therefore, the Court turned to whether fees could be assessed against the private consortium which had intervened in the case. No express statutory provision authorizing awards of fees against such defendants comparable to those discussed in *Piggie Park* were involved in the *Wilderness Society* litigation. Moreover, the "substantial benefit" or "common benefit" doctrine was not available because the Court of Appeals expressly found that, like the private company in *Piggie Park*, the oil consortium did not have sufficient "identity of interest" with the persons benefited by the plaintiff's litigation, and therefore assessing fees against the oil consortium would in no way spread the costs of the litigation among the persons benefited by it. ("[I]mposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries. . . ." (495 F.2d at 1029.)) Therefore, the Court of Appeals turned to the new "private attorney general" doctrine to determine whether, in its judgment the enforcement-necessity rationale justified a fee award assessment against Alyeska. Concluding that it did justify a fee-award against the intervening oil consortium of one-half of plaintiffs' counsel fee, the Court of Appeals remanded the case to the District Court to determine the amount of the fee.

The United States Supreme Court reversed, concluding that *"it would be inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by [the plaintiffs] and approved by the Court of Appeals."* (*Alyeska Pipeline, supra,* 44 L.Ed.2d at 147.) The Court emphasized that federal legislation dating back to 1853 and presently in effect limited the power of the federal courts to shift fees upon the losing party. (28 U.S.C. §§ 1920 and 1923 (a).) (44 L.Ed.2d at 149 to 153.) The Court noted that certain equitable exceptions had been created by the federal courts to the federal statutory rule against fee-shifting. In particular, the Court recognized that both the "obdurate behavior" and "common benefit" or "substantial benefit" doctrine had been "consistently followed." (44 L.Ed.2d at 153.) According to the Court, those exceptions "are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress," but "none of the exceptions is involved here" and the Court of Appeals had "expressly disclaimed reliance on any of them." (44 L.Ed.2d at 154.)

The Court then addressed the issue of whether the federal court's authority to develop equitable fee-shifting mechanisms was sufficiently broad to encompass the "private attorney general" doctrine, despite the express provisions of 28 U.S.C. §§ 1920 and 1923(a). The Court concluded that the federal courts do not. (The opinion expressly notes, however, that states are, of course, free to develop their own rules on fee shifting, and in diversity cases the federal courts should apply the state rule.) The Court's primary concern was that, where the "enforcement-necessity" rationale is the sole equitable notion behind the fee shifting, it becomes extremely difficult for the courts, without legislative guidance, to distinguish between those statutes that are sufficiently important to justify fee-shifting and those that are not. (44 L.Ed.2d at 154.) (In the *Alyeska* case itself, for example, the statute upon which plaintiffs prevailed—the Mineral Leasing Act—was of debatable importance.) The problem of "picking and choosing" among statutes was sufficiently troublesome, that the Courts believed that adoption of the "private attorney general" doctrine would infringe upon the Congressional prohibition against fee-shifting embodied in 28 U.S.C. §§ 1920 and 1923. (44 L.Ed.2d at 159.) Thus, the Court disapproved of further use of the theory to shift fees in the federal courts.

[5] *Wilderness Society* v. *Morton*, 495 F.2d 1026, at 1036 (D.C. Cir. 1974).

3. The "Private Attorney General" Doctrine in the California Courts

Unlike the situation as to the "substantial benefit" or "common fund" doctrines in California, there does not yet exist any appellate authority in California as to the "private attorney general" doctrine. A growing number of California trial courts, however, have already endorsed the "private attorney general" doctrine.

In *Crawford* v. *Bd. of Education of the City of Los Angeles*, No. 822–854 (L.A. Super. Ct., Feb. 11, 1970), appeal docketed, No. 37750 (2d Dist., Dec. 31, 1970), the so-called "Pasadena School Busing Case," the victorious plaintiffs were awarded attorneys' fees in the amount of $65,000. The trial court explained its reasoning, in part, as follows:

"The right of Counsel to reasonable compensation should not be restricted or inhibited by a doctrine which limits the compensation of services of Counsel to causes which provide monetary recovery. The protection and preservation of the inalienable constitutional rights of any class of citizens, the enforcement of duties of government, imposed upon it by law, to its citizens, is at least as valuable, if not more so, than the recovery by litigation of money. Rights, particularly the inalienable constitutional rights, are a species of property. In a country of laws, . . . for every person to receive the same equal protection of our laws, is one of the highest callings of Counsel; and when done in behalf of those otherwise unable to do so, the disadvantaged, Justice requires, demands, that they receive reasonable compensation therefor.

* * * * * * *

"If the Court does not have, is denied, the power, the right, to allow reasonable compensation for the services of Counsel in causes like this and particularly when they skillfully, efficiently and effectively reestablish the rights of the class in whose behalf the action is brought, the bringing of such actions would be discouraged instead of, as it should be, encouraged." (Slip opinion, at 61–62.)

Rich v. *City of Benicia*, No. 57567 (Solano Super. Ct., Nov. 7, 1974), involved the requirement that an environmental impact report be carried out before a project is initiated that may significantly affect the environment. The plaintiffs in *Rich* sued to suspend a certain reconstruction project in the City of Benicia, pending compliance with CEQA. The trial court awarded the successful plaintiffs reasonable attorneys' fees on the basis of the "private attorney general" doctrine. The court specifically took note of the "historical trend" and of "the gradual development of several ideas that are now generally thought to justify awards of attorneys' fees as an incident to the costs of successful litigation in the public benefit cases." (Slip opinion, at 3.) The court awarded fees, because "it effectuates a strong state policy to require careful scrutiny of potential results before permitting the execution of projects that may significantly affect the environment." (Slip opinion, at 6.)

(See also *American Friends Service Committee* v. *Procunier*, No. 219–108 (Sacra. Super. Ct., Dec. 4, 1972) (fee awarded to prevailing plaintiffs on "private attorney general" doctrine; appeal by defendants on fee issue dismissed when defendants prevailed on merits of the appeal); *Mandel* v. *Hodges*, No. 427816 (Alameda Super. Ct., Feb. 14, 1973) (fee award in "Good Friday" case affirmed on appeal; petition for re-hearing granted and presently pending in Court of Appeal both on merits and fee issue); *Serrano* v. *Priest*, No. C–938–254 (L.A. Super. Ct., Jan. 6, 1975) (fees awarded in school financing case).)

AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC REPORT

The Consortium on Legal Services and the Public was created by action of the Board of Governors in May of 1972, and the Board's action was ratified by the House of Delegates at the 1972 Annual Meeting. It consists of the Chairmen of seven American Bar Association committees including the Standing Committees on Lawyer Referral Service, Legal Aid and Indigent Defendants, and Legal Assistance for Servicemen, the Special Committees on Public Interest Practice, The Delivery of Legal Services, and Prepaid Legal Services, and the Special Committee to Survey Legal Needs. Six additional members at large of diverse interests and backgrounds are appointed annually by the Association president.

During the past year the Consortium has continued to serve as a forum for the interchange of ideas concerning how legal services are provided to the public and to identify issues warranting the Association's increased attention. The work of the Consortium during the past year has focused on (a) publication of its bimonthly newsletter, *alternatives: legal services and the public;* (b) co-sponsorship with the Ford Foundation of a study of the delivery of legal services in the United States; (c) formation of a committee to study fee shifting; and (d) plans for a proposal to the Board of Governors for a committee to study the effects of advertising on delivering legal services.

ALTERNATIVES: LEGAL SERVICES AND THE PUBLIC

alternatives was first published in August of 1974 and has been published bimonthly since that time. It replaces the *Pro Bono Report* and the *Lawyer Referral Bulletin.* It was created to provide a broad coverage of the legal services field and to encompass news of the area represented by the Consortium's seven constituent committees. *alternatives* is the vehicle for providing the bar and the public with an understanding of the work of each of these committees, of the various methods of delivering legal services to low-and middle-income persons, and of the interdependency of the various methods of delivering legal services.

alternatives is believed to be the only widely circulated publication concerned with the entire field of legal services. Its present circulation is about 18,000. It is funded through a grant from the American [illegible] Foundation.

STUDY OF THE DELIVERY OF LEGAL SERVICES

The Consortium on Legal Services and the Public has sought a grant from the Ford Foundation for the purpose of evaluating new developments and experiments directed at improving the delivery of legal services. The recipient of this grant is Prof. Junius L. Allison of Vanderbilt University, former executive director of the National Legal Aid and Defender Association. This grant has been endorsed by the Board of Governors of the Association.

The purpose of the study will be to examine new developments in the continuing efforts to expand the delivery of legal services with particular emphasis given to identifying innovative approaches warranting consideration and attention from the organized bar. Professor Allison will perform his study under the guidance of the Consortium and expects it to be completed by February 1, 1976. His report will provide back-up support for specific resolutions and possibly action programs to be submitted to the Association's House of Delegates (incuding appropriate committees and sections) to call attention to positive action that should be taken by the legal profession. It is expected that this study will reflect any existing gaps and inadequacies in the delivery system, thereby providing a resource that will be helpful to the Consortium and other groups in their efforts to develop action programs.

This study will not duplicate efforts now being made by study groups of the American Bar Association or others or significantly overlap other assignments within the Association.

It is hoped the study will encourage affirmative action on the part of the Association and stimulate the bar to assume a more visible leadership role in setting directions and initiating programs that will be carefully co-ordinated, comprehensive, and adequately supervised to make it possible for the organized bar to move more rapidly toward its goal of providing competent legal assistance to the public.

COMMITTEE TO STUDY FEE SHIFTING

Consortium Chairman Christopher F. Edley recently appointed several Consortium members to study the general concept of fee shifting, or reimbursement of attorneys' fees in appropriate cases.

The recoupment of counsel fees as part of legal expenses has long been a subject of debate and controversy in the legal profession. Award of attorneys' fees has been dependent on federal and state legislation, which are often inconsistent, and on a wide range of court decisions which are equally inconsistent and unrelated.

Various Association committees are considering the problem, and their deliberations, together with recently published judicial decisions, make it essential for the Association to confront the situation as soon as possible.

In its preliminary studies, the Consortium committee to study fee shifting concluded that recommendations for corrective legislation are long overdue and that the American Bar Association should take specific steps toward that end.

The Consortium proposes to invite comment from all interested Committees and Sections of the Association and others and to report with recommendations for action by the House of Delegates during its 1976 Mid-year Meeting.

PLANS FOR A STUDY OF ADVERTISING

The Consortium plans to propose to the Board of Governors that an appropriate committee of the Association or an ad hoc study group be designated to study the matter of advertising as it relates to nonprofit legal services offices or clinics.

Many experiments that are under way and which propose to meet legal service needs are frustrated in their attempts to function and are placed in jeopardy because of problems in the area of advertising. Many offices servicing people unable to afford counsel must depend on volume to be economically feasible. A program that is launched without advertising, if the rule against it ultimately will be changed, shoulders an unfair burden. Programs that now are being designed and that antisipate some relief in the restrictions on advertising are wasting time if they will be denied that relief.

The Consortium therefore will propose that a study group define the problem to help determine the course legal services programs should take.

Respectfully submitted.

CHRISTOPHER F. EDLEY, *Chairman.*
JOHN R. WALLACE.
BURNHAM ENERSEN.
HARRY L. HATHAWAY.
STUART L. KADISON.
JACK W. LEDBETTER.
F. WM. MCCALPIN.
BEVERLY C. MOORE.
RANDOLPH W. THROWER.
PHYLLIS W. BECK.
LOUIS J. GOFFMAN.
HARRISON M. ROBERTSON.
ROBERT M. SEGAL.

THE UNIVERSITY OF TEXAS AT AUSTIN,
SCHOOL OF LAW,
Austin, Tex., October 10, 1975.

HON. JOHN F. SEIBERLING,
Congress of the United States, House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING:

LEGAL FEES AND PUBLIC INTEREST LITIGATION

Introduction

This memorandum is in response to your request for my views on the subject of who should bear the costs of attorneys' fees, both in general and particularly in "public interest" litigation. While I have examined the bills introduced by you (and others) to alter the affect of the Supreme Court's *Alyeska Pipeline Service Co.* v. *Wilderness Society* decision, I have decided not to attempt a detailed analysis of them. Others are better qualified than I to do that. Rather, my comments are addressed to the more general issues you raised. An intelligent decision about fee shifting in public interest cases inevitably raises the question: if we do it here, why not in all cases?

For the reasons stated below, I oppose adoption of the English rule, which imposes the costs of the attorneys for both sides on the losing party. Public interest cases are special in that they will not be brought (except in very limited numbers) unless attorneys' fees are available, if the party arguing for the public interest prevails.[1]

[1] I recognize that not all cases are clearly won by one party and lost by the other. Also, some cases involve more than several parties, and interests. A public interest group may even be an intervenor, not a party to the initial suit at all. To make my discussion manageable, I make the simplifying assumption of two-party suits, one represented by a public interest group, and that they win.

A substantial proportion of public interest litigation is presently underwritten by Foundation funding. This happy state of affairs will not continue. Whatever the definition of "public interest" (even if only by Potter Stewart's observation about hard core pornography—I cannot define it, but I know it when I see it), if attorney fees are awarded only to successful public interest litigants this will insure that frivilous claims are not brought, and the very fact of success is probably as good evidence as any that the interest of the public was indeed protected. Such a system would hardly be an inducement to the formation of large numbers of public interest groups who would innundate the courts with litigation. All that is awarded to the winner is actual costs, and those only if both "reasonable" and "in the interests of justice." For losing cases, no fees would be awarded. While the role of public interest litigation will inevitably be a limited one, it is nevertheless valuable and should be fostered by awarding attorneys' fees to prevailing public interest litigants. However, many difficult problems must be addressed before a useful statute allowing fees in public interest cases can be produced. The discussion below is largely devoted to developing some of these difficulties.

The English position on attorneys' fees

In England, the losing party in a case pays the legal fees of both parties—and that means the real costs (provided they are reasonable), not a statutory amount based on 19th Century prices as is true in some American jurisdictions. Contingent fee arrangements, so much a part of the contemporary American legal scene, are regarded as champertous and thus impermissible under the English view. (Massachusetts and Maine are the only American states to follow the English position concerning contingent fees.) Finally, pursuing litigation in any but the lowest local courts requires the retention of a barrister (who may in turn, if the matter is a complex one, bring a senior barrister, known as a Queen's Counsel, into the case) as well as a solicitor. The discussion of the English rule is limited to fee shifting. However, in comparing the English and American position on fee shifting, it is necessary to keep in mind these other differences between the two systems.

It is true that the good people who put in 4,500 hours of legal work in winning effort on behalf of the Wilderness Society, et al. would have received compensation under the English approach. It does not follow from this that adoption of a general rule that winning parties may recover attorneys' fees would be a good thing for the public interest bar, let alone society generally. Not to be overlooked is the fact that such a rule is a two-edged sword—marvelous for the winner and a disaster for the loser. Since, I would guess, when public interest lawyers challenge large corporations, the corporations run up very large legal bills—much larger than those of the public interest lawyers—a great incentive would exist not to take on large cases. One such case, if lost, could wipe out a public interest law firm and/or groups such as the Wilderness Society which hired the firm. (If we assume that Alyeska Pipeline devoted as much lawyer time to the case as the Wilderness Society, and if we value lawyers' time at $50 per hour, 9,000 hours and $450,000 hangs in the balance.) It would be unfortunate if public interest lawyers took only cases which were likely to win.

And, what of the interest of the public? The English system greatly increases the potential loss faced by a person thinking about litigation, and thus presents a major barrier to access to the courts for many people. (New York State has more appellate judges than all of England—reflective of far less appellate business.) Consider the situation of an ordinary citizen who is involved in a collision with a truck owned by a very solvent (or insured) business, and who suffers substantial injuries. Most likely, a lawyer will be retained by our injured citizen on a contingent fee basis. To be sure, if he wins, the lawyer will take a large chunk of the recovery—certainly not less than 25%, with 33⅓% to 40% being most common, and 50% being by no means rare. If, however, the client loses, he pays nothing. His downside risk is zero. (This is true as to paying the attorney. The client will have to pay filing fees and some other costs, and also contribute some of his time if legal proceedings are initiated.) Under the English system, the client must being by facing the risk that he will have to pay several thousand dollars in legal fees if he loses. Such a situation is likely to be a further deterrent to the large segments of our society who cannot afford lawyers as is, and to others who are less than very wealthy—in short, the great "silent majority" in whose name public interest lawyers act. Also, it is quite possible that the total level of legal fees would rise substantially if the winning party knows that he will not be paying.

When two parties in a suit are of quite unequal economic strength, it is not an unknown tactic for the stronger party to try and bury the opposition in depositions, motions, delays, etc. Abandoning the American fee rule might be an incentive for more of this.

Let us return to our injured citizen. If the corporation (or its insurer) loses, it pays in fifty-two cent dollars because the money paid out is a business expense, leaving a smaller profit on which the 48% corporate income tax will be paid. Businesses would arguably be able to adjust to adoption of the English rule without undue difficulty. What of our ordinary citizen? The lawyer he goes to see would have to inform his that while he will be glad to take the case, even on a contingent fee, the potential litigant should understand that he may be out a few thousand dollars, and if he does not have that much cash, the winning party may attach his assets, obtain a lien on his house, garnish his wages, etc. In summary, I have grave doubts as to whether adoption of a general rule shifting all legal costs to losing parties is in the public interest.

Under what circumstances might courts not award fees to the winning party, if the English system were adopted? In England, legal fees are generally assessed on the losing party unless a reason exists not to do so. What of our ordinary citizen in my example above if he loses his case? Unless we are willing to accept a rule that says that wealthier people (or businesses) have to pay attorney fees but poorer ones do not, our citizen would have to pay.

What is the Public Interest?

I do not pretent to know the answer to this question, either in general or for many specific cases. The facts in *Alyeska Pipeline Service Co.* v. *Wilderness Society* present an interesting example. Given unemployment in Alaska (not to mention general support for the building of the pipeline at issue), a fuel shortage, dependency on foreign oil, etc., it is not a self-evident proposition that rapid completion of the pipeline is contrary to the public interest. What was clearly in the public interest was that applicable laws (NEPA and the Mineral Leasing Act of 1920) were followed, and that important arguments were presented. Presently, specific interest groups (generally those aggregations of large numbers of people and large amounts of money which we call corporations) have an incentive to strongly push their interests. There is nothing wrong with this. Rather, the problem is that there are often contrary interests which go unrepresented because they are unorganized and diffuse, and because the financial impact on any given individual is relatively small. If these views are not heard, the chances of fair outcomes will be substantially decreased.

The public interest was served by the Wilderness Society's law suit not merely because they won (though this is by no means irrelevant) but because they brought forth serious and important arguments which would otherwise have gone unnoticed and unheard.

Is the public interest the view of the majority?

At times, there is substantial public criticism of Government money being spent on suits against the Government, whether federal, state or local. The experience of OEO Legal Services is an example. The concern is that "wild-eyed do-gooders" are using the courts to legislate their views of what society ought to be. Consider the testimony of Mr. Dennis Flannery before Senator Tunney's Subcommittee on Representation of Citizen Interests (1973):

"[I]n some of these (environmental and other public interest) cases the public at large is not really aware of what the problem is until it reaches absolute crisis proportions. And so you have, in some of these cases, people who are going beyond what the public at large is prepared to accept and yet in a very real sense, I think, the public is being served even though if you had a plebiscite or vote, perhaps the vote would go the other way." (p. 839)

Now, that is strong medicine indeed. Presumably the justification for litigation like *Alyeska* is that the law is being followed, even if temporarily inconvenient to some. Of course, law can (and often should) be changed. The Congressional decision to allow the Alaska pipeline to proceed is an example, and I expect those who believed that to be a poor decision nevertheless recognize that Congress had the "right" (i.e. both the power and the authority) to take such a course of action.

Is there a danger of encouraging unmeritorious suits?

It is frequently argued that allowing attorney fees to "private attorneys general" will encourage "strike suits" for the purpose of obtaining "blackmail settlements." In many instances it is cheaper for the defendant to buy off the

complainant than to go through litigation and win. (Antitrust suits and F.C.C. comparative hearings are examples of proceedings that are very expensive even for the winner.) Bringing arguably unmeritorious claims is an expensive process, requiring much preparation. A lawyer who brings such a claim may be subject to disciplinary action pursuant to provisions of the Code of Professional Responsibility. A public interest law firm presenting an "unmeritorious" claim takes a large risk because if the suit is not settled they will not get paid anything. And, major corporations or the United States Government cannot be easily bluffed into settling cases. There is far too little public interest representation to make searching for frivolous suits to bring a likelihood. An analysis of the experience with existing legislation allowing the award of attorney fees would, I believe, show that any strike suit problem has been minimal. (No such study has been done, to my knowledge.)

The small (but meritorious) claim

Complaints involving small monetary amounts are often not brought because the costs are close to if not in excess the amount claimed. Such a suit is arguably more likely to be brought if one's attorney's fees can also be recovered (but see the discussion above of the downside risk problem). Professor Ehrenzweig has graphically explained his shock when, shortly after arriving in this country, he discovered that he had no effective recourse when a

". . . moving firm had cheated us of our last belongings; I was, of course, directed to a fine lawyer. "Sure," he said, "you have an airtight claim, and I shall take your case, but you will understand, I must have one hundred dollars as a retainer." I did *not* understand. Would he not get his fees from the defendant, as he would anywhere else in the world? I did not have the hundred dollars, and even if I had won, I would not have been made whole for I had to pay my own lawyer. Of course I did not sue. The little man had lost." [1]

There is no doubt that satisfaction for small grievances is hard to come by. Changing our fee system is unlikely to provide an effective solution. Arbitration; small claims courts; informal proceedings without detailed pleadings, transcripts, rules of evidence and, perhaps, lawyers; or neighborhood courts hold out far more promise than encouraging resort to full blown trials for small matters by allowing the winner to collect his costs.

Valid but unrecompensed wrongs such as that of Mr. Ehrenzweig notwithstanding, it is sometimes argued (notably by the insurance industry) that small claimants as a class are overcompensated because it is cheaper to pay off such claims than to fight them. At the least, it has not been demonstrated that grievants with small claims would be better off if we adopted the English fee rule. This is not to say that some such claimants will not be better off; it is likely that these will be more than balanced off by others who are worse off. It certainly can be argued that such an (arguable) improvement in distributive (as opposed to class) justice is an important goal. However, since I conclude that our fee system works at least as well as, and perhaps better than, the English system in the aggregate, I would want some fairly specific evidence that the English system produces greater distributive justice than ours before I would support a wholesale restructuring of our fee system.

Alternatives to public interest litigation

At the Tunney hearings, Mr. J. Anthony Kline of Public Advocates, a San Francisco public interest law firm observed, "[I]n a majority of public interest suits the Federal Government is a defendant." (p. 791). Thus it appears that official lawlessness is much of what the problem is perceived to be. Let us assume it to be so. What is to be done? One useful answer is to fund public interest law firms. This might be done directly, as with Legal Services programs, by allowing recovery of attorney fees in successful cases, by granting tax deductions for contributions to not-for-profit public interest organizations (this happens to a large extent already), etc. Before going the route of funding public interest litigation, thought should be given to alternative ways of decreasing official lawlessness. (Since people are not angels, it will never be eliminated entirely.) It is not possible here to do more than suggest a few of these:

(1) The Scandanavian Ombudsman, and variants thereof, have had substantial success in decreasing official lawlessness, as well as increasing respect for Government. Whether this experience can be imported, and

[1] Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966).

adapted to American conditions is no easy question. It should be asked. A substantial literature exists on the Ombudsman idea, and several states have adopted experimental ombudsman type projects.

(2) Government heal thyself. Certainly, more money and personnel would help in some places. The F.C.C. at one point wanted to practically give up its duty to regulate A.T. & T. because it lacked the staff to do so. Only a blistering dissent by Commissioner Nicholas Johnson, which caused a public stir, prevented this from occurring.

(3) Criminal penalties (fines and imprisonment) might be imposed on Government officials responsible for (knowing) disregard of the law.

(4) A separate, independent agency might be created to represent the public interest or interests before Governmental entities. This would insure that all views are fully heard. The Administrative Conference has recommended that this be done. The Office of Legal Services was for several years (1970–72) prepared to fund a "Washington Administrative Counsel" to represent the interests of the indigent before administrative agencies. (White House opposition prevented the project from coming into existence.) Such an entity could prevent official lawlessness before it happens, and also represent the public in far more situations than public interest litigants. The proposed legal services project would have cost one-half million dollars annually—or about as much as the costs of a *single* public interest law suit—*Alyeska*.

(5) Self-assessment by bar associations. This will not provide a total answer, and it is unlikely that many bar associations will tax themselves. (And, if indeed the *public* interest is involved, why single out lawyers to subsidize it?)

The adoption of one or more of these alternatives would not preclude support for public interest law firms. Even if one perceives that things are working very well, the existence of a gadfly may be useful to insure that they stay that way.

The question yet remains, how important is the elimination of official lawlessness? Even this country is not rich enough to do everything it would like. What if the choice is public interest litigation (or any other device for decreasing official lawlessness) versus money for training more doctors (substitute any current problems you feel in particularly urgent need of solution—a conservative's priorities might be less taxes and more income for the citizenry)? It is not impossible to conclude that official lawlessness is a low priority matter. Equally, the opposite result may be reached. My point is that one cannot usefully view the issue simply as whether we should or should not have Government lawlessness.

The Nature of Public Interest Litigation:

What will be the cost of a reasonable level of public interest representation—whether funded by losing litigants, foundations, Government, or whomever? Let me begin by drawing again on the Kline and Flannery testimony. Their view runs something like this: public interest cases are often huge undertakings, involving thousands of hours of the time of lawyers, staff, witnesses, citizens groups, etc. Even so, the lawyers on the other side (who presumably represent the malefactors of great wealth) have far more resources. If only fee shifting or other funding existed, public interest lawyers would be able to compete with the well and expensively represented vested interests on a more equitable footing, which will result in more just outcomes, thus serving the public interest. Why not instead deescalate to a lower amount of representation on both sides? In recent years we have taken the view that fairer outcomes will result from more hearings, more lawyers, even more procedural safeguards, etc. More is not necessarily better, or in the public interest.

Attorney fees for parties prevailing against the Government:

A strong argument can be made for having the Federal Government (which argument could, *mutatis mutandis*, also be applied at the state level) pay the attorneys' fees (as well as other costs) of all parties who prevail in law suits with the Government, regardless of who is plaintiff, the remedy obtained, or whether the case is civil or criminal. The Government is the entity all of us collectively have established to manage the affairs of our country. When the Government loses a case, costs have been "unfairly" (defined by the fact that the Government lost) placed on one person. Surely vindication of rights is in the public interest. Why, then, not pay the winning party's costs as part of the expense of operating a Government? (In such cases one might observe, with Pogo, that we have found the enemy, and it is us.) Such a policy has the further

appeal of spreading the costs of losing Governmental law suits among all of us (via the taxing mechanism), rather than heavily burdening a few people. If the Government wins a suit, it would pay its fees just like everyone else. What about mutuality—if the Government has to pay when it loses, why shouldn't it collect when it wins? If that were the situation, people who lost in cases against the Government would be punished in that they are worse off than other losing litigants. Consent by Government to liability has many precedents. The Federal Tort Claims Act is as well known (and expensive) an example as any.

If fee shifting became the norm, the Government should be treated like any other litigant, paying when it loses and collecting when it wins.

The analysis in this section would not be affected if the proceedings were before an administrative tribunal, at least when adjudicatory matters are contested. (This statement holds only as a broad generality. Actual implementation of fee shifting to prevailing private parties in administrative actions would require an analysis of the many types of proceedings conducted by different agencies.)

It is worth noting that some public interest cases are in reality if not in form brought against the Government. *Alyeska* again provides a convenient example. The gravaman of the Wilderness Society's claim was that the Department of the Interior should not have approved certain of Alyeska's plans (because NEPA and Mineral Leasing Act requirements were not met). The suit was brought against Interior, and Alyeska was an intervenor. (Even if it were decided that attorneys' fees should be awarded in some instances, it does not necessarily follow that they would be awarded on the *Alyeska* facts, except against the Government.)

With respect to administrative matters, as in *Alyeska*, intervention at the agency level might be much cheaper than subsequent law suits, as well as resulting in more expeditious final determinations. (Alyeska stated that each week of delay meant an additional $3.5 million in costs—which, of course, are eventually paid by the general public.)

One must have some substantial degree of faith in public agencies to represent and consider the public interest. If not, public interest litigation is unlikely to rectify the situation.

The consequences of changing things

A number of arguments have been presented in favor of retaining our present fee system. In not taxing reasonable attorneys' fees on the losing party we (along with Belgium) occupy a distinctly minority position. It would be foolhardy to argue that our view is inherently more "just" than the English (majority) rule. But, our way of doing things has been around for a long time now. What effects would changing our fee rule have? I do not know. What I do know is that the effects will be substantial, and unless we have a clear understanding of the nature and magnitude of these affects will be, changing our fee rule will be a leap into the dark. My judgment is that our fee system is, overall, not markedly better or substantially worse than the English systems. Given that proposition, the reforms I have suggested above seem to be a superior alternative to adopting the English fee rule.

Even if one believes a particular situation is awful, it is by no means certain that doing the opposite will lead to deawfulization. Doing so may have serious side effects, such that the change so hopefully undertaken may improve matters not at all, or even make them worse.

The role law can play

What role can public interest litigation play in making a better society for us all? Unless we have something approaching John Rawls' "nearly just society," the answer is likely to be, very little, for it will be a mere straw in the wind. As Professor Grant Gilmore recently observed:

"Law reflects but in no sense determines the moral worth of a society. A reasonably just society will reflect its values in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law and the lion will lie down with the lamb. An unjust society will reflect its values in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." [84 Yale L. J. 1022, 1044 (1975).]

Litigation and the settlement of disputes whether in public interest matters or ones of lesser moment, cannot for long be a tool of fundamental policy-

making, although the aggregate of all dispute settlements may have a very substantial effect on society. By and large, most of the people most of the time have to behave justly if we are to have a just society. (Are schools desegregated 21 years after *Brown* v. *Board of Education*?)

Law, in short, cannot make silk purses of sows' ears. That does not mean that lawsuits are without utility in settling the disputes that do arise. If one believes that there is a public interest, even if it cannot be defined with precidion, and that important segments of society go unheard on issues which importantly affect many people, then public interest litigation has a useful role to play. It is one of our basic values that channels should exist for all to express their views and have redress of their grievances. If this does not happen in the courts (and legislatures), it will eventually spill out onto the streets.

It is my judgment that Americans place a great value on the sort of access that is provided by public interest litigation. As for cost, there has probably been less spent for public interest litigation in the last five years than the cost of one C5-A airplane.

At a time when faith in Government, and objections to its pervasive influence and power, are substantial, public interest litigation may provide an important alternative forum for deciding about a future which, as Alvin Toeffler's *Future Shock* suggests, is descending ever more rapidly upon us. As this occurs, it is ever more likely that major interests will be unarticulated. Litigation which brings them forth is in the public interest.

STEPHEN K. HUBER.

STATE BAR OF GEORGIA,
Atlanta, Ga., December 22, 1975.

HON. JOHN F. SEIBERLING,
U.S. Representative, Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN SEIBERLING: Pursuant to your request of August 20, 1975, I am pleased to advise you that the Board of Governors of the State Bar voted to appose the passage of H.B. 8221 which would change the traditional "American Rule" regarding the awarding of attorneys' fees in public interest matters. Our position is that the proposed Bill is too broad and should not be supported.

Very truly yours,

W. STELL HUIE.

POMONA, N.Y., *August 22, 1975.*

HOUSE COMMITTEE ON THE JUDICIARY,
House Office Building
Washington, D.C.

DEAR SIRS MADAMS: I am writing in regard to the situation concerning the award of attorney's fees for employment discrimination cases brought into federal court pursuant to Title VII of the Civil Rights Act of 1964 (Title 42, Sections 2000e et seq., U.S.C.), hereinafter "Title VII" and the Civil Rights Act of 1866 (Title 42, Section 1981, U.S.C.), hereinafter "Section 1981". Since the recent Supreme Court decision rejecting the "private attorney general" concept in awarding attorney's fees to prevailing plaintiffs in "public interest" suits, attorney's fees are no longer available in employment discrimination suits brought under Section 1981, even though attorney's fees are available under Title VII because of specific provision.

In essence, the legal question presented in a Title VII case for racial discrimination in employment is identical to that presented in a Section 1981 case. A Title VII case, though, must satisfy the procedural prerequisites before the Equal Employment Opportunity Commission. Because of the long delays before the EEOC, Section 1981 suits became the only means to obtain adjudication of a case within a reasonable period of time. In order to obtain attorney's fees now, though, the procedural prerequisites of Title VII must be fulfilled.

It should also be noted that employment discrimination suits under Section 1981 are now in progress and were begun under the belief that attorney's fees would be awarded if the cases were won. In a case in which I am the plaintiff, Title VII would have been invoked in order to obtain attorney's fees, yet since the Supreme Court decision was not anticipated the procedural prerequisites of a Title VII suit were not fulfilled.

Section 1981, I believe, should thus be amended to provide for attorney's fees to the prevailing party in employment discrimination suits. Both Section 1981 and Title VII suits for racial discrimination in employment have served the public interest equally and therefore both acts should be treated equally in regard to the award of attorney's fees.

Very truly yours,

ALAN ROY HOLLANDER.

HILLIARD, JACKSON & BARNES,
Birmingham, Ala., October 14, 1975.

Re Hearings on attorney fees in civil rights litigation.

Hon. ROBERT W. KASTENMEIER,
Congress of the United States,
Washington, D.C.

DEAR CONGRESSMAN KSTENMEIER: It has come to my attention that the House Judiciary Committtee will soon conduct hearings on a subject of national importance: "The award of attorney fees in civil rights cases. Our law office is actively engaged in the civil rights area representing organizations and individuals in matters ranging from voting rights, welfare benefits, police brutality, racial and sexual employment discrimination to black economic development. We too are greatly concerned about the mood of some courts to close access to our courts by foreclosing the possibility of private Plaintiffs acquiring legal representation where such persons cannot afford to retain private counsel and to pay the cost of protracted litigation.

Our office desires to testify before any committee of Congress concerning the question of awarding attorney fees in civil rights litigation. Please advise of hearing dates and schedules.

Very truly yours in the struggle of justice and equality,

RONALD EDWARD JACKSON,
Attorney-at-Law.

CARNEGIE CORP. OF NEW YORK,
New York, N.Y., December 11, 1975.

Hon. JOHN F. SEIBERLING,
Member of Congress, Longworth House Office Building,
Washington, D.C.

DEAR REPRESENTATIVE SEIBERLING: I wanted to thank you for your letter regarding the legislation you introduced to overturn the Supreme Court finding in the *Alyeska Pipeline Service Co.* v. *Wilderness Society* case that federal courts have virtually no power to order the award of attorneys' fees without specific legislative authority. Since the decision will have a profound impact on public interest law, it is important that Congress consider the policy implications of the decision and act accordingly.

Our foundation has supported a number of organizations with an interest in the education of minorities—among them the NAACP Legal Defense Fund, the Native American Rights Fund, The Puerto Rico Legal Defense Fund and The Mexican-American Legal Defense Fund—and recognizes the fundamental importance to the legal system to assure that minority groups have a capacity to act in their own behalf. I know you have read recently of the funding crisis in major membership organizations in the civil rights field, which seems to me to underscore the need for the reassessment that will occur when The House Judiciary Committee holds hearings.

I have talked with Tom Troyer (of the Caplin and Drysdale law firm), who is counsel to the Council on Foundations. Tom has advised a number of public interest law firms and he has agreed to appear before the Judiciary Committee if invited. I'm sure he will make an informed witness.

With best wishes.

Sincerely,

ALAN PIFER.

APPENDIX 4

AMERICAN BAR ASSOCIATION,
Chicago, Ill., March 2, 1976.

Hon. PETER W. RODINO, Jr., *Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.*

Re: Attorneys' compensation in agency proceedings.

DEAR MR. CHAIRMAN: At the meeting of the House of Delegates of the American Bar Association held February 16–17, 1976, the attached resolution was adopted upon recommendation of the Special Committee on Federal Limitations on Attorneys' Fees.

This resolution is being transmitted for your information and whatever action you may deem appropriate.

Please do not hesitate to let us know if you need any further information or have any questions, or whether we can be of any assistance.

Sincerely yours,

HERBERT D. SLEDD,
Secretary.

Attachment.

AMERICAN BAR ASSOCIATION, FEDERAL LIMITATIONS ON ATTORNEYS' FEES

Resolved, That the ABA recommends to the Congress that, as to each agency which regulates the fees of attorneys in matters handled by federal agencies, and where a contingent fee is not already provided for by a statute or regulation applicable to that agency, Congress should enact a statute governing attorneys' fees as to each agency not already so regulated requiring each agency in awarding attorneys' fees to take into consideration the following relevant factors, among others:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the attorney or attorneys performing the services.

The determination of attorneys' fees shall be subject to review by the federal district court of the judicial district in which the claim is processed or in the federal district courts in Washington, D.C.

Further resolved, That the House of Delegates shall authorize the President of this Association, or his designee, to present these views to Congress.

AMERICAN BAR ASSOCIATION,
SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEYS' FEES,
Chicago, Ill., March 18, 1976.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Herbert D. Sledd sent me a copy of his letter of March 2, 1976, to you concerning the resolution and report of the Special Committee on Federal Limitations on Attorneys' Fees approved by the House of Delegates of the American Bar Association at the meeting held in Philadelphia, February 16 and 17, 1976.

Prior to the oral statement in support of the proposed recommendations and report which I made to the House of Delegates, I had several discussions with representatives of the Administrative Law Section of the American Bar Association and was granted the courtesy of a hearing by the Council of that Section.

They made a number of constructive criticisms of the report and recommendations and in particular indicated their opposition to retention of the $10.00 fee

limitation at the Rating Board level of the Veterans Administration and accordingly the recommendations of the Federal Limitations Committee were revised and the House of Delegates was informed that we were withdrawing any statements in the report itself agreeing to the retention of that limitation at the Rating Board Level. Accordingly, we have indicated on the enclosed copy of the "Report on Recommendation," those portions of the report that properly should be modified on page 3 and page 12.

Two other modifications were made on the report, one on page 8 updating the statistical information we had obtained as to the number and types of discharges of servicemen. Also on page 10, third paragraph, line 1, the insertion of the word "unemployability," between the words "the disability" in that line was necessary to conform that sentence to the requirements of the applicable statute.

We have received permission to release letters to you or such other congressional committee as may be looking into the matter, from the many attorneys who wrote to us concerning agency proceedings and particularly attorneys' fee limitations which have had the unfortunate practical effect of denying claimants representation by lawyers to assist them in those proceedings. In many instances, lawyers accepted those cases despite the totally inadequate fee and after one experience of that nature declined to handle such cases again, and in other instances refused to undertake representation of the claimants. The success of those claimants who were represented by attorneys seemed to point significantly to the need for the citizens to have competent representation in connection with the prosecution of their claims. We are concerned with the fact that payment of attorneys' fees by the claimant may tend to inflict a further hardship on the claimant by reducing even further the modest amount which properly should have been paid to the claimant without compelling him to retain counsel to protect his interests and prosecute his claim for him.

Very truly yours,

LOUIS G. DAVIDSON,
Chairman.

Enclosure.

[REVISED]

AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES, SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEYS' FEES

RECOMMENDATION

The Special Committee on Federal Limitations on Attorneys' Fees recommends adoption of the following resolution:

Resolved, That the ABA recommends to the Congress that, as to each agency which regulates the fees of attorneys in matters handled by federal agencies, and where a contingent fee is not already provided for by a statute or regulation applicable to that agency, Congress should enact a statute governing attorneys' fees as to each agency not already so regulated requiring each agency in awarding attorneys' fees to take into consideration the following relevant factors, among others:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the attorney or attorneys performing the services.

The determination of attorneys' fees shall be subject to review by the federal district court of the judicial district in which the claim is processed or in the federal district courts in Washington, D.C.

Further Resolved, That the House of Delegates shall authorize the President of this Association, or his designee, to present these views to Congress.

REVISION OF PARAGRAPH 3 ON PAGE 8 OF THE REPORT

Another pervasive problem in the Veterans Administration which attorneys could effectively monitor is the manner in which it determines who will and will

not receive benefits. The problem is most critical in the exercise of the VA's discretion as to whether those with less than honorable discharges will receive veterans benefits. From 1965 to 1975, approximately 621,626 service personnel were dismissed with less than honorable discharges. Of that number approximately 354,474 received a general discharge, 223,865 were dismissed with an undesirable discharge, 35,284 were discharged for bad conduct, and 2,511 terminations were classified as dishonorable discharges.[1] Of the various discharges, bad conduct and dishonorable discharges were rare, accounting for no more than 1% of the total discharges.[1] Such discharges are imposed only by general or special courts-martial. The middle echelon of discharges is the undesirable discharge. Like the honorable and general discharges, it is administrative, but like bad conduct and dishonorable discharges, it may carry heavy penalties in civilian life. Undesirable discharges are given most often for drug use, homosexual acts, conviction by civilian authorities, and offenses involving "moral turpitude."

REPORT ON RECOMMENDATION

The Committee on Federal Limitations on Attorneys' Fees believes that the Congress, once veterans' claims have been passed upon at the Rating Board level, should require allowance of a reasonable attorneys' fee based upon recognized and usual criteria for services rendered beyond the Rating Board level and consider factors such as the nature of the claim and the amount of the claim in tailoring fee compensation statutes to each federal agency. With respect to the Veterans Administration, the Committee recognizes that the current $10.00 fee limitation pursuant to statute (38 U.S.C. 3404) effectively prevents any meaningful participation by attorneys in the prosecution of VA claims. Since veterans' awards may be claimants' exclusive or only substantial means of support, especially with respect to disability claimants, it is important to preserve the award to the greatest extent possible.

By contrast, Veterans Administration data have shown that the representative has been more effective than the claimant at the Board of Veterans Appeals. Moreover, the claims which reach the Board of Veterans Appeals are usually more difficult to present than the claims resolved at the Rating Board level because of the need of preparing a proper record, especially since experience has shown the claimant should be prepared to challenge the procedural or substantive fairness at the Rating Board level. Therefore, since an attorney would be effective and often necessary at the Board of Veterans Appeals, the limitations on attorneys' fees should be relaxed as indicated above to encourage attorney participation. In determining fees, consideration should be given to the following: The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the attorney or attorneys performing the services [and, the financial ability of the claimant to compensate the attorney]. Finally, the Committee believes that review by an independent body, namely, the federal courts, is essential in ensuring the effectiveness of the fee compensation scheme.

BACKGROUND

One approach an attorneys' compensation statute can take is to provide omnibus guidelines governing the compensation to be awarded to attorneys representing claimants before all federal agencies. This approach is desirable to the extent that it gives all claimants an equal opportunity to secure counsel, regardless of which agency they petition for redress. Indeed, it is difficult to argue that an airline should be able to secure an attorney to represent it before the FAA, while a veteran should be denied similar protection before the VA. Conversely, it appears unjust that attorneys specializing, say, in aviation matters, are encouraged to participate in agency decision-making, while others specializing in different areas are precluded from participating. Therefore, the following omnibus model statute provides equal protection both for claimants and attorneys:

[1] "Types of Discharges Issued to Enlisted Personnel in fiscal years 1950–75," Office of Assistant Secretary of Defense (Manpower and Reserve Affairs), Oct. 1975.

Fees for legal services

A. A lawyer shall not enter into an agreement to charge, or collect an illegal or clearly excessive fee.

B. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following: (The first seven factors have been taken from the American Bar Association's *Code of Professional Responsibility*, DR 2–106)

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. [The financial ability of the claimant to compensate the attorney]. (Inclusion of this factor in the scheme will depend on whether the claimants or the agency pays the attorneys' fees. This matter is distinct from the issue of whether the ceiling on fees should be raised, and it will be considered by the Committee in a subsequent report.)

A fundamental problem with any omnibus statute is that it ignores special problems in certain agencies. For example, veterans sometimes may be adequately represented before the Veterans Administration by service organizations; Congress may want to discourage attorneys from participating in the agency process and charging claimants for their participation when service organizations could adequately represent the claimant. Moreover, the omnibus statute ignores the situation where an aggrieved party brings a small claim before an agency and an attorney, representing the claimant, invests considerable time in the matter at issue; it would be quite difficult to balance the interest in preserving the award which the claimant receives against the interest in compensating the attorney for his time, since compensation to the attorney if deducted from the claimant's recovery could defeat the purpose of the claim.

Also, the system may want to recognize the various degrees of sophistication among claimants in determining the relationship between attorney and client. The veteran with a limited education seeking disability benefits from the VA may be more vulnerable to possible abuses by some attorney than a corporate executive seeking redress before the SEC.

A parenthetical point which is essential to any statute regulating attorneys' fees is that the agency's award of fees must be subject to judicial review. ("In any . . . overhaul [of administrative agencies], specific attention should be paid to making the administrative process more open and simple, requiring that major administrative decisions be accompanied by an articulation of reasons, *subject to judicial review* of the fairness and reasonableness of the decision, and affording interested persons access to relevant information within the agency so that they may have an opportunity to develop an adequate record for agency decisions." [Emphasis added], *Law and a Changing Society, II*, at pp. 8–9, American Bar Association, June, 1975.) If abuses do indeed exist in the process by which attorneys are compensated for services before federal agencies, such abuses will not be eliminated, even with adoption or reform statutes, unless the procedures adopted for implementing the provisions of the statute are reviewable by an independent judicial body.

An alternative to the omnibus statute approach is the adoption of a number of statutes tailored to each agency. In determining the role which attorneys should play in the various agencies, draftsmen of the fee compensation statutes should consider:

1. The claimant's ability to represent himself before the agency;
2. The extent of a service organization's ability to represent the claimant;
3. The claimant's access to fair and equal representation by the service organization;
4. Cases in which the special competence of attorneys can be of value, particularly where the perfection of an adequate record at the agency level may be essential to the claimant's rights;
5. Whether certain statutory limitations on attorneys' fees effectively deny the claimant legal representation in agency matters.

In determining whether a service organization is competent in representing claimants before an agency, special attention must be given to the skills involved in successfully prosecuting a claim. For example, where cases involve substantial investigation of medical or public records, and preparation of countervailing proof, an attorney's training and skills can be expected to surpass the ability of a lay service representative to effectively represent claimants. Obviously, where claims involve complicated legal issues, service organizations often are not adequate substitutes for trained attorneys.

Perhaps, the agency on which the most attention has focused in recent years with respect to limitations on attorneys' fees is the Veterans Administration. The statute limiting compensation to attorneys representing claimants before the VA to $10.00 effectively removes the attorney from the decision-making process in VA matters. The following exposition reflects the various factors which must be considered in tailoring attorneys' compensation statutes to each federal agency.

The Veterans Administration has a $17,829,454,000 annual budget (P.L. 94–116, Oct. 1975). It ranks fifth in expenditures by federal agencies (HEW—$118 billion; Defense—$93 billion; Treasury—$43.4 billion; Labor—$22.6 billion). The four major categories of programs administered by the Veterans Administration are: readjustment benefits, health services, compensation and pensions, and life insurance. The first three categories account for ninety-seven percent of the VA's budget (Veterans Administration, "Budget in Brief: Fiscal Year 1974," page 21).

The VA's disability program has been a focal point of criticism in recent years. In November, 1972, the Armed Forces Journal obtained data on the percentage of retirements resulting from disability by rank and branch of service as of June 30, 1971 (Brook Nihart, "Disability Retirement: Some Facts *Armed Forces Journal*, November, 1972). Data showed that in every branch of service, two to three times as many generals had been retired for disability (31% on the average) as had colonels and majors (14%), although generals were only slightly older at retirement than majors (Nihart, *supra*). Colonels and majors had higher rates of disability retirement than senior noncommissioned officers (12.5%) who retired at about the same age (Nihart, *supra*). The highest rate appropriately went to those who had the most exposure to combat [junior officers (60%), and lower-ranked enlisted men (41%)] (Nihart, *supra.*) Interestingly, more Air Force generals were retired for disability (45%) than lower-ranked enlisted men (Nihart, *supra*).

In 1972, Senator Proxmire asked the GAO to determine how many Air Force generals, retired for disability, had received flight pay. The GAO found that during the period from 1967 to 1972, 337 generals retired from the Air Force, and 130 of them (40%) retired on 30% or more disability. Of these, 97 (75%) received flight pay during the year immediately preceding their retirement. (Letter from Comptroller General of the United States to Senator William Proxmire, Aug. 23, 1972).

The various studies suggest that there may be some inequality in the VA's administration of its disability retirement program; there may be several reasons for these inequities, including the liability of less sophisticated persons to present their case to the VA as compared with others. It therefore appears that attorneys could be useful and at times indispensable to the determination of disability claims in order to ensure equal treatment of claimants. The attorney can investigate the manner in which the VA handles his client's claim and, when appropriate, challenge the VA with respect to equal application of the laws and its regulations. Moreover, since disability benefits are granted only when the disability arises as a result of a service-connected impairment, the attorney can procure medical records to strengthen his client's case, a task which a service organization may be unable or unwilling to do.

"From 1965 to 1975, approximately 621,626 service personnel were dismissed with less than honorable dicharges, of that number approximately 354,474 received a general discharge, 223,865 were dismissed with an undesirable discharge, 35,284 were discharged for bad conduct, and 2,511 terminations were classified as dishonorable discharges. ("Types of Discharges Issued to Enlisted Personnel in Fiscal Years 1950–1975)." Office of Assistant Secretary of Defense [Manpower and Reserve Affairs], October, 1975." Such discharges are imposed only by general or special courts-martial. The middle echelon of discharges is the undesirable discharge. Like the honorable and general discharges, it is administrative, but like bad conduct and dishonorable discharges it may carry heavy penalties in civilian life. Undesirable discharges are given most often for drug use, homosexual acts, conviction by civilian authorities, and offenses involving "moral turpitude."

Contrary to widespread belief, federal law does not bar the Veterans' Administration from dispensing benefits to veterans with less than honorable discharges. The VA is in a position, for example, to extend educational assistance to veterans who, because of a lack of education or training, are perpetually unemployed. But because of the way the VA has applied the law, and the way it interprets its social functions, the agency has not made such assistance available.

Benefits are available by federal law to all veterans who receive discharges "under conditions other than dishonorable." Anyone who receives an honorable or general discharge is unambiguously entitled to benefits. Anyone who receives a dishonorable discharge is unambiguously excluded from benefits, as is someone issued a bad conduct discharge by a general court-martial. Undesirable discharges and bad conduct discharges issued by special court-martial constitute the "gray area." If a veteran has one of these—and more than six out of every seven Vietnam veterans with less than honorable discharges do (38 U.S.C. 101(2))—the VA makes an independent determination of whether or not it was issued under dishonorable conditions. The agency has adopted its own rules on this question. A discharge issued for mutiny, spying, or homosexual acts is automatically considered to be under dishonorbale conditions. In addition to the specific categories of discharges that the VA has determined to be under dishonorable conditions, the agency has adopted two rather broad and subjective criteria in its eligibility decisions. A discharge is considered to have been issued under dishonorable conditions if it stemmed from an offense involving "moral turpitude" or was the result of "persistent and willful misconduct." (Starr, *The Discarded Army*, at pp. 176–177). The determination is made on a case-by-case basis without the assistance of any published and definitive guidelines. The only guideline would appear to be an unwritten presumption that the service imposes less than honorable discharges only for acts of moral turpitude or persistent and willful misconduct, because the VA hardly ever comes to any other conclusion. For example, a recent study by the VA indicates that 93% of the veterans with less than honorable discharges who applied for educational benefits were denied them. (Letter from Mr. Stratton Appleman, Assistant Director, Public Information Office, Veterans' Administration, to Raymond Bonner, dated January 18, 1973.)

Ordinarily, the VA keeps no statistical records on benefit applications from veterans with undesirable and bad conduct discharges. A study of a five month period in 1972, however, noted that only 1,305 applications for educational benefits were received from men with less than honorable discharges. Of these, 91 were approved. During this same period, more than 4,000 veterans with less than honorable discharges applied for unemployment compensation (although the benefits are dispensed by the Labor Department, eligibility decisions are made by the VA). Of the 4,000 men who applied, 3,400 were found ineligible. Ninety-seven of the cases involved veterans with drug-related dischrages; six of these were approved. (Starr, *The Discarded Army*, at p. 179).

The per se rules which the VA has adopted with respect to servicemen with less than honorable discharges appear to be a violation of congressional intent. Some argue that service organizations can adequately protect and represent those allegedly unfairly denied benefits because of less than honorable discharges. It would appear from the statistics herein mentioned, however, that the American Legion, the VFW and other service organizations have not been particularly effective in prosecuting such claims. This is an area ripe for the watchful eye of the attorney in assuring that congressional intent is implemented and those entitled to benefits are treated equally.

The VA's disability program is another area in which the attorney could be quite useful, since the considerable discretion involved in processing disability claims makes the program susceptible to unequal treatment among veterans. For example, a regulation provides that a veteran can be classified as totally disabled if he is "unemployable" and he achieves a certain percentage rating under a rating schedule (38 C.F.C. 4.16–17). The concept of "unemployability," however, as described in the regulations, is rather imprecise, sometimes resulting in a lack of uniformity in practical application. (The regulations define unemployability as "unable to secure or follow a substantial gainful occupation." (38 C.F.R. 4.16.)

Similarly, in order for the veteran to participate in the unemployability, disability compensation program, he must have at least a 60% disability on the rating schedule, to two disabilities totalling 70% with one equal to 40% (38 C.F.R. 4.16). A determination of disability under the rating schedule requires many subjective determinations, including the degree of social impairment due to psycho-neurotic disorders. Even in the disability cases where medical disputes

predominate, subjective determinations must be made in arriving at the percentage of disability pursuant to the rating schedule, and without the assistance of a trained attorney a veteran may not be able to effectively guard against unequal treatment.

The need for trained attorneys to represent veterans before the VA is highlighted by the complex procedure involved in processing claims, especially in the disability program. Over 350,000 disability claims are made each year to the 57 regional offices of the VA. (Popkin, *Study of Five Disability Programs*, at p. 6). The claims are heard in the first instance by rating boards comprised of three members with at least GS–12 status. One member is a doctor, one is a legal specialist, and the third an occupational specialist. The legal specialist need not be a lawyer and the occupational specialist need not have vocational expertise. Though hearings are permitted, they are rare. No cross-examination is permitted before the Rating Board. If the claimant is dissatisfied with the decision of the Rating Board, he files a Notice of Disagreement (NOD) which initiates an appeal to the Board of Veterans Appeals (BVA). (The BVA consists of three members, one doctor and two lawyers. The BVA has a staff of 18 doctors. It allows no cross-examination; rather the reviews are conducted like informal conferences.) Forty thousand NOD's are filed each year in disability cases, constituting 80% of all NOD's. One-sixth of the claims are approved by the Rating Board after the NOD is filed. Interestingly, one-third of the appeals are dropped by the claimant after filing his NOD; this suggests, perhaps, that many dissatisfied veterans are unable to cope with the complicated procedures involved in processing claims.

A legal representative can be especially helpful in prosecuting certain claims, as in service-connection claims where vocational evidence is important. Service-connection cases often involve past medical history which the veteran's record many not fully reveal. Since attorneys are trained in the art of investigation, their assistance could be quite valuable. Similarly, where vocational evidence is important, the veteran's records may not be helpful to the extent that they do not contain information with respect to his work history; again, a trained attorney can be useful in gathering evidence for presentation before the Board.

William Popkin, Professor of Law at the University of Indiana, prepared a comprehensive report for the administrative conference in which he examined one year of BVA cases (fiscal 1972) which reviewed Rating Board decisions from the Indianapolis office of the VA. (Popkin, "A Statistical and Legal Analysis of the Role of Representatives in Administrative Decision-Making based on a Study of Five Disability Programs [Feb. 27, 1975]. The study contains the following disclaimer: "This report was prepared for the Committee on Grant and Benefit Programs of the Administrative Conference of the United States. It is one of three parts to be prepared for that Committee. It has not been reviewed or approved by the Committee or the Conference. It represents the views of the author only. It should not be used for quotation or attribution without this disclaimer.") Popkin's study supports the contention of this Committee that the effective marshalling and presentation of evidence can markedly improve a claimant's chances of success. His study demonstrates that a claimant has a significantly better chance of prevailing at the BVA level when new evidence is submitted to the Board. In service-connection cases, for example, when no additional evidence is submitted, claimants representing themselves were more effective than service representatives in prosecuting claims. When new evidence is presented to the BVA, the chances of a claimant prevailing jump in service-connection cases from 44% to 52%, and in rating scheduled cases from 32% to 48%. (Success rate with a service representative: 35%; Success rate without a representative: 57%. Popkin, at pp. 33, 34.)

These statistics suggest that new evidence has a significant effect on the outcome of cases at the BVA level. Moreover, it appears that service representatives have not availed themselves of the opportunity to present new evidence. In service-connection cases, for example, service representatives submitted new evidence in only 12% of the cases (Popkin, p. 35). Since attorneys are trained in the art of gathering and presenting evidence, it seems likely that their assistance would improve the veterans' chances of successfully prosecuting their claims, especially since service representatives often do not submit new evidence to the BVA. (In service-connection cases, service representatives submitted new evidence in only 12% of the cases. Popkin, p. 35.)

Recommendation

The claimant cannot always rely on the service organization to represent him before the Veterans Administration. It appears that service organizations may discourage claimants from bringing "harder" cases before the VA. Also, the serv-

ice organizations may be unwilling to fully and fairly represent certain types of claimants such as those with less than honorable discharges. Therefore, to equalize the ability of a claimant to secure redress before the VA, attorneys can be valuable in some representative capacity. We must, therefore, determine the capacity in which attorneys can serve. In determining that, we must be sensitive to the claiman's desire to retain as much money as possible from the award which he receives from the VA. On the other hand, in order to secure the award, he may need the assistance of an attorney. Legal representatives can be helpful at different levels of the administrative proceedings where certain issues are involved. For example, representatives can be especially helpful when matters involving issues not contained in the veteran's service records are in dispute. Generally, when marshalling and presenting new evidence is necessary in the prosecution of a claim, it appears that the representative can be most helpful. Moreover, legal representatives can be helpful in alerting the VA to unequal treatment of certain claimants.

There is some evidence that the Rating Board will often give the veteran the benefit of the doubt in certain matters (Popkin, at p. 40). For those who fall in this category, the services of an attorney would be unnecessary since claimants would have to pay attorneys' fees when representation would have been unnecessary. Therefore, in recognition of those who could successfully prosecute a claim either without legal representation or with representation by a service organization, on balance the system at the Rating Board level probably operates most effectively without the assistance of attorneys. A different story, however, exists at the BVA level. Those who are dissatisfied with the decision of the Rating Board may be unable to secure adequate representation from a service organization for various reasons. Moreover, statistics, such as the 7% success rate of those with less than honorable discharges who petition the VA for educational benefits (Popkin, supra, p. 9), indicate that the Rating Board has established certain unfair procedures; such procedures may go undetected by the BVA without the help of an attorney who can alert the BVA to specific procedural problems. Therefore, the Committee recommends that the guidelines set forth in the recommendations on pages 1 and 2 of this report be implemented at the BVA level so that claimants can secure legal counsel to represent them and to protect their interests.

This is the first of a series of reports by the Committee. This report focuses on the need for reform in the Veterans Administration with respect to federal limitations on attorneys' fees. The Committee will submit another report on the manner in which attorneys' fees will be paid. Also, the Committee will continue to examine other federal limitations on attorneys' fees [1] and submit future reports to the House of Delegates.

Respectfully submitted.

JAMES D. FOLIART
JOHN E. JAQUA
RUSSELL D. MANN
VERNON X. MILLER
MARTIN J. PURCELL
JOHN B. WALSH
LOUIS G. DAVIDSON,
Chairman.

FEBRUARY, 1976.

LIMITATION ON ATTORNEYS' FEES UNDER FEDERAL STATUTES AND REGULATIONS, STATUTORY PROVISIONS

Statute	Subject	Limitation
5 U.S.C. sec. 8127	Government employees claims for injuries.	Approval of Secretary of Labor.
7 U.S.C. sec. 499g	Perishable agricultural commodities	Approval of Secretary of Agriculture.
11 U.S.C. sec. 205(c)(2), (12)	Railroad reorganization	Approval of Interstate Commerce Commission.
14 U.S.C. sec. 413(c)	Coast Guard lifesaving service claims	$10 maximum.
15 U.S.C. sec 79k(d)(4), 79j(b)(2).	Public utility holding companies, issues and acquisitions.	Securities and Exchange Commission approval of transaction conditioned on approval of fees.
18 U.S.C. sec. 3006A	Counsel appointed in criminal cases	Maximum hourly rate and maximum total fee.
22 U.S.C. sec. 277(d)-21	Reimbursement for appropriated land pursuant to 1964 United States-Mexican convention.	Up to 10 percent.

[1] Attached hereto is a compilation of Limitations on Attorneys' Fees under various federal statutes and regulations as of Mar. 11, 1974.

LIMITATION ON ATTORNEYS' FEES UNDER FEDERAL STATUTES AND REGULATIONS, STATUTORY PROVISIONS—Continued

Statute	Subject	Limitation
22 U.S.C. sec. 1628(f) (supp. IV, 1969).	Claims before Foreign Claims Settlement Commission.	Do.
25 U.S.C. sec. 70n	Attorneys for Indian tribes	Absent approved contract, Indian Claims Commission may approve up to 10 percent.
25 U.S.C. sec. 31	Certain contracts with Indians	Approval of Secretary of the Interior and Commissioner of Indian Affairs.
25 U.S.C. sec 81a	Cancellation of attorneys' contracts with Indians	Approval of Secretary of the Interior of attorneys contracts predating sec. 81.
25 U.S.C. sec 81b	Continuation of attorneys' contracts with Indians	Contracts predating sec. 81 may be continued unless subsequently approved contracts on same matter.
25 U.S.C. sec. 82	Payment of attorneys for Indians	Approval of Secretary of the Interior and Commissioner of Indian Affairs upon receipt of sworn statement, detailing services rendered.
25 U.S.C. sec. 82a	Payment of attorneys by tribes themselves (excepting claims against United States).	Approval of Secretary of Interior of payment of fees on certain claims of 5 named tribes.
25 U.S.C. sec. 476	Contracts respecting tribal funds or property in hands of United States.	Consent of United States.
25 U.S.C. sec. 485	Rights of tribes to employ legal counsel	Secretary of the Interior must approve counsel and fee.
28 U.S.C. sec. 2678 (supp. IV, 1969)	Federal tort claims	For claims accruing after Jan. 17, 1967, 25 percent of judgment or settlement after commencement of court action; 20 percent of administrative award, compromise, or settlement.
30 U.S.C. sec. 938	Prohibition of discrimination against miners suffering from pneumoconiosis	Determined by Secretary of Labor.
31 U.S.C. sec. 243 (supp. IV, 1969)	Military Personnel and Civilian Employees Claims Act of 1964	10 percent of award.
33 U.S.C. sec. 928	Longshoremen and horbor workers' claims.	Labor Department or court approval required.
38 U.S.C. sec. 784(g)	Veterans' insurance claims	Court may allow up to 10 percent of award or a reasonable fee.
38 U.S.C. sec. 3404(c)	All veterans' claims	Up to $10 per claim allowable by Veterans Administrator.
42 U.S.C. sec. 406(a) (supp. IV, 1969).	Social Security Act	Secretary of Health, Education, and Welfare prescribes maximum fee.
42 U.S.C. sec. (b) (supp. IV, 1969).	——do	Court rendering judgment favorable to client may allow up to 25 percent of the amount of the past due benefits as fee.
42 U.S.C. sec. 1714	Claims of U.S. employees outside the United States.	Approval of Secretary of Labor.
43 U.S.C. sec. 1619	Alaska Native fund disbursements	Approval of Chief Commissioner of Court of Claims Up to $2,000.
45 U.S.C. sec. 355i	Railroad unemployment insurance claims.	Approval of Railroad Retirement Board or court.
46 U.S.C. sec. 1225	Contracts under the Merchant Marine Act.	Filing of retainers and expenses with Secretary of Commerce according to rules of the Secretary.
50 U.S.C. app. sec. 20	Trading with Enemy Act	Up to 10 percent if approved by President or his agent or court; appealable to district court in cases of unusual hardship.
50 U.S.C. app. sec. 1985	American-Japanese evacuation claims	Up to 10 percent allowable by Attorney General.

ADMINISTRATIVE REGULATIONS

Source	Subject	Limitation	Statutory basis
8 C.F.R. sec. 2923(a)(1) (1973).	Immigration proceedings	Disbarment for grossly excessive fees.	8 U.S.C. secs. 1103, 1362.
12 C.F.R. sec. 4013 (1973)	Import-Export Bank	Bank approval as condition of loan.	12 U.S.C. sec. 635.
13 C.F.R. secs. 103.13-5(c), 103.13-6 (1973).	Small Business Administration.	Contingent fee only if in reasonable relationship to services; SBA may require agreement permitting SBA to reduce fees it deems unreasonable.	15 U.S.C. sec. 634.
20 C.F.R. 404.973-404.975 (1973).	Old-age and survivors insurance.	Approval by Secretary for representation before Social Security Administration.	42 U.S.C. 406, 1302.
25 C.F.R. secs. 71.1(a), 72.5, 72.24 (1973).	Indian's attorneys and their fees.	Approval of Bureau of Indian Affairs; payment out of award, or under certain conditions from tribal funds in U.S. Treasury.	25 U.S.C. secs. 81, 47.
31 C.F.R. sec. 10.28 (1973).	Internal Revenue Service	No unconscionable fees	5 U.S.C. secs. 301, 551-558 (supp. IV, 1969).
32 C.F.R. secs. 1.500-1.509, 7.103-20 (1973).	Armed services procurement contracts.	Fees must be reasonable not contingent; covenant against contingent fees applies to securing of contracts.	5 U.S.C. sec. 301 (supp. IV, 1969), U.S.C. sec. 3012.

ADMINISTRATIVE REGULATIONS—Continued

Source	Subject	Limitation	Statutory basis
38 C.F.R. §§ 14.638, 14.639, 14.650–59 (1973).	Claims before Veterans' Administration.	With VA approval, $2 to $10 per claim; possible appeal; no fee for unrecognized attorney; automatic nonrecognition of attorney charging illegal fees.	38 U.S.C. §§ 210(b)(c), 3401–3404.
38 C.F.R. §§ 36.4312(1A), 4313(b)(v) (1973).	Veterans' loans	Reasonable and customary fees allowed; 10 percent or up to $250 is permitted for liquidation of loans after default.	38 U.S.C. §§ 212(a), 1804
41 C.F.R. § 1-1.503 (1973)	Government contracts	Covenant of no contingent fees, with stated exceptions.	40 U.S.C. § 486(c).
R.E.A. Bulletin 400-4 (1959).	Telephone loans	REA approval; up to $17.75 per hour for appearances.	7 U.S.C. § 901 et seq.
R.E.A. Form 739 (1957)	Electrification loans	REA approval of fees out of loan funds.	7 U.S.C. § 901 et seq.
45 C.F.R. 500.3 (1972)	Foreign Claims Settlement Commission.	Maximum percentages	50 U.S.C. App. 2001, 22 U.S.C. 1622.

AMERICAN BAR ASSOCIATION,
SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEYS' FEES,
Chicago, Ill., March 18, 1976.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of April 29, 1976, inviting us to send selected samples of the many letters we had received from lawyers throughout the United States concerning the problems and difficulty of citizens obtaining representation in the prosecution of their claims against agencies of the federal government, we are enclosing herewith the following letters which are fairly typical and representative of those we received and which we trust will be helpful to you in connection with the problems involved:

Letter from Jerome W. Kelman, dated March 14, 1975;
Letter from William R. Hussey, dated January 29, 1975;
Letter from John C. Caldwell, dated January 30, 1975;
Letter from Tim Weaver, dated March 10, 1975;
Letter from Don V. Souter, dated March 22, 1976;
Letter from James M. Corcoran, Jr., dated February 22, 1975;
Letter from Stephen A. Scherr, dated February 11, 1975;
Letter from David L. Perry, dated February 20, 1975;
Letter from William Nowland, dated January 31, 1975;
Letter from Daniel L. Furrh, dated January 31, 1975;
Letter from Woodford L. Gardner, Jr., dated February 3, 1975;
Letter from Howard J. Scott, dated January 23, 1975;
Letter from Steven E. Cichon, dated February 4, 1975;
Letter from Archibald H. Scales, III, dated January 8, 1975;
Letter from William I. Aynes, dated February 4, 1975;
Letter from W. Paul Hawley, dated February 17, 1975;
Letter from Edmund D. Wells, Jr., dated February 4, 1975;
Letter from Ben D. Worcester, dated January 31, 1975; and
Letter from Malcolm J. Montague, dated January 30, 1975.

Very truly yours,

LOUIS G. DAVIDSON,
Chairman.

Enclosure.

P.S. My son John was on the legal staff of the Impeachment Inquiry and, as a head of the Legal and Constitutional Task Force, also acted as a counsel to your Sub-Committee in drafting the rules for the Inquiry. He has spoken most highly of you and asks me to send his regards.

LAW OFFICES OF
KELMAN, LORIA, DOWNING, SCHNEIDER & SIMPSON,
Detroit, Mich., March 14, 1975.

AMERICAN BAR ASSOCIATION,
Chicago, Ill.

GENTLEMEN: Sometime ago, I received some communication in one of your publications that you wanted information from lawyers regarding experiences with federal agencies on fees. The enclosed letter indicates our experience in a

matter before the Veterans Administration. Because the lawyer handling this matter is on a fixed salary and is paid by this office as is his secretary, his rent and over-head expenses, we estimate that it cost us $600.00 to handle this case. We received $10.00 as a fee. As the letter states, we were warned not to charge more, not because we didn't know it, but because we were being told in no uncertain terms that we were foolish for handling this case and we were asked to allow the Veterans Administration to handle these things in their own way. I think as a member of the American Bar Association that it is the obligation of this Association to use whatever influence it can to change this situation. I am not as concerned for the lawyer who doesn't get paid; I am more concerned for the client who can't find a lawyer. Undoubtedly this office will not handle another Veterans Administration case for many years because we are not in a position to constantly do this type of charity work.

Very truly yours,

JEROME W. KELMAN.

LAW OFFICES OF
KELMAN, LORIA, DOWNING, SCHNEIDER & SIMPSON,
Detroit, Mich., March 14, 1975.

Hon. ROBERT GRIFFIN,
Senate Office Building
Washington, D.C.

Hon. PHILIP HART,
Senate Office Building
Washington, D.C.

DEAR SENATOR HART AND SENATOR GRIFFIN: Recently, the American Bar Association notified its members throughout the country that it was interested in problems that citizens were having in obtaining lawyers to represent them before certain specific agencies of the federal government wherein fees of attorneys were drastically limited. One of these agencies is the Veterans Administration.

Our office has just gone through a rather lengthy proceeding and in addition to writing to the Bar Association, I thought I would call it to your attention.

As you will note from this stationery, this is a law firm consisting of thirteen lawyers, some of whom are senior partners, others of whom are employees. I am sure you are aware of the fact that in the operation of this firm, a substantial overhead must be met monthly before any of the partners can begin to draw any profits. Nevertheless, we have been fortunate in that we have a successful practice, and we occasionally attempt to help people who are unable to pay on the basis of the fact that we feel it is a duty for attorneys to do so, when they are able to.

In October of 1973, we were asked by Mrs. Daisy Harris to represent her in litigation before the Veterans Administration Appeal Board. She was trying to obtain service-connected death benefits arising out of the death of her son.

So there will be no misunderstanding, we knew at the time we were retained that we would not get paid unless we won. However, we also knew that if we won, we would only get paid $10.00 for our efforts by virtue of the laws of the United States and the regulations of the Veterans Administration.

Mrs. Harris had been trying to get somebody to help her to no avail. We assigned a young lawyer in our office to handle her case in October of 1973. This young lawyer's services cost our office for salary and overhead over $15.00 per hour. If this office were to make any profit on his services, it would only be on any amount that we charged over $15.00 per hour.

The attorney assigned to handle this case worked on this matter from October of 1973 until a decision was rendered on March 11, 1975. His work involved appearing at one hearing, which took up an afternoon. It also involved spending an afternoon at the Veterans Administration prior to the hearing reviewing records and preparing. In addition, there were many other hours of preparation, telephone calls, correspondence, etc. Because no fee was being charged on a time basis, no accurate records are kept, but the attorney handling the case is certain that 20 hours is a conservative estimate as to the amount of time he spent in handling this case.

On March 11, 1975, a decision was rendered granting this lady $2,176.70 in accrued benefits and $123.00 per month for the rest of her life, plus any raises which may occur in the interim. She is presently 65 years of age.

One of the most interesting facets of this case and the primary reason for my writing this letter is that prior to the preparation of a lengthy brief which was submitted in this case, a very time-consuming job, this young lawyer received a telephone call from an employee of the Veterans Administration. This employee called for the purpose of advising this young lawyer that all he could charge was $10.00. He questioned this young lawyer why he was working so hard, trying to win this case, when he couldn't get paid. Frankly, as a result of this telephone call, this lawyer worked twice as hard as he would probably have worked, had he not received the call.

What I am trying to get across is that the purpose of keeping the fees at such abominably low rates is to prevent a lawyer from representing the people that need help. Thus, the individuals who need help are deprived of due process of law in their dealings with the Veterans Administration, unless they can find a firm like ours who on an occasion will handle such a matter as a charitable contribution.

I respectfully request that you consider the unfairness of the law as it applies to the beneficiaries of the veterans' benefits laws of the United States. These people are second-class citizens. I wonder if you really believe that what is being done at the Veterans Administration is fair. I would appreciate hearing from you.

Very truly yours,

JEROME W. KELMAN.

ATTORNEY AND COUNSELOR AT LAW,
Fort Lauderdale, Fla., January 29, 1975.

AMERICAN BAR NEWS,
AMERICAN BAR ASSOCIATION,
Chicago, Ill.

GENTLEMEN: I read your article entitled "Are Federal Limits on Lawyers Fees Cutting Off Some From Counsel?" in your January, 1975 issue, and believe I have an instance in which a client was denied legal counsel because of statutory fee limitations.

A client was in my office for the preparation of his Will and mentioned that he had a service-connected disability for which he was getting a small amount of compensation through the Veterans Administration. He added that he had recently been to a local orthopedic surgeon who had analyzed his problem to be substantially different from the diagnosis given by military doctors about 25 years earlier, and went on to indicate that the man had never had the condition attributed to him by the military doctors, and upon which his disability rating was based.

He approached me about filing a claim with the Veterans Administration for him for back benefits, for the current diagnosis, which his doctor indicated should have been made before, which would have entitled him, I believe, to increased benefits.

I began some research into the Veterans' Law, and almost immediately was confronted with the statutory provision allowing a maximum attorney's fee of $10.00 for assisting a veteran in making a claim. I also found that that $10.00 fee had been upheld by several courts, one of which said the main purpose of the fee limitation was to discourage claims from being filed.

My client declined to proceed further, and I certainly lost interest in pursuing the matter under the statutory fee arrangements.

If there are other statutory provisions similar to this one, I would hope that the Bar could do something to change the law, for I feel that such a limitation certainly deprives claimants of counsel.

Very truly yours,

WILLIAM R. HUSSEY.

ATTORNEYS AT LAW,
HIBBARD, CALDWELL, CANNING, BOWERMAN & SCHULTZ,
Oregon City, Oreg., January 30, 1975.

COMMITTEE ON FEDERAL LIMITATIONS OF FEES,
AMERICAN BAR CENTER,
Chicago, Ill.

GENTLEMEN: I saw the article in the January 1975 American Bar News concerning limitations on attorneys fees under federal statutes. In this office

we have not taken cases involving Social Security Administrative procedures nor Veterans Administration procedures for a good many years. On two occasions I have undertaken the representation of veterans knowing of the limitation. I have told clients that I had no desire to go through the red tape of registering so that I could get the pittance and considered that I would take those cases as matters in the public interest. On both of those cases I was able to prevail.

Likewise in both cases a veteran was being threatened with the withdrawal of pension rights which he had been receiving for a good many years. The Veterans Administration had suggested that he talk to one of the veterans service officers at one of the old line associations. The veterans reaction in doing so was that he got no representation and no help. The people in the Veterans organizations acting as the service officers seem to be more allied with the Veterans Administration viewpoint than acting as advocates for someone in need.

Briefly I will describe the situation in which these people each found themselves. The first one had fallen while on KP duty within the first three weeks he was in the Army. He received a minor back injury. When he was discharged it was noted and he did then receive a pension and had done so for a long time. He also had received a knee injury in the same fall. Later, on rechecking records, they found that he had been employed as a logger while in high school. He had a small workman's compensation covered injury.

To establish that the injury for which he was receiving a pension was service connected it required having a lawyer build a case in the way we all know how to do. It required interviewing and obtaining witnesses who had played football with him in high school and worked with him before he went in the service and after the small accident in the logging industry. After presenting the matters in that way we did prevail.

The other one involved a man who had received an injury when he was on a ship which was torpedoed during the war. He had fallen and received a back injury. He had a congenital condition, however, which later the Veterans Administration claimed was really the cause of all of his problems. This was aggravated by the fact that under the wartime conditions there was no adequate record made of his earlier injury. This involved detailed efforts to establish the condition and retain and increase his pension rights.

It has been my impression that the Veterans Administration people do not want strong advocates. I am sure they will resist any moves for lawyers to be paid on an adequate basis. I might note that one of the people in question was a very substantial tree farmer and was well able to pay attorneys fees at a complete, full and regular rate. The other would have been, in any case, a sort of a half-way charity case but he would gladly have paid something because of the benefits he received.

Very truly yours,

JOHN C. CALDWELL.

ATTORNEYS AND COUNSELORS,
HOVIS, COCKRILL & ROY,
Yakima, Wash., March 10, 1975.

AMERICAN BAR NEWS,
AMERICAN BAR CENTER,
Chicago, Ill.

(Attention of Special Committee on Federal Limitations on Attorneys Fees).

DEAR SIRS: I am writing in response to the article on fee restrictions in V.A. and Social Security matters. I have had experiences in both areas and I definitely feel that the restrictions placed upon the private practitioner certainly deprive a great number of individuals of much needed representation.

This is particularly true of people residing in smaller communities, such as my own, where there is an insufficient number of these claims to warrant one lawyer or firm from specializing to the degree necessary to handle these claims on an economic basis. Of course, in the case of V.A. cases, it is simply impossible to represent a claimant on any basis other than sympathy and a feeling of moral duty arising out of the tenets of our profession.

I assume you are interested in specific details of problems encountered with lack of counsel in federal matters. Four cases spring to mind:

1. Early in my practice, I represented a woman crippled with arthritis. Being new in the practice (and on salary from my firm), I undertook to represent her. The case was extremely complicated, involving establishing of disability three years previous to the application due to the lack of eligible quarters at the time of the hearing. Two expert witnesses were necessary as well as the testimony of three lay witnesses.

The hearing was held and denied. Administrative appeal was made and the hearing examiner was affirmed. At this point, the fee came into play. This woman had a claim which may well have been allowed by the District Court, however, due to the fee restrictions and the substantial amount of time and the experts required, forced me to terminate the representation. Incidentally, without earning a penny for the case up to that point.

2. Another Social Security case involving the same type problem as No. 1 which concluded in the same manner due to the lack of any assurance of a fee.

3. A recent V.A. representation—this case involved a close friend with whom I had gone to highschool and had remained close friends to this time. His problem concerned his degree of disability from Chronic Enteritis, a highly degenerative disease which is, in my opinion, erroneously classified on the disability charts. I undertook this case purely on the basis of friendship. At this point, after a hearing in Seattle (400 miles round trip and 8 hours time), it appears that my friend will have his disability raised to 100 percent from 30 percent. Had he not known a personal friend who was a lawyer, I am certain that this obvious miscarriage of the V.A.'s duty to this veteran would not have been accomplished. Compounding the problem is the embarrassment of the client when you tell him that you must refuse his attempt to pay you a fee because the V.A. will only allow $10.00. I think this is a factor which is overlooked in many discussions of this problem. Most veterans are proud men and they expect to do what they can to pay their way. To deny them this only brings home their disability more fully.

4. Another recent V.A. matter involving the right to medical care is in the process of being dropped by this office. The hearings on these matters, of course, can only be held in Seattle, and therefore effectively prevent local counsel from taking a short time to attend the hearings. This particular man simply will not be represented by this office because we cannot afford to represent tim. His case is just as complicated as the others described and I am very doubtful that he will prevail in the V.A. runaround without representation.

I cannot urge the committee too strongly to proceed with all haste to recitify this problem. It very nearly approaches a denial of due process and equal protection in many of these cases. I am sure it saves the VA and Social Security a good deal of money, because many just claims are not paid, but I feel that if this situation were made known to Congress, remedial legislation would insue.

Sincerely yours,

By HOVIS, COCKRILL & ROY,
TIM WEAVER.

LAW OFFICES OF
CHOLETTE, PERKINS & BUCHANAN,
Grand Rapids, Mich., March 22, 1976.

Re Federal Limitation on Attorneys' Fees.

SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEYS' FEES,
American Bar Association, Chicago, Ill.

GENTLEMEN: In the American Bar News of January, 1975, Volume 20, No. 1, page 4, there was an article asking to hear from lawyers with comments to help document circumstances where the limitations on lawyers prohibits people from hiring counsel.

I realize that this letter is about 14 months late, and I won't take time to explain why I am just getting to it now, but for whatever it is worth, I do wish to comment thereon.

First of all, I am very happy to see that we had a committee looking into the matter.

In 1972 I was asked by a man, whom I had represented once before, to help him on a VA claim. This was my first experience with the VA and it concerned tht gentleman's being turned down for disability benefit for his wife, i.e., he was receiving 100% disability, but because of a claim that a Mexican divorce he had procured during WWII was not valid he was, in the eyes of the VA, not married

even though he had been living with his present wife for many years and they had a 17-year-old daughter. This was obviously a legal issue and I took the necessary steps to file an appeal for him.

One of the very first letters I received cited the fee limitations set forth in 38 U.S.C. 3404–5, or 38 CFR 14655. This made me rather upset and I wrote my then Congressman, now President Ford, to complain and he gave me the history concerning this limitation which goes back really to post-civil war days, and also gave me some other information where a bill had been introduced in 1966 to remove the limitation. On checking further I was able to determine that the opposition to this case came from where I thought it would have come from, and that is the veterans organization who claims they offer free counseling to veterans before the Veteran Appeal Board. I feel that they use that as a gimmick to get people to join their organization.

As a member of the American Legion I wrote the Michigan Department to see if they really had lawyers who would handle this particular case. My answer was not very satisfactory, certainly not definitive.

In any event, I was angry enough so that I handled the matter without fee, but between the briefing work and the time with necessary correspondence, and checking in England to determine the whereabouts of his first wife, I had a couple thousand dollars time, estimated conservatively, in it. This was clearly a case that the average attorney would not have taken, could not have afforded to take. It is a case in which the law was clearly on our side, By Michigan law, which the VA chose to ignore since they have their own judge, jury, and prosecutor, as you no doubt know. Further, there is no place of appeal from the Board of Veterans' Appeals which is another situation which certainly ought to be corrected.

As stated, after a great deal of effort some satisfaction was obtained, but I don't think it was through my brief work, even though I felt that we were 100% correct, but always rather felt that it was because our Congressman, who had also contacted the Veterans' Administration, later became President.

I say, further, an example of the problem one has with the Board from which there is no appeal is that they are speaking with what I call a "forked tongue." In their opinion of December 4, 1973 they stated:

"(b) Where the issue is the validity of marriage to a veteran following a divorce, the matter of recognition of the divorce by the Veterans' Administration (including any question of bona fide domicile), *will be determined according to the law of the place where the parties resided when the right to benefits accrued;*" Emphasis ours.

Then in the letter to us after we went into local court and procured a court decree recognizing the Mexican divorce, and the subsequent marriage, they stated:

"We further advise you that it is up to the decision of the Administrator of Veterans Affairs to decide questions arising under laws administered by the Veterans Administration to include determining the validity of a marriage for the purposes of awarding benefits in Veterans Administration pension claims. *This is not subject to or controlled by the decisions of state courts.*" Emphasis ours.

I am also enclosing a copy of the report that I received in a letter from Olin Teague to Gerald Ford, dated August 22, 1972, with a copy of the 1966 Bill that was presented.

If there is anything further that I can do showing the "arbitrariness" of the appeal board for removal of fee limitations I would be glad to help. Along the same line, if there is anything that I can do to get Congress to take appropriate action to permit an appeal from the Veterans Board let me know. I feel that the courts are bulwark against the tyranny of appointed administration agencies. In fact, they are the only bulwark. Along this latter line—I would think that any appeal should be able to be taken in the veteran's own home district, I don't see why veterans should be forced to go to Washington to do so.

Very truly yours,

DON V. SOUTER.

Enclosures.

Calendar No. 1193

89TH CONGRESS, 2d Session | SENATE | REPORT No. 1233

REMOVING ARBITRARY LIMITATIONS UPON ATTORNEYS' FEES FOR SERVICES RENDERED IN PROCEEDINGS BEFORE ADMINISTRATIVE AGENCIES OF THE UNITED STATES, AND FOR OTHER PURPOSES

JUNE 9, 1966.—Ordered to be printed

Mr. LONG of Missouri, from the Committee on the Judiciary submitted the following

REPORT

[To accompany S. 1522]

The Committee on the Judiciary, to which was referred the bill (S. 1522) to remove arbitrary limitations upon attorneys' fees for services rendered in proceedings before administrative agencies of the United States, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

AMENDMENTS

Amendment No. 1: On page 1, lines 5 through 8, strike "attorney's fee which may be charged, contracted for, or received for services rendered for or in connection with any administrative proceeding", and insert in lieu thereof "attorneys' fees".

Amendment No. 2: On page 1, line 9, strike "such" and insert in lieu thereof "any administrative".

Amendment No. 3: On page 1, line 10, after "(2)", add a new clause as follows:

> authorizes an agency in its discretion to determine attorneys' fees or to approve attorneys' fees charged for the rendition of such services in any administrative proceeding; or (3)

Amendment No. 4: On page 2, line 1, strike "at law".

Amendment No. 5: On page 2, line 3, strike "such" and after "services" and before the comma insert the following: "in connection with any administrative proceeding".

LAW OFFICES OF
CORCORAN & CORCORAN PROFESSIONAL CORP.,
Evanston, Ill., February 22, 1975.

MR. LOUIS G. DAVIDSON,
Chairman, ABA Special Committee of Federal Limitations on Attorneys Fees, Chicago, Ill.

DEAR LOUIS: In the January 25th American Bar News it was requested that any lawyers knowing of instances of individuals being unable to obtain legal counsel because of federal limits on fees were to send their comments to your committee.

We have a situation where we represented a woman and literally we have received no fee, nor will we it appears.

In such a situation it would seem to me it would be impossible to obtain competent counsel because of what is involved. Although this is not a situation of no counsel it well could have been and it is for that reason I would like to give you the facts.

I represented a woman who is named the beneficiary of one-half the proceeds of a National Service Life Insurance policy and one of her two daughters the other one-half. The amount involved for our client was $5,000.00. The husband of our client was a veteran who suffered nervous disorders and the couple on the advise of family counselors or psychiatrists went through a divorce in Chicago several years ago. The veteran subsequently moved to California and off and on he lived with his mother. He changed the beneficiary on the life insurance several times and and the final change had the wife and the daughter as equal, co-beneficiaries. His wife was a Catholic and I think that he was. He always considered that they were still married and wrote her to that effect and also talked that way to her on the telephone. Over a period of years he was in and out of V.A. hospitals because of the mental problems before his death.

After his death when the claim for the insurance was made his mother filed an objection, not to the half share going to the daughter, but to the half share going to the wife. To make a long story short we went through three separate hearings representing the wife including a full hearing with the V.A. in Chicago. The matter was reviewed at Fort Snelling in Minnesota and the initial determinations that my client should receive half of the policy were upheld. There was a specific finding that the husband had testamentary capacity at the time he executed the change of beneficiary and we were able to lock in, by letters from him, this fact. Subsequently the mother appealed the ruling to the V.A. in Washington and our position again was upheld.

Subsequent to that time and after the V.A. had distributed the check to our client, the mother started suit in the District Court in Los Angeles against our client.

We were able to engage counsel in Los Angeles, but only after trying 15 to 20 different lawyers. The law concerning V.A. life insurance is vague and appears to allow a complete trial de novo. Our client did not have the resources to go to California in addition to losing the time from work. She worked in a rather lowly position in a hospital and as you well know hospital wages are not the highest. There was, I recall, a motion for judgment on the pleadings based on the V.A. hearings, which was denied. The court did have the authority that it did not exercise to enter the decision based on the various V.A. hearings. There is law on this both ways.

We also attempted early in the game to have the case transferred to Chicago so that our office could represent our client without bringing in outside counsel.

As it ended up a settlement was reached simply because of the small amount of money involved and the possible loss of job by our client if she left during this recent period of tight economy.

Subsequent to the trial our California counsel was informed by the assistant U.S. Attorney in California that the maximum payment allowable to him was somewhere in the neighborhood of $300.00, and that that amount had to be shared between our office and himself. As you can well imagine, his time and overhead ran much more than this and we ended up letting him take the full amount of the fee. Prior to the time that suit was started by the mother, our office had approximately $1,500.00 worth of time and we have not run our time since the start of the suit approximately two years ago.

The assistant U.S. attorney bluntly told California counsel that if anybody attempted to collect anything more from our client, whether she was willing to pay it or not, that he would have criminal proceedings started against the attorneys involved.

Thus, we have a case that we won at four administrative levels on which there are no fees payable.

I have long felt that clients can not get adequate levels representation because of these type of government regulations. I was somewhat under the impression that Senator Dirksen at one time had introduced or had passed some type of legislation to do away with this type of problem.

I remember many years ago when my uncle retired from the office that we had several hearings with the Social Security Administration as to whether the payments to him constituted "earned income" after his retirement from the partnership. Of course neither my father nor I were charging any fee, but in the course of our representation I happened to see the fees allowable for this type of hearing. To the best of my recollection the top fee allowable to an attorney was $35.00 even though he might go through three levels with the Social Security Administration.

This is absolutely ridiculous and these types of restrictions, as you are well aware, proliferate in various federal statutes.

We have not had the time to have one of our office clerks research this criminal threat by the Assistant U.S. Attorney. If and when we come up with an answer on it I will be glad to share it with you.

Very truly yours,

JAMES M. CORCORAN, JR.

HASTINGS, NEBR., *February 11, 1975.*

AMERICAN BAR NEWS,
American Bar Association,
Chicago, Ill.

GENTLEMAN: I refer to the January, 1975, issue of your publication concerning the article on federal limits on attorney's fees. In the article you asked for information on cases involving such limitations.

In 1973 a Mr. Donald C. Cameron, then residing in Harvard, Nebraska, submitted a claim to the Veterans Administration for a service connected disability benefit on account of a heart attack suffered early in 1973. The claim was denied by the Veterans Administration and Mr. Cameron exhausted his resources seeking help from service organizations and attorneys. Mr. Cameron then came to my office and asked for my assistance. Because I had the time to devote to submitting an appeal of the decision against him and to prepare a lengthy brief, I was able to take up the cause with the Veterans Administration. Eventually, the Veterans Administration granted the appeal and allowed Mr. Cameron's claim.

I submit this example as a case in which the federal limits on the fee for an attorney, in this case a fee of $10.00, effectively limited the client's possibility of obtaining a benefit for which counsel was apparently necessary. I think that anything you can do to eliminate this kind of restriction will be a benefit to everyone in Mr. Cameron's circumstances.

Respectfully yours,

STEPHEN A. SCHERR.

CORPUS CHRISTI, TEX., *February 20, 1975.*

SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEY'S FEES,
American Bar News, American Bar Association,
Chicago, Ill.

GENTLEMEN: In the recent American Bar News I read of the formation of your committee and your desire to obtain information.

(1) Longshoremen and Harbor Worker Compensation Act: Although my practice is primarily a personal injury practice involving maritime personal injury and Workmen's Compensation Practice, I attempt to avoid representing Longshoremen and Harbor Worker's Compensation Claimants for the reason that the fee allowed is not great enough to make representation of these claimants economically feasible.

Of course, most personal injury matters are handled on a contingent fee base, with the fees in this area of the country generally being one-third on most injury cases, and twenty-five percent in Workmen's Compensation Cases. In contrast, the fees allowed by the L&H Commissioner tend to be very much smaller than the traditional contingent fee. As a result, for me, and for other attorneys specializing in this type of practice, it is simply not economical to handle these cases.

(2) Veterans Administration: I have recently had occasion to represent the widow of a veteran in a claim for death benefits from the Veterans' Administration. The allowable attorney's fees as set forth in 38 C.F.R. Section 14.655 are so small as to clearly be confiscatory. These fees obviously are designed to prevent attorneys from appearing before the Veterans' Administration, and to favor large Non-lawyer groups, such as veterans' service organizations who apparently are authorized to appear and represent claimants before the Veterans' Administration.

(3) Social Security: In claims for disability benefits the Social Security Administration generally awards a contingent fee which is equal to twenty-five percent of the past due benefits which are recovered for the claimant. I feel that this fee is proper and adequate and should be retained.

I hope that these personal observations of my experiences will assist your committee in your work.

Very truly yours,

DAVID L. PERRY.

COLORADO SPRINGS, COLO., *January 31, 1975.*

Re Federal Limitations on Attorneys' Fees.

SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEYS' FEES,
American Bar Association, Chicago, Ill.

DEAR SIRS: I have before me the article entitled "Are Federal Limits on Lawyers' Fees Cutting off Some from Counsel?" which appeared in Vol. 20, Number 1 of the American Bar News publication dated January 1975. In response to the above titled article, the answer is a clear Yes.

On September 18, 1972, I had a client, namely Mr. Louis LaFerte, come to my office on a Veterans Administration matter. After a conference I researched Title 38 of the U.S.C.A. regarding the Federal Law on his VA claim. I immediately noted that there was a ceiling of $10 for an attorney to represent his interests. While the Federal Code gave standing to specific veterans organizations to represent him, a check with each of the organizations proved to be a waste of time.

My client informed me that five previous attorneys had told him the same thing, with one of the attorneys being a retired Federal Judge. It occurred to me that this $10 limitation was a fundamental deprivation of my client's rights under the Due Process and Equal Protection clauses of the United States Constitution.

To me a fair compromise would be a judicial and/or administrative law Judge review and approval of attorney fees much like Social Security matters. I think my client summed this situation up well as exemplified by the attached copy of a post card which I received in 1972.

May I express my appreciation that the ABA is looking into this miscarriage of justice.

Sincerely yours,

WILLIAM NOWLAND.

Enclosure.

Concerning our conversation Sunday evening, you should soon hear from, VFW, DAV, American Legion, Veteran Service Officer, American Red Cross.

Concerning the attorney pay restrictions, which bars me from a civil court. Because, due to disability and lack of education in law, I cannot prepare or properly present my case to a court.

I hope to make this a cardinal point, as it should concern the court and the attorneys, to have to share my legal restrictions.

L. LAFERTE.

GOLDSWORTHY, FIFIELD & GORMAN,
ATTORNEYS AND COUNSELORS,
Peoria, Ill., January 31, 1975.

SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEY'S FEES,
American Bar Center,
Chicago, Ill.

GENTLEMEN: In response to your request in the January 1975 edition of the American Bar News for documentation of citizens being denied legal services because of federal restrictions on attorneys' fees, I offer the following example:

We were retained to represent an individual who has a claim against the Veterans Administration. We were informed by the Administration that a Power of Attorney form, supplied by the Administration, must first be executed by the claimant and his attorney. The form contained a reference to Section 3404, Title 38, U.S.C. That section voids any agreement between attorney and client for legal fees, and imposes criminal penalties on an attorney who charges a fee for representing a client before the Veterans Administration. All fees must be paid by the Administration, and are limited to $10.00.

Although we believe that our client in this case may have a legitimate claim for benefits, it is obvious that a private firm could not afford to spend the many hours it would require to represent him adequately for a fee of $10.00. Therefore, we were forced to decline the case. Incidentally, Section 3404 has been held to be Constitutional, even though it denies the Veteran legal counsel of his choice. The Disabled American Veterans do represent such claimants, but seemingly in a rather impersonal way.

We strongly feel that such statutes should be repealed, not for the benefit of attorneys, but for citizens who need legal counsel before Administrative agencies.

Very truly yours,

GOLDSWORTHY, FIFIELD & GORMAN,
By DANIEL L. FURRH.

LAW OFFICES OF
REDFORD, REDFORD & GARDNER,
Glasgow, Ky., February 3, 1975.

Chairman LEWIS GENE DAVIDSON,
Special Committee on Federal Limitations on Attorneys' Fees, American Bar News, American Bar Association, Chicago, Ill.

DEAR MR. CHAIRMAN: I read with interest your recent announcement in the American Bar News concerning Federal limits on fees for attorneys. My personal opinion is that the limits on fees do have a substantial effect on the availability of legal representation.

After graduation from law school in 1969, I served in the United States Army from 1969 to 1971 with the last portion being in Vietnam. Upon my return to private practice in 1971 I, because of my veteran status, and work in military legal assistance, found that several clients with military law problems made their way to my office.

One such client I distinctly recall had lost a leg some seventeen years after World War II and was having repeated rounds with the Veterans' Administration in an attempt to determine whether or not the loss of the leg was a service connected disability. I started looking into this matter and upon requesting the proper authorization and power of attorney forms from the Veterans' Administration, I was immediately advised that anything I did for the veteran could only result in a charge not to exceed $10.00 for my professional services. I consider this to be a blatant effort to cut off any representation by the Veterans' Administration at the very inception of the inquiry. To complete the story, my client chose not to proceed further with the case. I was willing to see the matter through in spite of the preliminary admonition by the Veterans' Administration.

I will look forward to your subsequent activities in this committee and urge you to continue your efforts.

Very truly yours,

REDFORD, REDFORD & GARDNER,
WOODFORD L. GARDNER, JR.

LAW OFFICES OF HOWARD J. SCOTT,
San Diego, Calif., January 23, 1975.

SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEYS FEES,
American Bar Association,
Chicago, Ill.

GENTLEMEN: I have noted the work of your Committee as published in the January A.B.A. News, and I have some experience with problems with the Federal Government concerning their handling of attorneys fees.

I am a Certified Specialist in Workers' Compensation by the California Bar,

and in the course of such practice, I handle claims occasionally for employees of the Federal Government, which claims are administered by the U.S. Department of Labor, Office of Workers' Compensation Programs.

The law covering Federal employers' injuries requires that any attorney's fee be approved by this office of the Department of Labor. Unfortunately, many months ensue between an award which may be obtained purely through the efforts of an attorney and any approval by the Department of the employee's attorneys fees. In the meantime, the full amount of the award is sent to the client, and there is no provision for any lien on behalf of the client's attorney.

It often seems to me that the Department intentionally delays their approval of attorneys fee so that if and when the fee is approved, the client will have exhausted all the benefits which the attorney obtained for him. In fact, I believe there is an anti-attorney basis where, by these means, representation of an injured worker is discouraged.

The remedy would be to provide by legislation for an attorneys fee lien which must be honored at the time the award is made and before benefits are dispersed. This, in fact, is the law in connection with employee injuries under California law and also employee injuries under Federal law insofar as it applies to private employment under Federal jurisdiction.

Yours very truly,

HOWARD J. SCOTT.

ST. CLAIRSVILLE, OHIO, *February 4, 1975.*

AMERICAN BAR ASSOCIATION,
Chicago, Ill.

(Attention: Special Committee on Federal Limitations on Attorneys' Fees, Mr. Louis G. Davidson, Esq. Chairman).

DEAR MR. DAVIDSON: I am responding to the request in the article about your committee in the January, 1975 issue of the American Bar News.

In the course of my practice I regularly handle social security disability claims and coal miners' black lung cases under the Federal Coal Mine Health and Safety Act. These cases are accepted on a contingent fee basis of 25% of the past due benefits. My experience has shown that the contingent fee agreement is of critical importance in the ability of such claimants to retain counsel. It is my understanding that the contingent fee agreement is not unlawful. However, the social security administration has never yet honored any of these agreements in my cases. The fee approved was always significantly less than that due under the contingent fee agreement. Of course, where I am not successful in getting an award for my client, the question of the amount of my fee never comes before the social security administration.

I have never seen a prospective client in a black lung or social security disability claim who was able or willing to advance a reasonable retainer. I have declined cases that I might otherwise have accepted but for the difficulty I have had in getting what I consider a fair fee in the cases in which I have been successful. I am also considering not accepting cases of the kind mentioned above in the future because of the inadequacy of the fees I have been able to collect.

Furthermore, I resent being threatened with prosecution for collecting the fee agreed upon by my client at the time I undertook his representation when such agreement was not unlawful at its inception.

The Federal Regulations and Laws governing fees (See circular attached) particularly the administration thereof, in my experience, have made the social security claimant an undesirable client for lawyers in my opinion. I am curious to know whether other lawyers have reached this same conclusion.

Yours truly,

STEVEN E. CICHON.

Enclosure.

INFORMATION CONCERNING AUTHORIZATION TO CHARGE AND RECEIVE ATTORNEY FEE

(SOCIAL SECURITY REGULATIONS NO. 4, SECTION 404.976b)

In evaluating requests for approval of attorney fees, the purpose of the social security program to provide a measure of economic security for the beneficiaries thereof is considered, together with the following factors:

(1) The services performed (including type of service);

(2) The complexity of the case;

(3) The level of skill and competence required in rendition of the services;
(4) The amount of time spent on the case;
(5) The results achieved. (While consideration is given to the amount of benefits, if any, which are payable in a case, the amount of fee is not based on the amount of such benefits alone, but on a consideration of all of the factors (1) through (7). The amount of benefits payable in a given claim is only one of several factors considered in authorizing a fee since such amount is governed by specific statutory provisions, and b the occurrence of termination, deduction; or nonpayment events specified in the law, factors that are unrelated to efforts of the representative. In addition, the amount of accrued benefits payable in a given claim is affected by the length of time that has elapsed since the claimant became entitled to benefits);
(6) The level of administrative review to which the claim was carried within the Social Security Administration and the level of such review at which the representative entered the proceedings; and
(7) The amount of the fee requested for services rendered, excluding the amount of any expenses incurred, but including any amount previously authorized or requested.

Penalty For Violation of Fee Provision

Section 206 of the Social Security Act provides:

"... Any person ... who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee prescribed by the Secretary shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both."

HALL & SCALES,
ATTORNEYS AND COUNSELORS AT LAW,
Winston-Salem, N.C., January 28, 1975.

CHAIRMAN, SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEY'S FEES,
American Bar Association,
American Bar Center,
Chicago, Ill.

GENTLEMEN: Responding to an article in the January, 1975, issue of the American Bar News relative to the chilling effect that Federal limitations on attorney's fees has on availability of counsel, I offer the following information and documentation of my own experience with the Social Security Administration.

I enclose an affidavit which I prepared to bolster my request for reconsideration of the fee allowed and also a letter which I forwarded to the agency. The net effect of this request for reconsideration was to secure an additional $750.00. In sum I was paid $3,750.00 for nearly eighteen months' work on an agreed contract price that would have amounted to $7,100.00. The effect of this arbitrary reduction of fee, which I consider to have been fully earned, has been to cause me to turn away the two most recent Social Security applicants because of the firm belief that I cannot handle cases of this sort economically.

If you desire information other than that in the enclosed documents, I will be happy to respond to any specific inquiry which you may have. In the interest of confidentiality I have masked the name of the client in the documents which I am sending you.

Sincerely,

ARCHIBALD H. SCALES, III.

Enclosure.

JUNE 19, 1974.

BUREAU OF HEARINGS AND APPEALS,
Post Office Box 2518,
Washington, D.C.

(In the matter of _____, Jr., _____).

GENTLEMAN: This will give notice of my request for an administrative review of the inadequate fee allowed me in the above case. I am by copy of this letter notifying Mr. ——— of my objection and of this request.

In support of my request, I am enclosing an affidavit of attorney William S. Mitchell, who represented Mr. ——— in 1968 and 1969, and my own affidavit.

The actions of the Social Security Administration in this case, in repeatedly and adamantly denying Mr. ———'s claim, in attempting to discourage him from

hiring a lawyer, in delaying payment of my fee and in arbitrarily reducing the amount agreed to by the claimant and recommended by the Administrative Law Judge, are reasonably calculated to have a chilling effect on any claimant's ability to secure effective counsel.

Congress obviously intended to provide for legal representation for claimants erroneously denied compensation. The effect of your arbitrary 58% reduction of my fee is to frustrate that intent.

Despite the self-serving declaration on the form sent me to the effect that all relevant factors have been considered, I believe you failed to give proper attention to the following factors:

A. The complexity of the case—Mr. ——— had been repeatedly turned down for six years. The risk of failure was high.

B. The level of skill required—My service as counsel to the U.S. Army Physical Disability Agency made me perhaps better qualified in this case than other attorneys might have been.

C. The amount of time spent.

D. The results achieved—Retroactive benefits for six years in excess of $28,000.00.

For all of the foregoing reasons, I respectfully request reconsideration of the decision reducing my fee from $7,117.85 as agreed to $3,000.00.

Very truly yours,

ARCHIBALD H. SCALES, III.

Enclosures.

AFFIDAVIT

NORTH CAROLINA, FORSYTH COUNTY, ss:

I, Archibald H. Scales, III, being first duly sworn, depose and say:

1. I was employed by ———, Jr., Social Security Number ————, on February 28, 1973, to prosecute on his behalf a claim against the Social Security Administration for disability insurance benefits.

2. I did not receive at that time and have not since then accepted any compensation whatever for services in this case. I also have received no retainer or compensation for out-of-pocket costs incurred.

3. In March of 1973, Mr. ——— and I entered into an employment contract, which is on file with the Social Security Administration, providing that I would represent him on a 25% contingent fee basis.

4. At the time I accepted employment by Mr. ——— his case seemed nearly hopeless. His claim had already been rejected by the Social Security Administration on three separate occasions, and another law firm of the highest reputation had invested many fruitless months on his behalf. I agreed to help him because he appeared to me to be disabled from gainful employment and because I thought my experience as counsel with the U.S. Army Physical Disability Agency might enable me to help him when others could not.

5. When Mr. ——— first came into my office, his emotional disturbance and sense of frustration were manifest. The repeated denials of his just claim and his efforts to support his family without the compensation to which he was entitled had caused him anguish and had substantially contributed, in my opinion, to the emotional distress from which he suffered. The therapeutic effect of my efforts in securing him his just compensation cannot be gainsaid. While Mr. ———'s disability is emotional, there is no doubt that he is competent to manage his affairs.

6. Mr. and Mrs. ——— have told me that they were advised by a local representative of the Social Security Administration that they should not retain a lawyer because no one could help them and it would cost a lot of money. This employee of the Social Security Administration knew or should have known that any attorney's fee would not only be contingent upon a recovery for the ——— but would be subject to approval of the Agency itself.

7. I devoted a great deal of time and effort to this case for nearly a year until a favorable ruling was achieved in February, 1974. Since then, I have continued to consult with and advise Mr. ——— and his wife about matters related to his claim. My services prior to April 8, 1974, are itemized in my petition of that date, which I hereby incorporate in this affidavit and certify to be true. I spent many hours on this case which were not recorded and which were not set forth in my petition. Since the date of my petition, I have devoted perhaps another six or eight hours to the ———' problems.

8. Mr. ——— and his wife, at the time the favorable decision was received, were ecstatic. Substantial improvement in Mr. ———'s mental outlook and physical appearance were obvious. Mr. ——— told me on numerous occasions that he not only wanted me to have the full 25 percent for which we had contracted but that he wanted to pay me more than that. I, of course, declined his offer of payments in excess of the legal maximum as being contrary to law.

9. Before I was successful in Mr. ———'s case, he was receiving no Social Security benefits. The result of my efforts was to correct three previous erroneous determinations by the Social Security Administration and to secure for Mr. ——— six-years' retroactive disability compensation in excess of $28,000.00. One-quarter of this amount, or $7,117.85, is being retained by the Agency against my fee.

10. The Honorable John J. Forbes, Jr., the Administrative Law Judge who heard the case, and certainly the official best able to determine the value of my services, has advised me that he has no authority to approve a fee in excess of $1,000.00; however, he has recommended that the full fee of $7,117.85 be approved.

11. On May 31, 1974, fifteen months after I began work on Mr. ———'s case and three and one-half months after his favorable decision, I was notified by the Bureau of Hearings and Appeals that a fee of only $3,000.00 would be approved. No reason was given for this 58 percent reduction of the fee agreed to by Mr. ——— and recommended by Judge Forbes.

12. In my professional opinion, the actions of the Social Security Administration in attempting to discourage this claimant from hiring a lawyer, in delaying the payment of my fees for an extended period, and in arbitrarily reducing a just and reasonable fee by more than one-half, all tend to prevent claimants with just claims from being able to secure effective legal representation. I will be understandably hesitant to accept employment in a future case if this unilateral reduction of my fee is allowed to stand, and the effect upon attorneys similarly situated is obvious.

13. In my opinion, by establishing a 25% maximum, Congress obviously intended to provide for effective legal representation for claimants unjustly denied compensation. To deny full compensation to the claimant's attorney in this case is, in my opinion, reasonably calculated to discourage attorneys from taking such cases. There is no agency or association (such as the many veterans' organizations working in the field of VA claims) to assist Social Security claimants in the prosecution of their just claims. Claimants erroneously rejected by the Social Security Administration must rely on the services of the organized bar.

Further affiant sayeth naught.

ARCHIBALD H. SCALES, III.

Sworn to and Subscribed Before Me this ——— day of June, 1974.

———, *Notary Public—Guilford County.*

My Commission Expires: May 19, 1976.

AFFIDAVIT

NORTH CAROLINA,
Forsyth County, ss:

I, William S. Mitchell, being first duly sworn, depose and say:

1. I am an attorney licensed to practice law in the State of North Carolina, and a partner in the law firm of Booe, Mitchell, Goodson and Shugart, with offices in the Wachovia Building, Post Office Box 1237, Winston-Salem, North Carolina 27102.

2. From October, 1968 until May, 1969, I represented ———, Jr. (Social Security No. ———), the husband of one of the secretaries in my firm, in an attempt to secure Social Security disability insurance benefits for Mr. Fulk.

3. Although I spent a great deal of time and effort on Mr. ———'s behalf and secured additional documentation from his doctors, I was unable to have the previous unfavorable decision by the Social Security Administration reversed. I found the Social Security Administration to be immovable and adamant about giving Mr. ——— disability benefits. In May of 1969, I advised Mr. ——— to wait the necessary six months and file a new claim.

4. I consider Mr. ———'s case to be a complicated and difficult one. It was in my opinion very unlikely that he would obtain disability benefits.

5. I have been advised that Mr. ———'s present attorney, Archibald H. Scales, III, has been successful in securing for him a retroactive disability determination and past-due benefits in excess of $28,000. I understand that Mr. Scales invested a year of his time in this case before a decision was obtained and has continued to consult with and advise Mr. ——— in the five months that have elapsed since.

6. In my opinion, based upon my knowledge of the complexity of this case, the time required in such cases and the exceptional results achieved, Mr. Scales should receive the maximum fee allowed by law. Based upon the foregoing considerations and with a view to providing substantial economic security for Mr. ——— and his family, I believe the statutory maximum fee of 25% of the foregoing amount is thoroughly reasonable and appropriate.

7. I did not give Mr. Scales any assistance in this case and I have no claim for any part of his fee.

Further affiant saith naught.

WILLIAM S. MITCHELLL.

Sworn to and subscribed before me this 10th day of June, 1974.

KATHY K. AGEE,
Notary Public.

My Commission Expires: May 2, 1978.

AYNES, BURGER, GENINS & KIRBY,
ATTORNEYS AND COUNSELORS AT LAW.
Atlanta, Ga., February 4, 1975.

AMERICAN BAR NEWS,
AMERICAN BAR ASSOCIATION,
Chicago, Ill.

GENTLEMEN: You will recall the article in the January 1975 ABA American Bar News entitled "Are Federal Limits on Lawyers' Fees Cutting Off Some from Counsel?".

You indicated that the Special Committee on Federal Limitations on Attorneys' Fees is eager to document an answer to this question. Gentlemen, I am the answer to the Special Committee's need and eagerness.

For twelve to fourteen years, I have handled Social Security disability cases on a stupendous volume basis. I have enough closed files for review to keep the Committee busy for at least a year, provided there are at least thirty members of the Committee.

For twelve to fourteen years, I have written to Congressmen and any and everybody else whom I thought might possibly change the law. Finally, in sheer desperation, I ran for the U.S. Senate in 1972. With no money, no campaign manager, no charisma and nobody who really understood the problem, I finished something like seventh or eighth in a field of eleven to thirteen. Fairly simply, nobody understood the problem.

It is an absolute national disgrace that the attorney fee limitation for representation of a Veteran in any and all matters, whether the attorney spends ten minutes or ten years working on the Veteran's case, is limited to $10! After handling two of these cases, I was forced to swear off of them for the simple reason that I have a wife and four children. Several months ago, a prospective client contacted me regarding a Veteran's disability case. I patiently explained to him that I could not handle his case because of the $10 fee limitation. He eagerly wrote to his Congressman who returned to him a glowing letter telling him that he realized this was a gross injustice, and that he was happy to inform my client that there was a bill pending at this very moment which would raise the maximum fee limitation to $100! Smile.

After handling Social Security disability cases for twelve to fourteen years, and realizing that I was spending at least one-half of my time solely on Social Security disability cases, I asked my accountant to record my gross income from 1973 Social Security disability cases. His response was that I had earned $14,000.00 gross out of a total of $70,000.00 gross for the year. Realizing that I had earned and been awarded a great number of attorney fees which I had not received (the Government takes somewhere between three and eighteen months

to forward the fee to the attorney after it has been awarded) I decided to handle these cases one more year in the hopes that I could present myself with a better balance sheet at the end of 1974. Happily, with the advent of a new Chief Judge who understood the lawyer's problem, the transfer of two Judges who did not understand the lawyer's problems, and the death of a third Judge who did not understand the lawyer's problems, I am happy to report that I grossed $44,500.00 in fees on Social Security disability cases in 1974. This probably represents approximately one-half of my gross income for the year.

While I personally am at the moment doing well enough in Social Security disability cases to not complain, the situation has been so terrible for so long that 99 lawyers out of a 100 would not touch a Social Security disability case on a bet, for the sole thing they can recall is that the fees are limited and miserly. There can be no doubt that millions of deserving claimants who desperately need representation go unrepresented. I sincerely submit to you that I speak with authority, for I have won more than $75,000,000.00 worth of benefits for my clients in this area.

The American Bar Association does not have to go any further than me to make a 100% winning case for remedial legislation and/or Amicus Curiae briefs. I do not mean to be self-congratulatory; I am merely trying to impress you with the severity of the problem.

I would welcome your Committee making a study of my files. I would also welcome an invitation to speak, at my own expense, whenever and wherever the Committee might think I could do some good.

To end this much-too-long letter on a humorous note, Legal Aid refers Social Security disability claimants to me. I win their cases, have to sue them for my fee, and guess who defends them? You guessed it—Legal Aid. How's that for a round robin? Smile.

With kindest and best regards.

Yours very truly,

AYNES, BURGER, GENINS & KIRBY,
By WILLIAM I. AYNES.

LAFAYETTE, LA., *February 17, 1975.*

SPECIAL COMMITTEE OF FEDERAL LIMITATIONS ON ATTORNEYS' FEES,
American Bar Center, American Bar Association, Chicago, Ill.

GENTLEMEN: The January, 1975 edition of the American Bar News solicits information on what effect federal limitations on attorneys' fees have on the availability of legal representation.

I have been in the practice of law for nine years in Lafayette, Louisiana, a town of approximately 70,000. I was with a seven man firm for seven years and I have been practicing on my own for the past two years.

Generally, I avoid social security claims when they are not coupled with a personal injury or workmen's compensation costs. The problems encountered in the preparation and proof of such cases, when measured against a fee that is both contingent and low, make it economically unwise to handle them. I keep no file of the people who come to see me about such cases alone, hence am unable to give specifics. However, I would assume that this happens at least twice a year.

Recently, I handled a social security claim for a client who is a very good friend whom I was representing in a large personal injury case. I spent over 20 working hours on it as of now, have been out of my office for almost two days, and have been away from home over night and did not arrive at home until well after dark the next. This amounts to less than $40 per working hour and a lot less when you consider the overall loss of time. I can assure you that my client needed a lawyer to handle his claim and, further, that I would not have undertaken or pursued the case to a successful conclusion if it had not been for the considerations mentioned above.

The fee in a social security case is based upon the amount of the award for past due benefits, yet the client may draw considerable benefits over a span of years, which benefits are periodically increased by Congress. The lawyer, whose efforts got the benefits started, has no call on the subsequent payments. Therefore, if the lawyer gets on the case and pushes it to a rapid conclusion, which is obviously in the best interest of his client, then his fee is smaller than if he let the matter ride to handle more lucrative business. The latter is unconscionable and I have never heard of an attorney doing it, but it is certainly food for thought.

Another problem area is the situation where the social security administration fails to withhold the fee from the initial payment to the client and then neither the client nor the administration will furnish the information necessary to complete the petition for fee approval. I have been in the middle of this exact situation for eight months. I have requested this information from the client, the local office, the principal office, and the Commissioner of Social Security, all to no avail, and have now enlisted the aid of my congressman. The local office knew of my representation well prior to making the award to the client and, apparently, just made an error. However, I have now spent hours trying to get the information. And, even after I have it, I must complete the petition, submit it, have it approved, and then wait to see if the administration is going to see that it is paid or if I will have to proceed directly against the client. This certainly makes the handling of such claims even less desirable, a fact which I pointed out to my congressman.

I have never handled a Veterans' Administration claim.

I have heard that the government intends to put a limit of $100 or $200 on legal fees in closing costs on property transactions for title researches, etc. Such business accounts for a relatively small percentage of my practice and I can dispense with it. However, local title attorneys have told me that either figure is ridiculous in many cases and that they simply will not handle such matters.

I trust that the above information is of assistance to the Committee.

Very truly yours,

W. PAUL HAWLEY.

BLUEFIELD, W. VA., *February 4, 1975.*

SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEY'S FEES,
American Bar Center, American Bar Association,
Chicago, Ill.

GENTLEMEN: This responds to a request contained in an article entitled "Are Federal limits on lawyer's fees cutting off some from counsel?" appearing in Volume 20, No. 1 of the American Bar News January 19, 1975.

In that article you asked for instances in which a litigant has been deprived of counsel. May I give you several from my own practice.

Starting with the premise that there is a common law right in members of the public to obtain effective counsel of their own choice, let me advise that formerly we accepted a large number of Social Security Disability claims making advance fee arrangements which were partially on a prepaid fee basis and partially on a contingent basis. The total attorney's fee charged never exceeded the arbitrary maximum of 25% of the back award imposed by the Federal statute and 80 to 90 percent of the time was somewhere between 15 and 20% of such award. Such fee arrangement permitted us to devote the necessary time and go to the necessary expenses in what we considered the proper preparation of a case.

We have followed this practice for over 15 years in handling upward of 150 to 200 such claims under the Social Security Disability Benefits Statute and the Federal Coal Mine Health and Safety Act of 1969 as amended. Recently we have had two such fee arrangements disapproved and have been instructed to enter into no more of such.

As a result of this we have determined that only in rare and exceptional cases involving a long time client or for some other very compelling reason will we accept such claims and in fact have turned away prospective clients who have sought us out for the purpose of making such claim.

This has not worked any hardship on us because we have more to do than there is time for; but it has however deprived a prospective litigant of his freedom of choice in the selection of counsel.

Just as the power to tax is the power to destroy; the power to control the payment for the services of your legal adversary's counsel is an effective way to throttle litigation against oneself. This in effect is what can be done under the existing Federal Statutes on this subject.

With respect to practice before the Veterans Administration just recently for the very same reason we had to turn away a veteran who produced compelling documentary evidence that his claim had been given the run around by the Veterans Administration.

The annoyance and consumption of time on the part of the lawyers in preparing and presenting to his late adversary for approval a fee bill long ago agreed to between him and his client is bad enough but that is a matter that has an effect on the lawyer only; however, the statutes involved usually make it a misde-

meanor punishable by substantial fine to violate them and thus we come to the point where a litigant becomes deprived of effective counsel of his own choice because of the natural unwillingness of counsel to throw himself on the mercy of his late adversary, no matter how impersonal the adversary proceedings may have been, for approval of payment for his services and is thoroughly understandable reluctance to subject himself to criminal prosecution. It is to be hoped that this letter will serve you some useful purpose.

Very truly yours,

EDMUND D. WELLS, Jr.

ARLINGTON, VA., *January 31, 1975.*

CHAIRMAN, SPECIAL COMMITTEE ON FEDERAL LIMITATION ON ATTORNEY FEES,
American Bar Association, Chicago, Ill.

I oppose the filing of attorney fees and discipline of lawyers by any non-lawyer Civil Service Employee. I was in private practice 15 years, an administrative law judge with the Social Security Administration for 13 years. During that time SSA, like UA, was trying to keep lawyers out of the cases. Later when Congress amended the law to require adequate fees, SSA went too far the other way because fees were being determined by lay clerks.

BEN D. WORCESTER,
Administrative Law Judge.

WHITE, SUTHERLAND, PARKS & ALLEN,
ATTORNEYS AND COUNSELORS AT LAW,
Portland, Oreg.

LOUIS G. DAVIDSON, Esq.,
Chairman, ABA Special Committee on Federal Limitations on Attorney Fees, Chicago, Ill.

DEAR MR. DAVIDSON: Thank you for your letter of March 10, 1976. You have my permission to use my earlier letter in any way you deem appropriate, including releasing it to a Congressional committee or committees.

Since the earlier letter, I have from time to time inquired of members of our bar as to their views on the subject. The consensus I find is that almost no experienced counsel will take on a Social Security or Veteran's Administration matter except on an anticipation of pro bono work. Most do not take the time to submit fee requests. Youngsters new at the bar are willing to do so on the same basis as they take on criminal appointments. They don't have much to do, and they have very little overhead.

I think that Federal Longshoremen's and Harborworkers' practice is an entirely different matter. However, this is carried out by a very specialized bar, geared with automatic equipment to turn out such applications by the bushel, if need be.

Very Truly Yours,

MALCOLM J. MONTAGUE.

WILLIAMS, MONTAGUE, STARK, HIEFIELD & NORVILLE, P.C.,
ATTORNEYS AND COUNSELORS AT LAW,
Portland, Oreg., January 30, 1975.

Re ABA News Inquiry—January, 1975.
SPECIAL COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEY FEES,
American Bar Center, Chicago, Ill.

GENTLEMEN: In an article in the January, 1975, ABA News, a request for information on the effect of federal limitations on Attorney fees, on the availability of legal representation, was made. I can tell you my story.

This incident is some 15 years past, and I do not even remember the client's name. However, after I had returned from the military service to commence the practice of law, I was sought out by a lady whose claim for Social Security disability had been denied. After talking to her, I discussed the matter with her doctors, and obtained from them the medical reports they had sent to the Social Security Department, and supplemental medical reports. The matter was rather straightforward, and I prepared a petition on appeal for her, and it was verified and filed. Even as a young lawyer, I don't believe I had more than 8 or 10 hours in the file.

The petition was allowed, in full. My client was awarded an amount which was well over a thousand dollars (which was pretty good money at that time). It was only then that I realized that I had to petition for approval of an attorney fee. I did so, a little puzzled, and fearing to appear overreaching I requested only a modest amount. I was allowed $125, which in those days paid for one secretary and one light globe for one week. The point is that I spent more time on the petition for fees than I did on the case itself, or nearly so. I remember my client with some good feelings, since she was not only willing but anxious to pay a considerably larger fee, but it did not seem worth going to the penitentiary for.

Going to the penitentiary had a certain special piquant quality of thought at that time. I had also applied for admission to the federal court, at the half term (or as soon as I got out of the military service), which I did not realize would subject myself and the other three applicants to the entire criminal defense load of the local district court for at least six months. I tried a lot of cases, all of them free, and I felt good about it. I also tried a lot of cases on assignment from the state circuit court (over mild objection which got nowhere) and got $25 for a plea, and an additional $25 if the case was tried, if memory serves me right. I felt good about that, too, I say a "lot." I had between 25 and 30 of those matters, in six-month period. Memory serves me pretty well, there.

One might ask why I felt so degraded and put down by the Social Security regulation, and felt just right about my criminal defenses, even though they were really big losers from an economic standpoint.

I don't know the answer. I think it has something to do with self respect. I will tell you this, I have never handled another Social Security case, and I don't intend to do so unless I do it free. Moreover, I have no real objection to doing it free. But I won't petition the defendant, for an allowance of my fees. Today I am supposed to be a big shot lawyer, with an "A" rating, and a corporate, securities and general business practice, and I have clients who think I do a pretty good job. I still do a far too vast amount of so-called charity work, and am on the boards of numerous charitable and educational organizations, and at the same time recently concluded, successfully, an effort to have the first scenic-research area legislation ever passed by Congress, respecting a unique area of about 9,000 acres on the Oregon coast. The amount of time involved in this was prodigious. I still do take criminal cases, and would take a criminal appointment by a court, for free, at any time a court thought I could ably serve. I have also taken special appointments by probate courts of guardianships and other estates which have had serious problems, generally with the expectation that it would be essentially for nothing. I am not trying to blow my own horn, but I want you to get the picture.

But I still will never take a Social Security appeal, unless I take it for free. I felt morally wrong about even submitting my first and only petition for approval of fees, and I will never do it again. Just to fill in the record, I have been approached a number of times in the intervening years to handle Social Security and other cases and appeals, and I have always sent the client to young lawyers who I thought might need the work, and who I was sure would do a competent job. I don't know how they felt about it, but I was afraid that they might be taking the case just because I asked them to. I certainly never got any special thanks for those referrals.

Thank you for letting me get this off my chest. I have always felt rather badly about it—almost cheap. On the other hand I believed, and now believe, that I was right. Ethics and integrity are found in the soul of a lawyer, and not in the books. I can tell you that in this, the largest community in our state, those lawyers who have mentioned it in my hearing feel essentially the same, although the degree or motivation may be somewhat different from person to person. They dislike this kind of thing immensely, and basically it is not a financial problem.

I hope this has been of assistance.

Very truly yours,

WILLIAMS, MONTAGUE, STARK,
HIEFIELD & NORVILLE, P.C.
MALCOLM J. MONTAGUE.

ROAD SERVICE AND LODGING INSTITUTE,
Washington, D.C., April 12, 1976.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Foodservice and Lodging Institute urges the Subcommittee on Courts, Civil Liberties and the Administration of Justice to take favorable action on Bill H.R. 9093 by Rep. Crane (Ill.), the proposed "Equal Access to Courts" Act.

The Foodservice and Lodging Institute is a Washington, D.C. based trade industry group of 25 major multi-unit, multi-state food service restaurant and lodging companies throughout the United States. Collectively, our members operate more than 40,000 individual establishments and employ in excess of one million persons.

Our interest in this legislation can be traced to specific instances of the Federal Government's use of the courts against members of our industry as a tool to achieve submission. It is certain that practically every industry has its horror story. We have ours. The price of justice under the law is already too high. However, when an industry is forced to defend the same issue with practically the same set of facts on numerous occasions, the price of justice become unconscionable.

For the past nine years, the foodservice industry has been forced to endure repeated challenges of the same nature by the U.S. Department of Labor. Following a course which can only be characterized as vengeful or spiteful, the Labor Department has steadfastly refused to respect decisions of the U.S. District Courts and U.S. Courts of Appeals as authoritative, preferring instead to continue to shop around for additional cases involving the same circumstances in a different circuit.

The issue in question involves the Labor Department's interpretation of the Fair Labor Standards Act that the sale of meals by food service management companies in schools, colleges, hospitals, office buildings, industrial plants and government installations are not retail sales but rather sales for resale. This may seem like a rather innocuous application but I assure you it is not.

It is the contention of the Labor Department that employees in such establishments were brought within the purview of the Fair Labor Standards Act by virtue of the 1961 amendments to the Act. The industry has countered this interpretation with the assertion that employees in these establishments were performing an essentially retail function and were thus exempt from both the minimum wage and overtime provisions of the Act until 1967 when the entire food and lodging industry became subject to the minimum wage provisions and in 1974 when the industry became subject to the payment of overtime.

The dispute, more commonly known as the "Campus Chefs" issue, got its first test in court in 1967 when the Labor Department filed suit against Campus Chefs, Inc. challenging its operations at Shorter College in Rome, Ga. Wirtz v. Campus Chef's, Inc.

A second action, Wirtz v. Pickett Foods, Inc. was commenced in 1968 encompassing the same set of facts.

While the industry's position prevailed in both cases, the Labor Department refused to appeal and instead announced that it would acknowledge the findings of these courts only in the jurisdictions of these courts.

Since the Campus Chefs and Pickett Foods decisions, the Labor Department has brought suit on essentially the same issues in five other Federal District Courts, losing them all. It has appealed on only two of these suits and has been defeated in both.

Despite the nine separate instances in which the food service industry's position has prevailed, the Labor Department still adheres to its narrow interpretations of the law outside the jurisdictions of those courts which have ruled against them.

However costly litigation may be, the large companies engaged in foodservice management are committed to total opposition of the Labor Department's interpretation. But what of the smaller companies? These smaller companies have a choice of accepting this arbitrary interpretation which no court has ever upheld or they can suffer the pains of financially destructive litigation in which even if they prevail, they lose in dollars.

Bill H.R. 10894 may not stop the filing of repetitive litigation we have just described but it will certainly make the Labor Department and other administrative and regulatory agencies think twice if they are forced to pay for their own mistakes.

We support Bill H.R. 10894 and hope that the Subcommittee will report the measure favorably and respectfully request that this letter be made part of the hearing record.

Sincerely,

WILLIAM G. GIERY,
Executive Secretary.

HYDE TOOLS,
Southbridge, Mass., July 14, 1976.

Re H.R. 4675.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR MR. KASTENMEIER: An outline of the above Bill has been received and an explanation of what the Bill intends to do. After showing this to several of my colleagues, the unanimous comment was, "Long overdue." Everyone who has direct contact with the government knows that the bureaucrats are really taking advantage of legislation and putting manufacturers and people in real trouble for which the laws were not intended. We greatly appreciate this legislation.

Sincerely yours,

HYDE MANUFACTURING CO.,
R. U. CLEMENCE,
President.

JAYBEE MANUFACTURING CORP.,
Los Angeles, Calif., July 15, 1976.

Hon. ROBERT W. KASTENMEIER,
Chaidman, Subcommittee on Courts, Civil Liberties, and Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR MR. KASTENMEIER: I believe that Bill H.R. 4675 that has been introduced by Congressman P. M. Crane, is now in your committee, and is a good and worthy legislation and deserves to be passed.

If the government does lose in a civil suit brought against any citizen, then that citizen should be re-imbursed the unjust cost of his defense. Furthermore, a careful watch should be made on the number of unsuccessful suits brought about by any government department or employee and action should be taken to reprimand over-zealous or harassing tactics. H.R. 4675 should encourage citizens to challenge federal civil suits and exercise their rights to defend themselves in court.

As I understand the Bill, as presently drafted, H.R. 4675 does not cover IRS "tax liability" cases where the amount of tax owed is in question. I believe it should.

What is in the Bill to protect the litigation costs of a defendant in the case of a split decision?

The award of compensation should come out of the budget of the specific agency filing the suit, which would help control the over-zealous agencies mentioned in my paragraph two (2) above.

Finally, it would be meaningful that compensatory awards be made within twelve months of date that suit is settled to prevent undue financial hardship.

Congressman Crane's Bill H.R. 4675 is a good Bill and I sincerely hope that your committee will amend as I have suggested and work for its enactment into law.

Sincerely yours,

FRANK A. HOLMES,
Vice President of Marketing.

McDONOUGH CO.,
Parkersburg, W. Va., July 20, 1976.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR SIR: I am writing in support of H.R. 4675, "a bill to provide that in civil actions where the United States is a plaintiff, a prevailing defendant may recover a reasonable attorney's fee and other reasonable litigation cost."

The defendant in a civil suit brought by the United States government is in an unequal position in that the litigation costs borne by the United States are in fact partly the defendant's money. In addition, an agency of the United States government is encouraged to bring many unnecessary suits and this bill would bring reason to the selection of cases to be brought before the courts.

We would, however, like to see the inclusion of Internal Revenue Service "tax liability" cases.

Very truly yours,

JAMES T. WAKLEY,
Executive Vice President.

WINNETKA, ILL., *Aug. 24, 1976.*

Hon. PETER W. RODINO,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. RODINO: I write to solicit your support of the Phil Crane bill, H.R. 4675, which as I understand it will take over from the private citizen the main legal expense involved in lawsuits between American citizens and their own Government—which cases are eventually decided against the Government. Legal costs, as we all know, have skyrocketed, and if the only way individuals can oppose unfounded charges by Government bureaucrats, is to sue in a court of law, and at his own expense, no one shortly will be able to afford such luxury. The above bill ought to take care of the situation in handling the expenses of charges made without justification.

Sincerely,

J. H. FALL III.

WINNETKA, ILL., *August 24, 1976.*

DEAR CONGRESSMAN CRANE: What a terrific bill you have introduced—compensating citizens who win suits against them by the Government! H.B. 4675 should free many fine businessmen who have been harassed by EPA, IRS, OSHA and other power mad agencies—permitting them to fight rather than cave in.

Thank you!

Sincerely,

ALICE F. FALL.

PUBLIC CITIZEN,
WASHINGTON, D.C., *April 2, 1976.*

Re Financing public participation in government proceedings.

Hon. ROBERT KASTENMEIER,
U.S. House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: We are writing to emphasize and explain the need for legislation on what we believe could be one of the most important subjects considered in this Congress. We are referring to legislation which would make real progress toward reforming regulatory agencies and encouraging public participation in government proceedings by granting attorneys' and expert witness' fees to encourage citizen participation in administrative proceedings and citizens' actions for judicial review of illegal agency acts.

Challenging the actions of administrative agencies through civil suits has long been one of the few opportunities citizens have of guaranteeing agency programs which coincide with Congressional policy. And citizens' participation in agency proceedings is a recognized necessity to counter what the 1960 Landis *Report on Regulatory Agencies to the President-Elect* termed "the daily machine-gun-like impact on both agency and its staff of industry representation that makes

for industry orientation on the part of many honest and capable agency members as well as agency staffs."

Monitoring the vast array of federal agencies to ensure the interests of the general public are considered, however, cannot be adequately accomplished until citizens can afford the high cost of challenging harmful administrative actions in court or participating in administrative proceedings. Legislation is needed which would help alleviate these economic barriers by granting experts and attorneys' fees to public interest representatives participating in agency decisionmaking and successfully challenging administrative actions or serving the public interest through civil suits.

The need for attorneys' and experts' fees for public participation in government proceedings.

The Administrative Procedure Act permits "interested persons" to participate in all federal adjudicatory, rulemaking or licensing proceedings (1) yet in the vast majority of proceedings the average citizen or the public interest is rarely represented. As former Commissioner Nicholas Johnson has observed from his own experience at the FCC, citizen participation in that agency's decisionmaking process "is virtually nonexistent," wth the "necessary but unhappy result . . . that the FCC is a captive of the very industry it is purportedly attempting to regulate." (2) Ths situation is practically the same at the Federal Power Commission, where Chairman John N. Nassikas admitted in an October 17, 1975, letter to Representative Toby Moffett that, "Intervention by . . . [public interest or consumer groups] . . . has been rare in typical rate cases in which municipals and gas distributors are often the predominant intervenors . . ."(3) As Mintz and Cohen noted in *America, Inc.* . . . [R]egulatory operations of all kinds have suffered from the lack of public participation. The Federal Trade Commission provided a memorable example in 1963 when it proposed to make the Flammable Fabrics Act applicable to blankets used principally to wrap or clothe infants. "A public hearing was held but there was no government agency or individual who could appear to represent and defend the public interest," Commissioner Philip Elman has said "Incredibly, despite evidence that the fabric used in baby blankets was dangerously flammable and . . . that . . . blankets are worn by infants as clothing . . ., the Commission ruled that baby blankets were not articles of clothing and thus not protected by the Flammable Fabrics Act." (3, 4).

This lack of participation by the general public in regulatory operations is likely to continue as long as the cost, time and effort required to make a significant contribution continues to be so high while at the same time the government declines to reimburse such expenditures. For example, it was estimated in 1972 that the cost of active participation in rulemaking at the FDA is in the range of $30,000–$40,000, based on Administrative Conference staff interviews with "informed persons, including agency staff members, public interest lawyers, and private practitioners."(5) These costs usually include expenditures for expert witnesses, which have been estimated to cost about $4,000–$5,000 at, for instance, the Interstate Commerce Commission, for every ICC rate case.(6)

At the same time the costs of participation in such proceedings climbed due to inflation, the traditional sources of funding for the few citizens that are capable and available to participate have declined. One major source of funding of the public interest law firms that often represent citizens at nominal cost at such proceedings is private foundations. These foundations will provide only near-term support for activities such as participating in agency proceedings or challenging agency actions in court. As Joseph N. Onek, Director of the Center for Law and Social Policy, has suggested:

I would like to call the Subcommittee's attention to an excellent pamphlet put out by the Ford Foundation entitled, "The Public Interest Law Firm: New Voices and New Constituencies" . . . the pamphlet points out that 'foundations tend to provide "seed money" for projects for a few years at most but they expect the recpients to make it on their own.' The pamphlet then suggests that Ford plans to continue to provide support in public interest law for only about five years.(7)

Private donations, the second major source of funds for public interest organizations, are also insufficient to either provide significant support for those participating in agency proceedings or even to continue to support current projects. (8)

These funds must be used for a host of activities . . . and there is no certainty from year to year as to the level of contributions that will be received. During

periods of economic recession it is especially difficult for small contributors to donate, yet it is precisely during such times that the need for public interest litigation (or other work) may be greatest. Moreover, the volume of donations is largely dependent on provisions in the tax laws concerning charitable contributions and the very existence of organizations which must rely on such donations often seems to hang by a thread on the whims of the IRS.(9)

With the continued high cost and limited source of funds for participation in agency proceedings, it is clear that without government aid the public will continue to be unrepresented during federal agency decisionmaking despite the accepted opinion that public participation is absolutely necessary for a well-balanced agency decisionmaking procedure.(10) As Roger Cramton, a former chairman of the Administrative Conference of the United States and Former Assistant Attorney General, Office of Legal Counsel of the Department of Justice has suggested, "The cardinal fact that underlies the demand for broadened public participation is that governmental agencies rarely respond to interests that are not represented in their proceedings."(11) Yet it is unfortunately the case that most federal agencys' jurisdictions are so broad that they can no longer claim to represent or, most important, advocate the public interest. As Chief Justice of the Supreme Court Warren Burger suggested almost a decade ago in the District Court opinion "*Office of United Church of Christ* v. *FCC*." The [FCC] of course represents and indeed is the prime arbiter of the public interest, but its duties and jurisdiction are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of every one of thousands of licensees . . . The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.(12)

The problems of the FCC in representing the public interest adequately are applicible to most other federal agencies as well, due to their expanding jurisdictions, inability to represent one interest while at the same time being arbiter of the dispute, and other inherent problems which led Mr. Cramton to his conclusion.

Comments as to the necessity and effectiveness of public participation have been made with regard to several different federal agencies. A Report commissioned by the Nuclear Regulatory Commission listed over eight pages of contributions made by intervenors in NRC proceedings,(13) including those toward improved safety affirmed by the Nuclear Safety and Licensing Appellate Board, (14) the former Nuclear Safety and Licensing Appellate chairman, Alan Rosenthal,(15) and the Atomic Licensing Appeals Board,(16) among others. The Consumer Product Safety Commission has awarded its own funds to pay the counsel of indigent respondents(17) and paid the expenses for travel of some witnesses because they were "necessary for a full and complete hearing."(18) Finally, the Federal Trade Commission has already dispensed over $100,000(19) to public interest participants at its rulemaking proceedings under a new law which requires to make a presentation "necessary for a full determination of the rulemaking proceedings taken as a whole."(20)

Much of the same reasoning and analysis which explains why the government should provide reimbursement of attorneys' and expert witness' fees in agency proceedings applies equally to justify such reimbursement of the costs of challenges of agency actions in suits for judicial review. The Administrative Procedure Act permits aggrieved parties to challenge agency actions in court,(21) yet, due to the usual length and expense of such proceedings, few persons bring this type of litigation. Many public interest cases of this variety, such as the suit in *Alyeska Pipeline Service Co. v. Wilderness Society*,(22) where citizens attempted to halt construction of the Alaska pipeline because of federal agency violations of the Mineral Leasing and National Environmental Policy Acts, require a massive expenditure of funds for "extensive factual discovery, expert scientific analysis, and legal research on a broad range of environmental, technological and land use issues."(23) This action alone has been estimated to have cost over $200,000 in legal and expert witness' fees paid by public interest organizations. Of course, the same sources of funding for these types of legal actions—foundations and private donations—which have been discussed with regard to funding of participation in agency proceedings are grossly inadequate.

As with agency proceedings, the contributions to society made by the general public through actions for judicial review are unquestioned. Courts even developed the "private attorney general" rationale to give attorneys' fees awards to litigants who effectuated a strong Congressional policy by protecting the general public through actions for judicial review. (24) Under this theory, an exception to the usual "American rule" of not granting fees to the victor in litigation, the courts approved and encouraged private citizens to question potentially illegal or unconstitutional agency decision-making. As one district court said in such an opinion, *La Raza Unido* v. *Volpe*.(25)

Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants. As the amicus brief points out, only private citizens can be expected to "guard the guardians."

However, these exhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate . . . with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle. (26)

The contributions made toward sound agency decisions through citizen suits for judicial review, acknowledged and encouraged by the courts through their awards of attorneys' fees to private attorneys general, were abruptly halted or at least curtailed by the Supreme Court's May, 1975 *Alyeska* decision. That case held that the federal judiciary had no authority to award attorneys' fees absent specific statutory authority, and was quickly followed by the D.C. Circuit case of *Turner* v. *FCC*, (27) which based its decision on *Alyeska* in holding that the Federal Communications Commission had no authority to order a litigant to bear its adversary's expenses or otherwise to allow counsel fees as costs.

The *Alyeska* case immediately cut off a major source of funding of actions for judicial review, (28) thus putting an increased burden on private donation and foundation resources and highlighting more than ever the need for government awards of fees and expenses to successful public interest actions for judicial review. But the impact of *Alyeska* extended beyond court actions to agency proceedings as well. Before *Alyeska* and *Turner*, many agencies either were or were considering using their own funds to reimburse participants in proceedings before them when such participants were indigent and/or represented the public interest. (29) *Turner*, however, cast serious doubts on the legal authority of some federal agencies to make such awards, even though it did not directly rule on the question:

The reasoning of the Supreme Court in *Alyeska* . . . is fully applicable to litigation before the FCC. Congress has no more extended a "roving commission" to the FCC than it has to the Judiciary "to allow counsel fees as costs or otherwise whenever the [Commission] might deem them warranted." (30)

Although there is disagreement with the *Turner* decision, as the Comptroller General has ruled that the Nuclear Regulatory Commission has authority to award fees to intervenors, still, no court has ruled on the question and the GAO ruling applies only to the NRC. Thus now, based on the broad language of *Turner*, agencies will be fearful of using their appropriated funds to pay counsel fees of participants in their proceedings. Thus Congress must do so by statute.(31)

BENEFITS OF INCREASED PUBLIC PARTICIPATION IN GOVERNMENT PROCEEDINGS

The need for greater public participation in agency proceedings and for government funding of such participation has been amply demonstrated earlier in this statement as well as, . . . "by the voluminous record of the more than twenty-five hearings Congress has held on the subject in the past few years." (32) There is no need here for an extensive review of the benefits of increased public participation in agency proceedings, but we would merely like to summarize them briefly:

Well-Balanced Administrative Decisions. Currently, all different viewpoints are usually not represented at agency proceedings, resulting in decisions that ultimately favor the side able to afford the representation necessary to adequately present their view. This state of affairs has led to the common criticism of agencies that they are "run by the industries they're supposed to be regulating." Agency decisions will not be well-balanced, representing all viewpoints, until some form of reimbursement of currently unrepresented interests, such as S. 2715, is adopted.

Strong Advocacy of Currently Unrepresented Interests. Even though the mandate of most federal agencies is, in general, to protect the "public interest," they are still placed in the position of having to develop rules which incorporate all views the agency has had an opportunity to consider. Since the agency is in the position of having to be "fair" to all parties, it cannot be expected to vigorously advocate one side or the other. Because it cannot vigorously advocate one position, those who cannot afford their own advocate will not be well-represented at the proceedings. Increased public participation at these proceedings will assure vigorous representation of currently unrepresented interests, thus assuring their best possible and fairest case has been presented to the agency.

Greater Public Acceptance Of And Confidence In Administrative Decisions. As Judge Richey and Judge Leventhal suggested at the Hearings on S. 2715, the public, and particularly public interest organizations, are much more likely to accept an agency's decision (and not to "clog the courts" by challenging it in an action for judicial review) when they have had a full opportunity to present their views during the agency proceedings. Public confidence in the agency's decision is also increased. As Professor Ernest Gellhorn explains, "If agency hearings were to become readily available to public participation, confidence in the performance of government institutions and in the fairness of administrative hearings might be measurably enhanced." (33)

Greater Agency Personnel To Be More Vigorous In Their Work. The mere presence of intervenors in a proceeding may tend to make the agency personnel "do their homework," (34) resulting in more careful scrutiny of the issues and more sound agency actions. "The very presence of an intervenor in a proceeding can stiffen the staff's resolve and better enable them to withstand . . . pressure," (35) as well as enable staff members who may disagree with their supervisors to use public interest participants as a vehicle to carry their views through to an appeal process within the agency.

Greater Articulation of Administrative Standards and Reasoning. When proceedings are vigorously contested, the agency must of necessity clearly articulate the standards used and the reasoning behind its decision. (36) As chief Judge Bazelon suggested in *EDF* v. *Ruckleshaus*, "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions . . . When administrators provide a framework for principled decisionmaking, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process . . ." (37) The presence of adversary parties at a proceeding compels officers to justify their decisions in a way not necessary when just the agency and the industry get together and "agree" on a new rule or regulation.

An Important Double-Check On Health and Safety Related Regulations. When significant health and safety matters, such as whether or not to license a nuclear power plant, whether to permit marketing of a potentially unsafe drug, or what safety standards should be met by automobile manufacturers, are considered by an agency, there is no margin for error. The increased safety usually created when an outside party adds its views to the proceedings is well worth the small cost of financing such public participation. Contributions made toward increased public protection by nongovernmental parties in such areas suggest that this "double-check" is a significant benefit of increased public participation in agency proceedings.

And this is just a summary of the most important contributions made by increased public participation. Benefits to the entire agency decisionmaking process also come from suits for judicial review of agency actions. The most significant benefits of such litigation are:

Agency Accountability. Without the possibility of judicial review of agency actions, the agencies would be unaccountable for their actions. Suits for judicial review force federal officials to realize that no action taken can be arbitrary or capricious or be the "final word" on the subject.

Citizen Redress of Grievances Caused By Federal Agencies. When citizens feel the government has acted illegally to their detriment, the suit for judicial review is their major means of challenging such illegalities and forcing redress of their grievance. Whether the suit is to force illegally impounded funds to be spent, challenge an unfavorable location of a dam, object to freight regulations resulting in billions extra spent on freight shipments, or question agency approval of the marketing of an unsafe drug, these grievances can be redressed through suits for judicial review, forcing the agency to retract harmful actions.

Greater Articulation Of Administrative Standards and Reasoning. As mentioned earlier with regard to the benefits of participation in agency proceedings, when agency personnel know their decision might be challenged, they are more apt to clearly explain their standards and reasoning. If citizens have the resources to challenge actions taken with arbitrary standards or lack of clear analysis, agency officials will be more encouraged to justify their opinions.

Check on Government Illegalities. Agencies must not just be made aware that they will have to account for their actions, but when they do act illegally, outside the bounds of their Congressional mandate, the suit for judicial review benefits the entire governmental process by providing a remedy for such illegalities. As in *La Raza Unida* v. *Volpe*, (38) where highway construction was enjoined because various federal regulations for housing displacement and relocation and environmental protection were not complied with, and *Sierra Club* v. *Lynn*, (39) where public interest plaintiffs were instrumental in bringing about compliance with various environmental laws, these illegalities can only be corrected through the courts, since Congress has already acted and the Executive is the one breaking the law. Fee awards will continue the financing the courts were providing before Alyeska to allow these beneficial actions for judicial review to continue.

EXAMPLES OF THE NEED FOR PUBLIC PARTICIPATION IN GOVERNMENT PROCEEDINGS: EXAMPLES OF SUCCESS OF PUBLIC PARTICIPATION IN AGENCY PROCEEDINGS

Federal Energy Administration. "On May 29, 1974, FEA issued a regulation effective immediately . . . and without prior public comment, which permitted refiners of unleaded gasoline, which is in the same octane range as leaded regular gasoline at *premium* grade prices. After Consumers Union and the Public Interest Research Group bitterly protested this action and pointed to several studies which showed that the cost of refining unleaded was approximately the same as the cost of refining leaded *regular*, FEA withdrew its May 29 regulation," (40) thus saving consumers millions of dollars.

Nuclear Regulatory Commission. Intervenors at NRC proceedings have made numerous contributions, including: "improvements in the specificity of the requirements for the evaluation of light-water reactor emergency core cooling systems . . .; new guidelines on off-sight radioactive exposures, to be kept "as low as practicable" or approximately 1 percent or original limits . . .; reanalysis of steam and high pressure line routing to reduce dangers of pipe rupture . . . damaging safety systems; . . . uncovering weaknesses in plant security requirements . . .; reexamination of welding defects in at least one facility . . .; greater applicant use of closed cycle cooling towers and ponds to lessen heated discharges into rivers and lakes . . .; more careful review of effects of release of radioactive materials on marine life . . .; public assessment of the environmental impact of any decision to proceed with plutonium recycling," (41) and many more.

Civil Aeronautics Board. "[A]irlines maintain tariff regulations which give them absolute liberty to refuse transportation on the ground of body odor, bad breath, extreme ugliness . . ., or disability . . . unless the person is accompanied by an 'attendant.' . . . This rule . . . creates continuing possibilities for abuse and arbitrary rejections of . . . disabled or crippled persons . . . The rule . . . has made airline travel a virtual nightmare for thousands of disabled veterans and others who only need assistance in boarding and deboarding . . . except for the few who can afford to take along an attendant . . . Aviation Consumer Action Project has filed a rulemaking petition with the CAB to change this . . . As a result, the CAB has initiated an investigation to determine what problems exist in this area, and what might be done about them . . ." (42)

Federal Power Commission. The experience of an intervenor in the Davis Power Project case in West Virginia emphasizes the problems that public interest groups face and shows the impact they can have. Ray Ratliff, an attorney working for the West Virginia Highlands Conservency spent most of his time (for a substantial period during 1973 and 1974) filing comments on the draft and final environmental impact statements on the power plant proposed by the Monongahela Power Co. Although he charged his client only $5 to $8 per hour, instead of his usual fees, the Conservancy had no more money at the time the FPC's plant siting hearing began. Had it not been for the Sierra Club, which completed the hearings, the public's case would not have been presented. It is now well over a year after the conclusion of the hearings, and the FPC decision

has not yet been announced, I it it is expected that the intervention will cause the project either to be moved to a better location or else scaled down to perhaps one-tenth its original size.

Nuclear Regulatory Commission. "The Atomic Safety and Licensing Board (ASLB) of the NRC . . . fined Virginia Electric Power Co. (Vepco) $60,000 after finding company officials made 12 false statements about the safety of the North Anna 1-2-3-4 nuclear power plant site . . . Vepco repeatedly told the licensing board . . . that no geological fault existed on the site, though utility consultant and the intervenor—the North Anna Environmental Coalition—disputed the claim . . . The . . . Coalition . . , [challenged] Vepco's material false statements and demonstrated the necessity of having well-informed intervenors represented throughout the . . . process." (43)

These examples prove that citizens can, when financially able, make significant contributions to agency proceedings in a variety of areas. However, there are far more situations where citizens could have made a contribution, but due to the enormous cost if such efforts were unable to.

EXAMPLES OF POTENTIAL SUCCESSES OF PUBLIC PARTICIPATION IN AGENCY PROCEEDINGS THAT WENT UNREALIZED DUE TO A LACK OF PROPER FUNDING

Food and Drug Administration. FDA approved the use of DES as a "morning after" birth control pill, despite evidence linking DES to vaginal cancer in offspring of such women, when citizen participation in the proceeding to a greater extent might have convinced FDA it was following a harmful course of action. The FDA is currently considering the possibility of requiring nutritional information be given in advertisements for foods, and Consumers Union would like to participate in the proceedings and has applied for expert witness fees and attorneys' fees without which they could not afford to participate. Without such reimbursement, their own technical expertise in the area will be unavailable to FDA. (44) The Public Citizen Health Research Group has for a long time researched the problem of marketing standards for hearing aids, standards which they feel are necessary to stop fraud of older people buying the aids. Though they have studied the issue for some time and wanted to prepare and present evidence to the FDA when FDA held hearings on the issue, the HRG simply could not afford the additional staff attorney and expert witness time necessary to contribute to the FDA proceedings. The same funding problem stymied HRG's efforts to participate in FDA rulemaking on its policy regarding generic v. brand name drugs. HRG claimed that by buying generic drugs, the government could have thousands of dollars over buying the same drugs with brand names. FDA wanted to require generic manufacturers to perform extensive and costly tests to prove the generic drugs had the same qualities as brand name ones. HRG was unable to testify on the issue because it couldn't afford to prepare its evidence. (45)

Interstate Commerce Commission. In *Ex Parte 297*, a proceeding before the ICC, the agency was investigating Rate Bureaus, which are essentially legalized price fixing cartels, with a view towards eliminating their exemption from antitrust liability. A public interest organization filed on appearance and intended to participate in the proceedings to argue the consumer viewpoint. However, since just cross service of documents on the hundred of businesses involved will cost close to $100 each time it's done plus additional sums when pleadings are filed, the cost prohibits their making further contributions to the proceedings. (46)

National Highway Traffic Safety Administration of the Department of Transportation. NHTSA in 1968 held meetings with General Motors to investigate alleged defects in certain ¾ ton, 1960–65 model trucks with wheels which unexpectedly exploded while in use. GM and the agency agreed that the only wheels which were defective were those on trucks with camper bodies (50,000 trucks), not the entire 200,000 in question. Two months later, as a result of a law suit in which the court reversed the agency's deal with GM and required the investigation to be reopened. All 200,000 trucks were found to be defective, yet notice to owners didn't go out till 1974 when the court battles were finally resolved. The initial failure to recall the entire 200,000 trucks or to even notify the owners may have cost lives and property loss. Citizen participation in the early stages of the proceedings might have prevented the harmful and inappropriate accommodation between the agency and GM.

Department of Health, Education and Welfare. It has been estimated that unnecessary hospitalizations cost about $10 billion every year, and that unnecessary surgeries cost $4 billion per year. (47) HEW has the power to reduce substantially some of this waste, yet it has not taken sufficient action. For example, Medicare and Medicaid payments could be made contingent upon hospitals'

use of preadmission certification to verify the necessity of every hospitalization, or second opinions to confirm the necessity of every elective surgery. Citizen participation in HEW proceedings could prod HEW into action in these areas, helping to lower everyone's medical care costs.

Federal Power Commission. VEPCO has applied for a license from the FPC to build one of the largest pumped storage hydroelectric facilities in the country. The proposal raises many controversial issues, including economic need for the plant, location of transmission line routings, social and ecological impact, and other potential alternatives. Several consumer and environmental groups consider these issues extremely significant but many including major national organizations, have been forced not to intervene because of the tremendous cost of intervening in such an FPC proceeding. (48)

Nuclear Regulatory Commission. Consolidated Intervenors in California intervened in the case involving nuclear reactors in San Onofre, Ca. After an initial hearing, the issue of the adequacy of their opportunity to present information was taken to an appellate panel, which ruled in favor of the intervenors. The hearing was reopened so CI could present its case on issues of whether the applicant is technically qualified to run the plant, whether the plant was safe from sabotage, and other issues. Despite the existence of issues which the appellate board considered to be sufficient for an additional hearing, they are unlikely to be presented since the group has insufficient funds to continue. In another case involving the Coalition for Safe Electric Power of Cleveland which participated in hearings on nuclear reactors in Ohio, the group has been unable to pursue its contentions due to a lack of funds. (49)

Federal Energy Administration. On January 15, 1974, and again on March 1, 1974, the FEA granted increases totalling 3¢/gallon in the permissible profit margin limitations alolwed gasoline retailers. These increases were granted to cover fixed costs during the period of decreased gasoline sales caused by government allocation during the oil embargo. When gasoline sales returned to pre-embargo levels, FEA continued its policy of expanded profit margins. In response to a consumer petition, FEA finally reviewed the profit margins on April 24, 1975, over one year after the increase was no longer warranted. Provision for attorneys' or expert witness' fees for petitioning FEA and participating in their proceedings could have encouraged this citizen action a year earlier, saving consumers millions of dollars.

Bureau of Alcohol, Tobacco and Firearms of the Treasury Department. A citizen group in Washington, D.C., was the only advocate for consumers against over 100 industry representatives opposed to informational labeling of liquor. The Treasury Department decided to drop the proposal since they claimed there was "insufficient consumer interest." (50)

Interstate Commerce Commission. ICC regulations which require trucks to return empty from delivery, to make mandatory often out-of-the-way stops, and which allow companies to cooperate in rate-setting have been estimated to cost consumers several billion dollars annually. The trucking industry has little incentive to argue with the ICC because it passes these costs on to consumers who cannot afford to participate in the ICC rate-setting activities.

The examples listed thus far show that when citizens do participate in agency proceedings they can make significant contributions, but in all too many cases their potential contributions are lost due to their inability to pay the high costs of attorneys' and expert witness' fees necessary for such participation. This same situation exists with regard to actions for judicial review of agency actions. There are examples where citizens' actions for judicial review have been successful, and there are examples of potentially successful actions not brought due to lack of funding.

EXAMPLES OF SUCCESSES OF CITIZENS' SUITS FOR JUDICIAL REVIEW OF AGENCY ACTIONS

Department of Agriculture. In 1937, the Department issued a rule that vine-ripened tomatoes must be larger than those which are picked prematurely and colored artificially with ethylene gas. The effect was to give premature tomatoes a competitive advantage. Although the gas-ripened tomatoes are inferior in taste, texture and vitamin content, the USDA kept the regulation on the books long after the Depression-based rationale for the rule had become obsolete. Within the past year, consumer groups won a lawsuit to overturn the regulation.

Department of Transportation. Citizens filed suit to have highway construction enjoined because various federal regulations for housing displacement and

relocation and environmental protection were not complied with. The court, in the decision of *La Raza*, mentioned earlier, granted the injunction.

Federal Power Commission. "Consumers Union in 1972 challenged the first implementation of the FPC's "optional procedure" for pricing natural gas sold in interstate commerce in a case in which the FPC was being asked for a 73 percent increase over the area rate established just the year before. After very lengthy and expensive hearings at the FPC itself . . . during which CU had to confine its activities to cross-examination of industry witnesses because it could not possibly afford to put on expert witnesses of its own, the FPC issues its . . . opinion granting the increase on grounds that appeared . . . illegal under the Natural Gas Act." CU then sued the FPC for judicial review of the action, and more than a year later, the Court of Appeals held in CU's favor and remanded to the FPC. (51)

Federal Energy Administration. Although the Administrative Procedure Act requires advance notice and opportunity to comment before almost any agency regulation can be issued with a few narrow exceptions, and that the final regulation be published 30 days prior to its effective date unless good cause is found, FEA routinely ignores these requirements. Most courts have excused FEA's noncompliance because FEA was dealing with an emergency situation. However, in the case of its original unleaded gasoline price regulation (mentioned earlier) FEA ignored these procedures despite the fact it had 17 months' notice about regulating the price of unleaded gasoline. A consumer's group successfully sued FEA to have this regulation overturned to provide opportunity to solicit public comment. (52) In another example in which FEA was involved, Congress required that FEA specify the price for almost all crude oil and passed legislation (the Emergency Petroleum Allocation Act of 1973) with detailed procedures which FEA must follow to assure Congressional surveillance of any exemption to the FEA price. "Yet FEA has doggedly refused to impose any controls on new and released crude . . . with the result that this crude is sold at prices bearing no relationship to cost but that established by OPEC. A panel of the Temporary Emergency Court of Appeals . . . upheld (their) contention that FEA had violated its legal duty . . ." (53)

EXAMPLES OF POTENTIAL SUCCESSES OF CITIZENS' SUITS FOR JUDICIAL REVIEW OF AGENCY ACTIONS THAT WENT UNREALIZED DUE TO A LACK OF PROPER FUNDING

Civil Aeronautics Board. In its role of controlling the entry of airlines into the market, the CAB has not approved a new trunk carrier since 1938. In September, 1974 CAB rejected an application by Laker Airways, a privately-owned British airline, to fly regularly-scheduled New York-to-London flights for $125 each way—a little more than ½ the "economy" fare now charged by Pan-Am, TWA, and other members of the IATA, the international airline price-fixing cartel. Properly-financed citizens might have sought judicial review of the application proceeding arguing the citizens' interest in competition.

Atomic Energy Commission. Testimony on January 30th, 1976, before this Subcommittee was given by an environmental action group from western Michigan which had several successful in-court and agency interventions at the AEC in which they forced the AEC to develop proper environmental impact statements and reconsider safety hazards. However, even though they had raised thousands of dollars for their efforts, they had to abandon the fight to force the AEC to adopt stricter rules for distributing to private industry the highly radioactive plutonium. The AEC kept the group tied up in litigation for almost 7 years, until the group finally ran out of funds and had to give up. (54)

Federal Power Commission. The Environmental Defense Fund (EDF) is concerned about the FPC certification of coal gasification facilities. Therefore, they intervened in a coal gasification proceeding involving an application by El Paso Natural Gas Co., hoping that it would be the precedent-setting case for the issue. An experienced utility attorney was willing to represent them for low fees and members of their staff presented expert testimony which included a serious alternative proposal. Although EDF knew there would be other cases on the issue, they could only afford to participate in one, so they gambled that the El Paso case would se the precedent. Unfortunately, El Paso encountered technical problems and asked FPC to hold its decision in abeyance. Meanwhile, the precedent-setting decision was made in a different case without consideration of the EDF issues. The FPC staff knew of the EDF arguments but did not present them in the other case, and now EDF can't appeal since they didn't participate in the latter case. (55)

All Federal Agencies. Testimony before the Subcommittee on January 30, 1976, from a women's rights organization indicated it had made several efforts to raise issues of sex discrimination in the awarding of government contracts and licenses. Most of these efforts had to be dropped simply because the group could not afford the enormously high costs involved.

OTHER ISSUES RAISED BY THE PUBLIC PARTICIPATION IN GOVERNMENT PROCEEDINGS ACT

Apart from the need for and beneficial effects of citizen participation, there are several other issues regarding this type of legislation which we feel should be clarified:

Attorneys' Fees Awards In Public Interest Suits Were Long A Part Of The Tradition In American Courts. It has been suggested by some that providing awards of fees in suits for judicial review would be unprecedented in light of the "traditional American rule" that each party pays its own expenses, win or lose.(56) This statement is inaccurate, however, since the American rule has several exceptions to it, among them (previous to the *Alyeska* decision) the award of attorneys' fees to successful litigants in public interest suits. As Rex Lee of the Department of Justice stated in House hearings on attorneys fees in December, 1975, ". . . these bills [for attorneys' fees for, among other things, successful suits for judicial review of agency actions] . . . are . . . responses to the Supreme Court's decision . . . in *Alyeska* . . . Before *Alyeska* . . . courts routinely awarded such fees in certain types of civil litigation. The foundation for this action, of course, was the belief that the initiation of litigation by a private party implemented a public policy imbodied in the substantive statute at issue and that, accordingly, the plaintiff had performed a public service in the capacity of a "private attorney general."(57) In addition to the "private attorney general" exception, over 50 federal statutes provide exceptions to the American "rule" and allow awards of attorneys' fees, including many which allow such awards against the United States.(58) Thus, the "tradition" in American courts, at least until *Alyeska*, was to allow attorneys' fees to public interest litigants, just as this bill would do.

Deciding Who Should Be Awarded Fees And How Much Should Be Awarded Will Not Create Significant Additional Burdens On Courts Or Agencies: One concern expressed about awards is that courts and agencies will have to have extra proceedings to decide who should be awarded fees and how much, increasing the workloads of both.(59) This concern has not been borne out in current experience with attorneys fees awards. There are over 50 federal attorneys' fees statutes on the books, and no evidence was presented (in three days of hearings in the House and two in the Senate on attorneys' fees) to indicate significant problems in the area of court proceedings. Additionally, there is little merit to the argument that when a federal agency has been found by a court to have acted illegally, and when it has been left to a group of private citizens to go to court at great expense to correct the illegality, that it is "overburdening courts" to take the time to grant attorneys' fees for this public service. As to agency proceedings, the drafters of this type of bill must be careful to avoid creating much additional work for the agency. The agency before which citizens appear makes the decision as to awards, and this agency is of course familiar with whether or not the public participants have or have not made a significant contribution to the proceedings. Thus, one should let existing agencies make the decision on each participant requesting compensation by the agency, except in the few cases where the denial or amount of an award is challenged in court. Experience at the FTC under their fees statute verifies the soundness of this type of procedure. In the first six months after the adoption of regulations implementing their statute, it had to process less than twenty applications, each only 10–20 pages in length—hardly an overwhelming burden on any agency.(60)

Fee Awards Will Not Encourage Frivolous Suits. Rex Lee of the Justice Department testified before this Subcommittee that, "The process of litigation in the courts is almost always costly and in the typical case, obtaining a judicial determination is more costly to the loser than the winner. The monetary costs of litigation act as a sufficient deterrent to frivolous suits . . . and the courts have the equitable power to award fees against obdurate and malicious litigants."(61) Even with fee awards to successful litigants, this situation is not changed, for the simple fact remains that to get a fee award you have to win.(62) The reason people do not bring frivolous suits now to any significant extent, whether under the 50 attorneys' fees statutes on the books or for tort or contract or any other

reason is that it costs a great deal in time and effort to file suit, and the potential for reimbursement occurs only if you win a damages award or the like. Under this bill, litigants still have to win to get fees, and no judge will award them to one who brings a frivolous suit. In fact, as Mr. Lee testified, the judge would be more likely to use available equitable powers to make the one frivolously filing suit pay fees. In any case, we know of no evidence and no one presented any evidence of a significant number of frivolous suits having been brought due to adoption of any of the 50 or more attorneys' fees statutes now a part of federal law.

Such Statutes Will Encourage Only Necessary Litigation And May Possibly Ease The Burden On Federal Courts. It is true that such legislation will encourage citizens to bring actions for judicial review they might not otherwise have brought—that, in fact, is one of the main benefits of this bill when one reviews the examples previously listed of the need for such litigation. But, as mentioned earlier, the bill will not stimulate frivolous litigation, but only litigation challenging agency actions where the plaintiffs represent the public interest and think they have a very good chance of being successful. The Administrative Procedure Act's provision for judicial review was developed to make agencies accountable, and to force them to act in compliance with the law. Litigation which accomplishes that is certainly necessary, as is the award of fees which encourage suits not now brought to carry out the purpose of the APA. The bill also has other effects, however, that will lessen the burden on the courts. First, as Jurge Richey, Judge Leventhal as well as Rex Lee testified before this Subcommittee,(63) when citizens have greater opportunity to participate in agency actions, as this bill provides, then they are more satisfied their views have been considered and are less likely to bring actions for judicial review. Additionally, the agency officials are compelled to account for citizens' views in their decisions and thus are less likely to issue decisions capable of being successfully challenged in an action for judicial review. Second, just the prospect of citizens finally having the resources and the availability of the judicial review option acts as a deterrant to agency officials to act in a manner that does not comply with the law. The principle here is the same as in any law enforcement—if persons know the law will be enforced, they're more likely to obey it. This, in turn, results in greater deterrance and less need to actually bring such actions, thus less units for judicial review and a lesser burden on the courts.

Providing Fees For Judicial Review Of Agency Actions Is A Reasonable, Limited Area Of The Law With Which To Begin Given Fee Awards. It has been argued that rather than give attorneys' and expert witness' fees to citizens challenging all agency actions, such fees should only be given in limited areas such as civil rights and antitrusts to more or less "experiment" and see how the idea works.(64) There are, as mentioned numerous times, over 50 federal attorneys' fees statutes on the books. How many more "experiments" are needed? Courts have for years awarded fees to plaintiffs under the private attorney general theory. If fees-shifting is good enough for antitrust and civil rights cases, why aren't other areas such as environmental law, rights of mental patients, consumer health and safety, energy, and related subjects worthy of this new law? If fee-shifting were being suggested for all suits in federal court, thus altering the "American rule," or even if it were being suggested for all public interest suits, against both private and public defendants, then this question might be appropriate. But, fee shifting only in the area of judicial review of federal agency actions (even though in some licensing proceedings a private party is the real party in interest), under one administrative statute (5 U.S.C. 702), is certainly sufficiently limited, particularly given the long experience already had with fees statutes.

Federal Agency Support Is Irrelevant To The Judicial Review Portion Of This Legislation. It would seem that it would be important to get federal agencies to support changes in the law effecting them,(65) but the judicial review attorneys' fees suggested by this memorandum are an exception. Successful actions for judicial review are based on the notion that an agency either has not obeyed the law or has acted orbitrarily or capriciously, and no agency wants to encourage challenges to its actions. Agencies want their actions to be the final word on the subject, and should not be expected to ask that challenges to their actions be encouraged.(66)

Reimbursement Of Expenses For Participation In Agency Proceedings Are Modeled After A Procedure Now In Use At The Federal Trade Commission. The

entire procedure embodied in this bill is modeled after P.L. 93-637 (1975), the Magnuson-Moss Warranty FTC Improvements Act, which provided for counsel fees for citizen participation in FTC proceedings. The regulations implementing that law have been adopted (40 F.R. 33966, 8-13-75), and over $100,000 has been dispensed to citizens' groups making "necessary" contributions to FTC proceedings. The FTC procedure has only two weaknesses thus far, both of which seem to be corrected by this bill. First, analysis of funds granted indicated the FTC is giving money only to persons who present facts and give a different perspective on the issues which the FTC wouldn't otherwise have available. Those who offer a different perspective but who make no new factual presentations have been denied fees. We think that this distinction is unjustified, since the main reason for this bill is not to provide cheap research assistance to federal agencies, but to assure that there is an advocate for the citizen viewpoint. Language slightly different than in the Magnuson-Moss bill could alleviate such a stiff requirement. Second, fees awarded by the FTC are unusually low, being based in many cases on FTC staff salaries yet without consideration of public participant overhead costs on any reasonable basis.

The Agency Won't Have To Award Fees When Participants Make No Contribution. Under FTC regulations, persons who receive fee awards must sign statements that they will refund the money if they do not make the promised contributions. Either this procedure, or one which states that when a contribution is "clearly" not made, funds must be returned, eliminates any problems of payment for no work.

Fees Awarded Will Be Reasonable. Experience under the over 50 federal fees statutes indicates courts will award reasonable fees, basing their awards on criteria listed by the ABA.(67) No artificial amount should be set, since in many cases citizens must pay for expertise available from only a few persons and unavailable at a low price. Additionally, fees paid should not be based on the salary usually received by the attorney, because the purpose of this bill is to encourage increased participation in government proceedings. Whereas there are a few public interest attorneys willing to work for low wages, there are not very many more such attorneys than are now doing that work, meaning future retained attorneys will not come at the very low wages now paid by some starving public interest groups and this bill shouldn't attempt to enforce such a low rate of reimbursement. It should encourage, not discourage, citizen talents.

We believe the case for legislation granting attorneys' fees for public participation, in agency proceedings (such as S. 2715, attached) is overwhelming and, as seen above, that there are few arguments against the adoption of the bill. We again wish to reiterate our strong support for this type of measure, and look forward to working towards prompt passage of this type of much-needed legislation.

Sincerely,

DAVID M. LENNY.
JOAN CLAYBROOK.

REFERENCES

1. 5 U.S.C. 553, 554 & 558.
2. Mintz, Morton & Cohen, Jerry S., *America, Inc.* (New York: Dell Publishing Co., Inc., 1971) at 296 (hereinafter Mintz & Cohen).
3. Response to Questionnaire on Citizen Involvement and Responsive Agency Decisionmaking, committee print submitted by the Subcommittee on Administrative Practice and Procedure to the Judiciary Committee, U.S. Senate, 91st Cong., 1st Sess., 9-9-69 at 134.
4. Mintz & Cohen at 300. Another example of citizens not participating was provided in the statement of Peter Shuck of Consumers Union before the Senate Committee on Interior & Insular Affairs, April 28, 1975 in Hearings on the Implementation of the Emergency Petroleum Allocation Act of 1973. (Hereinafter Shuck) He said, "the degree of consumer participation in most FEA proceedings is essentially nil. CU, for example, is the largest consumer organization in the U.S. and yet its total advocacy staff consists of three lawyers in Washington . . . As we all know, however, the oil industry has no difficulty in making its voice heard at FEA."
5. Cramton, "The Why, Where and How of Broadened Public Participation in the Administrative Process," 60 Geo. L. J. 525 (1972) at 538 (hereinafter Cramton). Other evidence of the enormous cost of such proceedings abounds. For example, Reuben Robertson of the Public Citizen Litigation Group testified in Hearings on Attorneys Fees before the Subcomm. on

Courts, Civil Liberties and the Administration of Justice, Oct. 8, 1975, that, ". . . public interest intervenors . . . are rarely present because of the enormous cost of effective participation. For example, the fees for lawyers and expert witnesses to represent consumer interests effectively in a CAB airline rate or route proceedings may easily reach a hundred thousand dollars or more—not to mention the costs of printing and postage for cross-service of pleadings on sometimes hundreds of other parties . . . (N)o consumer spokesman is able to participate . . . in the proceedings before the FCC involving interstate telephone rates, in which millions of consumer dollars a year are at stake—proceedings which are now entering their seventh year."

6. Michael, James R., ed., with Fort, Ruth, *Working on the System* (New York: Basic Books, Inc., 1974) at 187. (hereinafter Michael & Fort). They also note that attorneys practicing before the ICC charge $45–$75/hour plus $300/hearing day.
7. Statement of Joseph N. Onek (hereinafter Onek), Hearings on the Effect of Legal Fees on the Adequacy of Representation, before the Subcomm. on Representation of Citizen Interests of the Sen. Comm. on the Judiciary, 93rd Cong., 1st Sess. at 853 (1973) (hereinafter Hearings). The Center for Law & Social Policy in Washington, D.C., is funded mostly by the Ford, Rockefeller and Clark Foundations; other examples of public interest law firms include Public Advocates, Inc., of San Francisco, funded by foundations with the understanding it will soon be self-supporting. See Peter Nussbaum, Attorneys' Fees in Public Interest Litigation, 48 N.Y. Univ. L. Rev. 301 (1973) at 310, not 26. Mr. Onek's point is corroborated by this article in the *Washington Post* of Sept. 28, 1973: " 'Environmental Groups Face Fund Cut: Ford Foundation Considers Ending Grants To Five Firms:' The Ford Foundation wants to end its grants to five public interest law firms that have won pioneering decisions in the field of environmental law. The firms . . . are: Center for Law in the Public Interest (L.A.), Environmental Defense Fund (D.C.), Natural Resources Defense Council (D.C.), Public Advocates (S.F.) and the Sierra Club Legal Defense Fund (S.F.). The proportion of Ford funding in the firms' programs ranges from 12 to 50 per cent."
8. See the *New York Times*, July 8, 1975, page 16, col. 1.
9. Nussbaum at 308. "For example, on Oct. 9, 1970, the IRS temporarily suspended 'the issuance of rulings on claims for tax-exempt status by "public interest law firms." ' News Release, IR–1069. There was an immediate public outcry against the move. See, e.g., Editorial, *New York Times*, Oct. 15, 1970, at 46, col. 2, and Senate hearings were scheduled. On Oct. 15, 1970, the IRS modified its original decision with respect to organizations that had previously received favorable rulings, but left a cloud over new grants to such organizations. See News Release, IR–1072. Finally, on Nov. 12, 1970, the IRS resumed issuing rulings regarding public interest law firms . . . News Release, IR–1078." Id. at 308, fn. 20. See also the Public Citizen request for 501(c)(4) status in Hearings at 1521.
10. The need for such public participation was reaffirmed by Prof. Ernest Gellhorn, writing in 81 Yale L. Jnl. 359 (1972) at 403 (hereinafter Gellhorn): "The demand for broadened public participation in governmental decision making rests on the belief that government, like all other institutions, rarely responds to interests not represented in its deliberations. An administrative agency is usually exposed only to the views of its staff . . . and of private persons with a financial stake in the outcome. The emergence of individuals and groups willing to assist . . . agencies in identifying interests deserving protection . . . presents an opportunity to improve the administrative process." See also letter from President Ford to Senator Ribicoff, Rep. Brooks and Rep. Staggers, April 17, 1975; Cramton; Recommendation 28, 2 Recommendations & Reports of the Administrative Conference of the U.S. 35 (1970–1972) reprinted in 30 Ad. L. 2d 121 (1972).
11. Cramton at 529, note 3.
12. 359 F. 2d 994, 1003 (1966).
13. Boasberg, Hewes, Klores & Koss, Report to the NRC, Policy Issues Raised By Intervenor Requests for Financial Assistance in NRC Proceedings, NUREG 75/071 (July 18, 1975) at 88–96 (hereinafter Boasberg Report).
14. Statement of Senator Kennedy, 131 Cong. Rec. S. 7494 (daily ed. May 6, 1975) (hereinafter Kennedy); Boasberg Report at 95.

15. Kennedy at S. 7494.
16. Boasberg Report at 90, note 143.
17. In the Matter of Esquire Carpet Mills, Inc., FTC Docket No. 8013 (CPSC June 2, 1975) slip op. at 3.
18. 39 *Fed. Reg.* 36041 (1974).
19. Phone conversation between Monica Andres of Congress Watch and Lee Simowitz of the FTC Office of Consumer Affairs, February 4, 1976.
20. P.L. No. 93-637 (1975).
21. 5 U.S.C. 702.
22. 95 S Ct. 1612 (May 12, 1975) (hereinafter *Alyeska*).
23. Id., dissent by Marshall, J.
24. Id., 95 S. Ct. 1628, note 46. See also Hearings, at 862-1107.
25. 57 F.R.D. 94 (N.D. Cal. 1972).
26. Id. at 100-101.
27. F. 2d. —, — U.S. App. 938 (D.C. Cir. June 23, 1975).
28. Though pre-Alyeska "private attorney general" fee awards were against private parties, not the US. (due to 42 U.S.C. 2412), both the private parties sued and the U.S. were usually co-defendants, so that even though such judgments were against both, they were financed solely by fee-shifting from private defendant to private plaintiff. Thus, the "private AG" rationale did in practice finance suits for judicial review of agency actions.

"The *Alyeska* decision has already begun to choke off citizen access to the courts. Lawyers who undertook major cases on behalf of the poor and disadvantaged have been forced to reconsider . . . Consider the situation of a Seattle lawyer who spent more than a thousand hours representing a group of 400 poor people who were to be put out of their homes by an urban freeway project. They were able to raise only $4,300 for their representation, but the lawyer was willing to take the case in the hope of a . . . fee award . . . if successful. After 21 months of litigation, the district court ruled that the freeway had been illegally planned because community groups had been excluded from the planning process, in violation of a federal law. The court invited the lawyer to submit a fee application, but before the court passed on the application, *Alyeska* came down." The case cost the firm $56,000 and they cannot afford to do that again. Statement of Charles Halpern, Council on Public Interest Law, Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm., Oct. 8, 1975.

29. Boasberg Report at 35-45.
30. U.S. App. 940.
31. Though the Deputy Comptroller General has ruled, in Opinion B92288, Feb. 19, 1976, that the NRC has the legal authority to award intervenor expenses if it wished, the opinion noted NRC is not compelled to, and since funds have not been appropriated for that purpose, it is not likely to, either.
32. Senator Kennedy, in the Opening Statement at these hearings, Feb. 6, 1976.
33. Gellhorn at 361, note 6.
34. Boasberg Report at 97-98.
35. Id. at 97.
36. Id. at 99.
37. 439 F. 2d 584, 598 (D.C. Cir. 1971).
38. 57 F.R.D. 94 (N.D. Cal. 1972).
39. —F. Supp. — (W. D. Tex. June 28, 1973).
40. Shuck.
41. Boasberg Report at 88-96.
42. Michael & Fort at 594.
43. *ECO*, November 16, 1975, at 8, col. 2.
44. Conversation between Dave Lenny of Congress Watch and Nancy Chasen of Consumers Union, November 13, 1975.
45. Conversation between Dave Lenny of Congress Watch and Anita Johnson of the Health Research Group, November 24, 1975.
46. Conversation between Dave Lenny of Congress Watch and Peter Shuck of Consumers Union, November 14, 1975.
47. Testimony of Dr. Sidney Wolfe before the House Subcomm. on Oversight & Investigations of the House Comm. on Interstate and Foreign Commerce, July 15, 1975.

48. Conversation between Dave Lenny of Congress Watch and Marcia Hughes of Citizens V.O.I.C.E., November 14, 1975. Several groups expressed an interest in intervening and some expertise on the issues, but could not afford to intervene. These include the Consumers Congress of Virginia, which raised $60,000 for the proceedings, the Environmental Defense Fund, the Environmental Policy Center, and the Legal Environmental Group of the University of Virginia Law School.
49. Memorandum of Matt Schneider, Senate Government Operations Reorganization Committee, in 120 Cong. Rec. S. 18727 (Daily ed. Oct. 10, 1974), in which seven other similar examples are documented.
50. Conversation between Lenny and Johnson of Nov. 24, 1975.
51. Shuck.
52. Id. See *Consumers Union* v. *Sawhill*, Civ. No. 74-1413 (Robinson, J.), Opinion of March 27, 1975, at 4.
53. Id. See *Consumers Union* v. *Sawhill*, No. DC-26, 512 F2d. 1112 (TECA, Feb. 18, 1975), reversed *en banc* (4-3 decision), F.2d. — (1975). Although Consumers' Union was successful in its contention at the TECA, they were then as indicated, reversed at the rehearing.
54. Testimony of Rober L. Conner of the West Michigan Environmental Action Council, Jan. 30, 1976 before Sen. Subcomm. on Administrative Practices & Procedures (hereinafter "Attorneys Fees Hearings"). Mr. Conners' groups also "stopped no less an adversary than the U.S. Army Corps of Engineers from installing a series of 17 dams on the Grand River and its tributaries in 1969," and claimed, "it did us no harm in that effort when then Rep. Gerry Ford told the Corps that it would not complete the project while he was in Congress."
55. Conversation between Lenny and Hughes of Nov. 14, 1975.
56. Statement of Rex Lee before Attorneys' Fees Hearings, February 6, 1976. (hereinafter Lee).
57. Statement of Rex Lee before the House Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm., Dec. 3, 1975.
58. See Boasberg Report, Appendix E.
59. Lee.
60. Conversation between Dave Lenny of Congress Watch and Lee Simowitz of the FTC on February 5, 1976.
61. Lee.
62. S. 2715 says "obtain the relief sought in substantial measure," which, of course, should not mean one has to win all issues and can mean one may technically "lose" and still have significantly advanced the public interest such that a fee award is justified. *Citizens Assn.* v. *Washington*, Civ. Action No. 1944-73, Sept. 30, 1974 (U.S. Dist. Ct. D.C.).
63. Judge Richey on Jan. 30, 1976, and Judge Leventhal and Rex Lee on Feb. 6, 1976 at Attorneys Fees Hearings. Rex Lee also stated, "The goal of insuring the full range of public participation in administrative proceedings is an important one. The effective advocacy in administrative proceedings of varied public interests could lead to more informed and hopefully wise administrative decisions, and perhaps a lessening of the need for judicial review of administrative decisions."
64. Lee.
65. Id.
66. Though a few public-spirited agency officials have testified in favor of S. 2715, the subject of Attorneys Fees Hearings, including Greg Staples of the ICC, Arthur Flemming of the USCCR, Commissioner Hooks of the FCC and Commissioner Pittle of the CPSC.
67. See ABA Canons 12 & 13 and the ABA Disciplinary Rule DR2-106.

CIVIL AERONAUTICS BOARD,
Washington, D.C., March 15, 1976.

Re Braniff Airways, Inc., et al., enforcement proceeding, docket 26364.

REUBEN B. ROBERTSON, ESQ.,
Counsel for Aviation Consumer Action Project.

DEAR MR. ROBERTSON: During the settlement discussions held among the parties in the above-referenced proceeding, the question of reasonable attorneys' fees arose. As you know, we took the position that, under present law, we could not support award of fees to you, either from federal funds, or from the corporate respondent, Braniff Airways.

Nevertheless, your participation in this proceeding, from filing the original administrative complaint and participating in the deposition sessions, to offering valuable suggestions during the final negotiating stage, definitely contributed towards an ultimate resolution of the matter consonant with the public interest.

We support your efforts to secure appropriate legislative amendments making it possible for administrative agencies to award attorneys' fees or to accept settlements which include payment of attorneys' fees by the respondent, to bona fide public interest groups under appropriate circumstances.

Sincerely,

THOMAS F. MCBRIDE,
Director, Bureau of Enforcement.

MIAMI, FLA., *January 13, 1976.*

HON. CLAUDE PEPPER,
House of Representatives,
Washington, D.C.

DEAR SIR: The House is considering a bill which would require the government to pay the legal fees and related expenses of contests initiated by the U.S. which the government eventually loses. The bill is intended to include tax controversies, although its language needs some revision to make that fact clear.

If enacted, the law would redress the imbalance resulting from pitting a person or firm with limited resources agains the almost unlimited resources of the United States. The bill is H.R. 4675, sponsored by Rep. Crane of Illinois. It deserves any support you can give.

Very truly yours,

MARSHA P. NILES.

AMERICAN AUTOMOBILE ASSOCIATION,
Madison, Wis., March 9, 1976.

Re H.R. 4675.
HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and Administration of Justice, Washington, D.C.

DEAR BOB: The Wisconsin Division of the American Automobile Association supports legislation introduced by Congressman Crane of Illinois, H.R. 4675, requiring the mandatory reimbursement of court costs and reasonable attorney fees of successful defendants in civil actions instituted by the U.S. government.

As chairman of the subcommittee on Courts, Civil Liberties and the Administration of Justice, we earnestly hope that you will actively support this measure.

The rapid expansion of the Federal government over the past forty years has greatly increased its effect on the lives of every American. This influence is even more acutely felt by the business community which year after year finds itself more heavily burdened by the increasing multitude of Federal rules and regulations.

We feel that the passage of H.R. 4675 would be a most helpful step to counteract a potentially unfair situation. We would appreciate learning whether you share our desire to support passage of this measure. It should be very popular with your constituents.

We are sending copies of this to the other members of our Wisconsin delegation and ask their support when the measure comes to a vote.

Cordially,

STUART B. WRIGHT,
General Manager.

APPENDIX 5

MERCER, N. DAK., *October 9, 1975.*

Chairman KASTENMEIER,
Subcommittee on Courts, Civil Liberties, and the Administration of Justice:

In regard to H.R. 8388, I went through a condemnation case Aug. 1974, with Bureau of Reclamation. Because of land taken for the McClusky Canal.

My opinion in taking of property for any kind of project, land should be bought or taken at least two years or more before needed so landowner has

time to replace property. And if party is willing to be relocated, that is a very sourceful means of acquiring property. As this property has to be replaced or taxes are to be paid. I strongly believe that Government, Federal, State or companies should pay for court costs and attorneys fees as condemnee has appraisal fee, picture taken, time loss, gas, meals and miscellaneus expenses. Sometimes a great distance to drive or motel expenses.

Sincerely yours,

MELVIN STROBEL.

TENNESON, SERKLAND, LUNDBERG & ERICKSON, LTD.,
ATTORNEYS AND COUNSELORS AT LAW,
Fargo, N. Dak., October 8, 1975.

HON. MARK ANDREWS,
Congress of the United States,
House of Representatives, Washington, D.C.

DEAR MR. ANDREWS: We have engaged in considerable condemnation work representing litigants whose land is being taken. Our experience has been almost entirely in State Courts and very little on the federal level.

The North Dakota law permits the Court to approve a reasonable fee for attorneys which implements the basic premise that land taken requires compensation for its market value. If the compensation does not include attorneys fees, the owner loses his land, does not get market value.

We understand Federal Legislation is under consideration which will permit attorneys fees in Federal condemnation cases also. Under the present practice under federal law, the landowner is not left whole and the injustice of big government continues.

We hope that you will do everything in your power to obtain legislation that will protect our North Dakota people against the inequities of the present law.

The thought comes to us that someone without knowledge of the true situation could very well say that this would be another piece of legislation to enrich lawyers. This, of course, is not so at all because lawyers are paid for their services in any event. Where the power of government takes property, that power should make compensation that is just and fair. Fairness is not achieved simply by the market value rule of damages or the allowance of other consequential damages because the damages thus allowed are not met.

Yours very truly,

C. J. SERKLAND.

JAMESTOWN, N. DAK., *October 8, 1975.*

HON. MARK ANDREWS,
House of Representatives,
Washington, D.C.

DEAR MARK: For some time I have been disturbed that the federal law does not allow attorney fees and other costs in condemnation actions.

My experience has been that we have gotten sizeable increases over the government offer and yet, for the landowner, these increases were cut down by the amount of our attorney fee. I represented a number of people in the Pipestem Condemnation and we were able to increase the offer for flowable easements three times but when they had paid me, the increase was not nearly that much.

I understand that a bill is now pending which would require that the Federal Government condemnation cases pay reasonable attorney fees and costs. I am sure that you will agree that this should be acted upon immediately.

I presume that the bill would require a five or ten percent increase but this is certainly reasonable. As you are no doubt aware, North Dakota has similar provisions in its condemnation law which does pay attorney fees and costs.

Yours very truly,

JAMES R. JUNGROTH.

TURTLE LAKE, N. DAK., *October 8, 1975.*

DEAR CONGRESSMAN MARK ANDREWS: We are writing this letter to express our support for the bill No. H.R. 8368 that you are introducing.

We feel that the court costs in land condemnation case should not be ours to pay as the court awarded this money to us as land value and severance.

This money should remain ours and not to the lawyers who took a third of it.

Our farm was hurt about as bad as any along the McClusky Canal. Our trial was about fifteen months ago.

Sincerely,

Mr. and Mrs. DONALD GOVEN.

MANDAN, N. DAK., *October 7, 1975.*

Hon. MARK ANDREWS,
Rayburn Office Building, Washington, D.C.

DEAR CONGRESSMAN ANDREWS: I have received a copy of a letter submitted by Attorney Floyd Sperry to your office, dated October 6, 1975.

I have tried a number of condemnation cases in both state and federal courts in North Dakota. Also, I had experience in representing the condemnor, the North Dakota State Highway Department, for four years and about an equal number of years representing property owners.

Under North Dakota Law, Section 3215, North Dakota Century Code, the property owner is entitled to reasonable costs and attorney fees. It has been my experience that this particular law has not worked any hardship on condemnors preceding thereunder. To the contrary, they have been more realistic about damages, resulting in very few appeals. The basic concept of eminent domain is that the property owners shall be made whole. In other words, he should be as well off after the taking as he was before. Also, the property owner is subjected to involuntary action resulting in the acquisition of his property for a public purpose.

In one particular case I tried in Federal District Court, Southwestern District, Bismarck, North Dakota, involving the McClusky Canal, a property owner, Kenneth Grabinger, was offered $23,500.00 for several hundred acres of his lands that was taken, including severance damages to the remainder. When the matter was tried, the government testified to damages in the amount of approximately $34,000.00 and the jury returned a verdict of $59,280.00. Because the Federal Government was a condemnor, Mr. Grabinger was required to pay from the award of just compensation, his attorney and appraiser fees. If the action had been brought under state law, Mr. Grabinger would have been entitled to the entire amount of $59,280.00, which the jury awarded as just compensation. Also, as the newspaper article enclosed herein indicates, had the government appraised the property properly, he would have at one time settled the matter for $33,000.00.

To eliminate this injustice, federal judges have, by judicial fiat, ruled that the substantiative law of the state is controlling, and that property owners are entitled to attorney and appraiser fees * * *. This, of course, results in nearly every Federal Judge going in a separate direction and placing counsel in a quandary as how to advise his client.

I would have to agree with Mr. Sperry that the months of October, November and December for trial lawyers are very demanding. However, the need for this legislation is so important that I would consider coming to Washington on my own time and expense provided I would be assured an opportunity to testify as to the difference between state and federal laws and the consequences thereof. Also citing examples, including the Grabinger case.

Sincerely,

JOS. A. VOGEL, Jr.

TURTLE LAKE, N. DAK., *October 14, 1975.*

Congressman MARK ANDREWS,
Washington, D.C.

DEAR CONGRESSMAN: It has come to my attention that the Judiciary Committee is holding hearings on Legislation introduced by you regarding the landowner being awarded compensation for Court Costs etc. in connection condemnation proceedings in addition to the award received for his property.

To me the present laws seem very unfair to the landowner and I believe some changes are long overdue. Having been through this type of action with some of my property I feel better qualified to state the need than some who have not had this experience.

I strongly urge the Committee to encourage your legislation and only hope it will be made retroactive to correct some of the injustice that has taken place recently in our area.

Respectfully,

CHARLES SCHLICHENMAYER.

FESSENDEN, N. DAK., *October 13, 1975.*

Congressman MARK ANDREWS,
Rayburn Building,
Washington, D.C.

SIR: I am very pleased to hear that you have introduced legislation in H.R. 8368 that would at last give the landowner in the U.S. a chance to get what is rightfully his. May I add my whole-hearted support for this legislation.

I feel when a landowner has to go through condemnation to get the price per acre he feels is fair, it is only right that he be compensated for his legal & court costs. Above and beyond his price per acre adjustment, that really he should have been offered in the first place by the purchasing agency.

It seems a shame that a country that can pour billions of dollars down a rat-hole called Foreign Aid, should have to try to steal at the lowest possible price, the real estate from its own people, rather than offer them a solid fair price.

Congresman Andrews, your legislation will help right a wrong that has been with us much too long already. May I urge the subcommittee to adopt your suggestions and pass this measure.

Best regards, I am

ROGER EBIL.

COMMITTEE TO SAVE NORTH DAKOTA, INC.,
Fargo, N. Dak., October 14, 1975.

Hon. MARK ANDREWS,
Congressman for North Dakota, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN ANDREWS: Thank you for notifying me, via your September 29, 1975 letter, of H.R. 8368. I have enclosed a statement concerning this resolution which you may pass along to Chairman Kastenmeier.

I have also enclosed a copy of a petition which was presented to me by George Boykoon at the September 15, 1975 Field Hearing on Garrison Diversion conducted by Chairman Moorhead of the Conservation, Energy and Natural Resources Subcommittee.

I am sure he would appreciate hearing from you on this matter.

Sincerely,

L. ROGER JOHNSON,
Executive Director.

COMMITTEE TO SAVE NORTH DAKOTA, INC.,
Fargo, N. Dak., October 14, 1975.

Hon. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

DEAR MR. CHAIRMAN: I am in receipt of a recent letter from Congressman Andrews informing me of H.R. 8368, legislation which he introduced and which would, if enacted, "provide that the landowner or condemnee shall be paid court costs, including attorney's fees, over and above the 'just compensation' award he receives for his property."

The Committee to Save North Dakota, Inc. has long advocated such legislation. We feel it deplorable that, as regards the U.S. Bureau of Reclamation's Garrison Diversion Unit in North Dakota, an agency of our Federal Government is allowed to continue its present inconsiderate, unfair and often coercive treatment of landowners affected with construction of the Garrison Project.

In every condemnation case that I am aware of on the Garrison Project, the court has awarded the condemnee considerably more than the final offer made the condemnee by the Bureau of Reclamation. In many cases the court has awarded an amount *double* that offered by the Bureau. Of the court-awarded increase, the condemnee's attorney typically receives one-third.

Thus, when a court awards a condemnee a "fair" price for property taken, the condemnee is obligated to pay, out of his "fair" award, his attorney, other litigation expenses, appraisal fees, etc. In short, he never actually receives "just compensation".

I have taken the liberty of including with this statement, a copy of a portion of the February 27, 1975 issue of the *McLean County Independent* depicting some

of the problems landowners have been faced with as regards the McClusky Canal of the Garrison Diversion Unit. Note especially the article entitled "Land Worth $59,280. But Grabingers Net $45,000" pointing out one example of a gross inequity that could hopefully be at least partially equilibrated with the passage of H.R. 8368, if I properly understand the provisions of this legislation.

Thank you for the opportunity to submit this statement.

Sincerely,

L. ROGER JOHNSON,
Executive Director.

OCTOBER 9, 1975.

DEAR SIR: Yes, I think there should be a change made. To bad that this letter is coming in this late.

But I work till sundown and don't even take time to read the paper let alone hear the news. That is why we are sometimes so poorly informed. We just can't take the time.

The Bureau of reclamation took 242 acres including my farmstead.

I did build a machine shed and move some of my grain bins.

But the road going in to my place, the Bureau took and didn't replace it. But they told me if I take it to court I would surely get a road. Well I didn't because my attorney didn't get paid for something like that. They were getting one third of the take. So they couldn't care less. The Bureau said I could use their road. But now they came the other day when I wasn't at home and put a gate on the road. I sure can't open a gate five or six times a day the rest of my life. They all said before it would be a cattle pass. But that's the Bureau for you. I had bad luck from the start.

1. Mine was the first case that came up.
2. My attorney had a lot to learn about condemnation and at my expense.
3. And like I said before, my attorney didn't care if I got a road; he didn't care or get paid for something like that.
4. The U.S. attorney threatened us if we said anything to make the Bureau look bad. He would mention relocation which the Bureau men always said before would never be mentioned in court. I could tell you a lot more but you probably don't have time to read all of this.

ELMER STROBEE.

LAW OFFICES OF
JOHNSON, MILLOY, ECKERT & JOHNSON, LTD.,
Wahpeton, N. Dak., November 3, 1975.

Hon. MARK ANDREWS,
House of Representatives,
Washington, D.C.

DEAR MARK: First of all, congratulations on the excellent job on the Today Show.

Secondly, I want to commend you and support you on your efforts to eliminate the practice of including attorneys' fees in the "just compensation" award received by a landowner in a court proceeding. In North Dakota, the attorneys' fees are generally calculated at one-third and are added to the just compensation award. In South Dakota, the case is just reversed. Our experience in South Dakota on the highway condemnation cases has been horrible. While the federal government pays about 90% of these costs for condemnation and for land, we have a situation where in North Dakota farmers have received as much as ten cents a cubic yard for their dirt and in South Dakota under identical conditions they have been getting by with a cent and a half. The federal statute says that there should be uniform treatment, but this is anything but fair treatment between South Dakota and North Dakota. I am at a complete loss as to why the South Dakota Highway Department is so damned antagonistic towards their farmers. It is a rank injustice as far as I am concerned.

I would imagine that these are extremely interesting and also extremely frustrating times in Washington, I think you are doing a good job.

Best regards.

Yours very truly,

VERNON M. JOHNSON.

TURTLE LAKE, N. DAK., *October 6, 1975.*

Congressman MARK ANDREWS,
Rayburn Office Building,
Washington, D.C.

DEAR CONGRESSMAN ANDREWS: Aldores and I ask you to support H.R. 8368 which provides that the landowner be paid court costs including attorney's fees in condemnation cases.

We would like this legislation to be made retroactive if possible. We feel when a jury makes a decision as a *just compensation* that this is the $ value the landowner should receive.

In a condemnation action an unwilling seller becomes a victim of his own government.

We ask that this statement be made a part of the record at the hearing on October 8 of the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

Thank you.

Sincerely,

ALBERT KLAIN,
ALDORES KLAIN.

MERCER, N. DAK., *October 5, 1975.*

MARK ANDREWS,
House of Representatives,
Washington, D.C.

DEAR MR. ANDREWS: Regarding the hearing on H.R. 8368 legislation that the land owner or condemnee shall be paid court costs, including attorney's fees over and above the "just compensation" he receives for his property.

Our property was also taken for the Garrison Diversion and we had to pay assessor's fees and costs plus one third of the net recovery had to be paid for attorneys.

Please use this written statement for your records at the hearing.

Sincerely,

Mr. and Mrs. EDWIN R. GESSELE.

OCTOBER 4, 1975.

Congressman MARK ANDREWS,
House of Representatives.

DEAR MR. ANDREWS: I would like to express my support for bill H.R. 8368, which will pay court and attorney fees, over and above just compensation received for property (land), which was condemned for Garrison Diversion by the Bureau of Reclamation.

I also feel this bill should be retroactive to the time when land was acquired for the McClusky Canal, by Bureau of Reclamation.

Land owners are not justly compensated when they have to give up one-third of their compensation to pay for attorney and court costs.

Bureau of Reclamation claims that a land owner should be worth as much after the land is taken as he was before. How can a land owner be worth as much when he has to pay one-third plus court costs out of the increase.

So far out of all the court cases that were held there has not been one that the government has won. Thus by passing this law, the Bureau of Reclamation would give the farmers just compensation for their land without going into condemnation and be less costly for the government.

Respectfully,

Mr. and Mrs. LAVERN AXT.

COMMITTEE TO SAVE NORTH DAKOTA,
Harvey, N. Dak., October 4, 1975.

DEAR MR. ANDREWS: Here is the statement you requested in reference to H.R. 8368. I thank you for this opportunity to serve the people going through condemnation proceedings.

Yours truly,

MONROE BOUGUSH, *Chairman.*

COMMITTEE TO SAVE NORTH DAKOTA,
Harvey, N. Dak., October 4, 1975.

DEAR CHAIRMAN KASTENMEIER: The Committee to Save N. Dak. was formed in 1972 when it became apparent there were serious problems with landowner treatment, one of which was the loss of about one-third of the price received through condemnation proceeding for attorney fees.

When the court awards a farmer or landowner the full value of his property then he should receive that full amount and not have to pay part of it for attorney fees.

Our organization urges you to support H.R. 8368.

MONROE BOUGUSH, *Chairman.*

HINGHAM, MASS., *March 18, 1976.*

Hon. ROBERT W. KASTENMEIER,
Chairman, House Judiciary Committee,
Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: I am writing you this letter on the recommendation of my Representative, Gerry E. Studds—12th District, Mass.

I was in litigation with the U.S. Government in a land condemnation and acquisition case in the State of Florida wherein I was forced by the Government to assume its land appraisal costs and court costs. This is the exact opposite of due process of law. My letter to Rep. Studds, which has been submitted as evidence, emphatically states my assessment of such a contradiction of law and gross injustice to any citizen forced with a similar confrontation.

I trust that when Bill H.R. 4675 is finalized it will also include the provisions of Bill H.R. 8368. I have asked Rep. Studds to do everything possible to have the Government refund the $1,472 to me, the amount I paid for appraisal and court costs.

I thank you and Rep. Gerry Studds for your efforts and courtesies extended to me.

Yours very truly,

CUMMINGS M. GIARDINO.

APPENDIX 6

Under existing law, the Federal government is generally immune from liability for attorneys' fees. The following section of title 28 of the U.S. Code is controlling:

Section 2412. Costs

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States. As amended July 18, 1966, Pub. L. 89-507, §1, 80 Stat. 308.

However, there are exceptions to the above statute, as well as specific laws which allow or mandate recovery against the Federal government or parties in Federal cases or proceedings. The following list are the exceptions:

FEDERAL ATTORNEY'S FEES STATUTES

1. *Federal Contested Election Act*—2. U.S.C. § 396.

"The committee (on House Administration of the House of Representatives) may allow any party reimbursement from the contingent fund of the House of Representatives of his reasonable expenses of the contested election case, including reasonable attorneys fees. . . ."

2. *Freedom of Information Act*—5 U.S.C. § 552(a)(4)(E).

"The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed."

3. *Privacy Act*—5 U.S.C. § 552a (g) (3) (B).

"The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed."

4. *Federal Employment Compensation for Work Injuries*—5 U.S.C. § 81.27.

"A claim for legal or other services furnished in respect to a case, claim, or award for compensation under this subchapter is valid only if approved by the Secretary (of Labor)."

5. *Packers and Stockyards Act*—7 U.S.C. § 210(f).

"If the defendant does not comply with an order for the paymenta of money within the time limit in such order, the complainant, or any person for whose benefit such order was made . . . (may sue in a United States District Court). . . . If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

6. *Perishable Agriculture Commodities Act*—7 U.S.C. § 499g(b).

"If any commission merchant, dealer, or broker does not pay the reparations award within the time specified in the Secretary (of Agriculture's) order, the complainant or any person for whose benefit such order was made . . . (may sue in a United States District Court). . . . If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

7. 7 U.S.C. § 499g(c).

"Either party adversely affected by the entry of a reparation order by the Secretary may . . . appeal therefrom to the district court of the United States. . . . Appellee shall not be held liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney's fees to be taxed and collected as a part of his costs." [sic]

8. *Agricultural Unfair Trade Practices*—7 U.S.C. § 2305(a).

"Whenever any handler has engaged . . . in any act or practice prohibited by section 4, a civil action for preventation relief . . . may be instituted by the person aggrieved. In any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs."

9. 7 U.S.C. § 2305(c).

"Any person injured in his business or property by reason of any violation of . . . section 4 of this Act may sue therefor in the appropriate district court of the United States . . . and shall recover damages sustained. In any action commenced pursuant to this subsection, the court may allow the prevailing party a reasonable attorney's fee as a part of the costs."

10. *Plant Variety Act*—7 U.S.C. § 2565.

"The court in exceptional cases may award reasonable attorney fees to the prevailing party."

11. *Bankruptcy Act*—11 U.S.C. § 104(a)(1).

"The debts to have priority . . . shall be . . . one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditor in involuntary cases. . . ."

12. 11 U.S.C. § 109.

"Whenever a petition is filed to have a person adjudged a bankrupt and an application is made to have a receiver or a marshal take charge of the property of the bankrupt, or any part thereof, prior to the adjudication, the applicant shall file in the same court a bond . . . conditioned to indemnify the bankrupt for such costs, counsel fees, expenses, and damages as may be occasioned by such seizure . . ."

13. *Railroad Reorganization Act*—11 U.S.C. § 205(c)(12).

"Within such maximum limits as are fixed by the (Interstate Commerce) Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceeding. . . ."

14. *Corporate Reorganization Act*—11 U.S.C. §§ 641–644.

§ 641—"The judge may allow . . . reasonable compensation for services rendered . . . (3) by the trustee and other officers, and the attorneys for any of them; (4) by the attorney for the debtor; and (5) by the attorney for the petitioning creditors. . . ."

§ 642—"The judge may allow reasonable compensation for services rendered . . . by the attorney or agents for any of the foregoing except the Securities and Exchange Commission."

15. *Bankruptcy Act—Corporate Reorganization Act* (continued).

§ 643—"The judge may allow reasonable compensation for services rendered . . . by creditors and stockholders, and the attorneys for any of them. . . ."

§ 644—"Where a petition is filed under section 127 of this Act, the judge may allow, if not already allowed, reasonable compensation for services rendered. . . . (1) by a marshal, receiver, or trustee . . ., and the attorneys for any of them; (2) by the attorney for the petitioning creditors; (3) by the attorney for the bankrupt. . . ."

16. *Federal Credit Union Act*—12 U.S.C. § 1786(o).

"Any court having jurisdiction of any proceeding instituted under this section by an insured credit union or a director, officer, or committee member thereof may allow to any party such reasonable expenses and attorneys' fees as it deems just and proper, and such expenses and fees shall be paid by the credit union or from its assets."

17. *Bank Holding Company Act*—12 U.S.C. § 1975.

"Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States . . . and shall be entitled to recover . . . a reasonable attorney's fee."

18. *Clayton Act*—15 U.S.C. § 15.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover . . . a reasonable attorney's fee."

19. *Antitrust Parens Patriae Act* (Public Law 94-435, § 301)—15 U.S.C. § 15c(a)(2).

"The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee."

20. 15 U.S.C. § 15c(d)(2).

"(T)he court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."

21. *Federal Trade Commission Improvement Act*—15 U.S.C. § 57a(h)(1).

"The (Federal Trade) Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section. . . ."

22. *Unfair Competition Act*—15 U.S.C. § 72.

"Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States . . . and shall recover . . . a reasonable attorney's fee."

23. *Securities Act of 1933*—15 U.S.C. § 77k(a).

"In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees. . . ."

24. *Trust Indenture Act*—15 U.S.C. § 77ooo(e).

"The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion . . . assess reasonable costs, including reasonable attorneys' fees, against any party litigant. . . ."

25. 15 U.S.C. § 77www(a).

"(T)he court may, in its discretion . . ., assess reasonable costs, including reasonable attorney's fees, against either party litigant."

26. *Jewelers Hall-Mark Act*—15 U.S.C. § 298(b).

"Any competitor, customer, or competitor of a customer . . . may sue . . . and if shall recover . . . a reasonable attorney's fee."

27. 15 U.S.C. § 298(c).

"Any duly organized and existing trade association . . . may sue . . . and if successful shall recover . . . a reasonable attorney's fee."

28. 15 U.S.C. § 298(d).

"Any defendant against whom a civil action is brought . . . shall be entitled to recover . . . a reasonable attorney's fee, in the event such action is terminated without a finding by the court that such defendant is or has been in violation of sections 294 to 300 of this title."

29. *Trademark Act*—15 U.S.C. § 1117.

"The court in exceptional cases may award reasonable attorney fees to the prevailing party."

30. *National Traffic and Motor Vehicle Safety Act of 1966*—15 U.S.C. § 1400(b).

"In the event any manufacturer or distributor shall refuse to comply with the requirements of paragraphs (1) and (2) of subsections (a) of this section, then the distributor or dealer, as the case may be, to whom such nonconforming vehicle or equipment has been sold may bring suit against such manufacturer or distributor . . . and shall recover . . . reasonable attorney's fees."

31. *Truth in Lending Act* (as amended by Public Law 94-240, § 4, Consumer Leasing Act)—15 U.S.C. § 1640(a).

"(A)ny creditor who fails to comply with any requirement under this part or (the Fair Credit Billing Act or Consumer Leasing Act) with respect to any person is liable to such person in an amount equal to the sum of . . . a reasonable attorney's fees as determined by the court."

32. *Fair Credit Reporting Act*—15 U.S.C. § 1681n.

"Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect of any consumer is liable to that consumer in an amount equal to the sum of . . . reasonable attorney's fees as determined by the court."

33. 15 U.S.C. § 1681o.

"Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . reasonable attorney's fees as determined by the court."

34. *Equal Credit Opportunity Act* (as amended by Public Law 94-239)—15 U.S.C. § 1691e(d).

"In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection."

35. *Motor Vehicle Information and Cost Savings Act*—15 U.S.C. § 1918(a).

"Any owner of a passenger motor vehicle who sustains damage as a result of a motor vehicle accident because such vehicle did not comply with any applicable Federal bumper standard under this subchapter may bring a civil action against the manufacturer of that vehicle . . . to recover the amount of those damages, and in the case of any successful action to recover that amount, costs and reasonable attorneys' fees shall be awarded to that owner."

36. *Odometer Requirements*—15 U.S.C. § 1989(a).

"Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of . . . in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court."

37. *Consumer Product Safety Act* (as amended by Public Law 94-284, § 10)—15 U.S.C. § 2059(e)(4).

"In any action under this subsection the court may in the interest of justice award the costs of suit, including reasonable attorneys' fees and reasonable expert witnesses' fees. Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of title 28, United States Code, or any other provision of law . . ."

38. 15 U.S.C. § 2060(c).

"A court may in the interest of justice include in such relief an award of the costs of the suit, including reasonable attorneys' fees. . . . Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of title 28, United States Code, or any other provision of law."

39. 15 U.S.C. 2072(a).

"Any person who shall sustain injury by reason of any knowing (including willful) violation of any consumer product safety rule, or any other rule or order issued by the (Consumer Product Safety) Commission . . . may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees. . . ."

40. 15 U.S.C. 2073.

"In any action under this section the court may in the interest of justice award the costs of suit, includin greasonable attorneys' fees. . . ."

41. *Magnuson-Moss Warranty Act*—15 U.S.C. § 2310(d)(2).

"If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) . . . unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate."

42. *Toxic Substances Control Act* (Public Law 94-469, § 20(c)(2))—15 U.S.C. § 2619(c)(2).

"The court, in issuing any final order in any action brought pursuant to subsection (a), may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate."

43. *Copyright Act* (Public Law 94-553)—17 U.S.C. § 505.

"In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."

44. *Organized Crime Control Act of 1970*—18 U.S.C. § 1964(c).

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may . . . sue and shall recover . . . a reasonable attorney's fee."

45. *Wire Interception Act*—18 U.S.C. § 2520.

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall . . . be entitled to recover . . . a reasonable attorney's fee. . . ."

46. *Education Amendment of 1972*—20 U.S.C. § 1617.

"Upon the entry of a final order by a court of the United States against a local education agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, 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."

47. *Mexican-American Chamizal Convention Act of 1964*—22 U.S.C. § 277d-21.

"The Commissioner, in rendering an award in favor of any claimant under section 277d-19 of this title, may, as part of such award, determine and allow reasonable attorneys' fees which shall not exceed 10 per centum of the amount awarded, to be paid out of but not in addition to the amount of the award, to the attorneys representing the claimant. . . ."

48. *International Claims Settlement Act*—22 U.S.C. § 1623(f).

"No remuneration on account of services rendered on behalf of any claimant in connection with any claim filed with the Commission under this subchapter shall exceed 10 per centum of the total amount paid pursuant to any award. . . ."

49. *Federal Tort Claims Act*—28 U.S.C. § 2678.

"No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment. . . ."

50. *Federal Rules of Civil Procedure*—28 U.S.C. App. Rule 37.

(a) Motion for order compelling discovery:

"If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

"If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or dependent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fee, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust."

(b) Failure to comply with order:

"In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both

to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

(c) Expenses on failure to admit:

"If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. . . ."

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection:

"In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

51. *Norris-LaGuardia Act*—29 U.S.C. § 107(e).

"No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's feet) and expenses of defense. . . ."

52. *Fair Labor Standards Act*—29 U.S.C. § 216(b).

"The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

53. *Labor-Management Reporting and Disclosure Act of 1959*—29 U.S.C. § 431 (c).

"The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

54. 29 U.S.C. § 501(b).

"The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit. . . ."

55. *Employee Retirement Income Security Act*—29 U.S.C. § 1132(g).

"In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party."

56. *Coal Mine Safety Act*—30 U.S.C. § 938(c).

"Whenever an order is issued under this subchapter granting relief to a miner at the request of such miner, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) . . . shall be assessed against the person committing the violation."

57. *State and Local Fiscal Assistance Amendments of 1976* (Public Law 94-488, § 7(b))—31 U.S.C. § 1244(e).

In any action under this section to enforce section 122(a), the court, in its discretion, may allow to the prevailing party, other than the United States, reasonable attorneys, and the United States shall be liable for fees and costs the same as a private person."

58. *Longshoremen's and Harbor Workers' Compensation Act*—33 U.S.C. § 928.

"(T)here shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employee or carrier . . ."

59. *Water Pollution Prevention and Control Act*—33 U.S.C. § 1365(d).

"The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees to any party, whenever the court determines such award is appropriate."

60. 33 U.S.C. § 1367(c).

"(A) sum equal to the aggregate amount of all costs and expenses (including the attorney's fees), as determined by the Secretary of Labor . . . shall be assessed against the person committing such violation."

61. *Ocean Dumping Act*—33 U.S.C. § 1415(g)(4).

"The court, in issuing any final order on any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable

attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

62. *Deepwater Ports Act*—33 U.S.C. § 1515(d).

"The Court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate."

63. *Patent Infringement*—35 U.S.C. § 285.

"The court in exceptional cases may award reasonable attorney fees to the prevailing party."

64. *Servicemen's Group Life Insurance Act*—38 U.S.C. § 784(g).

"(T)he court, as a part of its judgment decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties. . . ."

65. *Veterans' Benefits Act*—38 U.S.C. § 3404(c).

"The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees . . . shall be deducted from monetary benefits claimed and allowed."

66. *Safe Drinking Water Act*—42 U.S.C. § 300j–8(d).

"The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate."

67. *Social Security Act Amendments of 1965*—42 U.S.C. § 406.

(a) "Whenever the Secretary, in any claim before him for benefits under this subchapter makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix . . . a reasonable fee to compensate such attorney. . . ."

(b) "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation. . . ." (Both subsections (a) and (b) provide for payment out of past-due benefits.)

68. *Clean Air Act Amendments of 1970*—42 U.S.C. § 1857h–2(d).

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

69. *Voting Rights Amendments of 1975* (Public Law 94–73, § 402)—42 U.S.C. § 1973l(e).

"In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, 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."

70. *Civil Rights Attorney's Fees Awards Act* (Public Law 94–559)—42 U.S.C. § 1988.

"In any action or proceeding to enforce a provision of (42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986, 20 U.S.C. § 1681), or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or (42 U.S.C. § 2000d), 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."

71. *Civil Rights Act of 1964, title II*—42 U.S.C. § 2000a–3(b).

"In any action commenced pursuant to this subchapter, 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, and the United States shall be liable for costs the same as a private person."

72. *Civil Rights Act of 1964, title VIII*—42 U.S.C. § 2000e–5(k).

"In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the (Equal Employment Opportunity) Commission or the United States, a reasonable attorney's fee as part of the costs and the Commission and the United States shall be liable for costs the same as a private person."

73. *Legal Services Corporation Act*—42 U.S.C. § 2996e(f).

"If an action is commenced by the Corporation or by a recipient and a final order is entered in favor of the defendant and against the Corporation or a recipient's plaintiff, the court may, upon motion by the defendant and upon a finding

by the court that the action was commenced or pursued for the sole purpose of harassment of the defendant or that the Corporation or a recipient's plaintiff maliciously abused legal process, enter an order . . . awarding reasonable costs and legal fees incurred by the defendant. . . ."

74. *Fair Housing Act of 1968*—42 U.S.C. § 3612(c).

"The court may grant as relief, as it deems appropriate . . . reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees."

75. *Omnibus Crime Control and Safe Streets Act of 1968 Amendments* (Public Law 94-503, § 122)—42 U.S.C. 3736(c)(4)(B).

"In any civil action brought by a private person to enforce compliance with any provision of this subsection, the court may grant to a prevailing plaintiff reasonable attorney fees, unless the court determines that the lawsuit is frivolous, vexations, brought for harassment purposes, or brought principally for the purpose of gaining attorney fees."

76. *Noise Control Act of 1972*—42 U.S.C. § 4911(d).

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate."

77. *Railway Labor Act*—45 U.S.C. § 153(p).

"If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit."

78. *Merchant Marine Act of 1936*—46 U.S.C. § 1227.

"Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor . . . and shall recover . . . a reasonable attorney's fee."

79. *Communications Act of 1934*—47 U.S.C. § 206.

"In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured thereby for . . . a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

80. 47 U.S.C. § 407.

"If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit."

81. *Interstate Commerce Act*—49 U.S.C. §8.

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured thereby for . . . a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

82. 49 U.S.C. § 15(9).

"In any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case."

83. 49 U.S.C. § 16(2).

"If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

84. 49 U.S.C. § 20(12).

"The common carrier . . . shall be entitled to recover . . . the amount of any expense reasonably incurred by it in defending any action at law. . . ."

85. 49 U.S.C. § 94.

"The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees. . . ."

86. 49 U.S.C. § 908.

(b) "In case any carrier shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such carrier shall be liable to the person or persons injured thereby for . . . a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

87. (e) "If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

88. 49 U.S.C. § 1017(b)(2).

"The party who prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court. . . ."

89. *Trading With the Enemy Act*—5 U.S.C. App. § 20.

"No property or interest or proceeds shall be returned under this Act . . . unless satisfactory evidence is furnished . . . that the aggregate of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered in connection with such return or payment or judgment does not exceed 10 per centum of the value of such property or interest or proceeds or of such payment."

90. *Japanese-American Evacuation Claims Act of 1948*—50 U.S.C. App. § 1985.

"The Attorney General, in rendering an award in favor of any claimant, may as a part of the award determine and allow reasonable attorneys' fees, which shall not exceed 10 per centum of the amount allowed, to be paid out of, but not in addition to, the amount of such award."

APPENDIX 7

[From ABA: Special Committee on Public Interest Practice, *Public Interest Law:* Five Years Later, 1976]

PUBLIC INTEREST LAW: FIVE YEARS LATER—MARCH 1976

The Americna Bar Association owes a debt of gratitude to the private foundations which, without the initial assistance of the organized bar, fostered the growth of public interest law commencing in 1969 and developing to the point where now this activity contributes significantly to the overall pattern of the delivery of legal services to the citizens of our country.

This publication, the work of Sanford Jaffe, Esq., of the Ford Foundation, is designed to trace the growth of and to portray the worthwhile contributions of public interest law. It is presented jointly by the Ford Foundation and the American Bar Association's Special Committee on Public Interest Practice. The Committee hopes, by this publication, to aid in improving public understanding of the need for access to adequate legal representation.

HARRY HATHAWAY,
Chairman, American Bar Association Special Committee on Public Interest Practice.

FOREWORD

This is a timely report on an important subject concerning our legal system. "Public interest law" is a phrase that describes a wide variety of efforts aimed at providing legal representation for underrepresented interests in the legal process. These efforts are responsive to an enduring problem in our complex society: It is often impossible to protect or further important interests without legal help, yet many persons and groups do not have access to a lawyer.

This problem produces an imbalance and distortion in the legal process. Certain viewpoints do not have access to important decisionmakers. Decisions are made without benefit of an adversary presentation of all facts and arguments. Significant injuries may go without remedy. Justice is parcelled out unequally, and unwise decisions are made affecting all of us.

Public interest law seeks to fill some of the gaps in our legal system. Today's public interest lawyers have built upon the earlier successes of civil rights, civil liberties and legal aid lawyers, but have moved into new areas. Before courts, administrative agencies and legislatures, they provide representation for a broad range of relatively powerless minorities—for example, to the mentally ill, to children, to the poor of all races. They also represent neglected interests that are widely shared by most of us as consumers, as workers, and as individuals in need of privacy and a healthy environment.

These lawyers have, I believe, made an important contribution. They do not (nor should they) always prevail, but they have won many important victories for their clients. More fundamentally, perhaps, they have made our legal process work better. They have broadened the flow of information to decisionmakers. They have made it possible for administrators, legislators and judges to assess

the impact of their decisions in terms of all affected interests. And, by helping to open the doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.

Although public interest law has grown and has gained wider acceptance, it still faces an uncertain future. The major problem is funding. Even though public interest lawyers usually will accept far lower salaries than they could earn representing well-to-do clients, substantial funds are necessary to make a highly professional public interest practice possible. Yet, almost by definition, public interest lawyers represent persons or groups who cannot easily compete in the ordinary market for legal services.

Until now, foundations and individuals have generously contributed to public interest law firms. Without this charitable support, public interest law would not have achieved its present strength and made its important contributions. It is to be hoped that this important support will continue.

Realistically, however, additional sources of funding must be tapped if public interest law is to continue to grow and attract talented lawyers, and if it is to become a permanent part of our legal landscape. If our society believes, as I believe, that all viewpoints should have access to the legal process, then we must search for ways to assure that public interest law develops a secure financial base. This is not a problem for the legal profession alone, but it is a problem which the legal profession has a special responsibility to address. The legal profession, after all, holds a monopoly on legal services and it has particular duties to see that our legal institutions operate fairly and effectively.

Elsewhere I have argued that the organized bar should move more decisively from rhetoric about equal justice to true commitment, and assume responsibility for supporting public interest practice on a permanent basis.[1] There are signs that the bar is slowly moving in such a direction. The joint publication of this report by the American Bar Association's Special Committee on Public Interest Practice and the Ford Foundation is one such sign. I hope that this report will stimulate greater efforts to achieve the ideals of our profession and our society.

Justice THURGOOD MARSHALL,
Supreme Court of the United States.

EVOLUTION OF THE CONCEPT

When the Ford Foundation began its program of support of public interest law in 1970, public interest law was defined as "representation of the unrepresented and underrepresented." Public interest law had other charactristics as well: an orientation toward test cases; an interest in non-money damage remedies; an emphasis on opening up and improving government operations; a concentration on the administrative process, and a clientele not necessarily indigent but lacking the resources for effective representation on issues of broad concern to the community (for example, the environment and consumer affairs).[2]

Today, five years later, public interest law is viewed in much the same way by courts and administrative agencies, in Internal Revenue Service guidelines, and by the organized bar. In August 1975, for example, the American Bar Association approved a resolution that defined public interest law as:

Legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:

1. Poverty Law
2. Civil Rights Law
3. Public Rights Law
4. Charitable Organization Representation
5. Administration of Justice.[3]

This ABA's definition emerged from a historical context in which the commonality of these various forms of legal representation has been recognized. The right of the indigent to legal representation has long been acknowledged as deriving from the most elementary sense of professional ethics and regard for the adversary system. Defense of individual civil rights was an extension of

---

[1] Financing Public Interest Law Practice: The Role of the Organized Bar, 61 A.B.A.J. 1487 (1975).

[2] For an analysis of the emergence of public interest law activity and an account of earlier Ford Foundation involvement, see *The Public Interest Law Firm: New Voices for New Constituencies*, Ford Foundation, February, 1973.

[3] See Appendix, page 375

this principle, since those whose rights were most often in jeopardy were minorities, who usually tended also to be poor, and advocates of unpopular causes or ideas. The representation of charitable organizations is justified by the fact that, because society values these groups, there is an obligation to defend them against adversity. What is new in the definition is the category "public rights law," which encompasses the bulk of the practice of public interest law firms and is defined as:

Legal representation involving an important right belonging to a significant segment of the public . . . where society needs to have its rights vindicated but as a practical matter the would-be plaintiff or defendant will take action to vindicate or defend those rights only if he receives aid, and does not have to bear the cost himself.

In practice, civil rights litigation, especially as managed by the National Association for the Advancement of Colored People, was very different from legal aid. The latter was offered to the poor on the assumption that the existing system of law would assure justice provided all had access to it. Civil rights practice, on the other hand, was based on the assertion that the system was not sympathetic to the interests of minorities. It sought to remove barriers to equal treatment that were rooted in law and custom and thereby to establish a broad legal base for political, economic, and social parity. One of the means—test cases to attack class discrimination—was used by the NAACP Legal Defense Fund, Inc., which was established in 1939. The fund's victories in the 1950s and 1960s helped to lay the groundwork for subsequent public interest practice. (Other organizations that successfuly used test-case litigation were the American Civil Liberties Union, the Office of Economic Opportunity Legal Services program, and legal defense groups formed by Native Americans, Mexicon Americans, and Puerto Ricans.)

During the 1960s, too, other groups sharing interests that cut across ethnic or economic considerations—environmental, consumer, and health issues, for example—began to make claims on an economic and political system they believed to be unresponsive to their concerns. Ralph Nader was an early champion of these concerns. The Foundation-supported public interest law firm arose out of all these experiences, and its development was encouraged by a United States Court of Appeals decision that affirmed the need for representation of the noncommercial interests of large groups of citizens in the proceedings of regulatory agencies.[4]

In 1970, when the Foundation began to talk with young lawyers interested in setting up public interest law firms, it acted in accord with its program interests in several areas: environment, minorities, communications, electoral issues, and education. The Foundation also viewed public interest law as an instrument for improving the process of government and as a new way of extending legal representation.

The subject areas in which public interest law firms became engaged had long been recognized as appropriate for philanthropic investment, and subsidy of the practice of law for social purposes had been common in poverty and civil rights law. But something new had emerged: the use of charitable funds to support firms litigating on behalf of persons and groups who represented broad interests but might not be poor or deprived. The Internal Revenue Service saw this activity as significantly different from earlier practice, and in October, 1970, it suspended the issuance of tax-exempt ruling to public interest law firms.

Eventually, the IRS challenge was found wanting and dropped. But a question was raised by implication: Does representation by public interest law firms really serve the public interest? The question disturbed many even among these friendliest to the aims of the new institution. Eventually, the body of law and experience being developed in public interest actions may answer it definitively. In the meantime, a few observations may be noted:

1. For the most part, public interest law represents the rights of large numbers, many of them poor or members of minority groups. Yet the legitimacy of the litigation does not depend on the numbers benefited, or the economic or ethnic status of the clients. Rather, it is the nature of he right or the interest at issue that justifies action by a public interest law firm.

2. Although public interest law is concerned with both public and private decision making, experience so far reveals a concentration on government and on reforming public procedures. One result has been a positive reception by govern-

[4] *United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 944 (D.C. Cir. 1966).

ment of many public interest law efforts. Some government agencies now seek out the counsel and cooperation of public interest lawyers.

3. Public interest lawyers are also contributing to public consciousness of inequities or shortcomings in the society. In this sense, the public interest lawyer's purpose transcends process (representation of the unrepresented or underrepresented) and involves substantive concerns with issues of social policy. Further, each firm tends to specialize in particular areas, such as equality of opportunity in employment, education, and health; environmental protection; government responsiveness to the public, especially to neglected groups; the fairness of business practices, and the safety of commercial products.

THE RECORD

Ford Foundation Relations With Public Interest Law Firms

Once the Foundation established its commitment to public interest law as a promising new instrument to serve important social objectives, careful ground rules were adopted to guide relations with the firms it intended to support. The first was to look not only for talent and energy among the staff lawyers, but also for experience and standing at the bar among the firm's advisors and trustees. The second was that the Foundation would in no way be engaged in selecting, or rejecting, any particular lawsuit or administrative matter a firm might pursue.

In order to provide sustained counsel to the whole public interest law program, an advisory committee was established. It consisted of William Gossett, Bernard Segal, Whitney North Seymour, Sr., and Orison Marden,[5] all past presidents of the American Bar Association. The committee reviews and advises on all Foundation grants in public interest law.

It was recognized early that public interest law firms and their activities would probably be controversial and sometimes cause anger, since they are in the business of challenging the policies and practices of well-established institutions and powerful interests. Although there can be no absolute safeguards against unwise actions by a grantee firm, nor any way to immunize it against attack, the requirements established by the Foundation are designed to give the firms the best possible advice. For example, each firm has a litigation committee, composed of lawyer members of its board of trustees, to which staff attorneys are required to submit plans for all legal action for approval. Most of the litigation committee members come from the community in which the firm is located and have litigation experience or specialized knowledge in the firm's particular fields of interest. In addition, *each firm's* board of trustees stays in close touch with the Foundation's declared policies on public interest law.

Record of Performance

The first two firms to which the Foundation made grants in 1970 were the Natural Resources Defense Council, wholly concerned with environmental problems, and the Center for Law and Social Policy, which concentrates on the environment, consumer affairs, and health problems of the poor. By 1975, grants had also been made to thirteen other firms:[6]

Center for Law in the Public Interest.
Citizens Communications Center.
Education Law Center.
Environmental Defense Fund.
Institute for Public Interest Representation.
International Project.
League of Women Voters Education Fund.
Legal Action Center.
Public Advocates.
Sierra Club Legal Defense Fund.
Women's Law Fund.

---

[5] Deceased August, 1975.

[6] See Appendix, page 378, for additional information on these firms. Two grants that are an outgrowth of the public interest law program should also be noted. One, to the Public Interest Economics Foundation, will provide economic analysis and counsel to public interest law firms and citizen groups; the other, to the National Association of Accountants for the Public Interest, will provide accounting counsel for a similar clientele. Both actions reflect a concern that the policy-making process become more informed, open, and fair. They grow out of recognition that as public interest law issues have become increasingly complex and technical, informed citizen groups need better expertise to present their views adequately.

Women's Rights Project.

Research Center for the Defense of Public Interests (Bogotá, Colombia).

By 1975, about 300 cases were in litigation. Some seventy others had been closed out, having been won, lost, mooted, or withdrawn.[7] The firms had intervened or were intervening in nearly 150 administrative proceedings, mostly hearings before federal or state regulatory commissions. Other activities more difficult to tabulate filled approximately one-quarter of the combined dockets and presumably took at least that large a percentage of attorneys' time. These included participation in administrative rule making advisories to government agencies, research and publications, monitoring regulatory agencies, preparing petitions, and conducting negotiations. Both the variety of these nonlitigative and the time allocated to them attest to their special importance for public interest practice.

Firms have varied workloads, especially with respect to litigation. Lawsuits constitute only about one-third of the docket of the Institute for Public Interest Representation but two-thirds or more of the dockets of the Environmental Defense Fund, the Center for Law in the Public Interest, and the Sierra Club Defense Fund. Two specialized firms, International Project and the Citizens Communication Center, focus on work with regulatory agencies more than on litigation. The dockets of Public Advocates and the Center for Law and Social Policy are about evenly divided between litigation and other activities. The Women's Law Fund concentrates on regional litigation.

These differences derive from the firms' backgrounds, interests, and operating styles.

The Environmental Defense Fund (EDF), heavily committed to litigation, is following its early inclination: It began as an instrument of a group of scientists anxious to halt the indiscriminate use of DDT and other long-lasting pesticides. It was virtually launched in a courtroom to test whether litigation could accomplish what persuasion had not. EDF continues to regard legal action as a most useful way to check what the scientists on its board regard as environmentally and socially destructive actions. But EDF has not been content merely to oppose what it thinks ill-advised. It has also offered possible alternatives, as it did when opposing a proposal for a Tocks Island reservoir on the Delaware River (now abandoned), and EDF's program on water quality resulted from effective consultation with the government.

The Center for Law in the Public Interest began with a docket composed almost entirely of challenges to the use of land and resources in the Los Angeles area. In a short time, the firm completed an unusually large number of cases and won most of them. It has now broadened its agenda and is working in the fields of fair employment, corporate responsibility, and electoral reform. In the corporate responsibility area, two cases (Northrop and Phillips Petroleum) have been settled, with important results for the concept of independent "outside" participation in the management of these organizations.

The Sierra Club Legal Defense Fund was created to supervise lawsuits in which the Sierra Club was a litigant. (It is modeled after the NAACP's "Inc. Fund.") The central office has a comparatively small number of cases, but it supervises and lends technical support to a nationwide network of Sierra Club lawyers.

Citizens Communications Center engages in a variety of activities. Most of its time is spent representing the interests of citizen groups before the Federal Communications Commission. As far as possible it seeks to negotiate agreements between complainants and broadcasters and participates in rule-making and policy-making conferences with federal agencies.

The International Project, operating from a slim body of law, has concentrated on helping citizen groups to communicate and work with government agencies and advisory boards concerned with international matters, and to become involved in international meetings, such as the 1974 Law of the Sea Conference.

The Institute for Public Interest Representation, based at the Georgetown University Law Center, devotes much of its time to research and publication. It has a strong interest in administrative proceedings, petitions, monitoring, and other techniques aimed at improving government performance by critical review of official procedures.

The newer firms are still developing distinctive styles, but it appears that the Education Law Center and the Women's Rights Project will concentrate on litigation and agency monitoring. The Legal Action Center, on the other hand, will

[7] This is an approximation; exact figures are indeterminable because of joint suits. The total includes *amicus curiae* interventions.

use a variety of educational and informational techniques, in addition to litigation, to persuade public and private employers to hire ex-offenders and addicts.

The Research Center for the Defense of Public Interests in Bogotá, Colombia, represents the first attempt to test the adaptation of the concept of public interest law in a developing country. Set up by several Colombian attorneys, the center has a well-known and diversified board and has matching support from the Inter-American Foundation.

Although much of the publicity generated by public interest law has focused on environmental and consumer activities, a great deal of its work is done on behalf of minorities, low-income people, and others who suffer deprivation of one sort or another. Among the client groups and organizations that have been represented are women, juvenile offenders, the physically and mentally handicapped, children, and low-income tenants. And, in addition to environmental and consumer protection, the main areas of public interest law activity are reform of governmental processes, fair employment, the mass media, physical and mental health, women's rights, electoral rights, international issues, and education.

The following brief accounts of public interest law activities, organized according to subject matter, convey a sense of the versatility and scope of the organizations supported by the Foundation. They represent a considerable part—but by no means all—of what is being done in the public interest law field.

Environmental and Consumer Protection.—The recent proliferation of litigation on behalf of the consumer and in defense of the environment arises out of a perception that our system has not shown the necessary regard for health and aesthetically related values such as the quality of air, land, and water, and the safety of consumer goods.

Dozens of legal actions have been taken in the past five years to enforce provisions of the National Environmental Policy Act (NEPA) and similar state statutes. Much of the litigation has been concerned with who must file statements and the contents of those statements. A high percentage of these actions has succeeded in defining and enforcing the legislated procedure. As a result, many government agencies are now taking the impact statement requirements of NEPA more seriously than previously.

Public interest lawyers have also sought to enforce the substantive provisions of other protective legislation, such as statutes protecting the national forests against excessive tree cutting, and the pure water and clean air laws. They have also begun to explore questions dealing with occupational health and safety. A long and generally successful campaign has been waged in the courts, in administrative hearings, and by negotiation with regulatory agencies to ban certain pesticides with broad, indiscriminate, and long-lasting power to harm. The National Resources Defense Council, which has become exceptionally well informed on nuclear power, is active in several lawsuits that attempt to focus on issues relating to the disposal of highly toxic radioactive waste.

Private land-use development is also being subjected to environmental and other types of governmental control. In California, as a result of public interest law litigation, land developers must comply with state environmental statutes, and local zoning must conform to comprehensive, long-range planning. The Center for Law in the Public Interest has been most active in this area and has recently brought a case on behalf of people who work in Irving, California, but cannot live there because of restrictive zoning laws, which they contend violate the county's general growth plan.

Environmental litigation raises profound issues for public interest law. The cases and the interests at stake are complex. In most of the difficult cases, it is not self-evident what public policy should be. Nevertheless, the record for the last five years indicates that public interest law litigation in this field has touched a responsive chord among substantial segments of the public. That these efforts coincide with the concerns of large numbers of the American people appears to be borne out by the continuing strong support, including dues-paying memberships, for the major environmental organizations. In their impact on environmental policy, public interest law firms have developed a role for the public in the nation's decision-making process that could not easily have been forecast in 1970.

In the consumer field, the focus has been on challenges to practices that impair the quality of retail goods or that tend to fix the prices of basic products without reference to consumer interests. One example is the legal questioning of restrictions on the import of tomatoes, textiles, steel, and oil. Discriminatory credit and pricing have also been under attack. Suits to compel credit card companies to allow merchants to give discounts to cash customers have been mooted by legis-

lation granting that relief. Public interest lawyers continue efforts to get credit extended on an equal basis to women and to racial and ethnic minorities. Suits challenging the traditional rate structures of utilities, which now favor large users, have significance both for consumers and for the environment, since a suggested substitute system of pricing would discourage waste and reduce demand.

Efforts have also been made to support the enforcement powers of federal agencies. In an important administrative decision, the Federal Trade Commission now requires advertisers to substantiate scientific claims with scientific evidence. A case raising the issue of correcting misleading advertising was lost on appeal but in such a way that the issue can be resurrected. The Fairness Doctrine has been used for alternative advertising in both environmental and consumer matters. Action has also been taken to apply the provisions of the Administrative Procedures Act requiring notice and opportunity to comment to Federal Reserve Board regulations dealing with reserve requirements of its member banks. This is of concern to consumers, investors, and mortgagees.

As with environmental concerns, consumer protection efforts continue to enjoy wide support. Specialized consumer agencies at all levels of government have been established, and there are good prospects that the consumer movement will be reinforced by additional institutions.

Reforming the Government Process.—To help make government more responsive to wider segments of the community, much of the effort of the Ford Foundation-supported firms has been directed at opening administrative processes to public scrutiny, enabling the public to participate in agency decision making, and improving internal procedures of governmental bodies.

Freedom of Information suits have proved to be a sharp wedge in opening governmental agencies to public scrutiny and actions have been filed against a number of them, including the Federal Reserve System, the Federal Highway Administration, and the Department of Commerce. As a result, the courts have limited the scope of exemptions and the Act in several instances; for example, businesses can no longer resist disclosure with a blanket claim of "confidential" information, and audits of the Law Enforcement Assistance Administration are now available.

A principal method of public participation in administrative decision making has been the use of comments in rule making. Public interest law firms have committed a great deal of time and effort to this activity. As a result of their work and others' and of an important circuit court decision specifying the Federal Communications Commission's duty to seek out listener viewpoints, several federal agencies have now taken steps to broaden citizen participation in agency proceedings. The agencies have come to recognize that it is not enough to sit back and wait for the interests to clash; rather, an active effort must be made to get interested groups involved in hearings. The FCC now sends special mailings to groups interested in policy development. The Consumer Product Safety Commission has developed a program under which consumer groups can submit plans to develop safety standards for particular products and receive financial assistance for their work. The Federal Trade Commission has created a panel of consumer and industry representatives to work out a proposal on children's advertising. And the Interstate Commerce Commission has gone even further by creating an Office of Public Counsel to assist consumers, principally farmers and passengers, at public hearings.

Another means of broadening citizen participation has been through the use of advisory committees to governmental agencies. As a result of pressure, agencies have opened membership to unrepresented groups and created additional advisory committees to help the newcomers. A lawsuit, filed under the Advisory Committee Act of 1973, enabled a women's group to gain access to a Defense Department Advisory Committee that deals with women in the armed forces. Dockets of public interest law firms list many other, less formal modes of participation, from preparing reports to consultations.

Efforts to reform internal procedures range from lawsuits to informal pressure. These activities have helped develop new ways of dealing with prisoners and juveniles. In addition, procedures have been devised to minimize adversary situations; for example, the FCC has been persuaded to initiate a rule-making procedure that, under certain conditions, can avoid a license challenge, and the Food and Drug Administration, under a recent Supreme Court decision, has streamlined the way in which it determines the safety and efficacy of drugs.

Standing has been expanded in a variety of contexts and forums. Not too many years ago, it would have been unusual for people without a direct economic interest to participate in administrative matters. Now there is a growing number of

instances in which public interest law and governmental agencies have worked out cooperative arrangements. Today, the doors are open in many agencies, and the problem of access is rarely one of law but of the scarce resources of citizens groups.

Fair Employment.—Work in this area has concentrated on racial and sexual discrimination in public agencies (notably police and fire departments) and in private business (such as banks, insurance companies, retail stores). Suits have sought affirmative plans to ensure future equal treatment of minorities and women. The firms have also challenged discriminatory practices such as denial of leave and medical benefits for pregnant women and employment tests that in effect screen out minorities.

The approaches of the law firms vary. Public Advocates, for example, tries to enlist the support and cooperation of state and federal enforcement agencies not only to bring pressure on public or private groups practicing discrimination, but also to use the resources of the enforcement agencies to conduct investigations and make reports. When public agencies have been willing to do this, the cooperative arrangement has worked well. If the enforcement agencies are reluctant to proceed, or seem to enter into "sweetheart" agreements, the law firm will litigate.

Public Advocates has been able to negotiate industrywide agreements in banking, in the savings and loan industry, and in several utilities in California. It has been important both to the law firm and to the industry concerned to work with a broad coalition of minority-group organizations. In that way mutually satisfactory agreement goes far to assure the industry of the support of those organizations, and the law firm is spared the task of relitigating cases against individual employers.

Some of the most innovative work in combating employment discrimination is being done by the Legal Action Center on behalf of persons with criminal or drug abuse histories. An action against the New York City Transit Authority has established the principle that a public employer cannot exclude persons from employment solely on the basis of their past addiction or current participation in a methadone maintenance program. And the U.S. Postal Service has introduced new regulations providing for the hiring of former addicts, and current participants in methadone maintenance programs, in accordance with specific job-related selection criteria.

The Legal Action Center has developed adjustment and counseling procedures and a wide network of consultation services for agencies serving ex-addicts. Further, the center's close ties with the Vera Institute of Justice provide it with an unusual ability to monitor these actions.

The work of the Citizens Communications Center, described in the next section, bridges the communications and employment fields. In its negotiated settlements to ensure greater responsiveness to minorities in broadcast programming, the center has been able in many cases to include provision for affirmative action training and employment.

Responsiveness of the Mass Media.—A major concern of Foundation-supported firms active in communications has been to give audiences a voice in determining the kinds of programs they are to see and hear and to facilitate minority access to cable television. The firms have also challenged the concentration of control of broadcasting stations and newspapers and argued that where advertising promotes a misleading view, other views should be given a hearing.

One of the most important cases to date was the petition to deny a license filed by the Citizens Communications Center against the Alabama Educational Television Commission. On the basis of the center's arguments, the FCC held that the station had been guilty of discrimination against blacks in programming and hiring. The decision established the proposition that automatic renewal can no longer be presumed, and that if bona fide challenges are made, stations must demonstrate that their performance is in accord with the law. It incorporated many of the judicial precedents developed under civil rights, voting rights, and employment discrimination cases, the most important of which is that quantitative results, rather than proof of intent, are sufficient evidence of discrimination. In addition, the FCC held that public broadcasters have even greater obligations to minorities than do commercial broadcasters.

The Alabama case was the culmination of a sustained effort by the center over a considerable period to institutionalize challenges to license renewals as an effective legal tool. Nor have petitions been restricted to matters of discrimination; they have also challenged stations on the grounds of mislogging programs, changes in format, and concentration of control. By now, it has become a prac-

tice for many broadcaters to negotiate with citizen groups on a variety of issues rather than face the prospect of FCC action. Recently, in such pre-renewal discussions, at least ten agreements were reached in the New York-New Jersey area. This trend has become so pronounced, however, that the FCC recently told broadcasters that they cannot negotiate away their obligations under the law by sharing certain responsibilities with citizens groups.

Issues relating to the Fairness Doctrine are being dealt with increasingly through negotiations or by actions that have broader implications than the case-by-case approach. The Citizens Communications Center has come forward with a proposal that would allow broadcast journalists to present controversial issues without regard to balance, but would also offer individuals or groups "access message time" (one-minute spots in prime time) to respond. This system is now being tried on an experimental basis in San Francisco and Pittsburgh, and it has been welcomed as a creative alternative.

On the whole, the FCC has probably become more responsive to citizen access than any other major government agency. And the center's work has resulted in an increase in the means available to community groups to assess station performance and responsiveness.

Health and Mental Health.—Public interest lawyers have concentrated on improving standards of medical care for those least able to articulate their needs, especially the poor and minorities. A series of lawsuits to compel hospitals to offer a minimum amount of free service, as specified in the Hill-Burton Act subsidies, resulted in regulations by the Department of Health, Education and Welfare that define the service obligations of the hospital including a requirement to serve Medicaid patients. Related efforts have been made to force public hospitals to maintain standards equal to those of nearby private institutions. The Supreme Court has recently heard a case involving the obligation of hospital to provide at least some free service to indigents as a condition of maintaining a charitable tax status.

In addition, special concern has developed for the handicapped. A successful suit secured ramps for the physically handicapped in the new Washington, D.C., subway. Other litigation seeks to establish the right of physically or mentally handicapped children to equal public education.

Care for the mentally ill has become another major concern. Current suits argue for the right of the mentally ill to appropriate care and the consequent responsibility of the state to insure that a person who is civilly committed receives therapy and is not just locked up for safekeeping, a principle given strong support by a recent Supreme Court decision. Specific issues have been raised on the "convenience" use of tranquilizers, patient labor without pay, safeguards for human subject of medical experiments, and definitions of informed consent. The actions brought by public interest law firms have called attention to needed reforms that may require systematic oversight of health institutions.

Women's Rights.—Lawyers especially concerned with the rights of women have focused on discrimination in education and employment, on health issues, insurance coverage, and related benefits. Firms are also working on day-care licensing regulations that adversely affect the poor and on sex discriminatory practices in commercial and mortgage lending.

In matters related to women's health, public interest law activities have sought stricter regulation of potentially carcinogenic contraceptive drugs, of human experimentation, and of the use of drugs for nonapproved purposes. They have argued for monitoring procedures of intrauterine devices and for warning labels on prescription drugs that may be especially harmful to pregnant women.

The issues in insurance and disability largely center on the exclusion of pregnancy-related disabilities from sickness and accident plans. The Supreme Court held that state plan exclusions are not unconstitutional, but there are a number of cases challenging plans under antidiscrimination statutes. In an important case brought by the Women's Law Fund, the Supreme Court invalidated the mandatory maternity leave policy of the Cleveland Board of Education as arbitrary under the due process clause of the Fourteenth Amendment. In another pregnancy-employment case, it was held that failure to provide sickness and disability leave to a woman temporarily unable to work after childbirth violated Title VII of the Civil Rights Act when the collective bargaining agreement provided for sickness and disability leave, but not maternity leave. Several other cases challenge sex discrimination by employers in promotion, fringe benefits, reinstatement after maternity leaves, and layoff policies.

A number of actions involve discrimination against women in police and fire departments. Cleveland has now eliminated its quota restricting the number of

women police officers. A federal appeals court invalidated police weight but not height requirements that had eliminated 99 per cent of all women; the height issue is pending decision on a petition for *certiorari* before the Supreme Court.

In education, several cases involve discrimination in curriculum, vocational education, and athletics; equal resource allocations to female students and their activities; and the elimination of sex discrimination in textbooks. A recent case, on behalf of the Women's Equity Action League and others, seeks affirmative action by HEW and the Department of Labor in enforcing the antidiscrimination provisions of education and health-training programs.

International Issues.—The International Project was established to extend public interest law activities to the processes of foreign-policy formulation and international decision making, particularly when these impinge on consumer, environmental, and social concerns. The major consumer cases have centered on import restraints on steel, textiles, tomatoes, and meat. The firm's efforts have been directed both at assisting consumers in presenting their positions to government and at opening the decision-making process. As a result, the government's textile advisory committee and other aspects of the decision-making process on textile imports have been opened to the public, and the Department of Agriculture has agreed not to discriminate against imported tomatoes and to consider price and quality factors.

In the environmental area, a sustained effort has been made to extend NEPA's reach activities of U.S. agencies that have international significance, for example, on marine pollution problems. Work is also being done to bring environmental considerations to bear on the U.S. nuclear export program as well as the overseas pesticide program of AID.

An issue that has consumed considerable time and staff resources centers on oil transportation—the design, location, and construction of port facilities, international and national rules for construction and design of oil tankers, liability for oil discharges at sea, and the drilling of offshore oil. Another effort deals with issues that arose in the Law of the Sea Conference. International Project lawyers have participated on the Secretary of State's Advisory Committees and as members of the U.S. delegation to the Laws of the Sea Conferences, and they have also been collaborating with environmental groups in other countries.

The project has, with State Department support, arranged for environmental organizations, such as Friends of the Earth International, to be accredited before international agencies that deal with environmental matters.

Despite heavy demands of consumer and environmental issues on this small firm, the International Project is also beginning to explore the protection of human rights. A suit, brought on behalf of the Southwest African Peoples Organization, the American Committee on Africa and others, is challenging the Department of Commerce's dealings with South Africa on imports from Namibia (Southwest Africa). The plaintiffs allege that these negotiations violate the United States' obligations under the U.N. Charter and the Security Council resolution forbidding such dealings with South Africa because of its illegal presence in Namibia.

With respect to citizen access in general, the project has played a leading role in persuading the State Department to adopt rule-making procedures, regulations requiring public participation in international negotiations, and environmental regulations involving public comment.

Education.—In California, Public Advocates won an extended trial in the *Serrano* litigation, which demonstrated that there was a nexus between unequal school financing and deficient educational programs. The case, which was on remand from the California Supreme Court, involves the reallocation of a minimum of $850 million annually to poorer school districts. The trial court produced a lengthy opinion that is now being widely circulated by the law firm in response to requests from various groups throughout the country.

In both California and New Jersey, law firms are helping in the development of educational policy. The firms' contributions consist of advice, testimony, the preparation of explanatory material, and the general defense of rights that have been established in the courts. In New Jersey, the State Supreme Court ordered state agencies not only to change school financing patterns, but also to establish and enforce standards of effectiveness in educational outcomes. The Education Law Center has participated in efforts to implement the court's decision, particularly the examination of educational finance alternatives. In response to specific requests, it has provided legal memoranda and other forms of technical assistance to the legislature, the Governor, and state agencies. So far, the New Jersey Su-

preme Court has given the legislature until March 15, 1976, to provide additional funds to meet the constitutional mandate.

Judicial recognition that children have an enforceable state constitutional right to a qualitative standard of education has important implications for educational policy throughout the nation. All told, thirty-eight states have constitutional language identical or comparable to New Jersey's. Since the U.S. Supreme Court held in *Rodriguez* that unequal school financing is not a violation of the U.S. Constitution, the New Jersey and California experiences are expected to have increasing effect on equity cases in other states.

In addition to efforts in school finance, public interest law firms have been working to ensure support for special educational needs—for the handicapped, the retarded, and those who do not speak English as their native tongue. And work is being done to rid textbooks and curricula of racial stereotyping. Law firms are also involved in extending due process protection to students, such as the development of standards for suspensions and expulsions, access to records, the expunging of certain kind of information from records, and the regulation of behavior modification techniques.

Electoral Rights.—Public interest groups such as the Litigation Department of the League of Women Voters Education Fund have focused on activities to ensure full citizen participation in government through the electoral process. A number of actions have been aimed at removing administrative obstacles that effectively disenfranchise persons who are otherwise qualified to vote—for example, state and local residency requirements, restrictive absentee voting regulations, and failure to supply adequate and convenient registration sites.

Suits have been undertaken to enforce the principle of one-person, one-vote at all levels of government to make equal representation a reality. Other matters have challenged the use of multimember districts and other election schemes that have the effect of diluting the voting strength of minorities.

A key factor in the area of electoral rights is the dispersion of governmental authority among various state and local units of government. State and local discretion in the regulation of the franchise complicates monitoring of compliance by national groups. For example, after the Supreme Court's decision dealing with the durational residency requirements, a monitoring and enforcement program in twenty states had to be instituted by the League of Women Voters Education Fund to obtain compliance. This effort is part of the local league litigation program for which the national organization provides technical assistance. To date, some 170 local and state leagues have initiated lawsuits in voting rights as well as in areas of "League concern," such as women's rights, school issues, and the environment, housing, and land use.

Concerns About Public Interest Law

Four major questions have been raised regarding public interest law activity: (1) Are the courts the appropriate forum to resolve the kinds of issues with which public interest law is concerned? (2) Is public interest law activity overburdening the judicial system? (3) Do public interest law activities at times champion one "public interest" that clashes with another public interest, thus benefiting one segment of the public at another's expense? (4) Are these substantial interests in the community that are not being represented by public interest law firms?

An Appropriate Forum?

Cases that involve broad public-policy issues or deal with large complex and technical matters have frequently led people to raise questions about the proper role of the courts. Although public interest law has sharpened the focus somewhat, the issue is an old one. From the earliest days, courts have been called upon to interpret the Constitution, to adjudicate conflicts between government agencies, and to determine whether such agencies have carried out their responsibilities to weigh carefully competing values and interests. Public interest law operates within this established system, which is open to all citizens. What is new is that it introduces additional issues into the process and gives underrepresented groups a realistic opportunity, backed by adequate intellectual and financial powers, to be heard.

A contention of those who are skeptical of assigning too much policy-making responsibility to the courts is that such questions are more appropriately settled in the political arena, because legislatures and elected executives are more directly exposed to different interests. Also, it is argued, they have more and wider

channels to the public and its representatives than the courts, which can only set forth policy or estop action, whereas the legislature, with the power of the purse, must implement it.

There is no clear-cut answer to these arguments. The legislative process, too, has its drawbacks, and the tug between the two branches is likely to continue. However, it is important to note that courts act at the behest of claimants and never on their own. Claimants, whether represented by public interest law firms or not, are in court only if they allege a legel basis for their actions, statutory or constitutional, and legislatures can alter that basis within constitutional doctrine. Most importantly, courts are usually careful and thoughful, and there is a sound historical basis for confidence in the ability of the judiciary to handle the matters that come before it in a responsible manner.

In many of the areas where public interest law functions, there are no sure guides to measure competing values or decide with certainty which alternatives should be selected. Furthermore, it is in the nature of the judicial process to sort out and help define complex issues in a public forum. In so doing, it assists implementing agencies to fulfill their functions and enables different groups representing conflicting demands to test them in an adversary proceeding. Particularly at a time when large majorities of the public are intensely concerned with major problems, such as the energy crisis and the economic recession, some groups with special concerns believe that a court is the only place where they can get an adequate hearing.

To be sure, procedural due process is not an absolute. There are often better ways than a lawsuit to resolve some issues. New approaches to conflict avoidance and resolution are proper subjects of inquiry in this context, and are discussed in the last part of the paper.

PRESSURE ON COURT CALENDARS?

The question whether public interest law activity overburdens the courts is somewhat less fundamental, even though some observers have strong opinions about it. Some public interest law cases are complicated and difficult and would indeed take a lot of time, but few of these have reached the trial stage, where most of the court time is consumed. Many of the cases are resolved on the law issues. Moreover, public interest lawyers realize that, with few exceptions, they have neither the funds nor the resources to take cases that involve lengthy trials. A review of court dockets—federal and state—shows that the number of court cases brought by public interest law firms is relatively small. In fact, about half of the filings by public interest law firms are in the administrative process and rarely get to the courts.

The Foundation's procedures for selecting firms for funding and the way in which the firms operate help ensure that only substantial claims are brought and that the judicial system is not abused. The record is good; not a single case brought by a Foundation-supported firm has been dismissed as being frivolous; nor has there been any substantial charge of harassment or abuse of process.

Finally, the experience of the past five years shows a steady trend away from litigation and to negotiation and other nonlitigating approaches. The heavy participation of public interest law firms in rule-making illustrates this point.

COMPETING PUBLIC INTERESTS

The dilemma of competing public interests is the most difficult one for public interest lawyers. It is easier to deal with in those cases that require more open procedures, or seek to expand public access and information and secure legal rights and benefits. Thus, hospital care for the indigent, equal educational opportunities for the disabled, honest and informative advertising and labeling, a proper census count for Mexican Americans, and the treatment of pregnancy-related disabilities under health plans are objectives on which a broad public consensus can probably be found and for which the economic costs of conforming to the law are likely to be accepted.

The difficult cases are:

1. Those in which courts enjoin large economic enterprises or impose such onerous conditions on them that the enterprises might be abandoned, with potentially harmful consequences for economic development and employment. In the energy field, for example, there are cases in which ecological issues clash with substantial claims for economic growth and residential needs. Other ex-

amples are the enjoining of construction of an interstate highway system because of its environmental impact and its potential for housing displacement, or applying nationally the nondegradation principle in the Clean Air Act.

2. Those that deal with broad public-policy issues and impose large costs; for example, educational finance cases and reform of mental hospital procedures.

Often these are not contests between "good guys and bad guys," nor between private profit and public welfare. There are public needs and good arguments on both sides. In this sensitive area, the structure and the procedures that have been established—the Foundation's advisory committee as well as the boards and litigation committees of each firm—play an important counseling role.

Experience so far indicates that most of these cases get to court either because there are no effective alternatives to resolve the conflicts or because government or industry is not conforming to the law. As of now, the trade-offs in these complex matters cannot be measured quantitatively. It is hoped that a Foundation-commissioned study by the University of Wisconsin on the social and economic consequences of public interest law activity will yield methods for reliable and objective assessments of such costs and benefits.

For now the answer to the question must rest on two points. The proper function of public interest lawyers is to represent significant views that otherwise would go unrepresented in cases affecting the public welfare. The fact that some public desires are incompatible with others requires a court to be careful and puts a heavy responsibility of choice on public interest lawyers. It is their task to choose cases in which the issues are substantial and to litigate only when means short of litigation will not settle these issues. At the same time, they have to be sensitive to other social interests that may be unrepresented in the proceedings and guard against overzealousness.

And secondly, the political and social cost of leaving substantial interests without a representational voice in deciding their own lot is greater than the risk of letting them be heard. It is a principle rooted in the American tradition.

ADEQUATE REPRESENTATION

Are there substantial interests in the community that do not get adequately represented because of the way in which public interest law firms tend to choose their clientele? No doubt this is the case. Public interest law is still in its early stages, nurtured primarily by a thin flow of foundation funds; legal resources cannot yet be stretched to give everyone the necessary representation. Foundation support has been able to provide a small number of models that, it is hoped, will lay the basis for a more complete institutionalization.

The fact remains, however, that public interest law firms, most of the time, represent established and well-informed groups of organizations; the environmental and consumer cases are the best examples of this. Furthermore, there must be an aggrieved client, and while the rules of standing may be liberalized, the requirement of standing remains crucial. The lawyers themselves have a professional interest in assuring that their clients are responsible in order to assure the courts, administrative agencies, and public, that the interest they represent is substantial and important. In fact, the broader the interests of the group represented and the more numerous the plaintiffs, the more public interest lawyers are assured that they are representing an interest that should be heard.

Finally, in addition to the safeguards already discussed, the Internal Revenue Service guidelines on public interest law require the firms to file an annual report on the cases handled, including an explanation of the public interest involved in each case.

THE FUTURE

This review has discussed beginnings—the demonstration of potential. To move toward its fulfillment, public interest law needs more time and greater effort. The firms now heavily dependent on foundation support cannot remain so if for no other reason than that most foundations are reluctant to tie up their resources in long-term commitments. Moreover, the firms need to do better than just hang on; they need a chance to grow. And they can grow only if they can earn their way from the people they seek to serve.

The concluding section of this report looks at the future of public interest law over the next few years—probable sources of support and efforts to tap and develop them, as well as possible new forms of dealing with social and economic problems and inequities that may emerge from present experience and practice.

Fees. When the Internal Revenue Service dropped its 1970 challenge to public interest law firms, it made it a condition of their charitable status that they could not accept fees for professional work. As a result of a considerable effort by public interest law supporters, the Service recently changed that policy and decided that a public interest law firm can accept fees without jeopardizing its tax status. The ruling is qualified, however: The fee must be court- or agency-awarded or approved, and no more than half the firm's annual total costs (averaged over five years) can be defrayed from such fees. "This ruling," the IRS states, "is issued with the understanding that neither the expectation nor the possibility, however remote, of an award of fees will become a substantial motivating factor in [the] selection of cases."

Some public interest lawyers consider the ruling restrictive, but it opens the door to a potential source of support. The general rule in the United States is that each party pays its own attorneys' fees. But under several federal and state statutes, there are exceptions. These statutes include Title VII of the Civil Rights Act (covering employment discrimination), other civil rights statutes, laws relating to clean air and water and to freedom of information, and amendments to the Federal Trade Commission Act. Attorneys' fees can also be collected when there is a "common benefit or fund"—for example, a shareholder's derivative suit. Fees are also sometimes awarded when the defendant has acted in bad faith and it would be unjust to have a plaintiff bear his share of the litigation. The most important exception, however, under which some two dozen federal courts have held that fees were to be awarded is the "private attorney general" theory. This theory holds that a private citizen should be awarded legal fees when the suit brought has effectuated a strong statutory policy that has benefited a large class of people and where such an award is necessary to encourage private enforcement. The theory has also been used in some state courts, most notably in the *Serrano* (school financing) litigation in California, where the trial court awarded $400,000 in counsel fees to Public Advocates.

Recently, however, the Supreme Court, in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, held that federal courts did not have the power to award fees under the "private attorney general" exception. The Court said that recognition of such an exception to the American rule was within the province of Congress. However, the Court affirmed the common benefit or fund exception and the award of fees pursuant to statute. Also, the Court's ruling in the *Pipeline* case is limited to awards of attorneys' fees by courts in the federal system. Although the *Pipeline* case has been a blow to public interest law in its search for supplementary sources of funding, a good deal of follow-up litigation will be required before the case's influence can be more precisely assessed.

Prior to the Supreme Court's *Pipeline* decision, the principle of the private attorney general exception had received support from many sources. For example, Chesterfield Smith, recent past president of the American Bar Association, took a stand favoring reimbursement of the legal expenses of successful plaintiffs in public interest causes. He saw court-awarded fees not only as equitable in themselves but as a means of enabling the private bar to play a larger role in public interest law activity.

The private attorney general exception also enjoys support among some groups of the organized bar, and an ABA committee is working on a model law relating to the issue. As mentioned earlier, the lower federal courts were nearly unanimous in favor of the exception. Legislation has been introduced in Congress to give discretion to the federal courts to award attorney's fees in such cases, and a similar bill has been introduced in the California legislature. At this time, it is too early to forecast what the outcome of this legislative activity will be.

So far, public interest law firms have been awarded $1,297,298 in fees. They have received $378,848 of that amount, and the rest, $918,450, is subject to appeals and other unfinished business. However, the IRS ruling is so new that there is insufficient experience to predict the amount of dollars that could eventually flow from this source.

Another possibility of support is for clients who can afford something to pay a reduced fee to public interest lawyers. One of the underlying assumptions of the Foundation's program was that organizations would come to appreciate the effectiveness of legal tools and begin to budget accordingly. Some private attorneys who take public interest clients are being reimbursed by these client organizations. At present, the IRS rule bars tax-exempt public interest law firms

from accepting client fees, but the IRS might be persuaded to allow such fees, if the fee scale were below market value and the amounts if yielded fell short of covering the costs of the litigation. Recently, representatives of the Council for Public Interest Law, an organization of firms dedicated to the growth and development of public interest practice, met with the Commissioner of Internal Revenue on this issue and were encouraged to submit a proposed ruling on the subject. The Exempt Organizations Committee of the American Bar Association Section of Taxation has also taken a position in favor of public interest law firms' accepting client fees, within certain guidelines.

Public Subsidy.—There is a trend to provide for attorneys' fees through specific statutes. The Court in *Alyeska* expressed its basic support for this kind of assistance:

"It is apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances."

Another form of public subsidy is illustrated by the newly created New Jersey Department of the Public Advocate. The director, appointed by the Governor, has cabinet status. The Department has offices of rate counsel, mental health advocacy, inmate grievances, and public interest law. The public interest law office is empowered to institute litigation on behalf of a broad public interest, even against the state, and can intervene in any administrative proceeding. The Department also has an Office of Citizen Complaints and an Office of Dispute Settlement, which provide third-party services to community groups and government. The New Jersey agency is the first of its kind in the country. But there is interest elsewhere. The Wisconsin State Department of Administration has recently commissioned a feasibility study for a similar department.

Other possibilities are a tie-in with the Legal Services Corporation and specific authorizations in agency budgets for citizen input. For example, the Federal Trade Commission has set up a program whereby public interest lawyers can get fees for representation before the agency. The Nuclear Regulatory Agency is looking into a similar arrangement.

Public subsidies pose risks for public interest law. The unique virtue of "private attorneys general" is that they are private and thus immune from the restraints of public employment. If public interest law becomes overly dependent on government subsidies, it may become vulnerable. These matters are difficult to predict. It is not even clear that generalizations can be drawn from the OEO experience. OEO suffered heavy political attack, but government-supported public interest law may not incur this kind of opposition. OEO Legal Services was a pathbreaker. The idea of independent legal representation supported by public money may be gaining acceptance. For one thing, the leadership of the organized legal profession appears to be committed to it.

There remains some uneasiness among lawyers and others that prospects of court-awarded fees might encourage litigation of dubious merit and raise the possibility that defendants will try to induce lawyers to settle cases by offering to pay their fees. These fears do not seem to rest on substantial grounds. Since fees would be offered only to successful plaintiffs, those with frivolous causes are not likely to seek them. And if they do, courts have ample powers to punish and restrain. It is expected that courts will examine negotiated fees. Neither courts nor legislatures are likely to prove so generous in their awards as to tempt attorneys interested primarily in easy profit, especially since the costs of preparing public interest cases are relatively high. In addition, the tax-exemption of public interest law firms precludes any individual lawyer in a firm from benefiting from court-awarded fees.

Support by the Organized Bar.—If public interest practice is to remain and grow, it must be seen as an enlargement of the scope and responsibility of the legal profession. The profession has accepted responsibility for providing public defenders and legal services for the poor. The question is whether that responsibility extends to "public rights law." The Special Committee of the American Bar Association has said that it does, and at its 1975 annual meeting in Montreal, the House of Delegates accepted the Committee's recommendation.

Now that the organized bar is committed to the principle, what will happen in practice? The most optimistic estimate is that in about four to five years the ABA will have moved concretely to aid public interest law; the more pessimistic guess is that it will take eight to ten years. No one predicts the bar will move at once, and no one thinks it will not move at all.

When it moves, what can it do? Even though the ABA itself would probably not put up major financial support, it could strongly and probably effectively urge local bar associations to do so. Some bar associations, Beverly Hills, Philadelphia, and Boston, for example, already have made a beginning. Leaders of some large city associations who strongly support public interest law believe it might be possible to institutionalize aid, perhaps through a dues checkoff, that would assure a minimum of continuing support for one or more public interest firms.

The ABA might also support public interest law in nonfinancial but potentially very important ways, such as through help in negotiations with the IRS on fee questions, through the kind of strong and effective backing that it gave the federal legal services program, by support of legislation favoring public interest practice or by opposition to hostile bills. Such actions by the ABA could significantly improve the financial prospects of public interest practice, and, perhaps more importantly, encourage the bar to accept professional responsibility for it.

The number of firms that could at best be supported by all the sources and methods projected in this paper still falls far short of the number of practicing lawyers required to meet the needs that the work of the past five years has helped to reveal. More firms than there are now are needed, and they should be better distributed geographically. But growth may have to depend more heavily on the extension of the *pro bono publico* practice of conventional firms throughout the country. Here the prospects are unclear; the *pro bono* record of private practitioners is mixed. Most of this kind of work is being done on behalf of individuals and is in the nature of service rather than law reform litigation.

Council for Public Interest Law.—The economic options so far discussed are available mainly because public interest lawyers and a few of their supporters have worked to develop them. The further development of these possibilities and the cultivation of public acceptance are complicated and exacting tasks that cannot be effectively performed by a few individuals in their spare time. To this end, an organization was set up at the end of 1974 with funding from the Rockefeller Brothers Fund, the Ford and the Edna McConnell Clark Foundations, and the ABA.

The new council,[1] which has a full-time executive director, small support staff, and probably three years to complete its work, will begin with a systematic analysis of the economics of public interest practice—an area in which there are now many strongly held impressions and few data. It will then proceed to design possible financing mechanisms, such as drafting model legislation with respect to attorneys' fees as well as legislation to provide direct subsidies. Another project is investigating the feasibility of setting up a large pool of money with independent management and foundation and organized bar support to help finance public interest law activities. The council is also exploring methods by which prepaid legal insurance may be used to finance public interest law, and it is considering professional fund-raising campaigns, the encouragement of research groups, and the use of law school clinical programs. Some pilot experiments will be included in its work: For instance, if a local bar association is interested in public interest law, the council will help design a mechanism to facilitate contributions of local lawyers.

In addition the council will conduct an educational campaign aimed at the legal profession and the general public, serve as an information center, and provide technical assistance to lawyers and others interested in establishing a public interest law practice.

Foundation Support.—Five years ago only a few foundations were prepared to support public interest law activity. Today more than thirty participate, most of them small. Among the large ones, in addition to the Ford Foundation, are Carnegie Corporation, the Rockefeller Brothers Fund, and the Edna McConnell Clark Foundation.

Because of different reporting practices and definitions (litigation/advocacy, public interest law/civil rights), it is difficult to compile accurate figures on the total amounts contributed by all the foundations to public interest law.[2] However, following this Foundation's definition and that of the IRS, which excludes

[1] Its members include public lawyers, other practicing lawyers, and teachers of law.

[2] Statistics included in this section were obtained from initial surveying of the field by the Council for Public Interest Law. With the exception of those related to Ford Foundation activities, they should be regarded as tentative but not unreasonable approximations.

poverty and civil rights litigation,[3] the number of public interest law firms supported in part by foundations has grown from three or four in 1970 to over thirty at the end of 1974. Between 1970 and 1974, the total amount contributed by all foundations was about $15 million; the Ford Foundation's share of that total was close to $10 million. As of September, 1975, the Foundation had contributed more than $12 million to public interest law.

There has been fluctuations in foundation contributions. In 1970 and 1971, the Ford Foundation's contribution to public interest law practice represented more than 90 per cent of the total. By 1973, when several other foundations had become interested in the field, the Foundation's share had dropped to 49 per cent. Then, in 1974, perhaps because of budgetary problems, other foundations sharply reduced their commitments, and the Foundation's share jumped back up to about 80 per cent of the total. Approximately $9 million has been budgeted by the Foundation for public interest law activity through 1978.

SOME LONGER-TERM IMPLICATIONS

The experience of the last five years is now undergoing formal evaluation by an interdisciplinary group of scholars at the University of Wisconsin. The study, directed by Professor Burton Weisbrod of the Department of Economics, is seeking to place public interest law activities in a broad theoretical and empirical perspective and to find ways to assess the social and economic consequences of the activity. Not limited to the Foundation grantees, the study is taking into account all public interest law activities, including alternative mechanisms. Present plans call for the completion of a comprehensive report in publishable form in September, 1976.

The Wisconsin group has divided its work into two sets of studies. One is a series of examinations of public interest law activities in each of ten fields, such as the environment, consumerism, education finance, employment discrimination, safety and health, and land-use regulation. Each of these area studies will evaluate past activities and attempt to assess the potential for future public interest law efforts.

In addition, the research involves a set of more theoretical investigations, encompassing such matters as the definition of public interest law; how its activities relate to the activities of government, the private for-profit sector, and the private nonprofit sector; and distributional effects—who benefits and who is hurt by public interest law activities.

Even though the formal evaluation research is not completed, it is evident at this stage that quantitative answers in most of these areas are hard to come by. There will be some, but many of the judgments the evaluators will reach will have to be qualitative, yet specific and based on solid scholarly analysis

The work of the Wisconsin group, as well as discussion with other scholars and policy analysts, has begun to yield possible directions for the further development of legal tools and approaches to the management of disputes. Although the power to litigate and the ability to win are central to the effectiveness of public interest lawyers, some of the issues that engage them cannot be effectively resolved by a court decision. Some issues should not be dealt with in the courts, some need more expeditious handling than the legal system allows, and some require whole new approaches to conflict avoidance. The Center for Law and Social Policy recently established a project to study some of these questions.

In recent years we have witnessed a veritable cascade of disputes that have come before various kinds of tribunals. Issues range across the entire agenda of government—energy development, environmental protection, consumer protection, education, and so forth. Conflicts over these matters arise among interest groups, between interest groups and government, and between levels of government. Little need be said about the difficulties that the courts, administrative agencies, and other decision-making bodies have in attempting to resolve such large numbers of conflicts efficiently and fairly. The quantitative problem is compounded by the growing complexity, technological sophistication, and interdependence of society's problems.

Against this background, growing numbers of people have doubts about the capacity of government to deal with the problems that it is or will be facing.

---

[3] The Ford Foundation's extensive civil rights program is not included in this report. A general description of Foundation activities in this field may be found in *Current Interests of the Ford Foundation 1976–77*, available on request from the Foundation's Office of Reports.

CONTINUED

4 OF 5

Agencies with imprecise goals have enormous discretionary authority. Legislatures and chief executives find it increasingly difficult to direct and coordinate the activities of the bureaucracy. Policy directives lose much of their force as they move through the administrative hierarchy, and there is a lack of information about what happens at the field level.

The administrative process is predicated on the settlement of disputes between competing interests. In the regulatory agencies, formal hearings consume large amounts of time and resources. In human service agencies, such as schools, welfare, health, and mental health departments, the clients often are not capable of challenging the bureaucracy. Discretionary decisions have such low visibility that conformity to law is rarely put to the test.

The time is ripe to reexamine the connection between conflict resolution and public administration. Can conflict-resolution processes be made more flexible so that many kinds of problems can be handled more efficiently and equitably? What about the effect of increasing public participation? New structures are needed; different methods of dispute-settling need to be explored and tested.

For agencies dealing with masses of people, the discretion of lower-level officials might be reduced by standardizing administrative procedures. In voting rights legislation and administration this has been found to be the fair and efficient approach when enforced. One of the key benefits in using goals and timetables in employment discrimination cases is to avoid discretionary case-by-case determinations. When discretion has been replaced by standardization, implementation can be statistically monitored. It is reasonable to expect clear standards and objective eligibility criteria to help reduce conflict.

Another possibility is deregulation. A recent example is the Food and Drug Administration's experiment with food-identity standards. Under its prior approach, all ingredients for many foods had to comply with official standard recipes. It became difficult to establish or change a standard. Hearings were lengthy, complex, and costly. Under the new approach, the FDA is regulating only the essential elements of certain foods and relying on labeling requirements for nonessential elements. The Federal Communications Commission's antimonopoly rules are another example, and there are proposals to deregulate parts of certain industries, for example, trucking and the airlines.

Standardization and deregulation may make it easier to develop better methods of monitoring administrative performance. There are, of course, many administrative systems that cannot be standardized, but much can be done in order to improve methods of control. During the last two decades system-management techniques have developed rapidly and found wide application in public bureaucracies. Much heated debate about the merits of these techniques has been recorded in scholarly and general literature. But problems of accountability and efficiency persist, and all the experience shows that much more remains to be done to improve methods of coordination and control.

Still, no degree of standardization can or should obviate all administrative discretion. To take account of social and individual differences, balances have to be struck between the need for strict administration and flexibility. Many broad problems cannot be solved by standard procedures, and decisions will have to be made on a case-by-case basis. Thus, there will continue to be a need for administrative hearings and conflict-resolution techniques. However, traditional procedures can be redesigned in light of new needs. For example, a recent Supreme Court decision is allowing the FDA to modify its hearing process. Under this decision, drug companies must produce results of scientifically valid experiments before they are granted full evidentiary hearings on challenges to the efficacies of their products. The intent is to reduce lengthy hearings while protecting the public against ineffective drugs. Although scientific knowledge and other forms of expertise cannot resolve value questions, this kind of information can be used to reduce disagreements over questions of fact. The FDA Supreme Court decision is a concrete step in this direction.

Other techniques now being explored might resolve controversies before full evidentiary hearings become necessary. Public interest law participation in certain kinds of rule making is an example. Access by affected groups to this process should lead to better informed settlements which, in turn, should reduce the need for later confrontations. There is also good reason to explore the applicability of other techniques of conflict resolution. Arbitration and mediation have been used successfully in commercial matters and labor-management relations: to what extent are they applicable to other problems, such as in clashes on environmental or educational issues?

Where does public interest law fit in this wider perspective? No matter what reforms are implemented, institutions performing the role of ombudsmen and private attorneys general will still be necessary. Although mechanisms allowing for citizen participation in government are increasing, there is no reason to think that government is any more likely tomorrow than today to seek out the views of those who are not normally represented among its interlocutors. Thus, there will be a need for institutions to advocate the causes of the unrepresented.

It is probable, therefore, that public interest law activity will play different roles in varied institutional settings. Litigation, used judiciously, will continue to remain of central importance. Negotiation, participation in rule making, and administrative consultations often are more fruitful. Having established their credibility through work of high quality in these areas, public interest lawyers must use their imagination and resourcefulness to find new ways to help society serve people more equitably and effectively. It is likely that the final judgment on public interest law will be based on such innovative performance, rather than simply on a toting up of litigative victories.

Edward H. Levi, in his foreword to *The Public Interest Law Firm: New Voices for New Constituencies*, said that the important question is: "Whether [the] success or failure [of public interest law] however measured, will have effects upon our political system or system of justice through the creation, with staying power, of a new instrument for representation, or through the revitalization or conceivably the weakening of traditional forms."

Appendix

American Bar Association Special Committee on Public Interest Practice

Recommendations

The Special Committee on Public Interest Practice recommends adoption of the following:

Resolved, That it is a basic professional obligation of each lawyer engaged in the practice of law to provide public interest legal services;

Further resolved, That public interest legal service is legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:

1. *Poverty Law:* Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.
2. *Civil Rights Law:* Legal representation involving a right of an individual which society has a special interest in protecting.
3. *Public Rights Law:* Legal representation involving an important right belonging to a significant segment of the public.
4. *Charitable Organization Representation:* Legal service to charitable, religious, civic, governmental and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.
5. *Administration of Justice:* Activity, whether under bar association auspices, or otherwise, which is designed to increase the availability of legal services, or otherwise improve the administration of justice.

Further resolved, That public interest legal services shall at all times be provided in a manner consistent with the Code of Professional Responsibility and the Code of Judicial Conduct;

Further resolved, That so long as there is a need for public interest legal services, it is incumbent upon the organized bar to assist each lawyer in fulfilling his professional responsibility to provide such services as well as to assist, foster and encourage governmental, charitable and other sources to provide public interest legal services.

Further resolved, That the appropriate officials, committees, or sections of the American Bar Association are instructed to proceed with the development of proposals to carry out the interest and purpose of the foregoing resolutions.

Report

This resolution was deferred to the Annual Meeting at the Chicago Midyear Meeting so that it could be discussed with various segments of the organized bar.

Since then it has been reviewed from within the ABA and outside the Association. In February 1975, a Conference of Bar Leaders was held in New York City. Bar associations from Washington, D.C. to Boston were represented by their respective bar leaders; in most cases presidents and presidents-elect. The resolution was found generally acceptable and there was uniform agreement that the organized bar should do more to assist lawyers in fulfilling the public interest legal services obligations. There was no dissent from the proposition that each lawyer had a duty to provide public interest legal services.

As of the writing of this report, several state and local bar associations have adopted a statement of obligation substantially similar to that being proposed for adoption by this Committee. It is the Committee's opinion that these associations are leading associations, and the American Bar Association should also undertake the lead in this vitally important area of the delivery of legal services. The District of Columbia Bar, the Chicago Council of Lawyers, the Beverly Hills Bar Association, the Arizona, Philadelphia and the Boston Bar Associations have passed substantially identical resolutions to that being proposed. The Association of the Bar of the City of New York, the Florida Bar and the Seattle-King County Bar Association presently have the subject matter under active consideration.

The resolution has been reviewed and approved by the ABA Committee on Ethics and Professional Responsibility, and has been referred to all relevant committees and sections of the Association. It has also been favorably acted upon by the Consortium on Legal Services and the Public, which includes the following ABA committees:

(a) Standing Committee on Lawyer Referral Service.
(b) Special Committee on Delivery of Legal Services.
(c) Standing Committee on Legal Assistance to Servicemen.
(d) Standing Committee on Legal Aid & Indigent Defendants.
(e) Special Committee on Prepaid Legal Services.
(f) Special Committee to Survey Legal Needs.

The Young Lawyers Section, the Council for Advancement of Public Interest Law, and the National Legal Aid and Defender Association have also approved the resolution.

In general, the resolution states that it is the lawyer's duty, as a function of his professional status, to provide public interest legal services; legal services without fee or at a substantially reduced fee. The resolution further provides several areas which would qualify for fulfillment of the obligation.

Suggestions received from the Council of Criminal Justice Section have been reflected in the resolution since the Midyear Meeting. The resolution reflects these suggestions and, additionally, those received from bar leaders contacted from within and outside the ABA.

Generally, the pertinent changes to the resolution are:

1) The duty has been expressly stated as deriving (among other things) from the professional status of a lawyer.

2) The application of the resolution is limited to lawyers in the practice of law (e.g., judges would be exempted from some activities because of their status as judges; government lawyers would not necessarily be exempt, unless by definition their work qualified and their compensation was substantially reduced as a result).

3) Areas 1 through 4 have been simplified and shortened and one additional area has been added; that is Area 5, which would cover certain uncompensated work, such as bar association or related activity.

4) The resolution has also imposed an obligation upon the organized bar to foster and encourage governmental and charitable sources to provide public interest legal services and to further encourage and assist each lawyer in fulfilling his obligation.

In our many deliberations since September 1973, the Committee has concluded that the Canons and Ethical Considerations, although not explicitly, make it clear that the legal profession and each individual lawyer share the responsibility for providing public interest representation and that there is a duty on each individual lawyer to provide his share of such public service work.

Of course, behind the development of the resolution is our Committee's further conclusion that lawyers and the organized bar are in need of guidance in determining the areas in which they should become involved in performance of this duty.

The duty of each lawyer and the legal profession is well supported by authorities and in the basic precepts of the profession.

Roscoe Pound stated a profession's true function most succinctly:

"There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidently be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."

For this reason, in part, a lawyer's time and energies must be allocated not only according to the demands of the marketplace, but as well to the needs of society for his professional skills. It is the element of public service which distinguishes a profession from a trade, and our profession should impose upon itself the duty of such public service.

The Code of Professional Responsibility supports the resolution and the Ethical Considerations encompass services to the poor, but there is no mention of a professional obligation to provide representation in cases seeking the vindication of an individual's fundamental civil rights, or rights belonging to the public at large, where society needs to have its rights vindicated but as a practical matter the would-be plantiff or defendant will take action to vindicate or defend those rights only if he receives aid, and does not have to bear the costs himself. (Canons 2; EC2–25; EC2–16; EC8–3)

Ethical Considerations are "aspirational in character." As such, unlike the Disciplinary Rules, they are not enforceable standards, but are "objectives toward which every member of the profession should strive." [1]

Canon 2 provides: A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

EC2–25 provides: The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continue to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need.

See also EC2–16, which states: Persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should supply and participate in ethical activities designed to achieve that objective.

And see EC8–3, which states that: Those persons unable to pay for legal service should be provided needed services.

It is clear from the Canons and Ethical Considerations that the legal profession accepts responsibility for providing public interest representation, and that each individual lawyer shares this responsibility, but it is not clear exactly what types of legal services will fulfill the individual lawyer's obligation, or how much he is expected to do. Lack of affirmative guidance as to what each individual lawyer is expected to do has resulted in many lawyers and law firms doing little or nothing. A collective responsibility must be translated into a defined individual duty in order to realistically expect that each lawyer will contribute his share. The profession has not yet done this and our resolution is designed to meet this end. The Committee strongly recommends that the Association take action to cause lawyers to recognize their professional obligation.

Respectfully submitted.

HARRY L. HATHAWAY, *Chairman.*
EDMUND J. BURNS.
RODERICK A. CAMERON.
FRANK T. GRAY.
CHARLES A. HOBBS.
ARNOLD B. KANTER.
CHARLES J. PARKER.
WILLIAM G. PAUL.
HOWARD L. SHECTER.
MARNA S. TUCKER.

AUGUST 1975.

[1] Code of Professional Responsibility, Preamble and Preliminary Statement, p. 1 (1970).

Public interest law firms supported by the Ford Foundation

	Grants as of December 1975
Southern California Center for Law in Public Interest	$734,000
Center for Law and Social Policy	1,805,000
For Responsive Media: Citizens Communications Center	870,000
Council for Public Interest Law	110,000
Education Law Center, Inc.	1,125,000
Environmental Defense Fund, Inc.	747,000
Georgetown University Law Center	777,079
International Project	494,000
League of Women Voters Education Fund	659,370
Legal Action Center of the City of New York, Inc	375,000
Natural Resources Defense Council	1,975,000
Public Advocates, Inc	1,850,000
Sierra Club Legal Defense Fund, Inc	433,000
Women's Law Fund, Inc	340,000
Women's Rights Project	70,000
Research Center for the Defense of Public Interests	95,000

[From the Maryland Law Review, Vol. 35, No. 4, 1976, pp. 675–703]

A GIANT STEP BACKWARDS; ALYESKA PIPELINE SERVICE CO. v. WILDERNESS SOCIETY[1] AND ITS EFFECT ON PUBLIC LITIGATION

In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Supreme Court sounded a death knell to growing hopes that the judiciary would exercise its equity powers to shift the prevailing party's attorneys' fees to the losing litigant in public interest litigation.[2] In doing so, the Court expressly reaffirmed the "American Rule" under which attorneys' fees generally are not recoverable by the prevailing litigant in federal litigation.[3] Congress has often acted to mitigate the severity of the American Rule by authorizing awards of attorneys' fees to litigants suing under specific statutes.[4] The courts had also awarded attorneys' fees under two judicially fashioned exceptions to the American Rule.

---

[1] 421 U.S. 240 (1975) (Brennan & Marshall, JJ., dissenting; Douglas & Powell, JJ., not participating).

[2] *See, e.g.*, Nussbaum, *Attorneys' Fees in Public Interest Litigation*, 48 N.Y.U.L. Rev. 301 (1973) [hereinafter cited as Nussbaum]; Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 Hastings L.J. 733 (1973) [hereinafter cited as *Judicial Green Light*]; Note, *The Allocation of Attorneys' Fees After* Mills v. Electric Auto-Lite Co., 38 U. Chi. L. Re 316 (1971) [hereinafter cited as *After Mills*]; Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636 (1974) [hereinafter cited as *Equal Access*].

[3] 421 U.S. at 247, 270–71. For application of the American Rule, see F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 126–31 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717–18 (1967); Stewart v. Sonneborn, 98 U.S. 187 (1878); Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1873); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872); Day v. Woodworth, 54 U.S. (13 How.) 363 (1852); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

[4] *See, e.g.*, Amendment to Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (Supp. IV, 1974); Perishable Agricultural Commodities Act § 7, 7 U.S.C. § 499g(b) (1970); Bankruptcy Act of July 1, 1898, 11 U.S.C. §§ 104(a)(1), 641–44 (1970); Clayton Act § 4, 15 U.S.C. § 15 (1970); Unfair Compensation Act § 801, 15 U.S.C. § 72 (1970); Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); Trust Indenture Act of 1939, 15 U.S.C. §§ 77ooo(e), 77www(e) (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Copyright Act § 116, 17 U.S.C. § 116 (1970); Truth-in-Lending Act, 15 U.S.C. § 1640(a)(3) (Supp. IV, 1974) *amending* 15 U.S.C. § 1640(a) (1970); Organized Crime Control Act of 1970 tit. IX § 901(a), 18 U.S.C. § 1964(c) (1970); Education Amendments of 1972 tit. VII § 718, 20 U.S.C. § 1617 (Supp. IV, 1974); Norris-LaGuardia Act § 7, 29 U.S.C. § 107(e) (1970); Fair Labor Standards Act of 1938 § 16, 29 U.S.C. § 216(b) (1970); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 § 13, 33 U.S.C. §§ 928(a) & (b) (Supp. IV, 1972); Federal Water Pollution Control Act Amendments of 1972 tit. V § 505, 33 U.S.C. § 1365(d) (1974); Marine Protection, Research and Sanctuaries Act of 1972 tit. I § 105, 33 U.S.C. § 1415(g)(4) (Supp. IV, 1974); 35 U.S.C. § 285 (1970) (patent infringement); Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970); Civil Rights Act of 1964 tit. VII § 706, 42 U.S.C. § 2000e-5(k) (1970); Civil Rights Act of 1964 tit. II § 204, 42 U.S.C. § 2000a-3(b) (1970); Fair Housing Act of 1968 tit. VIII, 42 U.S.C. § 3612(c) (1970); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911(d) (Supp. IV, 1974); Railway Labor Act § 3(p), 45 U.S.C. § 153(p) (1970); Merchant Marine Act of 1936 § 810, 46 U.S.C. § 1227 (1970); Federal Communications Act of 1934 § 206, 47 U.S.C. § 206 (1970); Interstate Commerce Act, pt. I, 49 U.S.C. §§ 8 & 16(2) (1970); Interstate Commerce Act pt. II, 49 U.S.C. § 908(b) (1970); Fed. R. Civ. P. 37(a) & (c).

Under the common benefit exception attorneys' fees are awarded to a party whose successful suit has generated a benefit that he shares with others not participating in the litigation.[5] Under the improper conduct exception a defendant whose improper behavior has caused of oppressively complicated the suit is required to pay the attorneys' fees of the prevailing plaintiff.[6] In *Alyeska*, the Court halted the development of a third exception. It barred judicial use of the "private attorneys general" theory[7] to award attorneys' fees to the environmentalists groups that had sued to prevent the construction of a trans-Alaska oil pipeline which, as originally planned, would have violated several statutes. Under the private attorneys general concept, awards of attorneys' fees had been made to prevailing private or public interest litigants whose suits had clarified or enforced the law.[8] In an opinion reminiscent of the views of the late Justice Frankfurter that the judiciary should abstain from law making and leave that responsibility to the national legislature,[9] the Supreme Court reversed the United States Court of Appeals for the District of Columbia and held that only Congress could authorize such an exception to the American Rule.[10]

This Note will examine *Alyeska* and, more broadly, how the case fits into the parameters of the American Rule." It will take a close look at the history of the American Rule and the recognized exceptions to it and will discuss many of the factors and precedents that the Court considered or failed to consider in refusing to use its historical equity powers either to extend the common benefit exception to cover the *Alyeska* facts or to adopt the private attorneys general rationale.

Alyeska

In March, 1970, the Wilderness Society, the Friends of the Earth, and the Environmental Defense Fund, Inc., sued to enjoin the Secretary of the Interior[11] from issuing rights-of-way permits[12] requested by Alyeska, an oil company consortium.[13] Alyeska planned to use the rights-of-way over federally owned land in the construction of a trans-Alaska pipeline designed to connect the lower

---

[5] *See* notes 61–79 and accompanying text *infra*.

[6] *See* notes 80–88 and accompanying text *infra*.

[7] This doctrine was the basis of the lower court's order awarding attorneys' fees. Wilderness Soc'y v. Morton, 495 F. 2d 1026 (D.C. Cir. 1974 (en banc), *rev'd sub nom.* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[8] Many lower courts have recently used this rationale to redistribute the prevailing party's attorneys fees. In *Alyeska* the Court noted this, 421 U.S. at 270 n. 46, citing cases that "erroneously . . . employed the private-attorney-general approach" to award attorneys' fees where the plaintiff had sued to vindicate constitutional or statutory rights: Souza v. Travisano, 512 F. 2d 1137 (1st Cir. 1975) (protection of prison inmates' rights); Taylor v. Perini, 503 F. 2d 899 (6th Cir. 1974) (prevention of discriminatory treatment in prisons); Hoitt v. Vitek, 495 F. 2d 219 (1st Cir. 1974) (protection of inmates' civil rights against administrative discrimination); Fairley v. Patterson, 493 F. 2d 598 (5th Cir. 1974) (action to compel reapportionment to protect voting rights); Cooper v. Allen, 467 F. 2d 836 (5th Cir. 1972) (prevention of racial discrimination in public employment); Knight v. Auciello, 435 F. 2d 852 (1st Cir. 1972) (per curiam) (fair rental enforced under 42 U.S.C. § 1982 (1970); Lee v. Southern Home Sites Corp., 444 F. 2d 143 (5th Cir. 1971) (suit in response to discrimination in real estate sales); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) (failure of governmental enforcement to prevent noncompliance with environmental protection and housing assistance laws). *See also* Brewer v. School Bd., 456 F. 2d 943 (4th Cir. 1972) (Winter, J., concurring), *cert. denied*, 406 U.S. 933 (1972) (suit to compel school desegregation); Harrisburg Coalition Against Ruining the Environment v. Volpe, 331 F. Supp. 893 (M.D. Pa. 1974) (suit to enjoin highway construction detrimental to the environment); Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973) (highway construction enjoined to protect environmental interests; *losing* party awarded attorneys' fees).

[9] *See, e.g.*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533–35, 538–40 (1947).

"The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively narrow limits within which choice is fairly open to courts, and the extent to which interpreting law is inescapably making law. To say that, because of this restricted field of interpretive declaration, courts make law just as do legislatures is to deny essential features in the history of our democracy. It denies that legislation and adjudication have had different lines of growth, serve vitally different purposes, function under different conditions, and bear different responsibilities." *Id.* at 534.

[10] 421 U.S. at 270–71.

[11] Alyeska and the State of Alaska intervened in the suit in September of 1971. 421 U.S. at 4 n.7.

[12] Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

[13] Originally Atlantic Richfield Company, Humble Oil & Refining Company, and the British Petroleum Corporation formed the Trans-Alaska Pipeline System which was replaced in 1970 by Alyeska, owned by ARCO Pipeline Company, Sohio Pipeline Company, Humble Pipeline Company, Mobil Pipeline Company, Phillips Petroleum Company, Amerada Hess Corporation, and Union Oil Company of California, 421 U.S. at 241–42 n.2.

states to the extensive new oil field discovered in Alaska in 1968.[14] The environmentalist plaintiffs claimed that the issuance of the permits would violate the Mineral Lands Leasing Act,[15] the National Environmental Policy Act of 1969 (NEPA)[16] and the National Forest Lands—Use and Occupancy Act.[17] The district court granted a temporary injunction[18] but later dissolved it and dismissed the suit.[19] The plaintiffs appealed, and the Court of Appeals for the District of Columbia expedited hearing the case in view of its urgency.[20] Basing its decision solely on the Secretary's violation of the Mineral Lands Leasing Act, the court issued a permanent injunction without considering the complex NEPA issues.[21] The Supreme Court denied certiorari.[22] Reacting quickly to the injunction, Congress enacted the Trans-Alaska Pipeline Authorization Act[23] which authorized prompt construction of the pipeline. By the same Public Law, Congress amended the Mineral Lands Leasing Act both to allow for wider rights-of-way, such as those requested by Alyeska, and to define with greater specificity the process by which rights-of-way are to be awarded and the conditions under which they will be held.[24] The amended statute was generally less favorable to permit holders and applicants than was the original Mineral Lands Leasing Act.[25] Congress acted to increase the nation's independent oil supply and to mitigate the severe shortages which became apparent in the early 1970's and clearly did not intend to make the oil companies the ultimate "winners" of this litigation. As explained by Senator Henry Jackson, the new Act was adopted "*in spite of* the testimony and arguments presented by industry and administration spokesmen who advocated construction" of the Pipeline.[26] As a result of the more stringent safety and financial liability requirements imposed by the new Act, the environment was protected, government monies were saved, and the public interest was served.[27]

---

[14] The full extent of this oil field is not known, but knowledgeable estimates range from ten to seventy billion barrels. If the higher estimates ultimately prove to be correct, this oil field would be the second or third largest in the world and should be of immense political advantage and use, ending much of the United States' dependence on foreign oil The discovery and the development of this field, then, are immensely important to the country as well as to the oil companies. *See* Dominick & Brody, *The Alaska Pipeline:* The Wilderness Society v. Morton *and the Trans-Alaska Pipeline Authorization Act,* 23 AM. U.L. REV. 337, 348–49 n.43 (1973) [hereinafter cited as Dominick & Brody].

[15] 30 U.S.C. § 185 (1970). The consortium applied for "special land use permits," seeking as much as 246 feet more land in some areas than the width-of-the-pipe plus 50 feet right-of-way the Act authorized the Secretary of the Interior to grant. 421 U.S. at 242 and n.4.

[16] 42 U.S.C. §§ 4321–47 (1970). The plaintiffs contended that the Interior Department's impact statement (comprising six volumes and costing over twelve million dollars, Lieberman, *5-Year Fight on Alaska Pipeline Made It Better and More Costly,* N.Y. Times, May 26, 1974, § 1 at 1, col. 1) failed to consider adequately either the alternative of a pipeline route through Canada or the deferral of a decision until more information on a Canadian route could be considered. Wilderness Soc'y v. Morton, 479 F. 2d 842, 846 (D.C. Cir. 1973).

[17] 16 U.S.C. § 497a (1970). The plaintiffs argued that a permit issued by the Supervisor of the Forest Service violated the eighty acre limit imposed by these sections. *See* Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

[18] 325 F. Supp. at 424.

[19] 421 U.S. at 244. The dismissal decision of August 15, 1972, was unreported and contained no findings of fact.

[20] The court noted: [A]ny decision further enjoining construction of this project will impose serious costs on the oil companies who plan to build the pipeline and who have made substantial investments. . . . The project means much needed jobs and income to the people of the State of Alaska, and . . . badly needed revenues for the Alaska State Treasury.—Wilderness Soc'y v. Morton, 479 F.2d 842, 847 (D.C. Cir. 1973).

[21] *Id.* at 889, 893. The court noted that the NEPA issues were "not ripe for adjudication at the present time." The necessity of considering these issues was specifically obviated by Congress in the Trans-Alaska Pipeline Authorization Act. *See* notes 23–26 and accompanying text *infra.*

[22] 411 U.S. 917 (1973).

[23] 43 U.S.C. §§ 1651–55 (Supp. IV. 1974).

[24] Act of November 16, 1973, Pub. L. No. 93–153, tit. I § 185 (Supp. III, 1973). U.S.C. § 185 (1970) (codified at 30 U.S.C. § 185 (Supp. III, 1973)).

[25] For example, the new safety and liability standards, the requirement that all permit holders pay fair market value for the right-of-way, costs of permit application and monitoring are contained in 30 U.S.C. §§ 185(h), (*l*), (x) (1970). *See* Lieberman, *5-Year Fight on Alaska Pipeline Made It Better and More Costly,* N.Y. Times, May 26, 1974, § 1, at 1, col. 1. In an evaluation by Walter Hickel, an original defendant in the litigation: "That first pipeline wouldn't have just been an environmental disaster. . . . [I]t would have been a total engineering disaster." *Id.* at 34, col. 4.

[26] 119 CONG. REC. 22798 (July 17, 1973) (report to the Senate supporting the Trans-Alaska Pipeline Authorization Act) (emphasis added).

[27] Because the litigation directly caused the passage of the Act and secured these public benefits, the court of appeals termed the litigation of "great therapeutic value" and "a catalyst to effect change and thereby achieve a great public service." *See* 495 F.2d at 1033–34.

The environmentalist plantiffs then sought in the court of appeals to recover their costs and attorneys' fees expended in the litigation from Alyeska, the State of Alaska, and the United States on the grounds among others that they had acted as private attorneys general in enforcing the Mineral Lands Leasing Act.[28] There was no statutory authorization for the award of attorneys' fees under the Mineral Lands Leasing Act, and the court concluded that neither of the two recognized exceptions [29] to the American Rule applied tothe facts.[30] Yet the court still permitted the plaintiffs to recover because "the equities of this particular case support an award of attorneys' fees . . . ." [31] Recognizing that the plaintiffs might not have undertaken the litigation without the possibility of such an award, the court reasoned that the plaintiffs, "[a]cting as private attorneys general, . . . not only have . . . ensured the proper functioning of our system of government, but . . . have protected in a very concrete manner substantial public interest." [32] Interpreting a 1966 cost statute [33] to prohibit their taxing attorneys' fees against the federal government without congressional provision, and refusing to hold the State of Alaska responsible because it had voluntarily entered the suit simply to present another viewpoint,[34] the court taxed the nongovernmental defendant Alyeska only with its proportionate share (one-half) of the environmental groups' fees.[35]

In reversing these awards, the Supreme Court refused to adopt the private attorneys general rationale for fee-shifting without specific congressional authorization.[36] After a largely historical review of prior cases [37] and prior federal statutes on attorneys fees,[38] the Court concluded that, because neither the common benefit[39] nor the improper conduct [40] exception applied in this case, there was no alternative to application of the American Rule.

THE AMERICAN RULE AND ITS COMMON LAW EXCEPTIONS

The American Rule was adopted by the Supreme Court in 1796 in *Arcambel v. Wiseman*,[41] when the Court reversed an award of $1600 for counsel's fees entered by a lower federal court. The Court recognized that "the general pratice of the United States is in opposition to (this awards)" even though the colonists had inherited from England a tradition of awarding attorney's fees to prevailing plaintiffs. In the English common law courts, these awards were authorized by parliamentary statutes dating from as early as 1275.

---

[28] Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc).

[29] For a discussion of the common benefit and improper conduct exceptions to the American Rule, see notes 61–88 and accompanying text *infra*.

[30] 495 F.2d at 1029.

[31] *Id.* at 1036. Judge Wright wrote for the majority of four. Judges MacKinnon, Wilkey and Robb dissented.

[32] *Id. See also* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 901 n.223 (1975) [hereinafter cited as Dawson, *Public Interest Litigation*].

[33] 28 U.S.C. § 2412 (1970) provides: Except as otherwise specifically provided by statute, a judgment for costs . . . but *not including the fees and expenses of attorneys may be awarded* to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity. . . . (emphasis added).

[34] 495 F.2d at 1036 n.8.

[35] *Id.* at 1036. The vigorous dissents by Judges MacKinnon and Wilkey objected to applying the private attorneys general rationale to the facts of the case since they found only a public detriment in the delayed construction of the pipeline: Alaskan oil will reach Americans at least three years later and cost at least $637 million more than initially intended. The dissents did not question the validity of the private attorneys general rationale but argued strongly that it was inapplicable to the facts. 495 F.2d at 1039–46.

[36] 421 U.S. at 269–70. Justice White delivered the opinion of the Court.

[37] *Id.* at 249–50, 253–57. Justice Marshall, however, argued in dissent that there are "cases [which] plainly establish by presenting persuasive precedents an independent basis for equity courts to grant attorneys' fees under several rather generous rubrics." *Id.* at 277; *accord*, Justice Brennan's dissent, *id.* at 271–72. *See also* notes 110–13 and accompanying text *infra*.

[38] *Id* at 259–57. Early statutes hotting federal courts to the practice of the state in which the federal court was located had expired or were repealed by 1800. *See also* note 60 *infra*.

[39] For a discussion of the common benefit exceptions to the American Rule, see notes 61–79 and accompanying text *infra*. For a discussion of how the Court could have applied the common benefit exception to the *Alyeska* facts, see text accompanying notes 94–105 *infra*.

[40] For a discussion of the improper condust exception, see notes 80–88 *infra*.

[41] 3 U.S. (3 Dall.) 306 (1796). The Court noted the infirmity of the principle: "[E]ven if that practice [no awards of attorneys' fees] were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute."

In equity courts, awards had long been made regardless of statutes.[42] Perhaps the reluctance of American courts to shift the cost of legal representation arose from the general distrust of the legal profession prevalent in colonial society.[43] Moreover, laymen often tried their own cases, thus obviating the need for any fee-shifting. In addition, the law, with its adversary system, has often been conceptualized as a sporting contest with a winner and a loser; thus, it might be thought unfair, or unsportsmanlike, to burden the loser with winner's costs,[44] including his attorney's fees. It has been argued, however, that it was a "process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees.[45]

Yet many attorneys today support the American Rule as "part of our democratic tradition and a bulwark of equality." [46] In 1964, Justice Goldberg rejected the "historical accident" explanation of the origin of the American Rule and defended the ban on fee-shifting as "a deliberate choice to insure that access to the Courts be not effectively denied to those of moderate means," [47] reasoning that a poor plaintiff would be deterred from suing by the possibility of having to pay not only his but also his opponent's costs. Whatever the rationale, the Supreme Court gradually armored the Rule with precedents [48] by fashioning only two exceptions to it since 1796,[49] and assured its survival as a virtual legal oddity in present times.[50]

In 1853, Congress enacted a statute designed to standardize cost awards in federal courts and which included specified amounts that prevailing parties could recover from their opponents to pay attorneys' fees.[51] Despite inflation, these

---

[42] Goodhart, *Costs*, 38 Yale L.J. 849, 851–56 (1929) [hereinafter cited as Goodhart].

[43] In every one of the colonies, practically throughout the 17th century, a lawyer or attorney was a character of disrepute or suspicion. . . . In many of the colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the courts; in all, they were subject to the most rigid restrictions as to fees and procedures.—C. Warren, A History of the American Bar 4 (1966 ed.).

[44] *See* Goodhart, *supra* note 42, at 876–77; Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 Vand. L. Rev. 1216, 1220–24 (1967) [hereinafter cited as *The Ultimate Burden*].

[45] Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792, 799 (1966) [hereinafter cited as Ehrenzweig]. Professor Ehrenzweig called the American Rule "a festering cancer in the body of our law without whose excision our society will not be great." *Id.* at 794.

[46] 1962 ABA Section of International and Comparative Law, Proceedings, Report of Committee on Comparative Procedure and Practice 117–18. The report continued: [The American Rule] reduces the differences in part between the wealthy and the poor and permits the less affluent to press for the redress of wrongs" without the threat of paying his opponents attorneys fees. *Id.* at 118; *accord*, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967), discussed in notes 161–65 and accompanying text *infra*.

[47] Farmer v. Arabian American Oil Co., 379 U.S. 227, 237 (1964) (concurring opinion, quoting Judge Smith in the court below, 324 F. 2d 359, 365). In Dawson, *Public Interest Litigation*, *supra* note 32, the rationale that fewer poor litigants are deterred from litigation by the American Rule than would be by the "English Rule" is called an "unverifiable guess." *Id.* at 849. Perhaps American attorneys are reluctant to adopt fee-shifting because it would require that they relinquish the contingent fee system that often pays so well. Court-awarded and statutorily prescribed attorneys' fees probably would be lower than those recovered under a contingent fee arrangement.

[48] *See, e.g.*, F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 126–31 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717–18 (1967); Stewart v. Sonneborn, 98 U.S. 187 (1878); Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1872); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872); Day v. Woodworth, 15 U.S. (13 How.) 363 (1852); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

[49] For a discussion of these exceptions, see notes 61–88 and accompanying text *infra*.

[50] For a discussion on the prevalence of fee-shifting in other countries, see Baeck, *Imposition of Fees of Attorney of Prevailing Party Upon the Losing Party Under the Laws of Austria*, 1962 Proceedings, *supra* note 46, at 119; Baeck, *Imposition of Legal Fees and Disbursements of Prevailing Party Upon the Losing Party—Under the Laws of Switzerland*, 1962 Proceedings 124; Dietz, *Payment of Court Costs by the Losing Party Under the Laws of Hungary*, 1962 Proceedings 131; Freed, *Payment of Court Costs by the Losing Party in France*, 1962 Proceedings 126; Schima, *The Treatment of Costs and Fees of Procedure in the Austrian Law*, 1962 Proceedings 121; and Nussbaum, *supra* note 2, at 310.

[51] Act of Feb. 26, 1853, 10 Stat. 161 (1853) (emphasis added): That in lieu of the compensation now allowed to attorneys, solicitors, and proctors in the United States courts . . . the following and *no other compensation* shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors and proctors from charging to or receiving from their clients, other than the Government, such reasonable compensation for their services, *in addition to* the taxable costs as may be in accordance with general usage . . . or may be agreed upon between the parties.

The Act then specified the sums that could be taxed to compensate the lawyer for the prevailing party, but these did not exceed a twenty dollar docket fee for civil and criminal trials by jury or a final hearing in equity or admiralty.

specific amounts remained constant throughout subsequent revisions;[52] although awards under this statute were strictly enforced by the Court,[53] they were largely unsought after 1879, due to the twenty dollar limit imposed by the statute.

Against this background of outmoded statutory amount limitations and the federal courts' persistence in otherwise following the American Rule, Congress has made express provisions in an increasing number of laws[54] for substantial awards of attorneys' fees to successful plaintiffs. It has used the private attorneys general theory to authorize these awards to the plaintiff whose suit protects public rights or interests.[55] While some laws prescribe a mandatory award of attorneys' fees[56] to the prevailing plaintiff, most provide that attorneys' fees be awarded at the court's discretion.[57] As a result of these congressional enactments, the Supreme Court in *Alyeska* concluded that only Congress could provide for the award of attorneys' fees under the private attorneys general rationale;[58] thus, absent statutory guidance, the American Rule would operate to bar an award of attorneys' fees to the environmental groups.[59]

The Court's unwillingness to fashion another exception to the American Rule and allow fee-shifting for private attorneys general without statutory authorization appears inconsistent with the Court's approval of the two existing exceptions to the Rule. Both the common benefit and improper conduct exceptions developed without congressional mandate and thus depend solely on the Court's inherent equity powers.[60] The common benefit exception originated over ninety years ago in *Trustees v. Greenough*[61] where the Court was faced with the obvious injustice of holding a single creditor responsible for the entire cost of litigation when the suit he won preserved a trust fund for other bondholders as well as for himself. The Court held that the plaintiff's attorneys' fees should be paid from the common fund so that all who benefited from the suit would bear equally its financial burden.[62]

This exception was broadened considerably in *Central Railroad & Banking Co. v. Pettus*[63] where the attorneys who had brought a successful class action sued to recover attorneys' fees from passive members of the prevailing class. Even though the attorneys had been paid their agreed upon fees by the named plaintiffs prior to the suit for fees and despite the absence of an agreement with the inactive members of the class, the Court allowed them to recover additional fees because "every ground of justice" demanded that those who "accepted the fruits" of the litigation participate in paying for it.[64] While the common benefit exception had originally operated to protect the prevailing plaintiff from the in-

---

[52] The wording remained similar and the fee schedules the same through 1926 when they were codified as 28 U.S.C. §§ 521 & 572. When the Code was revised in 1948, the statute became 28 U.S.C. §§ 1920 & 1923(a), and the fee limits appeared to become discretionary as the stricture "and no other compensation shall be allowed" was removed. 28 U.S.C. §§ 1920, 1923(a) (1970). Nevertheless, the *Alyeska* Court concluded that these changes did not alter "the longstanding rule limiting attorneys' fees to the amounts schedule." 421 U.S. at 256 n. 29. The dissent is critical of relying on the statute as presently written as "an uncompromising bar to equitable fee awards." *Id.* at 280.

[53] Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1872); *see In re* Paschal, 77 U.S. (10 Wall.) 483, 493–94 (1870) (dictum).

[54] *See* note 3 *supra*.

[55] The plaintiff can recover his attorneys' fees, for example, if he sues under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (Supp. IV, 1974); Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970); Civil Rights Act of 1964 tit. II, 42 U.S.C. 2000a-3(b) (1970); Civil Rights Act of 1964 tit VII, 42 U.S.C. § 2000e-5(k) (1970); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (Supp. IV, 1974).

[56] Attorneys' fees are a mandatory award under the Clayton Act, 15 U.S.C. § 15 (1970); Truth-in-Lending Act, 15 U.S.C. § 1640(a)(3) (Supp. IV, 1974); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970).

[57] *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); Trust Indenture Act, 15 U.S.C. § 77www(a) (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970); Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000a-3(b) (1970); Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-5(k) (1970); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (Supp. IV, 1974).

[58] 421 U.S. at 271.

[59] *Id.*

[60] Federal courts from their inception have been endowed with equity jurisdiction like that of the English Courts of Chancery. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (15 How.) 556, 603 (1851). For a discussion of the historical basis and extent of these powers, see Guardian Trust Co. v. Kansas City So. Ry., 28 F. 2d 233, 240–43 (8th Cir. 1928).

[61] 105 U.S. 527 (1881).

[62] *Id.* at 532.

[63] 113 U.S. 116 (1885).

[64] *Id.* at 127. To secure their extra fee, the lawyers were given a lien on the salvaged assets made available to the creditors.

justice of bearing all attorneys' fees himself, *Pettus* went far beyond that rationale and gave an independent right to additional fees to the lawyer.[65]

The common benefit concept was expanded still further in *Sprague v. Ticonic National Bank*.[66] The plaintiff obtained a lien on certain funds of an insolvent bank where she was a depositor. The Court allowed her to recover her attorneys' fees from these funds, reasoning that since the principle of stare decisis operated to give other depositors rights to similar liens, the plaintiff should recover her attorneys' fees from the common funds.[67] Justice Frankfurter seized the occasion to note the Court's wide equity powers that allow a shift of attorneys' fees in an attempt to avoid injustice,[68] in spite of the longstanding American Rule.[69]

These equity powers were again exercised by the Court in *Mills v. Electric Auto-Lite Co.*[70] when the burden of paying attorneys' fees was shifted from the individual stockholder, who sued because of misleading proxy statements made by the company, to all the stockholders benefiting from the suit. Again the Court exercised its discretionary power and broadened the common benefit exception. Not only was the suit brought under a statute[71] silent regarding redistribution of attorneys' fees, but the suit had "not yet produced, and may never produce a monetary recovery from which the fees could be paid. . . ."[72] Yet the Court held that the prevailing plaintiff could recover his attorneys' fees from the company itself because "regardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute."[73] Although the common benefit exception to the American Rule originated with a distinct fund from which the Court could draw the monies for the plaintiff's attorneys' fees, in *Mills* the burden of the fees was borne by the defendant corporation and ultimately by its shareholders, a necessary shift since the suit had not generated any monetary benefit for any of the prevailing parties.[74] This liberal trend was supported in *Hall v. Cole*,[75] which shifted the plaintiff's attorneys' fees to the losing defendant union which had been ordered to reinstate the plaintiff to union membership after he had been expelled illegally for criticizing union officials. The suit thus protected the freedom of speech of all the union's members. In forcing the union, and consequently all the union members to pay the plaintiff's attorney's fees, the Court reasoned "that an award of counsel fees to a successful plaintiff . . . [under a statute, the Labor Management Reporting and Disclosure Act (LMRDA),[76] that was silent in this regard]

---

[65] Professor Dawson suggests that the Court must have been "bemused" to allow the lawyers' "appeal to unjust enrichment" to satisfy "such a far-fetched claim." Dawson, *Lawyers and Involuntary Clients: Attorneys' Fees From Funds*, 87 Harv. L. Rev. 1587, 1604 (1974) [hereinafter cited as Dawson, *Fees from Funds*].

[66] 307 U.S. 161 (1939).

[67] *Id.* at 167.

[68] *Id.* (emphasis added): [W]hen such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, . . . through *stare decisis* rather than through a decree—*hardly touch the power of equity* in doing justice as between a party and the beneficiaries of his litigation.

While these equity powers have been used to award attorneys' fees only if the attorneys' services were connected with litigation, there have been a few exceptions. *See, e.g.*, Winton v. Amos, 255 U.S. 373 (1921) (securing beneficial legislation for Choctaw Indians by successful lobbying); Bean v. Rayette-Faberge, Inc., 389 F. 2d 469 (2d Cir. 1968) (notification of company official's illegal actions); Louisiana State Mineral Bd. v. Abadie, 164 So. 2d 159 (La. App. 1964) (lobbying services).

[69] The Court in *Alyeska* accorded only superficial recognition to these broadly exercised discretionary powers by noting, in one paragraph, that the 1853 Act, note 51 *supra*, had been construed as not infringing or limiting the Court's equity powers. 421 U.S. at 257–58. The *Alyeska* Court thus overlooked the possible conclusion that because the judiciary independently intervened to prevent injustice by awarding attorneys' fees to the prevailing plaintiffs in the common benefit cases, similar discretionary intervention should occur in this case. The dissent seized this point and argued that judicial use of the private attorneys general exception for fee awards is justified by the Court's equity powers exercised in the common benefit cases. *Id.* at 275.

[70] 396 U.S. 375 (1970).

[71] *Mills* was based on a violation of the Securities Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970).

[72] 396 U.S. at 392.

[73] *Id.* at 396 (footnotes omitted). *See also* Hornstein, *The Counsel Fee in Stockholders' Derivative Suits*, 39 COLUM. L. REV. 784 (1939); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 60 HARV. L. REV. 658 (1954), which urged recovery for minority stockholders whose suits cleansed or improved their companies.

[74] *See* Dawson *Public Interest Litigation*, *supra* note 32, at 868–69. Some commentators were optimistic that *Mills*, through its shifting of attorneys' fees to the defendants, heralded a move to change the American Rule. *See* Nussbaum and *After Mills*, *supra* note 2.

[75] 412 U.S. 1 (1973).

[76] 29 U.S.C. §§ 401–12 (1970).

f[ell] squarely within the traditional equitable power of federal courts to award such fees" whenever necessary to prevent injustice, and was "consistent with both the [LMRDA] and the historic equitable power of federal courts to grant such relief in the interest of justice." [77]

Thus the common benefit exception to the American Rule, originally applied in the narrow situation in which the prevailing plaintiff sought to secure his attorneys' fees from the specific fund that his suit recovered,[78] expanded to encompass situations in which a significant, non-financial benefit was secured.[79] In theory and in practice, the Court accepted the inherent justice of shifting the burden of the litigation from the plaintiff to members of the plaintiff's class who also benefited from the suit. Where necessary, the defendants in these cases were taxed with the fees because they were the most appropriate parties for the distribution of the burden among the beneficiaries.

More often, fees have been shifted to the losing litigant when he has acted in bad faith. The Court has thus used its discretionary powers and shifted the prevailing plaintiff's attorneys' fees to the losing litigant in cases where the defendant has engaged in improper, oppressive, fraudulent, or vexation conduct. In *Vaughn v. Atkinson*,[80] for example, a sailor had been forced to leave his ship to receive extended medical treatment. His numerous requests to his employers for maintenance and cure payments to which he was entitled were ignored. Because the defendant's persistent and callous failures to pay or even to respond forced the plaintiff to go to court, and because the fee of plaintiff's attorney would have consumed half of the plaintiff's entitlement, the Court shifted the fee to the defendants.

In addition, fees have been awarded to the plaintiff when the defendant has acted improperly during the suit,[81] or where the defendant's conduct unnecessarily prolonged the litigation. In *Toledo Scale Co. v. Computing Scale Co.*,[82] for example, a patent infringement case, the defendant had increased the cost of the litigation by vexatiously instituting new suits in other jurisdictions to enjoin enforcement of the plaintiff's judgment. Courts have also used the punitive rationale of this exception to provide for the plaintiff's recovery of his attorneys' fees in civil rights litigation where the defendant's conduct has neither been in good faith nor consistent with his responsibilities. Thus the theory has been used to justify the awards of attorneys' fees against demendants who had not made good faith efforts to racially integrate schools,[83] to effect legislative reapportionment,[84] or to reinstate a college teacher dismissed for political reasons.[85] Indeed, it has even been held in a lower court that where there has been a continued and "extreme" pattern of evasion and obstruction which precipitated the suit, "justice would not be attained" without an award of reasonable fees.[86] This expanded concept of improper conduct has been applied to behavior that obstructs the administration of justice, regardless of whether that behavior necessitated the suit [87] or simply prolonged it.[88] The improper conduct exception

---

[77] 412 U.S. at 9, 14.

[78] *See* text accompanying notes 61–62 *supra*.

[79] *See* text accompanying notes 72–77 *supra*.

[80] 369 U.S. 527 (1962).

[81] First Nat'l Bank v. Dunham, 471 F. 2d 712 (8th Cir. 1973); City Bank v. Rivera Davila, 438 F. 2d 1367 (1st Cir. 1971); Niday v. Graef, 279 F. 941 (9th Cir. 1922).

[82] 261 US. 399 (1923).

[83] *See* Bell v. School Bd., 321 F. 2d 494 (4th Cir. 1963). There the court concluded that fee-shifting was justified because of the school board's long continued pattern of evasion and obstruction which included not only [their] unyielding refusal to take any initiative . . . but their interposing a variety of administrative obstacles to thwart . . . a desegregated education. . . . The equitable remedy would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme. *Id.* at 500. *See also* Nesbit v. Board of Educ., 418 F. 2d 1040 (4th Cir. 1969); Rolfe v. County Bd. of Educ., 391 F. 2d 77 (6th Cir. 1968); Hill v. Franklin County Bd. of Educ., 390 F. 2d 583 (6th Cir. 1968); Clark v. Board of Educ., 369 F. 2d 661 (8th Cir. 1966).

[84] Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) (three-judge court) (alternative holding), *aff'd mem.*, 409 U.S. 942 (1972); Dyer v. Love, 307 F. Supp. 974 (N.D. Miss. 1969).

[85] Stolberg v. Board of Trustees, 474 F. 2d 485, 491 (2d Cir. 1973). In McEnteggart v. Cataldo, 451 F. 2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), the court awarded the plaintiff/teacher his counsel fees even though his dismissal by defendants was upheld. The defendants' refusal to supply a statement of reasons for dismissal was sufficiently improper to warrant the award "since plaintiff was forced to go to court to obtain the statement of reasons to which he was constitutionally entitled." 451 F. 2d at 1112.

[86] Bell v. School Bd., 321 F. 2d 494, 500 (4th Cir. 1963).

[87] *Id.* (school board refusal to take any initiative to desegregate the schools). *See also* Rolax v. Atlantic Coast Line Ry., 186 F. 2d 473 (4th Cir. 1922) (illegal agreement to bar promotion of Negroes).

[88] Toledo Scale Co. v. Computing Scale Co., 261 U.S. 527 (1962), discussed in text accompanying note 82 *supra*.

has thus been applied to complex situations where the courts apparently decided that counsel fee awards were an appropriate, non-criminal form of punishment for the defendants. Like the common benefit exception, the improper conduct exception has been widely applied by the courts to award the prevailing plaintiff his attorneys' fees when justice so demands.

In spite of its recognition of these judicially created exceptions, the Court in *Alyeska* refused to exercise its equity powers again to fashion an additional private attorneys general exceptions to the American Rule; it simply distinguished the common benefit and improper conduct exceptions as not applicable to the *Alyeska* facts.[89] The Court seemed more anxious to fit *Alyeska* into a consistent chain of cases that follows the American Rule than to rectify any injustice than may have occurred in not shifting attorneys' fees.[90] Part of the explanation for the Court's refusal to use the private attorneys general rationale was its concern with the administrative problems posed by the rationale. For example, it would be necessary to make difficult decisions as to whether the enforcement of a particular policy should warrant fee-shifting, whether the awards should be mandatory or discretionary, whether a prevailing defendant should recover, and whether the suit should raise a presumption in favor of the plaintiff or against him.[91] Additionally, the Court concluded that any non-statutory award of attorneys' fees would be impossible in the large number of cases where the government is a defendant, because taxing fees against government defendants is explicitly barred by 28 U.S.C. § 2412.[92] Apparently, the Court did not find the desirability of awarding fees in the many other cases involving private defendants the more persuasive consideration. While noting the recent criticsms of the American Rule and tacitly recognizing the desirability of encouraging private litigation to implement public policy,[93] the Court nevertheless chose judicial restraint and decided that Congress, not the courts, must decide if, when, and how litigation costs should be redistributed.

ALTERNATIVES REJECTED: WHAT MIGHT HAVE BEEN

The Court's refusal to accept the private attorneys general rationale as a third exception to the American Rule need not have precluded an award of attorney's fees. The lower court concluded, without a thorough analysis of the factors involved, that neither of the two traditional exceptions to the American Rule was applicable.[94] A closer examination of the Trans-Alaska Pipeline Authorization Act and the litigation that stimulated it, however, reveals that *Alyeska* furnished the Court with at least an arguable case for application of a somewhat expanded common benefit exception. Although it was hotly debated in the court of appeals whether the environmentalist groups' efforts in court

[89] 421 U.S. at 257–59, 269.
[90] *Id.* at 250, 257.
[91] *Id.* at 263–64.
[92] *See* note 33 *supra*. The legislative history of section 2412 supports the interpretation that attorneys' fees generally are not to be taxed against the United States. H.R. Rep. No. 308, 80th Cong., 1st Sess. Appendix, at A189 (1947); H.R. Rep. No. 1535, 89th Cong., 2, 3 (1966); S. Rep. No. 1329, 2d Sess. 2, 3 (1966).
It can be argued, however, that state or federal governmental defendants should pay attorneys' fees, from tax monies specifically allocated for law enforcement, in suits where the plaintiffs are acting in the government's place to enforce the law. This approach would view fee-shifting as another way of taxing the cost of law enforcement to the public. *See* Mause, *Winner Take All: A Re-examination of the Indemnity System*, 55 Iowa L. Rev. 26, 37, 41–42 (1969). This argument is closely related, then, to the common benefit rationale which distributes the burden of the suit among those who benefit by it, as well as the improper conduct theory that forces the party causing the expenses of the suit to pay those expenses. *See also Equal Access, supra* note 2 and text accompanying notes 96–100, 104–05 *infra*.
[93] 421 U.S. at 270–71. For criticism of the American Rule, see Ehrenzweig, *supra* note 45; Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 Md. L. Rev. 379 (1973); Goodhart, *supra* note 42; Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 Iowa L. Rev. 75 (1963) [hereinafter cited as Kuenzel]; McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619 (1931); McLaughlin, *The Recovery of Attorneys' Fees: A New Method of Financing Legal Services*, 40 Ford. L. Rev. 761 (1972); Nussbaum, *supra* note 2; Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202 (1966) [hereinafter cited as Stoebuck]; *Judicial Green Light, supra* note 2; *After Mills, supra* note 2; *Equal Access, supra* note 2; *The Ultimate Burden, supra* note 44.
[94] 495 F. 2d at 1029. Even though the court noted that "every citizen's interest in the proper functioning of our system of government" was served by the litigation, this interest was determined not to be dispositive of whether to apply the common benefit exception. The court also deemed that the "appellees" legal position . . . was manifestly reasonable and assumed in good faith." *But see* text accompanying note 107 *infra*.

aided or injured the public a majority of that court found substantial long-term benefit stemming from the reforms inspired by the suit.[95] Essentially, these reforms produced a pipeline system that will operate more effectively as a result of the stringent standards imposed.[96] In the evaluation of Russell B. Train, later the Administrator of the Environmental Protection Agency, the litigation resulted in increased public safety and protection that was beneficial to the government, the public, and the oil industry.[97] The public benefited as well from the increased tort liability and the higher permit and maintenance prices that the new Act[98] imposed.

Given this benefit, one logical approach for the Court to have taken would have been to expand the common benefit exception to cover the *Alyeska* facts. At first glance, such an expansion from fairly well defined beneficiary classes such as stockholders of a corporation[99] or all members of a union to the more amorphous public at large[100] would seem merely to turn the common benefit exception into a private attorney general theory. But by focusing on the benefit conferred, the common benefit exception is intended to give effect to the equitable principle of avoiding unjust enrichment[101] to a far greater extent than is the private attorney general theory, with its focus on the enforcement of some law or legislative policy. Because the principle of avoiding unjust enrichment is so firmly established as a principle of judge-made common law,[102] while the private attorney general theory has more of a legislative pedigree,[103] an expansion of the common benefit exception to cover the *Alyeska* facts would have allowed the Court to do justice in the case with less of an intrusion into Congress's province than was perceived as the necessary effect of judicial adoption of the private attorney general theory.[104]

One of the prerequisites to application of the common benefit rationale is a showing that the party against whom the award is to be made is a proper party to bear or distribute the burden of the suit.[105] In *Alyeska* the oil company defendant was the proper intermediary to distribute the cost of the litigation because these costs could have been easily passed to the ultimate consumers of the oil in the form of higher prices. The distinction between the beneficiaries of the suit —the general public—and the ultimate consumers of the oil—those members of the public who pay for it—is more conceptual than factual. Additionally, it seems far more equitable to distribute the costs of the suit to the millions of users than to leave it with the three private citizen organizations that are supported by private and often small donations.[106] While this surely would have been a substantial expansion of the common benefit exception, the Court has not shied away from such expansions in the past and no compelling reason appears why the Court could not have made this further expansion in this case.

---

[95] 495 F. 2d at 1029, 1032–36.

[96] *See* Trans-Alaska Pipeline Authorization Act, 30 U.S.C. §§ 185(h), (*l*), (m) & (x) (Supp. IV, 1974); text accompanying notes 24–25 *supra*.

[97] "The Alaska Pipeline . . . has been an excellent example [of] where NEPA and the courts have forced the reconciliation of environmental concerns with sound engineering practices. . . . Much of the delay has been beneficial. . . . If the pipeline had been constructed using the original design specifications it would very likely have resulted in not only *very serious environmental damage* but also *serious operational problems*. Indeed, the physical integrity of the pipeline itself was very much at stake.

. . . [I]ndustry seriously underestimated the real technical difficulties of the task. . . . [G]overnment was ill-equipped both institutionally and informationally for dealing with the complex problems of the pipeline, 495 F. 2d at 1034–35 n. 3 *quoting* Remarks before the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973. *See also* note 25 *supra* (former Secretary of Interior Hickel's similar response).

[98] *See* the Trans-Alaska Pipeline Authorization Act, 30 U.S.C. §§ 185(h), (*l*), (m) & (x) (Supp. IV, 1974).

[99] *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), and text accompanying notes 70–74 *supra*.

[100] *See, e.g.*, Hall v. Cole, 412 U.S. 1 (1973).

[101] *See* text accompanying notes 75–79 *supra*.

[102] The lower court called "spread[ing] the costs of litigation proportionately among the beneficiaries, the key requirement of the 'common benefit' theory." 495 F. 2d at 1029.

[103] *See, e.g.*, note 4 and accompanying text *supra*.

[104] The *Alyeska* majority felt that fee awards under the private attorneys general concept "would make major inroads on a policy matter that Congress has reserved for itself." 421 U.S. at 269.

[105] *See* Hall v. Cole, 412 U.S. 1, 9 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396–97 (1970). *See also* Yablonski v. United Mine Workers of America, 466 F. 2d 434 (D.C. Cir. 1972); Robins v. Schonfeld, 326 F. Supp. 529 (S.D.N.Y. 1971).

[106] *Cf.* Natural Resources Defense Council, Inc. v. EPA, 512 F. 2d 1351 (D.C. Cir. 1975), which recognized the funding difficulties that public interest environmentalist groups have: "[These] [g]roups such as NRDC have never been secure financially, and only recently the foundations [as the Ford Foundation] have indicated their intent to divert their support to projects in other areas. Provisions for fees could thus have a strong impact on their continued willingness and ability to pursue . . . [statutory] actions."—*Id.* at 1358 (footnotes omitted).

In addition to the common benefit-redistribution rationale, perhaps on a closer examination of Alyeska's motives and behavior, the Supreme Court could have applied the bad faith exception to award attorneys' fees to the plaintiffs. In the debates surrounding the passage of the Trans-Alaska Pipeline Authorization Act, both "the industry and the Administration" were accused of "having been evasive, legalistic, and less than credible" in dealing with the issues presented by the development of the Pipeline.[107] This raises doubts about the honesty of the industry's policies and the independence of the various governmental agencies involved. While such inferences alone are not substantial enough to satisfy the bad faith requisite for fee-shifting under the improper conduct rationale, they do warrant a closer look at the facts of the case. The Court did not make this examination, however; it relied instead on the lower court's conclusory assertions of good faith and reasonable behavior of Alyeska and the government defendants without confronting the issue squarely.[108]

THE DISSENT IN "ALYESKA": COMPLETE SUPPORT FOR THE PRIVATE ATTORNEY GENERAL CONCEPT

Justice Marshall and Justice Brennan dissented in *Alyeska*. Justice Marshall insisted that the adoption of the private attorneys general rationale to award the plaintiffs their attorneys' fees was a viable and preferable alternative to the majority's conclusion,[109] arguing that the chains of precedent for the common law exceptions to the judge-made American Rule[110] illustrate that courts do have independent authority to award attorneys' fees. Further, this kind of judicial activity is not preempted by congressional activity because courts have acted to award fees under statutory causes of action which make no provision for such awards[111] and have interpreted various statutory fee regulations as imposing no restrictions on the equity powers of courts to redistribute attorneys' fees.[112] Thus the fashioning of the private attorneys general exception to the American Rule would have been merely another exercise of these same equitable powers, and not a judicial repudiation of the entire American Rule.[113]

Basic in Justice Marshall's vigorous dissent is a denial that congressional action in the area of attorney's fees prohibits or preempts the Court from making independent decisions in the same area.[114] In response to the majority's concern about manageable standards for application of the rationale,[115] the dissent proposed a three-prong test to identify those cases that warrant fee-shifting. Fees would be awarded to the prevailing plaintiff if (1) the right protected is one shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel fees; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.[116] The first two requirements were met in *Alyeska*, Justice Marshall asserted, by the governmental and public benefit derived[117] and the environmentalists' "largely altruistic" willingness to litigate these issues.[118] In response to the third requirement, Justice Marshall argued that because the consortium does business in forty-nine states and accounts for twenty percent of the national oil market, Alyeska was the proper intermediary to shift the costs of the litigation to the benefiting general public.[119] The majority criticized this test as emasculating the private attorneys

---

[107] 119 Cong. Rec. 22798 (1973) (remarks of Senator Jackson). Senator Jackson also noted that the companies "ridiculously downgraded the oil and gas potential of the [Alaska oil fields]." *Id.* at 22799. *See also* note 21 *supra*.

[108] 421 U.S. at 259–60.

[109] *Id.* at 271–72 (Brennan, J., dissenting); *id.* at 273–74 (Marshall, J., dissenting).

[110] *See* notes 61–77 and 80–88 and accompanying texts *supra*.

[111] *See, e.g., Mills v. Electric Auto-Lite*, notes 70–74 *supra* and *Hall v. Cole*, notes 75–77 *supra*.

[112] *See, e.g.*, the docketing fees statute, 28 U.S.C. § 1923 (1970), notes 51–52 *supra*, as construed in cases awarding fees under the exceptions to the American Rule: Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 n.11 (1967); Sprague v. Ticonic Bank, 307 U.S. 161, 164 (1939); Trustee v. Greenough, 105 U.S. 527, 535–36 (1881).

[113] 421 U.S. at 274, 282.

[114] *Id.*

[115] *Id.* at 263–64. *See also* text accompanying note 91 *supra*.

[116] *Id.* at 284–85.

[117] *Id.* at 285–86. *See also* notes 96–98 and accompanying text and note 108 *supra*.

[118] *Id.* at 286–87.

[119] *Id.* at 288.

general theory.[120] The Court asserted that the test's emphasis on the "important right" protected, without a definition of "important," would make it applicable to virtually all substantive legislation.[121] Thus "if *any* statutory policy is deemed so important" that attorneys' fees should be awarded to those who enforce it, the Court demanded, "how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C. § 1983 seeking to vindicate *constitutional* rights?" [122] Under Justice Marshall's test, however, fees would be awarded *only* in those section 1983 actions where shifting the cost to the defendant would place the burden on the class that benefits from the suit.[123] This limitation seems consistent with the Court's traditional concern that unjust enrichment be avoided [124] and envisions the private attorneys general concepts as quite similar to the common benefit theory.[125] The dissent thus recognizes the equitable basis for the private attorneys general concept and rightfully attacks "the inadequacy of the [majority's] analysis." [126]

PUBLIC INTEREST LITIGATION AND THE AMERICAN RULE

As society has become more complex, an increasing number of difficult and important social problems of a type ordinarily treated by legislative action have been left unresolved or unenforced by those primarily responsible for their solution. Frustrated citizens and groups with diverse economic resources have increasingly turned to the courts for assistance when other resources have failed them.[127] Initial successes in areas such as desegregation,[128] environmental protection,[129] or prison reform,[130] have encouraged other citizens, concerned with the general welfare, to bring their problems to court when the law, or the official charged with its administration, seems to offer no relief.[131] The complex public interest lawsuit has emerged, generally distinguished by issues of extreme social importance, often involving complex statutory schemes, or inspired by the "strength of Congressional policy." [132] Their complexity and importance often protract the litigation substantially. They often generate injunctive relief that benefits a substantially greater number of people than the litigants themselves but do not generally result in monetary damage awards.[133] Without any provision for fee-shifting, the expenses involved in these suits and the harsh reality of the unlikelihood of any substantial monetary recovery from which attorneys' fees

---

[120] *Id.* at 264–67 n. 39.
[121] *Id.* at 266–67 n. 39.
[122] *Id.* at 264 (emphasis in text).
[123] *See id.* at 285.
[124] The common benefit exception developed because of this concern. *See* text accompanying notes 59–79 and text following note 100 *supra*.
[125] 421 U.S. at 284: "[W]e have already recognized several of the same factors in the recent common-benefit cases." *See also* text accompanying note 143 *infra*.
[126] *Id.* at 282.
[127] *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1967); Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954). *Cf.* Bradley v. School Bd., 416 U.S. 696 (1974).
[128] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).
[129] *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Natural Resources Defense Council v. EPA, 484 F. 2d 1331 (1st Cir. 1972); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972).
[130] *See, e.g.*, Taylor v. Perini, 503 F. 2d 899 (6th Cir. 1974); Holtt v. Vitek, 495 F. 2d 219 (1st Cir. 1974).
[131] Liberalized rules of standing to sue gave greater access to the courts to those who challenged the legality of corporate and government action or inaction *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Trafficante v. Metropolitan Life Ins. Co. 409 U.S. 205 (1972); Association of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608 (2d Cir. 1965), *cert. denied*, Consolidated Edison Co. of N.Y., Inc. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).
Yet other cases restrict access by limiting class actions. *E.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); *see* note 185 *infra*; Zahn v. International Paper Co., 414 U.S. 291 (1973) and text accompanying notes 182–85 *infra*; Sierra Club v. Morton, 405 U.S. 727, 756 (1972) (Blackmun, J., dissenting).
[132] La Raza Unida v. Volpe, 57 F.R.D. 94, 99 (N.D. Cal. 1972). *La Raza*, a class action suit to enjoin construction of a highway, was the first case to apply the private attorneys general concept in awarding fees in environmental litigation.
[133] 57 F.R.D. at 101.

could be paid [134] foreclose many potential litigants from the courts,[135] regardless of the importance of the rights at issue.

The litigation surrounding the Trans-Alaska Pipeline typifies the public interest lawsuit. The matter at issue, the development of an indepedent American oil supply, had enormous international and domestic implications.[136] Efforts at development posed major dangers to persons, property, and the environment if the project were undertaken without the more adequate and comprehensive planning and safeguards [137] the environmentalists' suit sought to insure. In its eagerness to develop the oil discovery, the Department of the Interior chose an expedient means of development [138] which was subsequently found to violate the Mineral Land Leasing Act.[139] Since private suit was the only available means of forcing the government to consider adequately the impact of the pipeline as originally engineered, the moderately funded Wilderness Society and its co-plaintiffs devoted five years to this suit, consuming over forty thousand hours of attorneys' time. The attorneys' work was arduous litigation against a powerful oil company consortium which used its full panoply of legal resources in defense.[140] The traditional argument that fee-shifting would deter litigants from defending lawsuits is surely inapplicable to the *Alyeska* situation, where the plaintiffs' attorneys fees were "paltry in comparison with the interest [over one billion dollars] Alyeska had in defending this appeal." [141] To encourage other private citizen groups to shoulder complex burdens, such as these, against such large and resourceful defendants,[142] there must be the possibility that successful public interest litigation will carry with it an award of attorneys' fees.

The issues involved in public interest lawsuits, such as *Alyeska*, are conceptually similar to many of those involved in cases in which the expanded common benefit and improper conduct exceptions have been invoked. Generally, all of these cases are brought by private parties litigating issues that substantially affect the welfare of other non-parties, often affording a general benefit to a wide number of citizen-beneficiaries. Frequently, the defendant has acted improperly or in bad faith.[143] These similarities prompted lower federal courts to exercise their discretionary powers and and view these similarities to the recognized exceptions as a basis for adopting the private attorneys general rationale as a judicial remedy for the financial obstacles confronting public interest litigation.[144]

---

[134] The damages available in most public interest suits are meager at best in relation to the complexity of the factual, legal and social issues involved. This was recognized in NAACP v. Allen, 340 F. Supp. 703, 710 (M.D. Ala. 1972), where the attorneys had sued in the public interest to preserve civil liberties for black Americans: Because the probability of a large damage recovery is remote, . . . plaintiffs or their lawyers who bring class actions seeking to preserve civil liberties usually must make substantial financial sacrifices. In addition, a lawyer . . . is likely to suffer social, political and community ostracism [because of this kind of suit].

[135] Although it might be suggested that fee-shifting is unnecessary because poor Americans can use Legal Aid to bring these kinds of suits, Legal Aid has not proved a viable alternative because of its limited funding. A realistic method of fee-shifting would encourage more attorneys to undertake this kind of litigation for all clients. *See* Nussbaum, *supra* note 2, at 303–05. Professor Ehrensweig, *supra* note 45, at 1230, warned: If the bar continues to neglect needed reform, not only in its system of fees but also in the availability of legal services, the legal profession could conceivably suffer the same fate as the medical profession—that is, some form of "Legicare," a Government-financed legal service for all.

[136] *See* note 14 *supra*.

[137] *See* notes 25, 26, 97 and accompanying texts *supra*.

[138] *See* note 25 *supra*.

[139] *See* note 21 and accompanying text *supra*.

[140] Brief for Respondent, Wilderness Society, Appendix.

[141] Wilderness Society v. Morton, 495 F. 2d 1029, 1032 (D.C. Cir. 1974).

[142] For examples of suits involving large corporate defendants, see Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Merola v. Atlantic Richfield Co., 493 F. 2d 292 (3d Cir. 1974); Parham v. Southwestern Bell Tel. Co., 433 F. 2d 421 (8th Cir. 1970); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd* 480 F. 2d 240 (3d Cir. 1973). Examples of suits against powerful unions include Hall v. Cole, 412 U.S. 1 (1973); Yablonski v. United Mine Workers of America, 466 F. 2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973). For suits involving large governmental defendants, see United States v. SCRAP, 412 U.S. 669 (1973) (Interstate Commerce Commission as defendant); Taylor v. Perini, 503 F. 2d 899 (6th Cir. 1974) (Superintendent of Ohio prisons as defendant); Natural Resources Defense Council v. EPA, 484 F. 2d 1331 (1st Cir. 1973); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) (California Highway Engineer of California, and United States Secretary of Transportation as defendants).

[143] For discussion of the common benefit exception, see notes 61–79 and accompanying text *supra*; for a discussion of the bad faith exception, see notes 80–88 and accompanying text *supra*.

[144] *See* cases cited note 8 *supra*.

But these lower courts did so only after the Supreme Court provided a supportive milieu for further encroachments on the American Rule.[145] The Court in *Newman v. Piggie Park Enterprises*,[146] had construed Title II of the Civil Rights Act of 1964 to permit an award of attorney's fees for the purpose of encouraging the initiation of similar suits to enjoin racial discrimination in public accommodations.[147] The Court reasoned that "[i]f [a plaintiff] obtains an injunction, he does so not for himself alone but also *as a 'private attorney general'* vindicating a policy that Congress considered of the highest priority."[148] Although the suit was brought under a statute that explicitly authorized fee-shifting at the discretion of the courts, *Newman* identified the underlying theory as that of the private attorney general and raised a presumption in favor of shifting the prevailing party's fees, rebuttable only by a showing of "special circumstances [that] would render such an award unjust."[149]

Adopting the reasoning of *Newman* in a later suit brought under another statute[150] that also made an award of attorneys' fees discretionary, a unanimous Court held, in *Northcross v. Board of Education*,[151] that the plaintiffs were "private attorneys general" and thus entitled to an award of attorneys' fees.[152] Even though consistent with legislative mandate, the Court's action seemed expansive, encouraging many other private attorneys general to bring similar suits. Lower federal courts, guided by this spirit, responded by awarding attorneys' fees pursuant to the private attorneys general theory under other discretionary statutes[153] and statutes silent in regard to fee-shifting.[154] Encouraged by the Supreme Court and drawing on their own equity powers, the lower federal courts thus fashioned the private attorneys general exception to the American Rule.

Although the Supreme Court had acted, and the lower courts had quickly followed, to allow fee-shifting to encourage suits in the public interest,[155] a policy that awarded fees in this area in the absence of some statutory authority was never explicitly sanctioned.[156] Nevertheless, by awarding attorneys' fees without enunciating any specific constraints on when this was appropriate, and by mandating that other courts do the same,[157] *Newman* and cases following it raised the hope that judicial repudiation of the American Rule, or at the least an adoption of the private attorneys general rule as a general judicial remedy in public interest litigation, would soon be a reality.[158]

The Impact of Alyeska—The American Rule Reiterated

These repeated hopes that the American Rule would be at least modified were dashed decisively by *Alyeska*. In its rejection of the private attorneys general exception as a judicial discretionary remedy, the Court turned away from the *Mills*[159]-*Newman*[160] enlargements and towards the views of an earlier case, *Fleischmann Distilling Corp. v. Maier Brewing Co.*[161] In *Fleischmann*, the Court

---

[145] *See* Northcross v. Board of Educ., 412 US. 427 (1973); Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). The Court in *Alyeska* did not deal with the implication of these cases; rather, it used the narrowest view of their holdings to fit them into the recognized exceptions: *Mills* and *Hall* into the common benefit exception, 421 U.S. at 258, *Piggie Park* and *Northcross* as statutorially authorized, 421 U.S. at 262. *Cf.* Dawson *Public Interest Litigation*, *supra* note 32, at 866–70.

[146] 390 U.S. 400 (1968).

[147] 42 U.S.C. § 2000a (1970).

[148] 390 U.S. at 402 (emphasis added).

[149] *Id.*

[150] The Emergency School Aid Act of 1972 § 718, 20 U.S.C. § 1617 (Supp. II, 1972).

[151] 412 U.S. 427 (1973).

[152] *Id.* at 428.

[153] *See, e.g.*, Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-5(k) (1970).

[154] *See, e.g., Mills*, discussed at notes 70–74 *supra*; *Hall* discussed at notes 75–77 *supra*.

[155] *See* note 145 *supra*.

[156] It is true that the statutes involved in *Mills* and *Hall*, the Securities Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970) and the LMRDA, 29 U.S.C. §§ 401–12 (1970), respectively, were silent regarding fee-shifting. Yet because the statutes were passed specifically to protect the institutions involved, and the individuals in those institutions, from future abuses of individual rights, it can be argued that Congressional intent to encourage private enforcement was implicit. By fee-shifting, the Court acted pursuant to this intent by encouraging other possible private plaintiffs to sue.

[157] *See* text accompanying note 148 *supra*.

[158] *See* Nussbaum; *Equal Access; After Mills;* and *Judicial Green Light, Supra* note 2.

[159] *See* text accompanying notes 70–79 *supra*.

[160] *See* text accompanying notes 147–49 *supra*.

[161] 386 U.S. 714 (1967).

refused to apply the bad faith exception as a rationale to award the plaintiff his attorneys' fees where the defendant had caused the suit by deliberately infringing plaintiff's patent in violation of the Lanham Act.[162] The Court held that federal courts lacked power to award attorneys' fees even in cases of bad faith on the part of the defendant when the statute creating the cause of action expressly provided remedies for its vindication without including fee-shifting provisions.[163] Implicit in the Court's approach is the notion that the bad faith or any other recognized exception to the American Rule is inadequate to accomplish fee-shifting if juxtaposed against a statute creating the cause of action which specified the relief available without mentioning attorneys' fees. *Mills*, decided after *Fleischmann*,[164] seemed to contradict directly the *Fleischmann* position by holding that attorneys' fees could be awarded to the prevailing plaintiff suing under the Securities Exchange Act of 1934, even though the section sued under was silent regarding plaintiff's attorneys' fees.[165] But the Court returned to its *Fleischmann* approach in *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*[166] In *Rich*, the plaintiff, a supplier of building materials, sued to collect against a payment bond posted in favor of a government contractor under the Miller Act.[167] The plaintiff had not been paid by a company alleged by plaintiff to be a subcontractor of the defendant government contractor. The suit established that the debtor was in fact a subcontractor, thus giving the plaintiff access to the bond under the Act. The Supreme Court reversed the court of appeals decision allowing plaintiff to recover attorneys' fees because, as in *Fleischmann*, the statute creating the cause of action, although allowing the plaintiff to recover "sums justly due," contained no provision for fee-shifting.[168] The Court noted the existing policy arguments for fee-shifting and the judicial remedies for affecting it,[169] but foreshadowed *Alyeska* by nevertheless refusing to depart from the American Rule without congressional sanction.[170] At the time of the *Rich* and the *Fleischmann* decisions, these cases could have been viewed simply as an unwillingness of the Court to award attorneys fees by applying the bad faith exception to situations involving improper private conduct among competitors within a commercial context. But if *Rich* and *Fleischmann* are viewed as part of the approach that developed more fully in *Alyeska*, continued use of the bad faith as well as the common benefit exception may be doubtful absent statutory guidance. While these cases can be viewed narrowly, the more natural interpretation for the *Fleischmann-Rich-Alyeska* chain is that the Court has made judicial restraint on awards of attorneys' fees the general rule again and it is the exceptions which will be viewed narrowly in the future.

And yet the Court could have used its equity powers to fashion a private attorneys general exception to the American Rule.[171] These were the same equitable powers exercised by the Court when it acted to avert injustice by fashioning a remedy to allow the plaintiff to recover his attorneys' fees from a common fund[172] and then expanded the remedy to award a plaintiff his attorneys' fees because his suit had vindicated the constitutional rights of others.[173] The Court's history of broadening the common benefit exception and its increased use of the improper conduct exception could have been stepping stones to the adoption of the private attorneys general concept. What is missing in the Court's analysis in *Alyeska* is a sensitivity to the practical results of the suit[174] accompanied by a

---

[162] 15 U.S.C. §§ 1051–1127 (Supp. IV, 1974).
[163] 386 U.S. at 720. The Court returned to the traditional position on the American Rule, asserting that it protects a losing litigant and encourages the poor to sue.
[164] Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), was decided three years after *Fleischmann*.
[165] When *Fleischmann* was restricted to its facts in *Mills*, 396 U.S. at 391, the reasonable inference was that *Fleischmann* would be of dubious precedential value in the future. *See After Mills*, *supra* note 2, at 328, and Nussbaum, *supra* note 2, at 321, 335.
[166] 417 U.S. 116 (1974).
[167] 40 U.S.C. § 270a (1970) (requiring contractors' bonds on government contracts).
[168] 417 U.S. at 128, *construing* 40 U.S.C. § 270b(a) (1970).
[169] *Id.* at 128–31.
[170] *Id.* at 130–31.
[171] *See* 421 U.S. at 274, 282 (Marshall, J., dissenting); notes 110–16 and accompanying text *supra*.
[172] Trustees v. Greenough, 105 U.S. 527 (1882), discussed at text accompanying notes 61–62 *supra*.
[173] Hall v. Cole, 412 U.S. 1 (1973), discussed at text accompanying notes 75–77 *supra*.
[174] For a discussion of the benefits conferred by the suit, see text accompanying notes 96–98 *supra*; for a discussion of the difficulties involved in the suit and the implications from them, see text accompanying notes 140–42 *supra*.

perspective broader than the narrow focus on the individual plaintiff's relationship to the subject matter of the suit. The rather curt dismissal of the substantial benefit accruing to the public as a result of the suit [175] and of the benefits inherent in encouraging private citizens to sue in the public interest through the promise of attorneys' fees [176] led to the Court's refusal to take another step to avoid injustice in public interest litigation. Although such a step would have led to the shifting of attorneys' fees to the losing *defendant* in public interest suits for the first time, the Court had clearly done this type of shifting before in the improper conduct exceptions.[177] Similarly, since the Court had allowed shifting of attorneys' fees in suits brought under statutes silent regarding attorneys' fees,[178] and even had created a presumption in favor of fee-shifting when a statute had prescribed it as discretionary,[179] it was only a small step to allowing attorneys' fees in cases in which there was no statutory authorization. But the Court refused to take that forward step, retreating instead to a reliance on Congress to make a decision "on a policy matter that [it] has reserved for itself." [180]

PUBLIC INTEREST LITIGATION AFTER "ALYESKA"

In the aftermath of *Alyeska*, we are left with a sadly limping, slightly stunned public interest litigation movement even though the damage may be mainly to the movement's morale and not necessarily to its corpus.[181] In fact, *Alyeska* is actually the second case in a one-two punch thrown by the Supreme Court, seemingly aimed at knocking out public interest litigation, especially in the form of class action suits. The first blow was dealt in *Zahn v. International Paper Co.*,[182] where the Supreme Court held in a public interest lawsuit that a class action [183] can be maintained only when *each* member of the class, whether participating in the suit or not, satifies the ten thousand dollar jurisdiction amount requirement for suits brought in the federal courts.[184] While the *Alyeska* plaintiffs were not affected by this monetary interest requirement, *Zahn* created a rigid rule the persuasive effect of which must be to inhibit the bringing of public interest class-action suits.[185] Taken together, *Zahn* and *Alyeska* have dealt a powerful blow to the environmental protection movement, and to public interest litigation generally, by substantially reducing the opportunity to bring class action suits

---

[175] The Court implicitly agreed that the litigation produced a substantial benefit, as evidenced by its acceptance of the lower court's finding, 421 U.S. at 259, and its ignoring the dissent in the lower court, which vigorously objected to finding any benefit in the plaintiffs' suit.

[176] "It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances." 421 U.S. at 271.

[177] *See* text accompanying notes 80–88 *supra*.

[178] *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), and Hall v. Cole, 412 U.S. 1 (1973), discussed in text accompanying notes 70–74 and 75–77 *supra*.

[179] *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), discussed at text accompanying notes 146–49 *supra*.

[180] 421 U.S. at 269. The Court did not specify how Congress has made this reservation, however.

[181] Although Ralph Nader predicted that *Alyeska* "is going to have a very depressive impact on the ability of public interest lawyers to litigate" unless Congress responds with a statutory authorization for fee-shifting in public interest cases, public interest law firms had only begun to expect fees to be paid by the defendants under a private attorneys general theory. Time, May 26, 1975, at 42. In fact, the fees that had been awarded under this theory generally were insufficient to adequately cimpensate the attorneys. *See* Witt, *After Alyeska: Can the Contender Survive?*, 5 Juris Doctor 34, 35, 39 (October, 1975) [hereinafter cited as Witt]. The impact of *Alyeska* can be minimized if the attorneys take care to bring suit under those statutes that specifically provide for awards of attorney's fees. Certainly environmental litigation seem most clearly injured by *Alyeska* because the National Environmental Policy Act, 42 U.S.C. §§ 4321–47 (1970), has no fee award provision.

[182] 414 U.S. 291 (1973).

[183] Suit was commenced under Fed. R. Civ. P. 23(b)(3).

[184] The suit was brought under diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) (1970). The Court, interpreting this statute, construed legislative silence regarding aggregation of claims as a prohibition against it, 414 U.S. at 302, and noted that its result would be the same under the general federal question jurisdiction statute, 28 U.S.C. § 1331 (1970). 414 U.S. at 302 n. 11.

[185] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), imposed a further restraint on commencing class actions by holding that plaintiffs in class action suits are required to bear the cost of notice to members of the class, regardless of the size of the class or the expense of the notice, and that such cost could not be imposed on the defendant, regardless of the likelihood that the plaintiff class would ultimately prevail on the merits.

in the federal courts and by severely eroding the economic ability to assert environmental rights.[186]

Edelman v. *Jordan*,[187] which preceded *Alyeska* by a few months, may soon be felt as another blow to public interest litigation. In *Edelman*, the plaintiff brought a class action suit for injunctive and declaratory relief against the Illinois officials administering the federal-state programs of Aid to the Aged, Blind, and Disabled (AARD).[188] Edelman claimed that the Illinois Department of Public Aid, in not processing his claim to disability benefits for almost four months, violated federal law requiring eligibility determinations within thirty or forty-five days of application and the receipt of the assistance check within those periods for eligible applicants.[189] His suit was successful, and the district court issued an injunction to require compliance with the federal regulations and ordered all retroactive benefits be paid to eligible persons who had applied for them.[190] In reversing the court of appeals as to retroactive payments, the Supreme Court held that the eleventh immunity of states from suits in the federal courts precluded, absent state consent to the suit, the entry of an award of retroactive statutory benefits against state officials where the state, and not the individuals, would pay the benefits.[191] Even though the Court in *Alyeska* expressly did not extend the eleventh amendment interpretation espoused in *Edelman* to preclude the award of counsel fees against state defendants,[192] lower courts are currently divided on this question.[193] The conservative tendencies of this Court[194] suggest that such an extension is likely to come.[195] The result may be that even where an award of attorneys' fees is permissible under an exception to the American Rule, it would remain an inefficacious remedy if the defendants to the suit were immune from an award of fees.[196]

---

[186] In the future, the private plaintiff will have no opportunity to recover his attorneys' fees unless the litigation is brought under a statute providing for fee-shifting, as in note 4 *supra*, or unless he can persuade the courts that his suit clearly fits into the common benefit exception. The vitality of the common benefit exception is diminished, however, and that of the improper conduct exceptions, discussed at notes 80–88 and accompanying text *supra*, is dubious at best after *Fleischmann* and *Rich*. *See* text following note 170 *supra*. *But see* cases cited note 200 *infra*. Certainly *Alyeska* will influence lower courts to restrict, not enlarge, these exceptions and thus in large measure will foreclose fee-shifting. Until, and unless, Congress acts to authorize wider fee-shifting, the Court has sacrificed these public interest lawsuits and the plaintiffs who bring them, in *spite* of its recognition that "the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances." 421 U.S. at 271.

[187] 415 U.S. 651 (1974), *rev'g sub nom.*, Jordan v. Weaver, 472 F. 2d 985 (7th Cir. 1973).

[188] This program was funded by federal and state governments. 42 U.S.C. §§ 1381–85 (Supp. IV, 1970).

[189] Title 45 C.F.R. § 206.10(a)(3) (1968) required, at the time the suit was instituted, that applications for Aid to theAged or Blind be processed within thirty days of receipt and that applications for aid to the disabled be processed within forty-five days.

[190] *See* Jordan v. Weaver, 472 F. 2d 985, 988 (7th Cir. 1973), affirming the judgment of the lower court.

[191] 415 U.S. at 678.

[192] 421 U.S. at 269–70 n. 44. Some lower federal courts, however, have already extended *Edelman* to immunize states and state officials. Skehan v. Trustees, 501 F. 2d 31 (3d Cir. 1974).

[193] *Compare* Souza v. Travisono, 512 F. 2d 1137 (1st Cir. 1975); Class v. Norton, 505 v. Thompson, 494 F. 2d 885 (9th Cir. 1974); Gates v. Collier, 489 F. 2d 298 (5th Cir. 1973); F. 2d 123 (2d Cir. 1974); Jordon v. Fusari, 496 F. 2d 646 (2d Cir. 1974); Brandenburger Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972), *with* Taylor v. Perini, 503 F. 2d 899 (6th Cir. 1974); Skehan v. Trustees, 501 F. 2d 31 (3d Cir. 1974); Jordon v. Gilligan, 500 F. 2d 701 (6th Cir. 1974); Named Indiv. Members v. Texas Highway Dep't, 496 F. 2d 1017 (5th Cir. 1974).

[194] *See* Green, *A Pro-Business Tilt in the Courts*, The Wall Street Journal, June 10, 1975, at 20, col. 3, which noted the current Supreme Court's "judicial conservatism": "It's not willing to go one step further than it has to." The ruling in *Alyeska*, the author concluded, developed logically from this conservatism. *But cf.* an editorial on the same page, *A Case for Restraint*, The Wall Street Journal, June 10, 1975, at 20, col. 1, which applauded the holding in *Alyeska* and, by implication, the conservative Court.

[195] Wood v. Strickland, 420 U.S. 308 (1975), although noting that school officials have merely a qualified good-faith immunity, suggests that intentional misconduct, not mere harmful action, may be required in the future to justify damages awarded directly against school, and by extension governmental, officials.

[196] This immunity comes from either the eleventh amendment, *see* notes 192–93 and text accompanying note 194 *supra* or from 28 U.S.C. § 2412 (1970), *see* note 33 and accompanying text *supra*. The results could be similar to that if Harrisburg Coalition v. Volpe, 381 F. Supp. 898 (M.D. Pa. 1974), where a citizen's group successfully sued under the Department of Transportation Act to enjoin highway construction through a city park. The court refused to award the plaintiffs their attorneys' fees because only the city officials of Harrisburg, the least culpable of all the defendants, were not statutorially immune from paying them.

CONCLUSION

In a very real sense, it is too early to measure *Alyeska's* impact on public interest litigation. Although the initial reaction to *Alyeska* was dismay,[197] a more careful consideration must note that in general only expectations were disappointed by the Supreme Court, not funds interrupted.[198] By deferring to a Congress that had manifested an awareness of the problems presented by the American Rule even before *Alyeska* was decided.[199] the Court could actually have helped public interest litigants. If Congress acts to authorize fees taxed to losing defendants, even against the government, ultimately,[200] significant merely as the im- In that case, *Alyeska* will be hardly remembered, [200] significant merely as the impetus for such informed congressional actively. But if Congress chooses not to act at all, *Alyeska* will stand as a reaffirmation of the "traditional American way of *talking about* equal access to the courts . . . [while] *in fact*, because of economics, only government, large corporations and the wealthy will normally have access." [201]

[From Environmental Affairs, Spring 1976]

DEFROSTING THE ALYESKA CHILL: THE FUTURE OF ATTORNEYS' FEES AWARDS IN ENVIRONMENTAL LITIGATION

By Philip M. Cedar *

In recent years the American public has become a significant force in pressing for environmental protection. Because access to Congressional and administrative

*Staff Member, Environmental Affairs

[197] "They didn't just rule against us. . . . They threw out the whole development in the lower courts that was moving in the direction of more and larger fees on this basis," said Charles Halpern of the Council for Public Interest Law, quoted in Witt, *supra* note 181, at 35. *See also* Ralph Nader's reaction at note 181 *supra*.

[198] *See* note 181 *Supra*.

[199] Even before the results of *Alyeska* were announced, some members of Congress had already voiced approval for fee-shifting and there has been some preliminary Congressional debate on the matter. For example, regarding the Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (1974), "we expect that the courts will award fees to legal service programs in cases where an award would be made to a private attorney or where such officers are functioning like 'private attorneys general.'" 120 CONG. REC. 12953 (1974) (remarks of Senator Kennedy). *See also id.* at 12934–35 (remarks of Senator Abourezk). Senator Tunney has already conducted hearings on attorneys' fees and fee-shifting. *Hearings on Legal Fees Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 3 (1973). It is reported that Senator Tunney is considering whether amending existing statutes to authorize fee-shifting or a broad fee-shifting measure would be the more effective. On Aug. 1, 1975, Senator Tunney introduced a bill rights, consumer, and environmental areas.

Representative Seiberling has introduced H.R. 7825 and H.R. 8218 to amend the Mineral Land Leasing Act, 30 U.S.C. § 185 (1970); H.R. 7829 and H.R. 8222 to amend the National Environmental Policy Act, 42 U.S.C. §§ 4321–47 (1970); H.R. 7828 and H.R. 8220 to amend some early civil rights statutes, and a bill to amend the injunction section of the Clayton Act, 15 U.S.C. § 15 (1970), to allow awards of attorneys' fees. He has introduced H.R. 7826 and H.R. 8221, which would add a new section to Title 28 of the United States Code to award attorneys fees in civil cases in federal courts at the judge's discretion, even against the United States as a defendant. This would effectively reverse *Alyeska* without providing the guidance the Supreme Court deemed indispensible. See text preceding note 91.

Representative Drinan has introduced H.R. 7968 which would assess attorneys' fees against the United States when a suit successfully challenges an agency decision in civil rights, consumer, and environmental areas.

[200] For the immediate present, however, *Alyeska* has made itself felt as the authority by which awards are denied to successful plaintiffs. *See, e.g.*, Ripon Soc'y v. National Republican Party, 525 F. 2d 548 (D.C. Cir. 1975) (remanding for a decision consistent with *Alyeska*); Gilliam v. City of Omaha, 524 F. 2d 1013 (8th Cir. 1975); Burbank v. Twomey, 520 F. 2d 744 (7th Cir. 1975); Kirkland v. Department of Correctional Services, 520 F. 2d 420 (2d Cir. 1975); Named Indiv. Members v. Texas Highway Dep't, 519 F. 2d 1372 (5th Cir. 1975); Hallmark Clinic v. North Carolina Dep't of Human Res., 519 F. 2d 1315 (4th Cir. 1975); O'Neal v. Gresham, 519 F. 2d 803 (4th Cir. 1975); Handler v. San Jacinto Jr. College, 519 F. 2d 273 (5th Cir. 1975); Tryforos v. Icarian Dev. Corp., 518 F. 2d 1258 (7th Cir. 1975); Turner v. FCC, 514 F. 2d 1354 (D.C. Cir. 1975); Natural Res. Defense Council v. EPA, 512 F. 2d 1351 (D.C. Cir. 1975); Rasmussen v. City of Lake Forest, 404 F. Supp. 148 (N.D. Ill. 1975); Phillips v. Puryear, 403 F. Supp. 80 (W.D. Va. 1975).

Attorneys' fees have been awarded by the courts, in spite of *Alyeska*, in some recent cases. *See, e.g.*, Doe v. Poelker, 527 F. 2d 605 (8th Cir. 1976) (reaffirming a position in favor of fee awards because of improper conduct in "abortion litigation involving the State of Missouri," enunciated by the same court in Doe v. Poelker, 515 F. 2d 541, 547 (8th Cir. 1975)); Carter v. Noble, 526 F. 2d 677 (5th Cir. 1976) (for bad faith in cutting a prisoner's hair); McDonald v. Oliver, 525 F. 2d 1217 (5th Cir. 1976) (for bad faith and oppressive conduct by union officials); Clemons v. Runck, 402 F. Supp. 863 (S.D. Ohio 1975) (for bad faith in racial discrimination in sale of property); Morris v. Board of Educ., 401 F. Supp. 188 (D. Del. 1975) (for bad faith in firing teacher). *Cf.* SEC v. Aberdeen Securities Co., 526 F. 2d 603 (3d Cir. 1975) (remanded to determine if the common benefit exception could be applied to the facts of the case).

[201] Witt, *supra* note 181, at 41 (emphasis original).

policy decisions is often limited by cost to regulated commercial and industrial interests, individual citizens and public interest groups have opted for the more expeditious route of bringing law suits directly against violators of federal pollution standards and challenging administrative decisions which allegedly fail to comply with environmental protection and policy legislation.[1]

Despite serious economic obstacles, these citizen suits have assumed a well-recognized watchdog function. Such public interest environmental litigation has helped to fill the interstices created by inadequate enforcement resources in those agencies charged with the administration of environmental legislation. Citizen suits attempting to enforce Congressional mandates have received the approval of all branches of the federal government.[2]

The increased incidence of such suits can be attributed, in large part, to statutorily authorized and judicially created awards of attorneys' fees to the public interest plaintiff. "Fee-shifting," as this development has been termed, has induced citizens and non-profit public interest organizations to undertake complex litigation challenging agency determinations, as well as private corporate actions which have allegedly failed to comport with environmental protection statutes. Congressional authorization of fee awards against government defendants[3] and private defendants reflects a recognition of the inadequate financial support available to public interest plaintiffs.

The courts in the exercise of their equity powers have fashioned several exceptions to the "American Rule," which dictates that all litigants are responsible for their own attorneys' fees. The primary equitable exception, which greatly encouraged civil rights and environmental litigation, was based on the private attorney general theory. The rationale for this theory, as adopted and expanded by the lower federal courts, was that a public interest plaintiff, whose suit effectuated strong Congressional policies and benefited the public at large or broad segments of society, acted in essence as a private attorney general and was therefore entitled to collect attorneys' fees from the defendant.[4] An award based on this theory was further recognition of the private enforcement potential of such suits and the development of an effective means of mitigating the disparity of resources between public interest plaintiffs and the typical government or corporate defendant.

Notwithstanding the broad acceptance of this exception, the posibility of subjective judicial determinations as to which Congressional or public policies were

---

[1] *See, e.g.*, Clean Air Amendments of 1970, 42 U.S.C. § 1857(a) *et seq.* (1970); National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970) (hereinafter cited as NEPA).

[2] In his August 1971, "Message to Congress," President Nixon stated: My confidence that our Nation will meet its environmental problems in the years ahead is based in large measure on my faith in the continued vigilance of American public opinion and in the continued vitality of citizen efforts to protect and improve the environment. The National Environmental Policy Act has given new dimension to citizen participation and citizen rights—as is evidenced by the numerous court actions through which individuals and groups have made their voices heard. 7 Weekly Comp. of Pres. Doc. 1132, 1133 (1971).

The President's executive agency, created by NEPA, 42 U.S.C. § 4342 (1970), pointed out in its Second Annual Report that citizen litigation has: . . . speeded up court definition of what is required of federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated lawmakers and the public to the need for new environmental legislation.

U.S. Council on Environmental Quality, Environmental Quality: Second Annual Report 155–56 19(71). *But see* Cramton & Boyer, *Citizen Suits in the Environmental Field Peril or Promise?* 2. Ecol., I.Q. 407, 409 (1972), which asserted that the creation of private rights to sue for environmental protection were". . . neither philosophically sound nor carefully drafted," and thus gave a very guarded approval to such suits.

Legislative sanction is reflected in the various provisions authorizing such suits. *E.g.* Clean Air Amendments of 1970 § 304(b), 42 U.S.C. § 1857h-2(a) (1970) (authorizing citizen suits against any private or government violator); *Id.* § 307(b), 42 U.S.C. § 1857h-5(b) (directing petitions for review of specified actions of the Administrator to the United States Courts of Appeals).

Judicial approval is traceable to statements acknowledging the beneficial effects of such litigation. For instance, Judge Bazelon recently noted in Natural Resources Defense Council v. EPA, 512 F. 2d 1351, 1358(D.C.Cir. 1975); "These have opened the Administrator's actions to judicial scrutiny from a point of view divergent from that represented by the regulated interests, and their positions have frequently been upheld."

[3] The statutory provisions authorizing fee awards against the government are important exceptions to the application of the sovereign immunity doctrine to the taxation of costs and fees. In the absence of specific legislation providing otherwise, 28 U.S.C. § 2412 (1970) prohibits fee awards. Awards against state defendants may be barred by the concept of sovereign immunity as embodied in the Eleventh Amendment to the United States Constitution, U.S. Const. Amend. XI. *See* text at notes 82–100 *infra* for further explication of the effect of sovereign immunity on the awards of attorneys' fees.

[4] *See, e.g.*, La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972).

deserving of fee award incentives, and the confusion attendant upon such selections, led the Supreme Court in *Alyeska Pipeline Service Company v. Wilderness Society*[6] to decisvely foreclose fee awards based on the private attorney general rationale. The Court held that, in the absence of express statutory authorization for the granting of attorneys' fees, federal courts may exercise their equitable powers to allow counsel fees in only a limited class of cases.[6]

This dramatic halt in the developing of court awarded attorneys' fees has shifted the burden to Congress to select those areas of public interest litigation which merit or require the inducement of fee-shifting. Congress has in fact acknowledged the task.[7] The process of selection, however, is replete with difficult choices as to what constitutes he "public interested" and between the strong competing interests operative in environmental controversies. Manageable standards for regulating judicial discretion must be developed to prevent subjective policy preferences from becoming the benchmarks in granting or denying attorneys' fees. The appropriate choices must inevitably be based upon careful analysis of the operation of statutory and judicially created awards to date.

This article will focus on the development of fee-shifting in an attempt to clearly define the problems confronting Congress in its forthcoming response to *Alyeska*. A brief discussion of the economic constraints involved in environmental litigation [sets] the framework for the legal analysis. After an historical overview of the place of fee-shifting in American jurisprudence, recent statutory and judicial treatment of this development was examined. Finally, the reasoning of the Court in *Alyeska* is critically analyzed. The author contends that although the Court correctly terminated the common law usage of the private attorney general rationale, legislatively created fee awards under this theory remain the most viable method of financing private enforcement suits.

I. ECONOMIC OBSTACLES TO ENVIRONMENTAL LITIGATION

Basic to an understanding of the rationale supporting fee-shifting is a sense of the economic barriers inherent in the complex process of private enforcement of environmental statutes. The successful environmental plaintiff must overcome significant obstacles. Foremost among the barriers is the inequality of means between the public interest plaintiff and the government or industrial defendant.[8] That most environmental suits seek injunctive relief rather than monetary damages makes difficult the procurement of vigorous and competent representation for the public interest plaintiff.[9] The typical plaintiff in these suits, an ad hoc citizens group or standing public interest organizaton,[10] cannot look to an award of money damages to pay the expenses of the litigation but must rely primarily on the charity of local attorneys or limited grants from foundations to fund these court battles.[11] The government, relative to these plaintiffs, has virtually

---

[6] 421 U.S. 240 (1975) [hereinafter cited as *Alyeska*].

[6] *Id.* at 269. The Court approved of the longstanding exceptions for a litigant's bad faith or where a judgment results in the creation of a common fund. *See* text at notes 101–112 *infra* for a discussion of these exceptions.

[7] Witt, *After Alyeska Can the Contender Survive?* Juris Doctor, October 1975, 34, 40–41; Goldfarb, *In the Public Interest*, Washington Post, June 11, 1975, at A18, col. 4.

[8] *See* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612, 618 (1970). The imbalance of resources may be exacerbated where, in a suit against the government, a private company intervenes to protect its interest in relaxed enforcement of environmental safeguards. The *Alyeska* case, 421 U.S. 240 (1975), dramatically illustrates this problem. There, a consortium of seven major oil companies intervened to support the Secretary of the Interior's initial approval of the proposed trans-Alaskan pipeline.

[9] The absence of a potential contingent fee arrangement has dissuaded the private bar from becoming involved in public interest litigation. *See generally*, Note, *The Private Bar, the Public Interest and Tax Incentives: Monetary Motivation for Action*, 13 Ariz. L. Rev. 953 (1971).

[10] Among the more prominent environmental interest groups are the Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, the Appalachian Mountain Club and the Wilderness Society. Another similar source of legal resources and manpower in environmental litigation is the Center for Law and Social Policy. For a description of the Center's activities, *see* Halperin & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 Geo. L. J. 1095 (1971).

[11] Foundation grants cannot be viewed as a long-term, consistent source of funding. While these grants have supported public interest law firms and national organizations, the grantors have perceived the funds as "seed money." *See* Berlin, Roisman & Kessler, *Public Interest Law*, 38 Geo. Wash. L. Rev. 674, 686–87 (1970). Even assuming a willingness to continue funding these groups, foundations, as institutional investors subject to fluctuation in stock-market conditions, may have a difficult time living up to their funding commitments. Neither can such grants be assumed to come with no strings attached. Foundations may place implicit or explicit conditions on the grantee's activities and use of such funds. Halpern & Cunningham, supra note 10, at 1112.

unlimited legal resources.[12] The industrial defendant or intervenor will allocate funds for legal services commensurate with the potential source of profit to be derived from relaxed environmental standards. In addition, the corporate party to the litigation will receive a tax deduction for expenses incurred for such business-related lawsuits.[13]

While the lack of adequate funding is shared by public interest litigators in other areas,[14] environmental lawsuits demand an additional measure of expertise in non-legal matters. Scientific data must be gathered, analyzed and presented in order to demonstrate the adverse environmental consequences of the private or agency project being challenged.[15] Successful prosecution of an environmental lawsuit therefore requires either retaining experts or at least engaging in the costly process of taking extensive depositions. Typically, the litigation and appeal will extend for several years.[16] Continuation of the litigation depletes the already meager resources of the plaintiff[17] and precludes it from participating in other potential lawsuits.

II. American Rejection of the English System of Indemnity

Fee-shifting, or "indemnity," as some have termed it,[18] is not new to Anglo American jurisprudence. For centuries the English have allowed counsel fees as a part of the award assessed against unsuccessful litigants.[19] The chancellor in equity was recognized as always having the discretionary power to award fees to the prevailing party.[20] Statutorily based awards in the law courts have been a part of the English system since 1207.[21] For the last one hundred years, judges at law have also been invested with the power to award fees in their discretion.[22] The English system of fee awards, however, failed to take root in America. The

---

[12] *Hearings on Attorneys Fees Before the Subcomm. on Representation of Citizen Interest of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. at 791 (1973) (testimony of J. Anthony Kline, Esq.) [hereinafter cited as *Hearings*].

[13] Federal income tax law permits business corporations to deduct the cost of such litigation from taxable income. Int. Rev. Code of 1954, § 162(a). *Cf.* Commissioner v. Tellier, 383 U.S. 687 (1966). Since the present corporate income tax rate is approximately 48%, in essence, the federal government is contributing almost one-half of the private defendants' legal expenses. Int. Rev. Code of 1954, § 11.

[14] "Civil rights organizations suffer from the same funding deficiency. Legal services organizations, although principally funded through direct governmental assistance, are in a similar position, particularly in areas where "test cases" are required. *See generally* McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 Ford. L. Rev. 761 (1972).

[15] *Hearings*, *supra* note 12, at 837 (testimony of Dennis Flannery, Esq.).

[16] The *Alyeska* litigation, which culminated in the Supreme Court's decision of May 12, 1975, 421 U.S. 240, was initiated by the Wilderness Society on March 26, 1970 in a suit to enjoin the construction of the trans-Alaskan Pipeline. Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). The appeal on the merits of this suit was finally concluded by the decision of the Court of Appeals for the District of Columbia on February 9, 1973. *See* Wilderness Society v. Morton, 479 F. 2d 842 (D.C.Cir.), *cert. denied*, 411 U.S. 917 (1973).

[17] Note that the public interest intervenors in Scenic Hudson Preservation Conf. v. FPC, 354 F. 2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), a case which is recognized as one of the leading standing decisions, required a last minute gift from a reluctant foundation in order to participate in the appeal to the Second Circuit. Sive, *The Functions and Features of Private Litigation in the Growth of Environmental Law*, Transcript of the Speeches, National Conference on Environmental Law 58 (November 1970). Protracted litigation is not without adverse consequences for the defendants and the public. E.g., N.Y. Times Jan. 6, 1974, sec. 1, p. 53, col. 2 cited in W. Gellhorn & C. Byse, Administrative Law 185 n. 3: Consolidated Edison officials noted that the hydroelectric project being challenged in the *Scenic Hudson* case, as originally proposed, would have cost $165 million, but after the inflationary effects of the delay engendered by the court action estimates were as high as $500 million.

[18] Mause, *Winner Takes All: A Re-examination of the Indemnity System*. 55 Iowa L. Rev. 26 (1969) [hereinafter cited as Mause].

[19] *See generally*, Goodhart, *Costs*, 38 Yale L. J. 849 (1929).

[20] Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301, 312 (1973) [hereinafter cited as Nussbaum]; Goodhart, *supra* note 19, at 852–54.

[21] Statute of Marlborough, 52 Hen. 111, c. 6 (1267) (authorizing fee awards to the prevailing tenant-defendant in certain actions maliciously brought by a landlord). 2 F. Pollock & F. Maitland, History of English Law 597 n. 6 (2d ed. 1909). *See* Nussbaum, *supra* note 20, at 312–13, for a concise history of statutory fee awards.

[22] In 1875, the Rules of Court altered the established tradition of awarding fees as of right to grant such awards in the discretion of the court. Order 55 of the Rules of Court, attached as First Schedule to the Supreme Court of Judicature Act, 38 Vict., c. 77 (1875).

American system of requiring each party to finance its own legal representation is virtually unique.[23]

Several arguments advanced in support of the American Rule warrant consideration. The Supreme Court, as an important advocate of the American system of fee awards,[24] posited the theory that the poor might be "unjustly discouraged" from instituting actions to vindicate their rights, if, in losing, they would be saddled with liability for the fees of their opponent's counsel.[25] Another argument commonly advanced is that an individual with a small damage claim will be discouraged from bringing suit, if the possibility exists that defendant's attorney's fees, which might exceed the value of the claim, would be taxed against him.[26] Similarly, a defendant faced with a small claim might be induced to capitulate, notwithstanding a legitimate defense, so as to avoid the additional liability for plaintiff's counsel fees.[27]

The Supreme Court has also noted "the expense and difficulty" inherent in litigating the amount of the fee to be awarded.[28] This fear that the post-litigation determination of fees will create an undue burden on the courts is not shared uniformly. Congressional authorization of fee-shifting [29] indicates at least a provisional legislative finding that this mechanism for effectuating certain articulated policies is both appropriate and manageable. Moreover, the lower federal courts, upon whom this "burden" falls, have not been reluctant to award fees.[30] Whatever "difficulty" is created by grafting such hearings onto a lawsuit is attributable not to the institution of fee-shifting, but instead to the lack of workable standards for setting the award. In the absence of such standards, the disparity in per hour rate or in the size of the overall fee [31] may have a significant effect on a public interest plaintiff's decision to litigate. The lack of uniformity and resultant confusion in the fee hearings does not necessarily condemn the indemnity system, but rather calls out for legislative guidance for determining the size of the fee.

Several commentators have advocated wholesale adoption of the "English Rule." [32] Some contend that under the indemnity system, which "raises the stakes" [33] to include additional liability for fees, litigants are encouraged to settle

---

[23] *See generally*, Report of the Committee on Comparative Procedure and Practice, Proceedings ABA International and Comparative Law Section 117–24 (1963); Report of the Committee on Comparative Jurisprudence, Proceedings ABA International and Comparative Law Section 125 (1952). Conflicting explanations for this aberration have been offered by several commentators. *See, e.g.*, Goodhart, *supra* note 19, at 873 (since lawyers were held in suspicion during the early years of America's development, the courts did not want to encourage the use of attorneys by awarding fees); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792, 798–99 (1966) ("accidental statutory history"); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Min. L. Rev. 619, 641–42 (1931) (individualistic spirit of the frontier years demanded each party bear his own costs).

[24] *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) (the inclusion of attorneys' fees in a damage award was reversed because "(t)he general practice of the United States is in opposition to it"). Acceptance of the American system was recently reaffirmed in *Alyeska*, 421 U.S. 240 (1975).

[25] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) [hereinafter cited as *Fleischmann*].

[26] Wilderness Society v. Morton, 495 F. 2d 1026, 1031 (D.C. Cir. 1974) [hereinafter cited as *Wilderness Society*].

[27] *Id.* at 1032.

[28] *Fleischmann*, 386 U.S. at 718. *See also* Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872): ". . . this grafted litigation might possibly be more animated and protracted than that in the original cause."

[29] *See, e.g.*, Clean Air Amendments of 1970 § 304(d), 42 U.S.C. § 1857h–2(d) (1970). *See* text at notes 38–81 *infra*, for an analysis of legislated exceptions to the American Rule.

[30] *Wilderness Society*, 49 F. 2d at 1031 n. 1. *See* text at notes 140–163 *infra*, for a discussion of the tremendous increase in fee awards in the public interest prior to *Alyeska*, 421 U.S. 240 (1975).

[31] *Compare Wilderness Society*, 495 F. 2d at 1037 (1974) *with* Wyatt v. Stickney, 344 F. Supp. 387, 410 (M.C. Ala. 1972), *aff'd in part sub. nom., Wyat v. Adcrholt*, 503 F. 2d 1305 (5th Cir. 1974) *and* Natural Resources Defense Council, Inc. v. EPA, 484 F. 2d 1331, 1339 (1st Cir. 1973).

[32] *E.g.*, Ehrenzweig, *supra* note 23, at 793; McCormick, *supra* note 23, at 643; Goodhart, *supra* note 19, at 877. For an excellent analysis of the various arguments both for and against the adoption of the English Rule, *see*, Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 648–55 (1974).

[33] *Wilderness Society*, 495 F. 2d at 1032.

out of court.[34] Plaintiffs are said to be less likely to bring nuisance suits, defendants less apt to interpose frivolous defenses.[35] Plaintiffs who mistakenly believe their claim is meritorious will not hesitate to litigate, however, nor will defendants who assume the same. In fact, fee-shifting under the English Rule may provide a positive incentive to litigate. Thus, the same characteristics which can be argued for repudiation of the American Rule can also be cited by opponents of a system of universal indemnity. Absent statistical evidence demonstrating the positive effects of an indemnity system on court congestion and on the goal of equalizing access to the courts, mere speculation as to behavioral changes among litigants does not provide a sufficient basis for adoption of the English Rule.[36] In this context, total abandonment of the American Rule would appear to be ill-advised.

Adoption of a pure indemnity system would have dire consequences for the poor or public interest plaintiff. A disadvantaged litigant seeking to vindicate his or her rights through injunctive or declaratory relief may well be discouraged not only by the absence of a monetary award but also by the possibility of having to defray counsel fees for both parties. With the premium which the English Rule places on predictability of outcome, "test cases" in developing areas of the law or in areas where the precedents are uncertain are likely to be discouraged.[37] Environmental suits would therefore decrease in view of the emergent nature of that area of the law. The element of mutuality of indemnity which characterizes the English system is thus inappropriate where the purpose of the fee award is to encourage legitimate suits by disadvantaged persons and citizen suits as a private law enforcement mechanism.

III. STATUTORY INFLUENCES ON THE DISTRIBUTION OF ATTORNEYS' FEES

A. Statutory Exceptions to the American Rule

The initial Congressional stance with respect to awarding attorney's fees was to permit a federal court to follow the practice of the courts of the state where it sat.[38] Despite the subsequent expiration of legislative authorization to follow state rule, the practice continued until 1853 when Congress attempted to standardize the costs and fees allowable in federal litigation.[39] In 1853, legislation was passed which prescribed a limited number of items to be allowed as taxable costs.[40] Among the goals of the Act was the preclusion of abuses in the practice of fee-shifting which had at times led to exhorbitant awards being taxed against the losing litigant.[41] In order to achieve this goal, Congress expressly defined those few instances in which counsel fees would be collectible from the losing party and provided that no other compensation was permissible.[42] This statute has been carried forward by Congress and is presently embodied in sections of the Judicial Code of 1948.[43] Under these sections, a court may tax as costs only attorneys' docket fees in a narrow range of cases.[44]

---

[34] *See* Geller, *Unreasonable Refusal to Settle and Calendar Congestion—Suggested Remedy*, 1962 PROCEEDINGS OF ABA SECTION ON INTERNATIONAL AND COMPARATIVE LAW 134, 135 (1963). *But see* Mause, *supra* note 18, at 31 (indemnity would discourage pre-trial settlements by encouraging plaintiff's to demand more). Comment *Liability for Attorneys' Fees in the Federal Courts—The Private Attorney General Exception*, 16 B.C. IND. & COM. L. REV. 201, 204–05 (1975).

[35] *See* Mause, *supra* note 18, at 38. Professor Mause, in his preliminary behavioral analysis of litigants under both systems, concluded that without more specific data the impact of indemnity on the incidence of litigation was impossible to determine.

[36] One practitioner went so far as to say the operation of a universal system would be unconstitutional as a violation of the First Amendment right to litigate federal issues. *Hearings*, *supra* note 12, at 854 (testimony of Joseph Onek, Esq.). *See* N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Brotherhood of Ry Trainmen v. Virginia, 377 U.S. 1 (1964).

[37] Mause, *supra* note 18, at 41.

[38] Act of September 29, 1789, 1 Stat. 93–94, c. 21 § 2; Act of March 1, 1793, I Stat. 333, c. 20 § 4. District courts sitting in admiralty or maritime jurisdiction were to follow a specific fee schedule. *Id.* at 332, c. 20 § 1. These enactments expired prior to 1800 leaving the federal courts without express legislative guidance for over 50 years. For a concise history of the relevant legislation from the early enactments through the mid-twentieth century, *see Alyeska*, 421 U.S. 240, 247–55 (1975) and authorities cited therein.

[39] Legislation 1842 gave the Supreme Court authority to regulate costs and fees, but the Court took no action under this statute. Act of August 23, 1842, 5 Stat. 518, c. 188 § 7. *See Alyeska*, 421 U.S. at 250–51.

[40] Act of February 26, 1853, 10 Stat. 161, c. 80 § 1.

[41] *Alyeska*, 121 U.S. at 251 n. 24 (citing the remarks of Sen. Bradbury, Cong. Globe App., 32d Cong., 2d Sess. 207 (1853)).

[42] Act of February 26, 1853, 10 Stat. 161–63.

[43] 28 U.S.C. §§ 1920, 1923(a) (1970).

[44] 28 U.S.C. § 1923(a) (1970).

This apparent Congressional acceptance of the American Rule has been tempered by the recent enactment of statutory fee-shifting provision which seek to encourage private enforcement of the policies articulated therein. These fee provisions are premised primarily [45] on the recognition that economic barriers hinder the effectuation of Congressional policies through private litigation.[46] The statutory allowances differ both in scope and form. The nature of the legislative mandate varies from allowing awards in "exceptional cases" [47] to granting awards to any party "whenever the court determines such award is appropriate." [48] The provisions, however, may be broken down into those which allow awards in the discretion of the court [49] and those which require the court to award fees to the prevailing plaintiff.[50]

A significant proportion of the recently enacted environmental protection statutes contain fee-shifting provisions.[51] In specifically providing for a private right of action under the statutes, Congress evidently acknowledged that private enforcement was necessary to effectuate important environmental policies. Moreover, to mitigate the deterrent to private suits under the statutes posed by the cost of legal representation, broad discretionary fee-shifting sections were adopted. The rationale supporting the provisions, as enunciated by the Senate Committee Report for the Federal Water Pollution Control Act Amendments of 1972, was that citizens bringing legitimate actions under the acts would be "performing a public service and in such instances the courts should award costs of litigation to such party." [52] The Committee further indicated a desire to extend permissible awards to plaintiffs in actions which cause an abatement of a violation before a verdict is issued.[53] Thus ultimate success in a citizen's suit was not intended to be a prerequisite to an award.

The discretion afforded the trial courts in awarding attorneys' fees under these statutes may be utilized to discourage abuse of the citizen suit provisions. The legislative history of the Water Pollution Control Act suggests that the discretion was engendered by fears that the citizen suit provision would be used to bring "frivolous or harassing actions." [54] This discretionary power may also be viewed as authorizing an award in favor of the defendants where the litigation is deemed frivolous by the trial judge.

The discretionary nature of the legislative mandate, however, necessarily militate against consistency in judicial construction of fee-shifting provisions

---

[45] While the legislative histories do not clearly indicate a punitive rationale, such a theory may well have supported inclusion of a fee-shifting provision in certain statutes. *E.g.*, Clayton Act § 4, 15 U.S.C. § 15 (1970) (mandatory taxing of fees against an antitrust violator in addition to the treble damage provision in the same section). In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) [hereinafter cited as *Piggie Park*, the Supreme Court recognized dual support for an attorney fee provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a–3(b) (1970): Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

[46] *See, e.g.*, the Senate Report to the Amendments to Freedom of Information Act, Pub. L. 93–502, 88 Stat. 1561 § 1(b)(2) (Nov. 21, 1974) (amending 5 U.S.C. § 552(a)) in which it was stated: "the necessity to bear attorneys' fees can thus present barriers to the effective implementation of national policies expressed by Congress in legislation." S. Rep. No. 854, 93d Cong., 2d Sess. 17–18 (1974).

[47] *E.g.*, Act of July 19, 1952 c. 950, 66 Stat. 813, 35 U.S.C. § 285 (1970) (patent infringement).

[48] *E.g.*, Clean Air Amendments of 1970 § 304(d), 42 U.S.C. § 1857h-2(d) (1970).

[49] *See, e.g.*, Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1970); Securities Act of 1933, 15 U.S.C. § 77k(e) (1970), Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501(b) (1970).

[50] *See, e.g.*, Perishable Agriculture Commodities Act, 7 U.S.C. § 499g(b) (1970); Truth in Lending Act § 130, 15 U.S.C. 1640(a) (1970); Communications Act of 1934, 47 U.S.C. § 206 (1970).

[51] Clean Air Amendments of 1970 § 304(d), 42 U.S.C. § 1857h–2(d) 1970); Noise Control Act of 1972, 42 U.S.C. § 4911 (Supp. II 1972); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(d) (Supp. II 1972); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(d)(4), 33 U.S.C. § 1415(g)(4) (Supp. II 1972).

[52] S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1972). *See also* S. Rep. No. 1196, 91st Cong., 2d Sess. 65 (1970) (Clean Air Amendments).

[53] *Id.*

[54] *Id.* Concern over the institution of harassing suits and the burden on the courts resulting from a flood of citizens suits are not commonly held by the judiciary. *Cf.* Office of Communication of United Church of Christ v. FCC, 359 F. 2d 994, 1006 (D.C. Cir. 1966) (agency fears of inundation of their processes are rarely borne out); Scenic Hudson Preservation Conf. v. FPC, 354 F. 2d 608, 617 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (". . . the expense and vexation of legal proceedings is not lightly undertaken.").

in environmental legislation.[55] A liberal stance with respect to these provisions was illustrated by *Citizens Association of Georgetown v. Washington*,[56] in which the court awarded attorneys' fees to the public interest plaintiffs, in spite of its dismissal of the suit for failure to establish the alleged violation of emissions standards under the Clean Air Act.[57] The court predicated the award upon what it considered the "plain meaning" of the fee provision in the Act, which indicated awards could be made irrespective of the success of the plaintiff in establishing a violation under the Act.[58]

Similar considerations entertained by the court in *Delaware Citizens for Clean Air v. Stauffer Chemical Company*[59] produced a conflicting result. In *Stauffer Chemical*, a citizens group brought suit against the corporation charging that its sulfur dioxide emissions were in violation of the Clean Air Act. The suit was dismissed on the grounds that the Administrator of the Environmental Protection Agency (EPA) was contemporaneously considering the propriety of a state-granted variance to permit Stauffer more time to construct the required emissions control facility. The court denied the requested award of attorneys' fees, noting that providing "added incentive" for the institution of citizen suits was inappropriate when the Administrator was engaged in review of a state initiated revision to its air quality control plan.[60] While recognizing the positive contributions of citizen suits to the effective enforcement of emissions standards, the court was unable to find a "compelling equity" in favor of the plaintiff to support an award.[61]

In contrast to the reasoned approaches in these cases, the district court in *Colorado Public Interest Research Group v. Train*[62] summarily dismissed plaintiff's motion for a fee award under the Federal Water Pollution Control Act.[63] The action, which sought to compel the EPA Administrator to take supervisory control under the Act of discharges of radioactive material into navigable waters, was dismissed on the basis of federal regulations which placed the power plant in issue under the jurisdiction of the Atomic Energy Commission. The court rejected plaintiff's contention that a fee award was permitted by the Act even where the government prevailed. The district court judge noted that this contention went "somewhat against my training and experience as a lawyer possessed of much experience in losing contingent fee cases."[64] Without reference to the wording of the statute or the legislative history, the court found it inappropriate that the suit should be "subsidized with taxpayers' money."[65]

These cases present important questions as to the breadth of Congressional policy supporting fee awards: Should this discretionary power invested in the federal district courts be exercised whenever an important environmental issue is brought out or clarified by a public interest suit? Once plaintiff's good faith is established, should counsel fees be awarded automatically irrespective of the ultimate outcome of the suit? Does Congressional intent to accelerate enforcement of environmental legislation extend so far as awarding fees in any non-frivolous citizens suit? Unfortunately, the legislative history provides little guidance for the trial court in exercising its judgment relative to these questions.

Stauffer Chemical apparently stands for the proposition that the discretionary fee-shifting provisions authorize a balancing of the equities as assessed by the court. Although judicial flexibility in allowing awards may contribute to the just

---

[55] This result remains true despite the Supreme Court's guidance offered in *Piggie Park*, 390 U.S. at 402, where the Court held that a fee-shifting provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a–3(b) (1970), was to be followed in successful suits under that Title "unless special circumstances would render the award unjust." *Id.* at 402. The Court's construction of the provision in *Piggie Park*, albeit in a civil rights context, should have defined the scope of discretion afforded trial courts in applying discretionary fee-shifting provisions contained in other statutes; however, few courts have looked to the case for guidance in exercising their discretion.

[56] 383 F. Supp. 136 (D.D.C. 1974).

[57] 42 U.S.C. § 1857 *et seq.* (1970).

[58] 383 F. Supp. at 144. This interpretation comports with the legislative history of the Act. The Senate Committee Report stated: "(t)he court may award costs of litigation to either party whenever the court determines such award is in the public interest without regard to the outcome of the litigation." S. Rep. No. 1196, 91st Cong., 2d Sess. 65 (1970)

[59] 62 F.R.D. 353 (D. Del. 1974).

[60] *Id.* at 357.

[61] *Id.*

[62] 373 F. Supp. 991 (D. Colo.), *rev'd on other grounds*, 507 F. 2d 743, 749 (10th Cir. 1974), *cert. granted*, 421 U.S. 998 (1975). The Tenth Circuit did not address itself to the attorneys' fees question and the Supreme Court is not expected to pass on this issue. *See* 43 U.S.L.W. 3032 (U.S. 1975) (questions presented).

[63] 33 U.S.C. § 1365(d) (Supp. II 1972).

[64] 373 F. Supp. at 995.

[65] *Id.*

application of this remedy to individual cases, the latitude afforded the lower courts may produce an unhealthy disparity among the courts and may permit arbitrary denials of awards to frustrate an articulated Congressional policy. The dissimilarity in construction of the statutes destroys the predictability upon which litigants base their strategies. This factor is of particular salience where the very ability to fund the litigation is based on the potential of an award of counsel fees. Broad discretion, without statutory language to provide benchmarks for the courts, may result in the granting or denying of awards based upon the subjective policy preferences[66] or upon the predisposition of the judge against Congressional authorization of fee-shifting, as exemplified by *Colorado PIRG*. Nevertheless, the extent to which the discretionary provisions disserve the policy behind the encouragement of citizen suits through fee-shifting is presently unclear, and requires the attention of Congress prior to the enactment of similar provisions in other environmental statutes.

Another important deficiency in the Congressional response to the recognized need for encouraging private enforcement is the lack of consistency among the statutes addressed to environmental problems. Whether produced merely by the ad hoc nature of Congressional determinations fostered primarily by the committee system, or by a genuine failure to achieve a consensus as to the need for supplementary citizen action, citizen suit and fee-shifting provisions are noticeably absent in legislation, such as the National Environmental Policy Act (NEPA),[67] which embodies significant environmental policy statements and mandates consideration of the ecological consequences of major projects.[68] Additionally, certain environmental statutes lack internal consistency with respect to the award of attorneys' fees.[69] The legislative histories of such acts provide little insight into the basis for Congressional preference.[70] What has thus emerged is a crazy quilt of provisions which defies rational explanation.

A dramatic example of the failure to achieve a modicum of consistency within a statute is represented by the fee-shifting provisions in the Clean Air Amendments of 1970. The Act specifically permits suits under § 304 in the district courts in the form of mandamus and confers upon the courts the power to issue appropriate relief.[71] Section 307 grants jurisdiction to the courts of appeals to review specified actions by the Environmental Protection Agency Administrator.[72] Notwithstanding Congressional approval of citizen suits under the Act,[73] only § 304 accords the power to award attorneys' fees.[74] The unexplained absence of a fee-shifting arrangement in actions initiated in the courts of appeals has given rise to conflicting interpretations of these sections of the Act. In two cases, both entitled *Natural Resources Defense Council v. Environmental Protection Agency*,[75] The court were confronted with actions brought against the EPA under § 307, by public interest plaintiffs who sought to challenge the sufficiency of state air pollution control plans approved by the Agency. The First Circuit in *NRDC I* issued an order favorable to the plaintiff; the claim in *NRDC II* was satisfied by the agency's voluntary capitulation on the merits, while the appeal was pending before the District of Columbia Circuit Court of Appeals. The successful plaintiffs in each case subsequently filed a motion for an award of attorneys' fees.

The court in *NRDC I* rejected the contention that the absence of a fee-shifting clause in § 307, coupled with express allowance for awards of fees under § 304, required an inference that Congress deliberately chose to exclude such a remedy

---

[66] *See Alyeska*, 421 U.S. at 266 n. 39 (1975), where the Court expressly disapproved of latitude accorded judges under the private attorney general rationale and noted the possibility of selective application of substantive law priorities and preferences.

[67] 42 U.S.C. § 4321 *et seq.* (1970).

[68] *See also*, Department of Transportation Act, 49 U.S.C. § 1653(f) (1970); Federal Aid Highway Act of 1970, 23 U.S.C. § 109(h) (1970).

[69] *See, e.g.*, Clean Air Act Amendments of 1970, 40 U.S.C. § 1857 *et seq.* (1970). *See* text at notes 71–81, *infra*, for a discussion of this inconsistency.

[70] This absence of consistency also characterizes the treatment of fee awards in civil rights legislation. *Compare* the Reconstruction Civil Rights Acts, 42 U.S.C. § 1981 *et seq.* (1970) (no fee-shifting provisions) *with* Civil Rights Act of 1964, Title II and VII, 42 U.S.C. §§ 2000a–3(b), 2000e–5(k) (discretionary authority to award fees). The failure to *provide* fee awards under the Reconstruction statutes may be in part explained by their enactment before Congressional recognition of the potential inducement to citizen redress in the courts which fee-shifting represents. The historical explanation is, however, inapposite with regard to environmental legislation in that the relevant statutes are of recent vintage.

[71] 42 U.S.C. § 1857h–2(a) (1970).

[72] *Id.* § 1857h–5(b).

[73] *See* text at notes 51–53, *supra*.

[74] Clean Air Act Amendments of 1970 § 304(d), 42 U.S.C. § 1857h–2(d) (1970).

[75] Natural Resources Defense Council, Inc. v. EPA, 484 F. 2d 1331 (1st Cir. 1973) [hereinafter cited as *NRDC* I]. Natural Resources Defense Council, Inc. v. EPA, 512 F. 2d 1351 (D.C. Cir. 1975 [hereinafter cited as *NRDC* II].

for actions initiated in the courts of appeals.[76] The First Circuit noted that the availability of attorneys' fees should not depend upon the forum of the suit nor should remedies in such cases be limited to the express language of the particular section.[77] It held, based upon the approval of fee-shifting in the legislative history and the wording of § 304, that the plaintiffs were entitled to the benefits of that provision.[78]

In contrast, the District of Columbia Circuit in *NRDC II* reluctantly declined to follow the First Circuit's interpretation. The *NRDC II* court found that the sections "contemplated distinct groups of cases" for which the remedies were not interchangeable.[79] While emphasizing the absence of a sound policy for denying the availability of fees under § 307 and noting the temptation to follow the First Circuit, the court declined to grant counsel fees for fear that the award would "strain the limits" of the "interpretive function." [80]

The pitfalls inherent in such inconsistency in statutory mandate in addition to unenlightening legislative history dilutes the desired encouragement to private enforcement which fee-shifting provides. The court in *NRDC II* was not unmindful of the anomalous result engendered by the inconsistency within the Clean Air Amendments and accordingly suggested several options to Congress to rectify the problem.[81] One obvious cure, as suggested by the District of Columbia Circuit, would be to extend the scope of § 304 to include actions brought in the courts of appeals. In treating this example of internal statutory contradiction, Congress should be aware that it indicates a failure to establish a rational scheme of fee-shifting sections in environmental statutes such that litigants and judges may have sufficient guidance.

B. A Statutory Obstacle to Environmental Litigation

The doctrine of sovereign immunity, which provides that a state may not be sued without its consent,[82] has been extended to preclude fee awards against the federal government in the absence of express Congressional authorization. Despite mounting criticism of the reach of the doctrine,[83] this common law rule is of such vitality with regard to attorneys' fees that Congress deemed it appropriate to codify it in § 2412 of the Judicial Code [84] in order to standardize its application. This total prohibition was modified in 1966 to allow a judgment of certain costs against the government.[85] The rationale for the amendment, on the basis of the Senate, on the basis of the Senate Committee Report, was to correct the existing disparity of treatment between private litigants and the United States with respect to the allowance of costs.[86]

The statute, however, expressly excluded the award of attorneys fees from taxable costs, notwithstanding the apparent recognition of the inequality of means between the government and its adversaries. Clarity of wording and legislative history [87] leaves little room for the courts to perform their inter-

---

[76] *NRDC I*, 484 F. 2d at 1336 n. 6.

[77] *Id.* at 1336. The court relied on Hall v. Cole, 412 U.S. 1 (1973) and Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). *See* text at notes 129–37 *infra* for a discussion of these cases. On the judicial treatment of remedies available under §§ 304 and 307, *compare* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd* by an equally divided Court *sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973) *with* Anaconda Co. v. Ruckelshaus, 482 F. 2d 1301 (10th Cir. 1973).

[78] *NRDC I*, 484 F. 2d at 1338.

[79] *NRDC II*, 512 F. 2d at 1355.

[80] *Id.* at 1357. *But see NRDS II*, 512 F. 2d at 1361 (Wright, J., dissenting) wherein the judge asserted that § 304 should be read broadly particularly in light of the impossibility of awarding fees on other theories as mandated by *Alyeska*.

[81] *NRDC II*, 512 F. 2d at 1357.

[82] Hans v. Louisiana, 134 U.S. 1, 12–13 (1890); United States v. Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940).

[83] *See* L. Jaffe, Judicial Control of Administrative Action 198–99 (1965); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 418 (1970).

[84] 28 U.S.C. § 2412 (1970).

[85] Act of July 18, 1966, Pub. L. No. 89–507, 80 Stat. 308, *amending* 28 U.S.C. § 2412. The amended version of § 2412 provides in pertinent part: Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States.

[86] S. Rep. No. 1329, 89th Cong., 2d Sess. (1966) in United States Code Cong. and Admin. News 2528 (1966).

[87] Letter from Nicholas De B. Katzenbach, Attorney General of The United States, *Attached to* S. Rep. No. 1329, 89th Cong., 2d Sess. (1966), *id.* at 2530: "The bill makes clear that the fees and expenses of attorneys and expert witnesses may not be taxed against the United States." *See also* Cassata v. Federal Savings and Loan Ins. Corp., 445 F. 2d 122, 125 (7th Cir. 1971).

pretive function to meet the equitable demands of each case. The reasons which Congress relied upon in not permitting attorney's fees awards in the absence of an express statutory provision are unclear. Although more equitable treatment for private litigants by awarding costs against the State mitigates the governmental advantage, it continues to ignore the basic disparity in resources, particularly where the plaintiff must rely on marginal foundation support.[88] Arguments have been advanced that the "inequity of recognizing a litigant's right to sue on the one hand, but depriving him of otherwise available financial implements with which to vindicate that right, is patent." [89] One public interest litigator commented that § 2412 has had a "most significant chilling effect" on the development of fee-shifting as a method of inducing private enforcement.[90]

This potent deterrent to citizen suits against the government has led to judicial attempts to circumvent the prohibition of the cost statute. Frustration expressed by some courts has resulted in acceptance of tenuous arguments in support of taxing private intervenors or defendants.[91] The attenuated line of thought offered to justify the imposition of fees on private corporations turned primarily on the erroneous assumption that the intervenor or private defendant, admittedly having a stake in relaxed environmental standards, also shared in the responsibility for inadequately prepared Environmental Impact Statements under NEPA or for the government's failure to comply with the applicable statutes.[92] Courts based these awards, in the absence of express statutory authorization which would have nullified the effect of § 2412, on the now defunct private attorney general rationale.

In cases where no private party was available upon which to impose a fee award, several courts have taxed counsel fees against the federal government after finding in other statutes a responsibility to assist in providing legal services under certain circumstances.[93] The courts here sought to broadly construe statutes conferring upon the government the duty to represent Indian interests or to provide legal counsel in agency proceedings so as to create a federal responsibility to finance plaintiffs actions against the challenged agency. Like the attempts to tax private intervenors to mitigate the effects of the sovereign immunity bar the opinions in these cases had stretched the applicable statutes beyond a reasonable construction to achieve an equitable result. In view of appellate court disapproval of such attempts to circumvent § 2412,[94] these cases may serve more importantly to underscore the impatience of the judiciary with the effects of that statute on public interest litigation.

Another method of awarding counsel fees to public interest plaintiffs, in cases in which the federal government is a party, is to tax the fees against the state defendant. Awards in such cases are not automatically granted when the plaintiff has demonstrated the requisite "vindication of a Congressional policy," [95] which would otherwise trigger the private attorney general rationale. Environmental statutes such as NEPA, in placing the responsibility of compliance upon federal agencies,[96] make difficult an attempt to justify the imposition of counsel fees by fixing a duty of obedience upon the state. Additionally, many courts have held that the Eleventh Amendment to the Constitution pre-

---

[88] *See* text at notes 8–13, *supra.*

[89] King and Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 87 (1973).

[90] *Hearings*, *supra* note 12, at 791 (statement of J. Anthony Kline, Esq.).

[91] Wilderness Society v. Morton, 495 F. 2d 1026 (D.C. Cir. 1974), *rev'd sub. nom.* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973), *rev'd*, 502 F. 2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975). For an extended discussion of the *Alyeska* case, *see* text at notes 164–202, *infra.*

[92] In actuality, 42 U.S.C. § 4332(2)(c) makes federal agencies primarily responsible for the preparation of Environmental Impact Statements (EIS's) which the Act requires in "major Federal actions." *Cf.* Committee to Stop Route 7 v. Volpe, 7 ERC 1681, 1682(D. Conn. 1972).

[93] Pyramid Lake Paiute Tribe of Indians v. Morton, 360 F. Supp. 669 (D.D.C. 1973), *rev'd*, 499 F. 2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); Red School House, Inc. v. OEO, 386 F. Supp. 1177 (D. Minn. 1974).

[94] *See* Sierra Club v. Lynn, 502 F. 2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975); Pyramid Lake Paiute Tribe of Indians v. Morton, 499 F. 2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

[95] *Piggie Park*, 390 U.S. at 402 (1968). *See* text at notes 123–63 *infra* for a discussion of the private attorney general rationale.

[96] *See* note 92 *supra.*

cludes fee awards against the states on a sovereign immunity theory.[97] Since the circuits are split on the effect of sovereign immunity of the states on fee-shifting, this approach can only have a limited impact on the development of private enforcement, particularly in view of the demise of the private attorney general rationale.[98]

The cases are legion which the courts would have awarded attorneys' fees to public interest plaintiffs but for the sovereign immunity bar.[99] Constraints imposed by § 2412 are particularly acute where the suit is brought under the provisions of NEPA, in which the federal government is invariably the defendant.[100] The sovereign immunity bar, taken together with the absence of fee-shifting authorizations in major environmental statutes and judicial preclusion of awards based on the private attorney general theory, has severely limited the range in which the courts may operate to effectuate the established Congressional policy of encouraging private enforcement. Therefore Congress should evaluate and resolve the conflicting policies behind the sovereign immunity bar and citizen suit provisions in environmental legislation.

IV. JUDICIAL TREATMENT OF FEE-SHIFTING AND THE GROWTH OF THE PRIVATE ATTORNEY GENERAL RATIONALE

A. The Early Development of Fee-Shifting

Fee-shifting, in its infancy, was employed by the courts as a mechanism to spread the costs of successful suit among the plaintiff and the beneficiaries of the litigation. The early cases making awards for this purpose were grounded in the original authority of the chancellor to do equity in particular cases. So reasoned the Supreme Court in the leading case, *Trustee v. Greenough*,[101] in which a plaintiff who succeeded in rescuing a trust fund from a delinquent trustee was allowed an award of attorneys' fees to be drawn from the reclaimed fund. The suit, filed on behalf of other participants in the fund, created a common fund from which equity demanded a ratable contribution for legal fees incurred. The Court in *Trustees* found nothing in the 1853 fee bill,[102] which had severely limited awards of counsel fees, to deprive equity courts of their "long established control" over the costs and charges of litigation involving the rights to a general or common fund.[103]

In *Sprague* v. *Ticonic National Bank*,[104] the Court further developed the "common fund" exception to the rule prohibiting fee-shifting. There, a successful suit against an insolvent bank, which resulted in a lien on funds earmarked for repayment of money deposited by the plaintiff, established, by collateral

---

[97] The Eleventh Amendment provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI. The leading case construing the Amendment with regard to judgments and awards against the State is Edelman v. Jordan, 415 U.S. 651 (1974). *Compare* La Raza Unida v. Volpe, 57 F.R.D. 94, 101–02 n. 11 (N.D. Cal. 1972) *with* Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dep't, 496 F. 2d 1017, 1026 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). For more extensive consideration of the problem *see* Note, *The Eleventh Amendment Does Not Bar An Award of Attorneys' Fees Based on the Private Attorney General Theory*, 32 Wash. & Lee L. Rev. 133 (1975); Comment, *Liability for Attorney's Fees in the Federal Courts—The Private Attorney General Exception*, 16 B.C. Ind. & Com. L. Rev. 201, 230 (1975); Comment, *Attorneys' Fees and the Eleventh Amendment*, 88 Harv. L. Rev. 1875, 1902 (1975); Note, *Awarding Attorney's Fees Against a State Official Sued in His Official Capacity After* Edelman v. Jordan, 55 B.U.L. Rev. 228, 241 (1975). All of the above named commentators concluded that fee awards are a permissible imposition on state treasuries.

[98] While recognizing the disparity among the lower courts on the issue, the Supreme Court, in *Alyeska*, 421 U.S. at 269–70 n. 44 (1975) declined to address the question. Since *Alyeska*, the Court has elected not to hear cases which present Eleventh Amendment issues with regard to fee-shifting. *See, e.g.*, Taylor v. Perini, 503 F. 2d 899 (6th Cir. 1974), *vacated* and *remanded* for further consideration in light of *Alyeska*, 421 U.S. 982 (1975); Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dep't, 496 F. 2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975).

[99] *E.g.*, Committee to Stop Route 7 v. Volpe, 4 ERC 1681 (D. Conn. 1972).

[100] *E.g.*, *Alyeska*, 421 U.S. 240 (1975); Sierra Club v. Lynn, 502 F. 2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

[101] 105 U.S. 527 (1881) [hereinafter cited as *Trustees*].

[102] Act of February 26, 1853, 10 Stat. 161, ch. 80 § 1. For a discussion of the statute and its present day vitality, *see* text at notes 39–44, *supra*.

[103] *Trustees*, 105 U.S. at 536. This exception to the American Rule was extended by Central R.R. & Banking Co. v. Pettus, 113 U.S. 146 (1885), to give directly to plaintiff's attorney a right to recover reasonable fees from the beneficiaries of a fund created or retained by his efforts.

[104] 307 U.S. 161 (1939) [hereinafter cited as *Sprague*].

estoppel, the rights of fourteen other depositors who were not represented in the suit. The absence of a class action or the actual creation of a fund was held not to preclude the reimbursement of counsel fees on the theory that plaintiff's success would have a stare decisis effect entitling others similarly situated to enforce their own liens against the banks.[105] Justice Frankfurter, speaking for the Court in *Sprague*, noted that the creation, in essence, of a constructive fund, was a judicial act that "hardly touch(ed)" the general equity power of the federal courts "to do justice between a party and the beneficiaries of his litigation."[106] This broad reading of the equitable exception to the American Rule for common fund cases proved to be an important antecedent to the development of the private attorney general theory discussed below.[107]

In contrast to the cost spreading rationale in common fund cases, the federal courts, in the exercise of their equity powers, have taxed counsel fees against parties acting in bad faith prior to or during the litigation as a punishment for such conduct. The courts have found an award of reasonable attorneys' fees appropriate where the unsuccessful litigant has engaged in vexatious, harassing, dilatory, or otherwise unreasonable conduct.[108] For example, defendants found to have wilfully disobeyed or failed to make good faith efforts to comply with constitutional imperatives in desegregation[109] and reapportionment cases[110] have been taxed under the punitive rationale of the bad faith exception. Furthermore, a court may assess attorneys' fees for disobedience of a judicial order.[111] Although the bad faith rationale has not experienced the same expansion as the other equitable exceptions the demise of the private attorney general doctrine may prompt the courts to look more carefully at the behavior of the ligitants in search of a non-statutory basis for an award of counsel fees.[112]

B. Fee-Shifting in the Public Interest: Toward a Private Attorney General Rationale

The need to encourage citizens to litigate important social issues and to vindicate personal rights has resulted in an effort by the judiciary to expand access to the courts. Predicated, in part, on the recognition of practical difficulties inherent in citizen participation in modern government and influence in bureaucratic decisionmaking,[113] these judicial efforts have chipped away at the barriers which had previously relegated individual grievances to the cumbersome legislative process. The creation of private rights of action under federal statutes which were merely declarative of certain rights[114] or provided only for government enforcement[115] has contributed to increased access to the federal courts. In the environmental area, relaxation of standing requirements to permit challenges to agency action by public interest groups reflects judicial cognizance of the role of the courts in protecting our natural resources.[116] Set in the context of these developments, fee-shifting in public interest litigation can be understood as a logical extension of these attempts to open the courts to legitimate citizen grievances.

---

[105] *Id.* at 167.

[106] *Id.* This expansive construction of the power of equity is echoed in other decisions by the Court. *See, e.g.*, Union P. Ry. Co. v. Chicago R.I. & P. Ry. Co., 163 U.S. 564, 601 (1896); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

[107] *See* text at notes 129–40 *infra*. For a detailed, but more critical analysis of the "common fund" cases, *see* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 850–81 (1975).

[108] *See, e.g.*, Vaughan v. Atkinson, 369 U.S. 527, 530–31 (1962); Kinnear-Weed Corp. v. Humble Oil & Refining Co., 441 F. 2d 631, 637 (5th Cir. 1971); *see also* 6 J. Moore, Federal Practice § 54.77(2), p. 1709 (2d ed. 1974).

[109] *See, e.g.*, Bell v. School Bd. of Powhatan Cty., 321 F. 2d 494, 500 (4th Cir. 1963); Rolfe v. County Bd. of Educ. of Lincoln Cty., 391 F. 2d 77, 81 (6th Cir. 1968).

[110] Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972). *See Alyeska*, 421 U.S. at 270 n. 46 (1975) (rejecting the application of the private attorney general rationale in *Sims* but approving of the bad faith ground).

[111] *E.g.*, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

[112] *See, e.g.*, Doe v. Poelker, 515 F. 2d 541, 547 (8th Cir. 1975).

[113] Flast v. Cohen, 392 U.S. 83, 111 (1968) (Douglas, J., concurring); N.A.A.C.P. v. Button, 371 U.S. 415, 430 (1963).

[114] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n. 13 (1968); *cf.* Bivens v. Six Unknown Named Agents Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[115] J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); *but see* Holloway v. Bristol-Myers Corp., 327 F. Supp. 17, 21–22 D.D.C. 1971).

[116] *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

While the coalescence of the growth of equity power to transfer fees and the recently expanded access to the courts provided familiar ground for the courts to base awards to public interest plaintiffs, the federal judiciary primarily looked to Congressional policy as the foundation upon which the build the private attorney general doctrine. With the appearance of early fee-shifting provisions in certain enforcement statutes,[117] some lower federal courts were willing to extrapolate from this Congressional inclination a basis for awarding fees to private parties suing to enforce broad statutory policies, even where the relevant statute was silent on the fee award question.[118] The Supreme Court, however, was initially reticent to go beyond the boundaries of statutory fee-shifting. In *Fleischmann Distilling Corporation* v. *Maier Brewing Company*,[119] the Court held an award of attorneys' fees inappropriate where the applicable trademark statute[120] "meticulously" provided the complete remedies available under the act without authorizing the transfer of litigation costs.[121] Basic to the holding in *Fleischmann* was the Court's adoption of the canon of statutory construction, *expressio unius est exclusio alterius*, which states, that specific mention of one remedy implies exclusion of another. This conservative approach to fee-shifting temporarily chilled the development of awards as a method of mitigating the economic deterrent to private enforcement of federal legislation.[122]

One year later the Court had occasion to make substantial inroads into *Fleischmann*. The per curiam opinion in *Newman* v. *Piggie Park Enterprises*[123] stands as the foundation and most concise statement of the now defunct private attorney general rationale. In a suit brought under Title II of the Civil Rights Act of 1964[124] to enjoin racial discrimination in a restaurant chain, the court allowed the successful plaintiffs an award pursuant to the fee-shifting provision in the Act.[125] More importantly, the Court went further in dicta by declaring that a plaintiff who obtains an injunction under the Act, "does so not for himself alone but as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."[126] The Court relied explicitly on the strength of the legislative history[127] and implicitly on the heightened national demand for the eradication of racial discrimination that marked the 1960's in concluding that the Congressional policy was in fact of the "highest priority."[128]

Despite the strong dicta in *Piggie Park*, the decision had to be limited to statutory fee-shifting issues. Expansion by the Court was required in order to develop the private attorney general doctrine into an equitable exception to be operative in the absence of specific statutory authorization. Such expansion came indirectly from the Court in *Mills* v. *Electric Auto-Lite Company*.[129] The action was brought as a shareholders' derivative suit under § 14(a) of the Securities Exchange Act of 1934[130] to set aside a merger approved by the shareholders on the basis of a misleading proxy statement. The Court held that an award of attorneys' fees was appropriate notwithstanding the absence of specific statutory authorization for fee-shifting or a common financial benefit or fund created by the suit.

Confronted with similar Congressional treatment of fee awards as was presented in *Fleischmann*, the Court was forced to detail its attempt to distin-

---

[117] *E.g.*, Securities & Exchange Act of 1934 § 18(a), 15 U.S.C. § 78r(a) (1970).

[118] *See, e.g.*, Rolax v. Atlantic Coast Line R.R. Co., 186 F. 2d 473 (4th Cir. 1951) (civil rights violation within a union).

[119] 386 U.S. 714 (1967) [hereinafter cited as *Fleischmann*].

[120] Lanham Act, 15 U.S.C. § 1051 *et seq.*, (1970).

[121] *Fleischmann*, 386 U.S. at 719.

[122] *See, e.g.*, Stevens v. Abbott, Proctor & Paine, 288 F. Supp. 836, 848 (E.D. Va. 1968) (fees denied in suit brought under the Securities Act of 1934).

[123] 390 U.S. 400 (1968).

[124] Civil Rights Act of 1964, Title II, § 204(1), 42 U.S.C. § 2000a-3(a) (1970).

[125] *Id.* § 204(b), 42 U.S.C. § 2000a-3(b) (1970).

[126] *Piggie Park*, 390 U.S. at 402. The private attorney general theory was first employed to expand the class of persons who had standing to challenge administrative action. Associated Indus. v. Ickes, 134 F. 2d 694, 704 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943).

[127] *Piggie Park*, 390 U.S. at 402 n. 3, *citing* S. Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1–2 (1963).

[128] The holding of *Piggie Park* was twice reaffirmed in school desegregation suits brought under the Emergency School Aid Act of 1972, 20 U.S.C. § 1601 *et seq.* (Supp. IV, 1974). Northcross v. Bd. of Educ., 412 U.S. 427 (1973); Bradley v. School Bd., 416 U.S. 698 (1974). Section 718 of the Act, *id.* § 1617, a discretionary fee-shifting provision similar to the clause construed in *Piggie Park*, was held in both cases to require an award of fees to the successful plaintiffs. The Court in *Northcross* found that the plaintiffs were "'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions." 412 U.S. at 428.

[129] 396 U.S. 375 (1970) [hereinafter cited as *Mills*].

[130] 15 U.S.C. § 78n(a) (1970).

guish that case. Provisions for fee-shifting under two other sections of the Securities Exchange Act[131] rendered the statute susceptible to the *expressio unius* argument held applicable to the remedies available in *Fleischmann*. However, the *Mills* Court, relying in part on an analogous Second Circuit decision,[132] held that the absence of express Congressional authorization for a fee-shifting under § 14(a) did not preclude such an award in certain cases.[133] The *Mills* opinion drew an analogy from the recently acknowledged judicial power to create a private right of action under the Act[134] to establish the ability to award counsel fees.[135] Thus, the Court concluded that the lack of Congressional mandate for fee-shifting under the statutory section in issue did not deprive a court of the power to award counsel fees in appropriate circumstances.[136]

To buttress this circumvention of Congressional silence, the traditional formulation of the common fund exception was expanded to encompass benefits to a corporation and its shareholders which were incapable of expression in monetary terms. This alternative holding provided the impetus for the lower courts to apply the private attorney general rationale ot non-statutory fee-shifting. The Court held that where a successful suit conferred a "substantial benefit on an ascertainable class" and the "court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them," fee-shifting is permissible.[137]

The Court further emphasized the validity of this form of benefit in saying: "... private stockholders' actions of this sort 'involve corporate therapeutics' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute." [138] In effect, the construction that vindication of statutory policy was a significant benefit conferred upon the corporation by private enforcement suits engendered at least an expanded construction of equity powers under the common fund exception, if not its merger with the private attorney general theory articulated in *Piggie Park*. *Mills* was therefore read by the lower courts to provide authority in a broad range of cases for fee-shifting in the absence of express Congressional authorization.[139]

C. Expansion of the Private Attorney General Theory in the Lower Federal Courts

The Inferior federal courts were particularly receptive to the Supreme Court's apparent expansion of equity power to award fees in the absence of statutory authorization. The broad language of *Mills* and *Piggie Park* was interpreted to permit awards to plaintiffs who effectuated "important" Congressional policies by securing rights and benefits due a certain class or group. For example, the Fifth Circuit gave *Mills* a typically generous reading, noting that the decision was "better understood as resting heavily on 'overriding considerations' that private suits are necessary to effectuate congressional policy and that awards of attorneys' fees are necessary to encourage private litigants to initiate such suits." [140]

The lower courts treated the size and relevant common interests of the class of beneficiaries more liberally than the immediately ascertainable class of share-

---

[131] Securities Exchange Act of 1934 §§ 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a) (1970).

[132] Smolowe v. Delendo Corp., 136 F. 2d 231 (2d Cir. 1943). The court in *Smolowe* awarded attorneys' fees, in a suit by stockholders to recover short swing profits for the corporation under § 16(b) of the Securities Act of 1934, "on the theory that the corporation which had received the benefit of attorney's services should pay the reasonable value thereof." *Id.* at 241.

[133] 396 U.S. at 390–91.

[134] J. I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964).

[135] *Mills*, 396 U.S. at 391.

[136] *Id.* at 390–91.

[137] *Id.* at 393–94.

[138] *Id.* at 396, *citing* Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 659, 662–63 (1956).

[139] The common fund exception was again given broad reach in Hall v. Cole, 412 U.S. 1 (1973). In that case, a former union member expelled for decrying certain union actions and policies, sued for reinstatement under § 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412 (1970). The Supreme Court affirmed the award of attorneys' fees, despite the absence of a fee-shifting provision in § 102. *Fleischmann* was distinguished by reading authorization in that section to grant "such relief . . . as may be appropriate" to include fee awards. Under the expanded common benefit doctrine developed in *Mills*, the Court held the suit, by vindicating plaintiff's right of free speech guaranteed by the Act, had rendered a substantial benefit to the union and its membership, 412 U.S. at 8. The Court concluded that an award in this case fell "squarely within the traditional equitable power of federal courts to award such fees whenever 'overriding considerations indicate the need for such a recovery.'" *Id.* at 9, *quoting Mills*, 396 U.S. at 391–92.

[140] Lee v. Southern Home Sites Corp., 444 F. 2d 143, 145 (5th Cir. 1971).

holders in the *Mills* case.[141] The most significant development of the private attorney general doctrine came in suits vindicating federal rights[142] and challenging racially discriminatory practices.[143] Awards in these cases were often premised on the recognition that a "private attorney general" who advances the public interest should not be forced to bear the costs of litigation.[144] Alternatively, the courts reasoned that the vindication of important rights ought not be made dependent upon the financial resources of the plaintiff; therefore, elimination of an impediment such as counsel fees would go far to encourage these suits.[145] While the Supreme Court envisioned equity based awards as being discretionary,[146] some of the lower courts held such an "award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public minded suits ... and to carry out Congressional policy."[147]

Environmental plaintiffs also benefited from the private attorney general doctrine, albeit to a lesser extent than civil rights plaintiffs. As noted above,[148] fee awards in environmental suits, particularly those brought under NEPA, were precluded by the sovereign immunity bar. Additionally, certain litigated environmental issues lacked clearly defined statutory and public policy imperatives that characterize racial discrimination and civil rights cases. The courts, lacking an unassailable public policy preference, were less willing to encourage conservationist suits through fee awards.[149]

Notwithstanding the sporadic incidence of fee-shifting in environmental litigation, the private attorney general doctrine provided an important impetus for litigation over ecological and conservation issues.[150] In one of the leading cases applying the doctrine, *La Raza Unida* v. *Volpe*,[151] the district court awarded counsel fees to a public interest organization which had obtained an injunction halting the construction of a highway through public parklands. The court articulated three requirements the satisfaction of which would qualify plaintiffs for a fee award: "(1) the effectuation of strong public policies; (2) the fact that numerous people received benefits from plaintiffs' litigation success; (3) the fact that only a private party could have been expected to bring the action. . . ."[152]

In this particular suit, both federal and state agencies were named as defendants, resulting in a private party mounting the challenge. The requisite strength of public policy was found in federal legislation designed to prevent wholesale destruction of our natural resources by highway construction[153] and to protect the interests of persons displaced by such projects.[154] The consideration of alternative routes to highway projects running through parklands, which the

---

[141] *See, e.g.*, Calnetics Corp. v. Volkswagen of America, Inc., 353 F. Supp. 1219, 1225 (C.D. Cal. 1973) (fee awarded in private antitrust suit since plaintiff vindicated a compelling national economic interest which benefits inured to the "marketplace"); Brandenburger v. Thompson, 494 F. 2d 885, 888–89 (9th Cir. 1974) (fee awarded in suit striking down a durational residency requirement for welfare recipients which benefited a "significant class" composed of "potential welfare recipients and interstate travelers").

[142] *See, e.g.*, Donahue v. Staunton, 471 F. 2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (fee awarded in suit brought under 42 U.S.C. § 1983 (1970) to vindicate free speech guarantee); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972) (fee award to plaintiff who successfully sued the state on reapportionment issue); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974) (fee award in suit establishing a constitutional right to treatment for mental patients).

[143] *See, e.g.*, Knight v. Auciello, 453 F. 2d 852 (1st Cir. 1972) (fee awarded in suit brought under 42 U.S.C. § 1982 (1970) based on racial discrimination in housing); N.A.A.C.P. v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F. 2d 614 (5th Cir. 1974) (fee awarded in successful action to enjoin discrimination in state police hiring practices); *see generally* cases collected in Derfner, *Attorneys' Fees in Pro Bono Publico Cases*, reprinted in *Hearings*, *supra* note 12, at 862.

[144] *See, e.g.*, Fowler v. Schwarzwalder, 498 F. 2d 143, 145 (8th Cir. 1974).

[145] *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom.*, Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974).

[146] Hall v. Cole, 412 U.S. 1, 15 (1973).

[147] Simms v. Amos, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972).

[148] *See* text at notes 99–100 *supra*.

[149] Harrisburg Coalition Against Ruining the Environment v. Volpe, 381 F. Supp. 893, 898–99 (M.D. Pa. 1974); *cf.* Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 62 F.R.D. 353, 356 (D. Del. 1974).

[150] *See* Witt, *After Alyeska: Can the Contender Survive*, Juris Doctor (October 1975), at 35.

[151] 57 F.R.D. 94 (N.D. Cal. 1972) [hereinafter cited as *La Raza Unida*].

[152] *Id.* at 101.

[153] *E.g.*, Department of Transportation Act of 1968 § 4(f), 49 U.S.C. § 1653(f) (1970).

[154] Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 § 201, 42 U.S.C. § 4621 (1970).

La Raza Unida plaintiffs had gained through the judicial process, was mandated by the Department of Transportation Act.[155] As further support for its award, the court noted that to force plaintiffs to pay their counsel fees after effectively policing those charged with implementing Congressional mandates would be "tantamount to a penalty." [156]

In taxing fees against the state defendant,[157] the court noted that all state residents had received the fruits of the litigation. By matching the state treasury, as the source of the fund, with the residents as beneficiaries, the court concluded that it was following the dictates of *Mills*.[158] This somewhat loose adaptation of *Mills* raises an important question as to the application of the common benefit rationale for fee-shifting in environmental litigation. In contrast to the direct benefit of increased corporate control which inured to the stockholder beneficiaries in *Mills* or the actual recovery of a fund in *Trustees*, the actual benefits which accrue to the general public in successful environmental suits are difficult to trace with accuracy. While maintenance of clean air or clean water may fairly be viewed as a benefit uniformly accruing to all members of the public, the preservation of beautiful open spaces and parklands cannot be easily identified as such. The number of persons actually taking advantage of public parklands, although difficult to ascertain, certainly amounts to less that the entire taxpaying public. This inability to match cost with the benefits of the litigation required a strained interpretation of the common benefit line of cases to justify a fee award against the government.[159] The *La Raza Unida* court and other federal courts, which found partial support in *Mills* for taxing fees against the government were, in reality, acting without precedential guidance from the Supreme Court.[160]

Another potential defect in the private attorney general doctrine illustrated by *La Raza Unida* was the latitude accorded judges in determining which types of private enforcement litigation were sufficiently invested with the public interest or involved high priority legislation demanding inducement of fee-shifting. In *La Raza Unida*, the protection of parklands and assistance to persons displaced by eminient domain taking for mass transit projects, as the relevant statutory policies, were probably no stronger in the minds of the legislators than statutes aimed at product safety or the regulation of securities markets. Thus it may have been possible under the doctrine to cause an award to turn automatically upon the invocation of a federal statute without additional indicia of Congressional concern.

In *Piggie Park*, the statutory fee-shifting case which spawned the notion of private enforcement as vindicating strong Congressional policies, the Court relied on legislative history which indicated a Congressional concern of preeminent importance.[161] In lip service recognition of a need to find a heightened and immediate legislative interest or concern, the lower courts at times noted that a fee award was not a license to encourage enforcement of all statutes.[162] Yet

---

[155] Department of Transportation Act of 1968 § 4(f), 49 U.S.C. § 1653(f) (1970). *See generally* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[156] *La Raza Unida*, 57 F.R.D. at 101.

[157] The court dismissed the Eleventh Amendment sovereign immunity argument which led other federal courts to deny an award in otherwise appropriate circumstances. *See* text and notes 96–98, *supra*.

[158] *La Raza Unida*, 67 F.R.D. at 101.

[159] This strain on the logical application of a common benefit theory does not, however, negate its utility as a justification for taxing the government in order to spread the cost of private enforcement among its intended beneficiaries. When a private citizen or public interest group acts as an attorney general in enforcing federal legislation with which the government itself has failed to comply, the yought not hear the litigation costs of performing a function ordinarily assigned to a public official and defrayed through tax revenues. While the government may be an effective mechanism for redistributing the burden of private enforcement suits, this theory is less apposite when applied to justify taxing fees against a private violator of environmental protection statutes. Support for taxing such violators may more appropriately come from a punitive or an incentive rationale.

[160] This position was taken by several commentators. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 897 (1975) ; King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 Tenn. L. Rev. 27, 48 (1973) ; *but compare* Note *The Allocation of Attorney's Fees After Mills* v. Electric Auto-Lite Co., 38 U. CHI. L. REV. 316, 330 (1971). Consistent with these criticisms of the expansive interpretation of *Mills*, the Supreme Court in *Alyeska* noted the impropriety of placing within the common benefit framework suits which involve millions of taxpayers who allegedly receive intangible benefits, 421 U.S. at 265 n. 39 (1975).

[161] *See* text at note 127, *supra*.

[162] *La Raza Unida*, 57 F.R.D. at 99 ; Lee v. Southern Homesites Corp., 444 F. 2d 143, 145 (5th Cir. 1971).

the courts, in purporting to find a strong Congressional policy, could in essence rely on a subjective judgment of public good or benefit. The judges were thus set free to exercise their discretion in determining what constituted socially desirable litigation which warranted fee awards.

Thus, prior to the Supreme Court's opinion in *Alyeska*, the private attorney general doctrine was poorly defined. Despite the broad language of *Mills* and *Piggie Park*, which had triggered its development, the doctrine had not been expressly approved by the Supreme Court. The Court had, on several occasions, declined to pass on the validity of the doctrine as a rationale for transferring fees in public interest litigation.[163]

V. THE ALYESKA LITIGATION AND THE DEMISE OF THE PRIVATE ATTORNEY GENERAL DOCTRINE

The *Alyeska* litigation was commenced in 1970 by several environmental interest groups[164] against the Secretary of the Interior[165] to halt the construction of the trans-Alaskan oil pipeline. After two years of court proceedings, during which construction of the pipeline was suspended by preliminary injunction,[166] the plaintiffs obtained a declaration by the District of Columbia Circuit Court of Appeals[167] that the developer's rights of way granted by the Secretary of the Interior were in violation of § 28 of the Mineral Leasing Act of 1920.[168] Following their success in temporarily halting the project pending further study, the environmental groups filed a bill of costs with the Court of Appeals. They requested an award for over four thousand hours of attorney time allocated in connection with the numerous motion hearing and appeals undertaken during the course of the litigation.

Sitting en banc the District of Columbia Circuit Court of Appeals decided in favor of an award of attorneys' fees relying entirely on the private attorney general doctrine.[169] Since an award taxed against the Federal Government was precluded by the sovereign immunity bar, and the court determined an award against the State of Alaska, irrespective of proscription by the Eleventh Amendment, would be inappropriate where the State had intervened to present the "public interest implications" of the pipeline,[170] the burden of plaintiffs' counsel fees fell on Alyeska, the consortium of oil companies involved in the construction of the pipeline. Because Alyeska, had an immense financial interest in the outcome of the suit and had been a vigorous participant at all stages of the litigation, the court found the consortium to be the real party in interest,[171] and remanded to the district court with directions to tax the oil companies one-half of what it determined to be reasonable attorneys' fees.[172]

---

[163] Northcross v. Bd of Educ., 412 U.S. 427, 429 n. 2 (1973); F.D. Rich Co. v. U.S. *ex rel.* Indus. Lumber Co., 417 U.S. 116, 130 (1974).

[164] Wilderness Society, Environmental Defense Fund, Inc. and Friends of the Earth.

[165] The State of Alaska, to present another version of the public interest implications of the pipeline, and Alyeska Pipeline Service Company, a consortium composed of seven major oil companies, was granted leave to intervene early in the proceedings.

[166] Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). For a more extensive discussion of the litigation prior to the Supreme Court's opinion in *Alyeska, see* Dominick & Brody, *The Alaska Pipeline:* Wilderness Society v. Morton *and the Trans-Alaska Pipeline Authorization Act*, 23 Amer. U. L. Rev. 337 (1973).

[167] Wilderness Society v. Morton, 479 F. 2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

[168] 30 U.S.C. § 185 (1970). Although allegations that the Department of the Interior had failed to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1970), were fully briefed and argued, the court declined to adjudicate these issues on ripeness grounds, 479 F. 2d at 890.

[169] Wilderness Society v. Morton, 495 F. 2d 1026 (D.C. Cir. 1974) [hereinafter cited as *Wilderness II*]. Three justices of the seven member panel vigorously dissented.

[170] *Id.* at 1036 n. 8.

[171] Alyeska being comprised of oil companies which account for approximately 20% of the national oil market and do business in 49 states, was arguably an appropriate medium for redistributing the cost to the general public. *See Alyeska*, 421 U.S. at 288 (Marshall, J., dissenting). The *Wilderness II* court dismissed this seeming infusion of the *Mills* common benefit rule into the private attorney general exception, 495 F. 2d at 1029. However, the real party in interest justification is likewise vulnerable to challenge. As an intervenor, Alyeska was neither involuntarily brought into the litigation as a violator of the relevant statutes nor, in reality, charged by statute with compliance under NEPA or the Mineral Leasing Act; therefore, to tax attorneys' fees merely for vigorous participation and interest in the litigation against a party so situated seems inequitable. *See* Sierra Club v. Lynn, 502 F. 2d 43, 65-36 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975). This strained rationale for shifting fees to a private intervenor, criticized in *Sierra Club*, again points to the inequity created by the sovereign immunity bar.

[172] *Wilderness II*, 495 F. 2d at 1036.

The constellation of events which surrounded the litigation made tenuous the requisite ascertainment of strong Congressional public policy which would trigger the private attorney general rationale. In response to the delay in construction of the pipeline engendered by the litigation, Congress enacted legislation amending the Mineral Leasing Act to allow the granting of permits sought by the oil companies and declaring that no further statements under NEPA would be required before construction commenced.[173] The amendments did, however, include certain provisions to insure safety and environmental protection along the pipeline route.[174] Moreover, the Senate Committee which reported out the bill explicitly noted that the litigation-produced delay had lessened the risk of environmental damage.[175]

In acknowledging the national commitment to protecting the natural environment, as exemplified by NEPA, the Court of Appeals noted benefits from the litigation in the form of forced reconsideration of the environmental consequences of the project[176] and the "inclusion of strong safeguards in plans for the Alaskan line."[177] Instead of construing the Congressional intervention as a rejection of the environmentalists' position, the majority read it to be a recognition of the substantial policy and technical issues which the litigation had served to focus.[178] The accumulation of these benefits gave rise to the majority's conclusion that plaintiffs had vindicated the statutory interests of all citizens affected by the proposed pipeline project.[179]

In contrast to the aura of successful litigation portrayed by the majority, the disservice to the public caused by the delay in construction, concern with blocking access to much needed oil reserves and the attendant increase in cost and dependence on foreign petroleum marked the dissenting judges' rejection of the fee award.[180] The Mineral Leasing Act amendments were viewed as the definitive statement of Congressional preference for immediate resumption and completion of the pipeline.[181]

What emerges from the juxtaposition of majority and dissenting opinions is that Congressional policy on this question was at best ambiguous. The case is therefore instructive in highlighting the difficulty in adducing a strong Congressional policy, particularly in environmental lawsuits where a demand for energy resource development and interest in the preservation of the environment collide. Moreover, it indicates the inherent weakness in allowing judges, absent legislative guidance, to render subjective assessments or speculate as to those statutes which require the inductment of fee-shifting for private enforcement. The resultant differences in the perception of justice and the public interest may undermine the public confidence in a neutral judiciary.

Upon a grant of certiorari,[182] the Supreme Court reversed the District of Columbia Circuit Court of Appeals in a 5–2 decision.[183] The Court held that under the American Rule attorneys' fees would not be recoverable on a private attorney general theory in the absence of express statutory authorization.[184] Mr. Justice White, speaking for the Court, engaged in an extensive historical analysis to document both statutory and judicial adherence to the American Rule.[185] In establishing the Rule's continuing vitality, principal reliance was placed on the 1853 docketing fees statute, which undertook to limit the circumstances where fee awards were appropriate.[186] The combination of the present version of that statute,[187] being essentially unaltered, and the express fee-shifting authorization

---

[173] Trans-Alaska Pipeline Authorization Act, Pub. L. 93–153, Tit. II, 87 Stat. 584, 43 U.S.C. § 1651 *et seq.* (Supp. IV, 1974).
[174] *Id.* at § 204(b), 43 U.S.C. § 1653(b) (Supp. IV, 1974).
[175] S. Rep. No. 93–207, 93d Cong., 1st Sess. 18 (1973): *"When we subsidize lawyers to bring such suits against our national interest we promote our own destruction" Id.* (dissenting opinion) (emphasis in the original).
[176] *Wilderness II* 495 F. 2d at 1034.
[177] *Id.* at 1035 n. 5, *citing* 119 Cong. Rec. *S* 13574 (daily ed. July 16, 1973) (remarks of Senator Fannin).
[178] *Id.* at 1035.
[179] *Id.* at 1032.
[180] *Id.* at 1041 (MacKinnon dissenting). Judge MacKinnon went so far as to boldly state:
[181] *Id.* at 1039 (MacKinnon dissenting). "Judging from Congress' most recent action, plaintiffs have been *frustrating* the policy Congress considers highly desirable and of the utmost urgency." *Id.* at 1042 (Wilkey dissenting) (emphasis in the original).
[182] 419 U.S. 823 (1974).
[183] *Alyeska*, 421 U.S. 240 (1975). Justices Powell and Douglas took no part in the consideration of the case, while Justices Brennan and Marshall dissented.
[184] *Id.* at 269.
[185] *Id.* at 247–62.
[186] *Id.* at 252–56.
[187] 28 U.S.C. §§ 1920, 1923(a) (1970).

contained in various recently enacted statutes[188] was therefore read as being indicative of Congressional hegemony over the creation of this remedy.

The Court, however, failed to convincingly treat its own precedents which establish a coordinate independent equity power to award fees under the several flexible exceptions to the American Rule. The proposition that sporadic Congressional exercise of its prerogative to annex fee-shifting provisions to certain statutes preempted the judicial creation or at least maintenance of nonstatutory theories upon which to base awards ignores the well-established breadth of equitable remedies.[189] Such an argument, as noted by the dissent, is logically inconsistent with the Court's acceptance of the previously sanctioned bad faith[190] and common fund[191] exceptions.[192] Assuming that the federal judiciary has the power "to do equity" in these situations, the same power would likewise attach in cases where justice requires a fee award to ratably allocate the burden of private enforcement.[193]

In rebuttal to the majority's broad construction of the docketing fees statute, the dissent invoked the Court's prior rejection in *Trustees* and *Sprague* of arguments that the statutes operated as a plenary restraint on the equity power to award fees.[194] In both *Sprague* and *Trustees*, the Court had explicitly held that the statute imposed no bar to an award of fees in common fund cases, and contained nothing which could be construed to deprive equity courts of their long-established control over taxing litigation costs.[195]

Mr. Justice Marshall's dismissal of the Court's interpretation of Congressional silence as to fee transfers[196] was appropriately grounded in the broad language of *Mills* and *Hall v. Cole*.[197] These recent decisions offer a clear statement of the Court's preference prior to *Alyeska* for interpreting Congressional silence "not as a prohibition, but as an authorization for the Court to decide the attorneys' fees issue in the exercise of its coordinate, equitable power."[198] If the holding of *Alyeska* is viewed solely as evolving from the judicial power argument addressed above, the lack of cogency undermines its credibility.

Notwithstanding the apparent internal inconsistency or the Court's failure to square its reasoning with even the most conservative reading of *Mills*, the Court correctly reversed the award of fees under the private attorney general rationale. Alternative support for the holding may be adduced from the inability of the judiciary to develop manageable standards to govern the use of the private attorney general rationale as an incentive for private enforcement actions.[199] This interpretation of the majority's reasoning is most directly responsive to the demonstrated deficiencies in the application of the doctrine,[200] and is therefore the most persuasive ground for the decision.

Recognizing the Court's concern with the vagaries inherent in a fee-shifting scheme dependent upon a trial judge's subjective assessment of the importance of a public policy involved in a particular case, Mr. Justice Marshall attempted to salvage the doctrine by suggesting several criteria to aid the courts in determining the propriety of requested awards.[201] The principal factor to be considered would be whether the "important right being protected is one actually or necessarily shared by the general public or some class thereof."[202] Mr. Justice Marshall's formulation adds little to the criteria established in *La Raza Unida* to

---

[188] *See* notes 48–54, *supra*.
[189] 421 U.S. at 282 (Marshall, J., dissenting).
[190] *See, e.g.*, Vaughan v. Atkinson, 369 U.S. 527 (1962).
[191] *See, e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).
[192] *See* 421 U.S. at 278–82 (Marshall, J., dissenting).
[193] As Mr. Justice Marshall correctly states, the only explanation which preserves the internal logic of the Court's argument is that these already sanctioned exceptions were too well established to jettison. *Id.* at 278 (Marshall, J., dissenting).
[194] *Id.* at 278–79 (Marshall, J., dissenting).
[195] Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939); Trustees v. Greenough, 105 U.S. 527, 535–36 (1881).
[196] 421 U.S. at 281–82 (Marshall, J., dissenting).
[197] 412 U.S. 1 (1973). *See* note 139, *supra*, for a discussion of Hall v. Cole.
[198] 421 U.S. at 281 (Marshall, J., dissenting), *citing Mills*, 396 U.S. 375, 391 (1970).
[199] *Id.* at 266 n. 39.
[200] *See* text at notes 160–63 and text following note 181, *supra*.
[201] 421 U.S. at 285 (Marshall, J., dissenting).
[202] *Id.* Other factors implicated in the determination are whether "(2) . . . the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation." *Id.* Note that this third requirement presents the same admixture of vindication of Congressional policy drawn from *Piggie Park* and the common benefit rationale of the *Mills* case which left the lower courts without precedential foundation. *See Id.* at 265 n. 39. *See also* text at notes 157–60, *supra*.

assist in the crucial determination of which legislative policies are actually of the highest priority. One need look no further than the *Wilderness II* opinion to witness the enigma involved in ascertaining the "important right" without statutory guidance. The conflicting perceptions of public policy illustrated by the 4–3 split in the lower court's decision in *Wilderness II* underscored this problem.

In light of the dissent's failure to propose viable standards for gauging a statute's importance, the holding in *Alyeska* attains credibility. Nevertheless, a restrictive reading of the Court's finding of legislative dominance over fee-shifting will unduly constrain the jurisdiction which equity courts have traditionally exercised where compelling circumstances require. The rationale of *Alyeska* should therefore be ascribed to the Court's recognition of a need to impose prudential limits on the power of a federal judge to grant awards of attorneys' fees to public interest plaintiffs in the absence of statutory authorization. The demise of the private attorney general doctrine need not be interpreted as a judgment on the merits of fee-shifting or the utility of redistributing the cost of legal services to encourage private enforcement of environmental legislation. In deciding not to embroil the federal courts in political and social policy debates, the Court merely returned to the legislature the burden of ascertaining those public policies which demand private enforcement incentive through fee-shifting.

CONCLUSION

Recent legislative authorization of citizen suits in numerous environmental protection statutes has created a vital role for the federal courts in the process of environmental decision-making.[203] Given this consistent Congressional approval of private enforcement in the courts, the need to encourage such suits becomes clear. Citizen suit provisions contained in these statutes, however, will remain empty invitations, without an opportunity for public interest plaintiffs, lacking any direct monetary stake in the litigation, to recover the costs of vindicating statutory rights or enforcing Congressional mandates. Citizens and environmental interest groups assuming this watchdog role are in actuality "private attorneys general" performing an enforcement function ordinarily assigned to government officials who are compensated by the public treasury. If for no other reason, logic demands that a citizen suing to enforce compliance with an environmental protection statute should not be forced to bear the litigation costs incident to performing a quasi-official function.

With private foundation sources of funding for environmental plaintiffs uncertain, the need to develop a comprehensive scheme of fee awards for public interest litigants is acute. In suits against the government, an award will act to redistribute the costs to the general public, who in most instances, is the intended beneficiary. Additionally, this mechanism for equalizing the resources of private, non-profit plaintiffs doing battle with government and corporate entities has not been an administrative burden on the courts, as witnessed by their willingness, prior to *Alyeska*, to grant fee awards with impressive regularity.[204]

While a comprehensive Congressional scheme which entitles a plaintiff,[205] suing under any environmental protection or policy statute, to an award of attorneys' fees is the long range goal to be pursued,[206] the following two proposals must receive the highest priority. The federal sovereign immunity bar embodied in § 2412 of the Judicial Code must be repealed or strictly limited in environmental protection situations. This statute stands as a deterrent to numerous legitimate

---

[203] Some commentators take issue with the propriety of an active judiciary in this area. Heyman, Quarles, Sive & Cutler, *The Challenge of Environmental Controls*, 28 Bus. Law 9, 22–28 (1973) (remarks of Lloyd Cutler, Esq.). *But see* Leventhal, *Environmental Decision-making and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 542 (1974).

[204] One commentator suggests another conclusion. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 905 (1975). Whatever administrative difficulties are encountered in post litigation fee hearings stem in large part from a lack of standards to guide judges in computing the size of the award. This problem might be remedied by the establishment of guidelines similar to those established by the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(d) (1970), or by promulgation of local court rules. Caveat: in designing the schedules, fees ought to be of sufficient size to attract skilled advocates who are capable of presenting the complex and delicate issues that attend environmental disputes.

[205] As established under the fee-shifting provisions in the clean air and water pollution legislation, ultimate success in the lawsuit need not be made a prerequisite to an award.

[206] An omnibus provision permitting fee awards in suits brought under any environmental protection or policy statute would be preferable. However, divisions of jurisdiction among the various Congressional committees might preclude such a solution.

suits which would name the federal government as defendant. In addition, the immediate inclusion of a fee-shifting provision under the National Environmental Policy Act is essential.[207] Since only the government is charged with compliance with NEPA requirements, the statute will be enforced, if at all, through litigation commenced by individual citizens or their representative organizations. The absence of transfer provisions in other environmental legislation also deserves Congressional attention in order to develop a comprehensive program to encourage enforcement by citizen watchdogs and to supplement government efforts to achieve compliance with these statutes. Until Congress enacts such a program, the cloud created by *Alyeska* will continue to hang over public interest environmental litigation.

[From the *Barrister;* Winter 1976]

Development of the Fee-Shifting Doctrines Aftermath of the Alyeska Decision *

(Roger M. Leed †)

On May 12, 1975, Justice White, speaking for a five-justice majority, pronounced the obituary for the "private attorney general" doctrine in *Alyeska Pipeline Service Co. v. The Wilderness Society.* ——— U.S. ———, 95 S. Ct. 1612, 44 L. Ed. 2d 141, reversing *Wilderness Society v. Morton.* 495 F.2d 1026 (D.C. Cir. 1974). The doctrine had inspired hopes that it could become the financial mainstay of public interest litigation.[1] It stimulated a minor flood of law review articles because it seemed an exciting and significant, new trend in the law.[2] Six circuits had adopted the doctrine, recognizing it as a necessary and appropriate exercise of inherent equitable powers.[3] Justice White dashed those hopes, silenced the commentators, and rejected the reasoning of the lower courts.

The majority said that federal courts are entitled to disregard the American Rule barring fee-shifting, in "limited circumstances," as many previous decisions of the Court had held.[4] But the private attorney general doctrine was too imprecise, unmanageable, and sweeping to qualify as an equitable exception to the American Rule. Furthermore, Congress, by setting limits on the award of fees as costs in the docketing statute, 28 U.S.C. § 1923, intended to foreclose any broad

---

[207] One such bill has already introduced and is pending in the House Committee on Merchant Marine and Fisheries. H.R. 7829, 94th Cong., 1st Sess. (1975).

*This article is a follow up to Mr. Leed's article entitled, *The Development of the Fee-Shifting Doctrine: Attorney's Fees for the Private Attorney General,* which appeared in the Spring 1975 issue of Law Notes.

† B.A., Harvard, J.D., University of Michigan. Member of the Seattle Law Firm of Schroeter, Jackson, Goldmark & Bender. Mr. Leed is a member of the ABA Standing Committee on Environmental Law, and Vice-Chairman of the Litigation Section's Environmental Litigation Committee. He is also an Adjunct Professor, teaching a course in environmental law, at the University of Puget Sound School of Law.

[1] Witt, *After* Alyeska: *Can the Contender Survive?,* 5 Juris Doctor, 34 (1975). The article quotes Charles Halpern, of the Council on Public Interest Law, as saying: "Until *Alyeska,* I would probably have said that attorneys' fee awards were the number one factor in the future of public interest law financing," at 35.

[2] *E.g.,* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 Harv. L. Rev. 849 (1975); King and Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation,* 41 Tenn. L. Rev. 27 (1973); Comment, *Who is to Guard the Guardians: Awarding Attorneys' Fees Against a State Defendant in Public Benefit Litigation,* 9 U.S.F.L. Rev. 465 (1975); Comment, *The Eleventh Amendment Does Not Bar an Award of Attorneys' Fees Based on the Private Attorney General Theory,* 32 Wash. & Lee L. Rev. 133 (1975); Comment, *Liability for Attorneys' Fees in the Federal Courts—The Private Attorney General Exception,* 16 Boston Col. Ind. & Com. L. Rev. 201 (1975); Comment, *Private Attorney General Fees Emerge from the Wilderness,* 43 Fordham L. Rev. 258 (1974); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts,* 122 U. Pa. L. Rev. 636 (1974); Nussbaum, *Attorneys' Fees in Public Interest Litigation,* 48 N.Y.U. L. Rev. 301 (1973); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest,* 24 Hastings L. J. 733 (1973).

[3] *E.g.,* Sousa v. Travisono, —— F. 2d ——, (1st Cir. 1975); Cornist v. Richland Parish School Board, 495 F. 2d 189 (5th Cir. 1974); Taylor v. Perini, 503 F. 2d 899 (6th Cir. 1974); Morales v. Haines, 486 F. 2d 880 (7th Cir. 1973); Fowler v. Schwarzwalder, 498 F. 2d 143 (8th Cir. 1974); and Brandenburger v. Thompson, 494 F. 2d 885 (9th Cir. 1974).

[4] These limited circumstances include where a trustee has preserved a fund, Trustee v. Greenough, 105 U.S. 527 26 L. Ed. 1157 (1881); where a party preserved or recovered a fund or property for the benefit of others, Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Hall v. Cole, 412 U.S. 1 (1973); wilful disobedience of a court order, Toledo Scale Co. v. Computing Sale Co., 261 U.S. 399 (1923); or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, F. D. Rich Co., Inc. v. Industrial Lumber Co., Inc. 417 U.S. 116 (1974).

extension of fee-shifting, which conclusion is confirmed by the fact that Congress has created legislative exceptions to the American Rule in a number of statutes so as to ecourage private enforcement.[5] "[I]t is apparent," wrote Justice White, "that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making these awards are matters for Congress to determine." [6] Whether the decision proceeds from the Court's desire to respect Congressional intent or from judicial antipathy to the doctrine is not clear from the *Alyeska* opinion.

The *Alyeska* decision came as a real, if not entirely unanticipated, shock to public interest lawyers throughout the country.[7] Many were counting on the private attorney general doctrine to sustain the public interest bar when foundation support ended.[8] For those who saw the doctrine as the financial salvation of the public interest bar, the *Alyeska* decision is a bitter disappointment. Indeed, the *Alyeska* opinion seems clear notice to the world that the Supreme Court sees no reason for the judiciary to encourage public interest litigation.[9]

Yet, while the *Alyeska* decision was certainly a body blow for environmental groups and public interests lawyers, fee-shifting has survived it, and is very much alive. Fee-shifting is still rooted in federal decisional law, and Congress may very well step forward and accept the Supreme Court's challenge to legislate the private attorney general doctrine.[10] Moreover, the states are free to adopt the doctrine judicially or by legislative action.

Courts may shift the fee burden when authorized by statute, where successful litigants create a common fund or extend a substantial benefit to a class, where a party has wilfully disobeyed a court order, or where the losing party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . ." [11]

In the aftermath of *Alyeska*, Congress is studying the question of how best to appropriately encourage and support public interest litigation.[12] Even had the private attorney general doctrine been adopted by the Supreme Court in *Alyeska*, the fact that the courts have interpreted 28 U.S.C. § 2412 to preclude taxing attorney's fees against the United States would have prevented litigants from benefiting from the doctrine in most instances.[13]

One legislative approach is to enact a general statute authorizing courts to shift the fee burden when the plaintiffs fit the definition of private attorneys general. Another is to identify specifically those statutes which should be enforced by private litigants, and encourage that enforcement by authorizing attorneys' fee awards.

---

[5] See statutes collected in footnote 33, 95 S. Ct. at 1623.

[6] 95 S. Ct. at 1624.

[7] If the court had desired to recognize the private attorney general doctrine, it had the issue squarely before it in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974), and ignored the opportunity. This was an omen for court watchers.

[8] *The Public Interest Law Firm, New Voices from New Constituencies*, The Ford Foundation (1973), at 36–37.

[9] The observation of the Court of Appeals, below, that "(i)t is a paramount principle of equity that the court will go much farther both to grant and to withhold relief in furtherance of the public interest than when only private interests are involved," *Wilderness Society* v. *Morton*, 495 F. 2d 1026, 1030 (D.C. Cir. 1974), (en banc) contrasts sharply with the *Alyeska* majority's attitude toward public interest litigation.

[10] See Tunney, *Financing the Cost of Enforcing Legal Rights*, 122 U. Pa. L. Rev. 632 (1974).

[11] 95 S. Ct. at 1621–1622.

[12] Congressman Seiberling (R. Ohio) has introduced H.R. 7826 and H.R. 8221, which would add a new section to Title 28 of the U.S. Code, giving federal courts discretion to award attorneys' fees to the prevailing party in civil actions when "the interests of justice so require." The United States would be liable for such awards the same as a private party.

Congressman Seiberling has also introduced bills which permit or require payment of attorneys' fees to prevailing plaintiffs in civil rights actions (H.R. 7828 and H.R. 8220), suits under the Mineral Leasing Act of 1920 (H.R. 7825 and H.R. 8218), and NEPA suits (H.R. 7829 and H.R. 8222).

A bill authorizing assessment of attorneys' fees against the United States in civil rights, consumer, and environmental suits successfully challenging an agency decision has been introduced by Congressman Drinan (D. Mass.). (H.R. 7968).

Other bills pending which relate to fee-shifting include H.R. 8219, H.R. 8368, H.R. 8742, H.R. 8743, H.R. 9093 and H.R. 9552.

[13] The *Alyeska* majority appears to approve this interpretation, 95 S. Ct. at 1626, but Justice Marshall's dissent points out that the issue was not before the court and goes on to say:

"The statute, construed in light of the rule against implied restrictions on equity jurisdiction, may not foreclose attorneys fee awards against the United States in all cases." 95 S. Ct. at 1636, n. 9.

Whatever Congress does, the private attorney general doctrine still has application, insofar as courts rely on it to require broad interpretation of statutory authority to award fees. In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S. Ct. 964. 19 L. Ed. 2d 1263 (1968), the Supreme Court held that a court must award attorneys' fees to a successful plaintiff, absent exceptional circumstances, in a suit under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), even though Congress provided that such an award was discretionary.

Another example of the use of the private attorney rationale to justify a broad reading of a statutory authorization is *Natural Resources Defense Council* v. *EPA*.[14]

The *Alyeska* decision has compelled lower courts to pay much closer attention to the approved equitable exceptions to the American Rule. In *Doe* v. *Poelker*,[15] the 8th Circuit, noting that the *Alyeska* decision foreclosed fee-shifting on the basis of the private attorney general doctrine, nonetheless authorized a fee award on the basis of the obdurate behavior exception.[16] The 5th Circuit deferred to the *Alyeska* holding by reversing a district court fee award in *Wallace* v. *House*,[17] but one member of the panel would have affirmed the award on the strength of the trial court's finding of bad faith on the part of defendants.[18] It is to be expected that the substantial benefit and obdurate behavior exceptions will be invoked more frequently by public interest plaintiffs now that the private attorney general doctrine has been foreclosed, and that courts which are convinced that fee-shifting is both appropriate and necessary will listen sympathetically.

The various state jurisdictions must resolve for themselves whether application of the private attorney general doctrine is within the inherent powers of the judiciary. State courts may very well come to a different conclusion than did the United States Supreme Court, particularly because the *Alyeska* opinion places such prominent reliance on federal legislative history.

In California recently, the Los Angeles County Superior Court awarded $800,000 in attorney's fees to two public interest law firms under the private attorney general doctrine.[19]

In the State of Washington, the Supreme Court now has under consideration the question of whether a trial court should have entertained a fee award application based on the private attorney general doctrine.[20]

It is yet too early to assess the full impact of the *Alyeska* decision. But it is clear that fee-shifting, under appropriate "limited" circumstances, is still available to public interest litigants in the federal courts. It is reasonable to expect that Congress will continue to expand the availability of the statutory private attorney general doctrine. In the states, court decisions and legislative action will define and probably expand the availability of fee-shifting, and the private attorney general rationale.

Despite *Alyeska*, fee-shifting can help support public interest litigation, though public interest lawyers will obviously have to rely more on alternative means of financing than would have been necessary if the views of Justice Marshall, who dissented in *Alyeska*, had prevailed.[21]

[From the American Bar Association Consortium on Legal Services, June 1975]

REVIVING THE "PRIVATE ATTORNEY GENERAL" IN PUBLIC INTEREST CASES

1. THE ALYESKA PIPELINE DECISION: FIRING THE PRIVATE ATTORNEY GENERAL

(By Edward F. Mannino*)

In its very recent decision in *Alyeska Pipeline Service Company* v. *The Wilderness Society*, 43 U.S.L.W. 4561 (May 21, 1975), the Supreme Court has brought

---

[14] 484 F. 2d 1331 (1st Cir. 1973); Contra, Natural Resources Defense Council, Inc. v. EPA, 512 F. 2d 1351 (D.C. Cir. 1975).
[15] 515 F. 2d 541 (8th Cir. 1975).
[16] 515 F. 2d at 546–48.
[17] 515 F. 2d 619 (5th Cir. 1975).
[18] 515 F. 2d 637.
[19] Serrano v. Priest, L. A. Superior Ct., No. C–938 254. (August 1, 1975), Order Concerning Attorneys' Fees.
[20] Public Utility District No. 1 of Snohomish County v. Kottick, No. 43389 (Wash. Sup. Ct.), appeal pending.
[21] 95 S. Ct. at 1629.
*Edward F. Mannino is a partner in a Philadelphia, Pennsylvania, law firm. He also is cochairman of the ABA Young Lawyers Section Delivery of Legal Services Committee.

to an abrupt halt the burgoening precedent shifting the burden of plaintiffs' attorneys' fees under the "private attorney general" doctrine.[1] Finding that doctrine foreclosed in most cases by 28 U.S.C. § 1923, the Court declared legislative action to be necessary to authorize a broad "private attorney general" mandate for fee shifting. It held that: "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of Section 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."

Given the need for federal legislation to revive the private attorney general, this article will briefly note some recommended areas that should be addressed by this legislation, in order to make that doctrine an effective tool for fee shifting in public interest cases.

Initially, as the Court itself recognized, there is need for guidance as to what types of cases should qualify for fee shifting. That courts can differ on these questions is apparent from the recent decision in *Harrisburg Coalition* v. *Volpe*, 381 F. Supp. 893 (M.D. Pa. 1974). There, a citizens' group sued under the Department of Transportation Act to enjoin highway construction through a city park. An amicable settlement was reached, whereby the planned highways were realigned in such a manner as to reduce the impact on the park. Although this relief was approved by the court under Federal Rule 23 as fair and adequate to the class, plaintiffs' petition for reimbursement of attorneys' fees was denied. While the court specifically recognized that the suit had minimized the adverse effect of the highways on the park and had also induced "a more intense degree of introspection in the governmental agencies involved" in planning the highways, attorneys' fees were nevertheless denied because the park had long been deteriorating and the settlement did nothing to revitalize it. The court further noted the defendants' argument that an award of fees could encourage litigation which alleged only technical violations of environmental statutes, and that this litigation might have a net detrimental effect by holding up needed highways.

Another recent decision, *Citizens Association* v. *Washington*, 7 E.R.C. 1074 (D.D.C. 1974), illustrates how a different federal judge can reach an opposite conclusion on similar facts in a public interest case. There, an environmental group sued to prevent the construction of two buildings in the District of Columbia, alleging violations of the Clean Air Act. Although the plaintiffs were unsuccessful on the merits, the court nevertheless awarded fees against the District of Columbia because of what it perceived to be a "record of inaction" in implementing the Clean Air Act. Indeed, the court declared that an award of fees was appropriate because: "The public should know that air pollution continues in the District because the District government has been and continues to be slow in acting to fill the regulatory vacuum. Hopefully, the suit at bar will educate the public and the responsible public officials on this matter."

Mere legislative recognition of the "private attorney general" doctrine, without more, would only accentuate this divergence in judicial viewpoints as to what constitutes the "public interest." As such, the possibility of obtaining reimbursement under the fee-shifting doctrine would depend increasingly on the particular judge who happened to be assigned to a particular "public interest" case. Against this background, a partial solution to the problem may be obtained by an attempted codification in legislation or otherwise of the objective factors that might properly identify a particular case as one suitable for fee shifting under a revitalized "private attorney general" doctrine. Indeed, the dissenting opinions of Mr. Justice Marshall in *Alyeska* suggests one possible formulation: "The reasonable cost of the plaintiff's representation should be placed upon the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring

[1] See, *e.g.*, *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) and cases collected at 43 U.S.L.W. at 4570, note 46. See generally, Derfner, "Attorneys' Fees in Pro Bono Publico Cases" (Lawyers' Committee for Civil Rights, 1972); Comment, *Court Awarded Attorneys' Fees and Equal Access to the Court*, 122 U. Pa. L. Rev. 636 (1974).

the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.[2]

II. OTHER OBSTACLES TO ADEQUATE FEE AWARDS IN PUBLIC INTEREST CASES

Even among the many courts accepting the "private attorney general" doctrine prior to the *Alyeska* decision, several obstacles to adequate fee awards have arisen. Since "private attorney general" legislation has been necessitated by that decision, these obstacles should also be addressed by the Congress and state legislatures.

A. *Statutory Bars against an Award of Fees against the Federal Government.* While the concept of fee shifting has been gaining increasing judicial acceptance during the past few years, the defendants against whom these fees may be awarded has ironically been restricted. Section 2412 of Title 28 of the United States Code, for example, specifically precludes any award of attorneys' fees against the federal government. While statutes such as the Clean Air Act have superceded this general prohibition with specific contrary language (42 U.S.C. § 1857h-2(d)), Section 2412 has prevented the imposition of attorneys' fees against federal agencies in many cases, particularly under the National Environmental Policy Act (42 U.S.C. § 4321 et seq.). Since that act does not provide a specific authorization for attorneys' fees against federal defendants, courts that have found violations of the act, and found that the public interest has been effectively served in the litigation, have nevertheless declined to award fees because of the statutory bar of Section 2412. Indeed, in face of this statute, courts, in two cases (both reversed) have awarded attorneys' fees against private parties, who are not immunized from an award of fees by Section 2412, even where the federal defendants were arguably more culpable.[3]

Since a prime justification for the "common fund" and "private attorney general" theories for fee shifting has been that a broad constituency represented by the defendant had been aided by the litigation, it is particularly appropriate that the federal government be required to bear fees when the interests of a significant part of the population have been vindicated by the litigation, since any fee award will be paid out of the public treasury. A sensible solution to this problem would be the repeal of the general prohibitions of Section 2412 against award of attorneys' fees against the federal government. If felt necessary under particular circumstances, more narrow legislation specifically precluding these awards in specified areas could be drafted.

B. *Eleventh Amendment Barriers to Fee Awards against State Officials.* The recent Supreme Court decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), which held that the Eleventh Amendment precluded a damage award where the state treasury would provide the necessary funds, has been read by some courts as also precluding any award of counsel fees against state defendants.[4] While the Supreme Court expressly left this question open in the *Alyeska* case, an extension of the *Edelman* doctrine to foreclose fee awards will, in conjunction with the immunization of federal defendants under Section 2412, result in the ironic situation of many cases in which the public interest has obviously been served by a given result, but in which no defendant can be found against whom an award of fees can be entered. The *Harrisburg Coalition* case provides a good example. There the court held, in the alternative, that the federal officials were immunized by Section 2412 and that the state officials were protected by the Eleventh Amendment. This left only the officials of the city of Harrisburg, whom all parties agreed were the least culpable of the three sets of defendants, and the court declined to make any fee award against them.

---

[2] The Court majority severly criticized this formula, 43 U.S.L.W. at 4569, note 39, and other formulas should be considered by Congress. Moreover, as the Supreme Court indicated in *Alyeska*, Sen. John V. Tunney of California, who chaired the Subcommittee on Representation of Citizen Interests of the United States Senate Judiciary Committee, has already conducted an intensive examination of the subject of attorneys' fees, including the concept of fee shifting. See, *e.g.*, *Hearings on Legal Fees Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 3 (1973). See 43 U.S.L.W. at 4571, note 47. Legislative hearings on an appropriate statutory formula can thus go forth speedily.

[3] *Wilderness Soc'y* v. *Morton*, 495 F. 2d 1026 (D.C. Cir. 1973), *rev'd*, 43 U.S.L.W. 4561 (May 12, 1975); *Sierra Club* v. *Lynn*, 364 F. Supp. 834 (W. D. Tex. 1973), *rev'd on this point*, 502 F. 2d 43, 64–66 (5th Cir. 1974).

[4] *E.g.*, *Skehan* v. *Board of Trustees*, 501 F. 2d 31 (3d Cir. 1974); *Jordan* v. *Gilligan*, 500 F. 2d 701 (6th Cir. 1974).

Attempts to award fees directly against individual governmental official defendants also pose considerable problems, since a finding of international or malicious conduct may be required under the recent Supreme Court decision in *Scheuer* v. *Rhoads*, 416 U.S. 232 (1974). A graphic example of the difficulties of a successful plaintiff in a public interest case seeking such a fee award is provided by the recent decision of the United States Court of Appeals for the Third Circuit in *Goode* v. *Rizzo*, 506 F.2d 542 (1974), which the Supreme Court has recently agreed to review. There the court pointed out, *inter alia*, that any award against officials of the city of Philadelphia, in a police misconduct case, would require a detailed record considering a number of specific items, including the questions of official immunity, vicarious liability, and identification of the specfic indivduals who might, in equity, be held liable. The court also pointed out that: "[T]he equities involved in a private attorney general or spreading-the-cost theory are less apparent if individuals are being ordered to reimburse the plaintiffs than if a large entity in which all claims membership is to pay the assessment. Correspondingly, the traditional test of obduracy and intransigence may have far more significance if individual liability is involved."

It is clear that the statutory immunity of federal officials, the Eleventh Amendment, and concepts of individual responsibility will combine in many cases to preclude any award of fees to a successful plaintiff who has vindicated an important public interest, even if the private attorney general doctrine is revived by legislation. Such a result will have the negative impact of foreclosing many of these suits and depriving those whose interests would be vindicated of effective legal services. Imaginative congressional and state legislative action on these problems is particularly appropriate, since many cases do in fact implement important public objectives and should be encouraged. This legislative action appears to represent the most promising solution here. Since both federal and state immunity may be waived, repeal of Section 2412 as part of any private attorney general legislation at the federal level, and enactment of appropriate legislation at the state level permitting an award of fees from the state treasury in "public interest" cases, offers a sensible way out of the dilemma now posed by Section 2412 and the Eleventh Amendment.

C. *Amount of Fee Awarded.* As Mary Frances Derfner has perceptively noted,[5] fee shifting will never operate sufficiently to encourage the litigation of public interest cases unless courts grant generous fees. The method of calculating fees in public interest cases should be no different than that now being utilized in the fields of antitrust and securities regulation litigation. Thus, the approach adopted in the widely-cited *Lindy*[6] case seems equally appropriate in the public interest area. The court indicated that the first step in setting the amount of fee to be awarded is to establish how many hours were spent by each attorney who worked on the case and what was done. After establishing the amount of time spent, the court then is to determine an appropriate hourly rate to be applied against the time involved. That hourly rate, in turn, should be adjusted either up or down, depending on two other factors: (1) the contingent nature of success, a significant factor when there is no substantial retainer being paid to the plaintiff's attorney, and (2) the quality of the work performed. When the case has been difficult, and the attorneys' work exceptional, the basic hourly rate should be adjusted significantly upward. In *Arenson* v. *Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974), for example, the court awarded twenty-two attorneys in an antitrust case more than one million, three hundred thousand dollars in attorneys' fees for a settlement involving a phase out of fixed commission rates on commodities exchanges during a four-year period. The court found this award was justified because of an estimated future savings of eight hundred million dollars for the 400,000 class members resulting from the settlement. After establishing the reasonable hourly charge to be assessed on behalf of each attorney, the court went on to award four times this basic hourly amount so as to compensate the attorneys for the quality of their work in effectuating the settlement.

Judge Robert F. Peckham's recent decision in *The Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), demonstrates that this approach is equally suitable for establishing fees in public interest cases. There the court established

[5] Derfner, *supra* note 1, at 8–12.

[6] *Lindy Bros. Builders* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161 (3d Cir. 1973), *on remand*, 382 F. Supp. 999 (E. D. Pa. 1974).

a reasonable hourly rate of fifty dollars for 750 hours of work performed in securing declaratory relief which established the right of individuals not suspected of any crime to be free from unwarranted police searches and seizures. It is significant that Judge Peckham adopted a liberal approach in setting the fee award by recognizing that the time for which reimbursement could be sought was that spent on work "reasonably calculated to advance their clients' interests," thus including time spent on an injunction hearing. Thus, rather than attempting to remove, with surgical precision, "unnecessary" work from the time to be compensated, the only work that should not be compensated is that performed in advancing "clearly meritless claims." Judge Peckham also added $10,000 to the amount that would have been generated by the fifty dollars-an-hour rate to recognize the excellent of the work performed by the attorneys in question. Thus, rather than penalizing attorneys representing public interest groups by setting low rates, the effect of the ruling in *The Stanford Daily* case is to award fees on an hourly basis competitive with ordinary commercial work.

By contrast, the recent decision in *Natural Resources Defense Counsel* v. *Fri*, 7 E.R.C. 1346 (D.D.C. 1974),[7] although it awarded fees on an hourly basis of thirty and forty dollars an hours, showed a reluctance to award these competitive fees based on its observations that (a) the fees permitted were "above those normally allowed in other areas such as the representation of indigent criminal defendants," and (b) "members of the legal profession have an obligation to represent clients who are unable to pay for counsel and also to bring suits in the public interest." While the latter comment recognizes what all too many lawyers have forgotten, these factors should not serve to reduce the amount of an otherwise justified fee. As such, the approach of *The Stanford Daily* case seems highly preferable to assure the representation of individuals whose rights to effective legal services would otherwise be jeopardized, and legislative recognition of the need for equal awards in public interest cases would be most appropriate.

[From Trial magazine, November–December 1975]

Attorneys' Fees: A Two-Pronged Problem

(By The Honorable Charles R. Richey[1])

The awarding of attorneys' fees must be viewed as a two-pronged problem: First, we must ask which way the prevailing wind is blowing. Second, in the limited situations in which attorneys' fees are available, under what conditions and standards are they awarded?

The bar, the courts, and the Congress, as well as state legislatures and administrative agencies, must develop acceptable means for obtaining counsel fees in order to insure access to the courts on the part of everyone, and particularly the poor and disadvantaged. This demands a creative effort on the part of all of us in the legal system; we must make certain that opportunities for payment of counsel fees to vindicate public rights are encouraged in order to correct some of our country's major social problems.

In discussing attorneys' fee applications, we must recognize that at the heart of this issue lies a fundamental policy decision. Those who sanction the award of attorneys' fees state that such fees are necessary because a party who recovers an award for an injury is not really made whole unless his attorneys' fees are added to the recovery. Those in opposition argue that parties should not be penalized for seeking to prosecute or defend their rights, and that the prospect of paying for their opponents' attorneys' fees may be an inhibitor to many members of our society, especially the poor, or even the middle class. Faced with these divergent views, what is the solution? I am of the opinion that there is no simple answer.

In the recent decision of the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 95 S.Ct. 1612, decided May 12, 1975, Justice White, speaking for a five-to-two majority, held that under the "American Rules," attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of specific statutory authorization. In the latter part of the majority

---

[7] See also the approach utilized in *Souza* v. *Travisono*, 43 U.S.L.W. 2402 (1st Cir. 1975).

[1] The Honorable Charles R. Richey is judge of the United States District Court for the District of Columbia.

(Write TRIAL for list of federal laws awarding fees compiled by Judge Richey.)

opinion, Justice White, identifying the basic rationale for the decision of the Court, stated:

". . . congressional utilization of the private attorney general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." [95 S.Ct. at 1624–25.] The message of the Court in *Alyeska* is clear. Faced with the fundamental policy question I referred to earlier, the Court chose to defer to Congress.

I do not think the decision in *Alyeska* was or should have been unexpected, and the Court, in the first part of its opinion, took great pains to make this apparent.

At the heart of the Court's decision, in footnote 33 and the accompanying text, the Court sets forth numerous instances in which Congress has specifically permitted the award of attorneys' fees. In displaying these numerous legislative permits, Justice White noted—and this was the critical portion of the opinion—that it is within Congress' sole discretion to determine when fee-shifting should be permitted to further the public policy of a statute.

I think that the understated thrust of the majority opinion was that Congress is better able to ascertain in *which* instances attorneys' fees should be awarded; I don't believe that the Court meant to rely merely upon a recognition that Congress has on numerous occasions acted in this area.

Alyeska is a recognizable signpost for the future. On a broad scale, the battle is going to be waged in Congress and, in fact, it has already begun. For example, the new amendments to the Freedom of Information Act specifically provide for attorneys' fees. [Pub. L. 93–502, 88 Stat. 1561, §(b)(2)(Nov. 21, 1974).] But, I do not think that this is the true wave of the future, for these amendments involve litigation against the government. When it comes to the question of attorneys' fees where the litigation is between private parties, the battle will be more vigorous with lobbying on both sides and with more emphasis on the fundamental questions involved in fee shifting. It is not at all clear, at least to this jurist, whether Congress will really be better equipped to make these choices, and I fear that special interests, considering their resources and lobbying expertise, may have the upper hand. I am not encouraged when Congress, in enacting the Legal Services Act of 1974, 42 U.S.C. § 2996 *et seq.*, only saw fit in the area of attorneys' fees to include a provision shifting fees when a poor person has sought the aid of Legal Services to bring a suit for the purpose of harassment. Congress failed to address those instances where the poor person's opponent, in prosecuting or defending a case, has similarly misused the legal process. As a jurist with some experience in the workings of Congress, I am not surprised by such legislation, but I can say that I find it offensive and not in the public interest.

I realize that what is of most interest today is the meaning of *Alyeska* in the area of commercial litigation. There is a general misapprehension that the question of attorneys' fees has focused on the area of public interest litigation, and that fees are not recoverable in commercial litigation. But, this error is understandable, particularly in light of certain opinions of the Supreme Court. For example, consider the relatively recent case of *F. D. Rich Co.* v. *United States ex rel Industrial Lumber Co., Inc.* [417 U.S. 116 (1974)], which involved a suit by a subcontractor against a contractor for payment pursuant to a claim under a Miller Act bond. The Court, while finding the contractor liable, stated that: "Miller Act suits are plain and simple commercial litigation" and, therefore, attorneys' fees are not recoverable. [417 U.S. at 130–31.] This implies that it is well settled that in cases which involve commercial litigation, no fees can be recovered. But, a closer look at the *Rich* case reveals that the Court declined to award fees because there was nothing in the statute on which the Court could base an award of fees. While it may be true that fees are generally not recoverable in commercial litigation, the same is true in other areas of the law. And, in fact, case law demonstrates that the major inroads into the "American Rule" have come in the area of commercial litigation.

There are basically three exceptions to the "American Rule." Fees may be recovered when (*1*) the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . ." *Vaughn* v. *Atkinson*, [369 U.S. 527 (1962)]; (*2*) the litigation has established what is known as a "common fund", *Sprague* v. *Ticonic National Bank*, [307 U.S. 161 (1939)]; and (*3*) a party has

willfully disobeyed a court order, *Toledo Scales Co.* v. *Computing Sale Co.*, [261 U.S. 399 (1923)].

Although the second exception—fees for bad faith, vexatious, wanton, or oppressive conduct—has not arisen often in the area of commercial litigation, I am frankly surprised that it has not, and I suggest to you that this might be a ripe area for exploration.

An example of the use of this exception is the recent case of *Doe* v. *Poelker*, [515 F.2d 541 (8th Cir. 1975)]. There, the plaintiff brought suit seeking a declaration and injunction against the policy and practice of the local hospitals which refused to perform abortions. The Eighth Circuit Court of Appeals, in determining whether attorneys' fees should be awarded, found that the case fell within the bad faith exception. The court noted that the defendants, and particularly the Mayor of the city, had refused to permit abortions, despite the clear pronouncements of the Supreme Court in *Roe* v. *Wade*, [410 U.S. 113 (1973)] and *Doe* v. *Bolton*, [410 U.S. 179 (1973)]. Therefore, the court, finding that the action of the defendants was not only in bad faith, but was oppressive considering that the injured class "was such as to leave them relatively defenseless against this violation of their rights," awarded attorneys' fees.

Transplanting this exception into the commercial sector, it seems that it might be successfully raised in a variety of cases. For example, let us suppose that Mr. X. enters into a contract with Ms. Y, and that the contract is clearly one of adhesion. Mr. X persists in asserting the terms of the contract necessitating that Ms. Y bring a lawsuit to enjoin the enforcement of the contract by Mr. X. Ms. Y wins on summary judgment, the court finding that the cases are legion where such clauses have been held to be unenforceable. It would appear, since this is an action in equity, that the same exception as used in *Poelker* might be applied upon a finding of vexatious conduct. And, if the plaintiff was in the same position as the plaintiff in that case, then there might be an added incentive to award fees. In this regard, I recommend that you take a second look at the unconscionability cases and such cases as *Williams* v. *Walker Thomas Furniture*, [350 F.2d 445 (D.C. Cir. 1965)].

Now I do not want you to get the impression that I am recommending that this exception will be applicable to many cases, or that it may be widely used; however, there are instances where it seems feasible, and those of us in commercial litigation will have to educate ourselves to them. I would only add that the exception is rooted in equity, and that your purpose is therefore to do equity, and not seek fees when they are unwarranted. And, I would further add that, given the tone of the decision in *Alyeska*, the court will be on guard to prevent the exceptions from swallowing the rule; in fact, this concern may even result in a narrowing of the exceptions, which to this date have been rather loosely articulated. Furthermore, where it appears even to a small degree that the suit was either brought or defended in the belief that a position was at least arguable, courts will not be receptive to an application for attorneys' fees. And, finally, courts may also be reluctant to invoke this exception since, to a certain extent, it reflects upon losing counsel.

While I believe that there is a future in applying the exceptions to the "American Rule" to the area of commercial litigation, particularly the "common fund" theory, I think the road is more clearly marked for development by Congressional action. Many attorneys are probably unaware that there are provisions for attorneys' fees in many statutes already in existence. Allow me to summarize some of the most significant provisions authorizing attorneys' fees, in statutes as well as rules of procedure and before the administrative agencies:

A. STATUTES

The Wire Interception Act, 18 U.S.C. §2520: any person whose wire or oral communication is intercepted in violation of this statute has a civil cause of action for damages equal to one hundred dollars a day for each day of violation, *plus* punitive damages, *plus* a reasonable attorney's fee. This is especially interesting in light of recent revelations of wrongdoing in the intelligence field.

The Interstate Commerce Act, 49 U.S.C. §16(2): this is part of the oldest Act (1887) authorizing attorney's fees. The plaintiff who successfully sues a carrier for failure to comply with an order for the payment of money is allowed a reasonable attorney's fee as part of the costs of the suit.

The Unfair Competition Act, 15 U.S.C. § 72: this act punishes the importation or sale of articles within the United States at less than market value or whole-

sale price. The plaintiff who is injured by such an act can sue and recover, *inter alia*, a reasonable attorney's fee.

The Norris Laguardia Act, 29 U.S.C. § 107(e): the party which requests a temporary restraining order or injunction must provide security to cover his opponent's expenses, including the expense of reasonable attorney's fee should the party requesting the order fail.

The Bankruptcy Act (as amended 1952), 11 U.S.C. § 104(a): Attorneys' fees are among the highest-priority debts from bankrupt estates, taking precedence over the payment of dividends to creditors.

The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k): under this statute aimed at employment discrimination, it is within the court's discretion to award attorneys' fees to the prevailing party (unless the prevailing party is the Equal Employment Opportunity Commission. Title II of the Act, 42 U.S.C. § 2000a-3(b), also includes a provision for the awarding of fees on a *mandatory* basis. See *Aleyska*, *supra*, 95 S.Ct. at 1624.

B. RULES OF PROCEDURE

The Federal Rules of Civil Procedure provide for attorneys' fees to the prevailing party in a discovery dispute. The circumstances in which fees may be awarded by the Court are spelled out in Fed.R.Civ.P. 37.

C. ADMINISTRATIVE AGENCIES

The Magnuson-Moss Warranty Federal Trade Commission Act, [Pub. L. No. 93-637, 88 Stat. 2183 (*U.S. Code Cong. and Ad. News*, 93rd Cong., 2d Sess. 2534) (1975)]: This is the first effort in the administrative field to provide financing for intervenors in rulemaking proceedings. Any person who represents an otherwise unspoken-for interest is entitled to fees if that interest should be represented for a fair determination in the rule-making proceeding and if the intervenor can demonstrate need. The FTC has promulgated *proposed* rules to implement the mandate of the statute. See 40 Fed. Reg. 15238 (1975). The *Nuclear Regulatory Commission* is currently considering providing financial assistance for intervenors. Other federal statutes which provide for attorneys' fees are compiled in the Appendix to this article.

A number of the statutes are not automatic, but rather discretionary. For example, the Securities Act of 1933 and the Securities Exchange Act of 1934 both provide that fees *may* be recovered, not that they *shall* be recovered. Where the statute is discretionary, I would recommend that you prepare early in litigation to establish a basis for recovery. Secondly, not all actions should be brought in federal court. Many states have statutes providing for attorneys' fees which are not found on the federal level. Therefore, look to your state remedies, which may be just as adequate as the federal remedies. This is also important in diversity cases, where state law may be applied.

In *Citizens Association of Georgetown, et al. v. Washington*, a case before me, the plaintiffs relied on the Clean Air Act in an attempt to block the construction of two buildings on the Georgetown waterfront area. The financial impact upon the defendants, if the plaintiffs were successful, would have been in the millions. The plaintiffs failed, however. Nevertheless, I still awarded them attorneys' fees. The basis for this was that the Act contained a provision permitting attorneys' fees. [42 U.S.C. 1857th-2(d)]. In light of the language of the statute and the legislative history indicating that an award of fees did not depend upon success in the action, and since the plaintiffs had done a public service by bringing the action, I awarded the losing party's attorney counsel fees. This case is an example of the impact of environmental and other legislation in the commercial area, and an example of the possibility of awarding attorneys' fees even to the unsuccessful litigant.

Attorney fee applications in the area of the common fund has been left untouched in *Alyeska*, and is very important to the litigating attorney.

The "common fund" theory, which I noted earlier in discussing the *Greenough* case, achieved wide acceptance as an exception to the "American Rule" because the fees, at least ostensibly, do not come out of the opponent's pocket. Rather, the award is described as monies that are due to others who are benefiting from the action of the plaintiff, often class action member, and who must pay for their benefit. However, the monies are not taken from each person who has benefited, which is often totally impractical, but from the fund itself. Therefore,

in personam jurisdiction is not necessary. On this point, I refer you to the opinions of my colleagues Judges Gesell and Flannery in their respective decisions in *National Council of Community Health Centers* v. *Weinberger* [387 F. Supp. 991 (D.D.C. 1974)] and *National Association of Regional Medical Program, Inc.*, v. *Weinberger*, [103 Daily Washington Law Reporter 1193 (D.D.C., C.A. 1807–73, decided May 19, 1975)]. This opens the way for the awarding of fees from the fund itself, without need for concern with a large group of plaintiffs.

The real difficulty in applications for attorneys' fees in this area is the determination of the amount of the fee. I would like to share with you my experience in the case of *Kiser* v. *Miller*, [364 F. Supp. 1311 (D.D.C. 1973)], modified on other grounds, *sub nom.*, *Kiser* v. *Huge* [517 F.2d 1237 (D.C. Cir. 1975)]. *Kiser* involved litigation by a group of miners against the trustees of the United Mine Workers pension fund. Plaintiffs' attorneys asked to be compensated on the basis of their contingent fee contracts. However, for reasons set forth in the opinion, I set aside those contracts as being void and against public policy. Instead, I adopted a two-level approach to the determination of fair attorneys' fees in class actions.

On the first level, I integrated several of the factors familiar to you from the *Code of Professional Responsibility*, § DR2–106: (1) time and effort expended, (2) the novelty and difficulty of the issues, (3) the skill required to perform the legal services involved, (4) the amount of duplication of other counsel's work, (5) the amount of risk involved, and (6) the nature and amount of the results obtained. The initial attorneys' fees amount was determined on this level by multiplying a suitable hourly wage, taking into consideration the factors enumerated above, times the number of hours actually spent by the attorneys in the course of the lawsuit.

On the second level, the most important factor is to add on a premium of *at least* 10% of the first level amount in order to induce counsel to represent the public and enforce the law.

The appellate courts have insisted on a complete record, because the award of the fee is discretionary, and the standard of review is whether the trial court abused its discretion and whether the amount awarded is fair and reasonable and has a complete factual predicate. I recommend to you Judge Flannery's opinion in the *Medical Programs* case as a model for counsel. His extensive discussion of the application of the factor to that case demonstrates what counsel must be prepared to show in order to recover fees.

CONCLUSION

While the "American Rule" is going to be with us for a long time, there are avenues for obtaining attorneys' fees: by the exceptions to the Rule and by statute. Counsel will have to be imaginative and innovative. As for congressional action in this area, I would merely say that I hope that it will be responsible and just. Even though there are statutes in existence that afford attorneys' fees, let us hope there will be more. The expansion of attorneys' fees will involve efforts in Congress, the state legislatures, and administrative agencies (the bar should especially not overlook the latter forum as the opportunities for requests in rule-making and quasijudicial proceedings increase). Finally, with respect to determining the amount of compensation where fees are available, the courts have clearly set forth the factors that will be considered. The burden is now on counsel, on a case-by-case basis, to make the record so that proper and just fees will be awarded.

○

END