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COMMENTS

ATTORNEYS' FEES: ONLY CONGRESS CAN AWARD COMPENSATION TO PRIVATE ATTORNEYS GENERAL

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)

A consortium of oil companies¹ sought to exploit large oil deposits on the north coast of Alaska.² The consortium applied to the Secretary of Interior for rights-of-way and land-use permits for construction of an oil pipeline.³ Three private conservation groups⁴ brought suit to enjoin these issuances, and were successful in the United States Court of Appeals for the District of Columbia.⁵ Congress promptly amended the Mineral Leasing Act,⁶ on which the injunction was based, to permit

1. The Trans-Alaska Pipeline System, later reconstituted as Alyeska Pipeline Service Company. At the time of this decision, Alyeska's stock was owned by ARCO Pipeline Co., Inc., Sohio Pipeline Co., Humble Pipeline Co., Mobil Pipeline Co., Phillips Petroleum Co., Amerada Hess Corp., and Union Oil Co. of Calif. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 241-42 n.2 (1975).

2. The companies sought to build an oil pipeline across Alaska. The economic and environmental questions about the route chosen, and possible alternative routes, were at the center of the litigation. The route selected would have required transshipment of oil by tanker from Valdez, on the south coast of Alaska, to California and perhaps Japan. An alternative route through Canada would have allowed delivery of oil and natural gas directly to United States markets in the Midwest. See Cichetti, *The Wrong Route*, ENVIRONMENT, June 1973, at 4; Dominick & Brody, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 AM. U.L. REV. 337 (1973); Ramseier, *Oil On Ice*, ENVIRONMENT, May 1974, at 6.

3. Portions of the pipeline would lie on federal land, and the Mineral Leasing Act, ch. 85, § 28, 41 Stat. 449 (1920), as amended, 30 U.S.C. § 185 (Supp. III, 1973), placed it in the discretion of the Secretary of Interior to grant rights-of-way through public lands for oil pipelines under certain conditions. Such rights-of-way were to be limited to the width of the pipeline plus 25 feet on each side. The pipeline was to be four feet wide. The companies requested rights-of-way of varying widths, up to 200 feet, primarily to accommodate access roads needed during construction. *Wilderness Soc'y v. Morton*, 479 F.2d 842, 848-49 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973). Various land-use permits, required by federal statutes, were requested by the State of Alaska and the oil companies. *Id.* at 846, 847.

4. The plaintiffs were the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth. *Id.* at 850.

5. *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973).

6. 30 U.S.C. § 185 (Supp. III, 1973), amending ch. 85, § 28, 41 Stat. 449 (1920).

construction of the pipeline; the court of appeals thereupon granted the conservationists' request to withdraw their suit, and awarded them one-half their reasonable attorneys' fees,⁷ to be paid by the oil companies. The Supreme Court reversed the judgment for attorneys' fees, and *held*: Congress has withdrawn the courts' power to create a "private attorneys general" exception to the general rule that attorneys' fees may not be awarded as costs.⁸

A prevailing party generally may not recover attorneys' fees in the absence of an authorizing statute or enforceable contract.⁹ Varying reasons have been given for this rule,¹⁰ which has not been seriously challenged, but has been frequently revised by statute.¹¹ Congress enacted the Fee Act of 1853¹² to regularize the award of attorneys' fees in federal courts, which until then had followed state law, and to limit the size of such awards.¹³ Congress has since enacted many statutes

7. *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974).

8. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

9. We do not think that this charge [counsel fee of \$1600 demanded as costs] ought to be allowed. The 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.

Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (emphasis in original). For citations to cases repeating the rule, see 1 S. SPEISER, *ATTORNEY'S FEES*, § 12:3 (1973) [hereinafter cited as SPEISER].

The American rule has been criticized frequently, primarily on the theory that it limits access to the courts. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (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); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Stoebuck, *Counsel Fees Included As Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974); Note, *Attorneys' Fees: Where Shall The Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

10. The most frequently given reason for the rule is that the award of attorneys' fees to prevailing parties would discourage those unable to risk such losses from asserting their rights in court and encourage needless or malicious litigation. See, e.g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). See generally SPEISER § 12:3; Annot., 8 L. Ed. 2d 894 (1962). Moreover, granting attorneys' fees would burden courts with difficult determinations of the reasonableness of the fees. SPEISER § 12:4. The contrary practice is followed in Britain. See 421 U.S. at 247 n.18; Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

11. See note 14 *infra*.

12. Ch. 80, 10 Stat. 161, *as amended*, 28 U.S.C. §§ 1920-23 (1970). The legislative history of the Act is limited. See note 24 *infra*.

13. *The Baltimore*, 75 U.S. (8 Wall.) 377, 392 (1869).

authorizing awards in excess of those specified in the Fee Act.¹⁴ In most of these statutes, suits by private citizens are a part of the enforcement scheme designed by Congress; successful plaintiffs are awarded attorneys' fees to encourage enforcement efforts.¹⁵

Despite the frequently asserted American rule barring the award attorneys' fees without statutory authority, courts have equitable powers to shift fees under a wide variety of circumstances.¹⁶ There are, however, no clear guidelines for the award of attorneys' fees under the many exceptions to the American rule.¹⁷ Three cate-

14. These federal statutes place it in the discretion of the trial court to award attorneys' fees to the prevailing party. *See, e.g.*, Federal Tort Claims Act § 422, 28 U.S.C. § 2678 (1970); Longshoremen's and Harbor Workers' Compensation Act § 28, 33 U.S.C. § 928 (1970). For other such statutes, see 421 U.S. at 260-61 n.33,

15. *See, e.g.*, Clayton Act § 4, 15 U.S.C. § 15 (1970); Securities and Exchange Act of 1934 §§ 9e, 18a, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Norris-LaGuardia Act § 16(b), 29 U.S.C. § 216(b) (1970). State statutes not in conflict with federal law regarding attorney's fees are usually followed in diversity cases. 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77(2) (2d ed. 1975).

16. [A]llowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is "part of the historic equity jurisdiction of the federal courts."-
Vaughan v. Atkinson, 369 U.S. 527, 530 (1962), quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939).

17. When granting equitable relief, federal courts are not governed by state law, even in diversity cases. In awarding damages, the federal courts have not felt restrained by statutes that limit the inclusion of attorneys' fees among costs. Such awards have been made in varied circumstances. *See, e.g.*, *Granview v. Hudson*, 377 F.2d 694 (8th Cir. 1967) (principle stated but fees denied); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (5th Cir.), cert. denied, 379 U.S. 880 (1964) (private antitrust suit); *Dillard v. Yeldell*, 334 A.2d 578 (D.C. App. 1975) (a "balancing of interests" is required). Even rough categorization of the cases in which fees were awarded as damages is difficult. Annot., 8 L. Ed. 2d 894 (1962), dealt only with civil cases in federal courts in which the prevailing party recovered counsel fees. In the absence of a governing statute or enforceable contract, such fees have been awarded in cases involving trademark infringement and unfair competition, admiralty, civil contempt, disobeying writ of mandamus, and the three exceptions discussed in notes 23-26 *infra*. Annot., *supra*. The Annotation noted that, in 1961, 1500 cases were found squarely within this limited scope. *Not* included in the total were

Right of indemnitee's insurer defending action against indemnitee, to recover costs and attorneys' fees from indemnitor. . . .

Right to recover as damages attorneys' fees incurred in earlier litigation with a third person because of involvement therein through a tortious act of present adversary. . . .

Attorneys' fees as element of damages allowable in an action on injunction bond. . . .

. . . .
[A]llowance of attorneys' fees to party interpleading claimants to fund or property

gories of exceptions have recently come to the fore because of their use in public-interest litigation.

The first category, the "common fund" exceptions, has been used to award attorneys' fees to a party who successfully asserts rights shared by others in a common fund.¹⁸ Attorneys' fees are paid in such instances from the fund itself and so, in effect, by those who benefit from the plaintiff's suit. Originally limited to proceedings in which there was a preexisting fund, this exception has been broadened to include other common-benefit situations.¹⁹ A second broad category includes suits in which the defeated party has been excessively obstructive, has refused to comply with an order of the court, or has acted in bad faith or with obstinate obduracy.²⁰ The defeated party is penalized by being ordered to pay the prevailing party's attorneys' fees. The third exception is for "private attorneys general," prevailing plaintiffs who have vindicated important public rights or policies.²¹ This exception to the American

Id. at 895 nn.4-6.

A large number of domestic relations judgments have allowed attorneys' fees, which have not been limited to the prevailing party. Another broad class of such actions includes those brought by employees against their employers for work-related injuries, and suits by union members against their unions. *Id.* SPEISER, *supra* note 9, at §§ 13:1-13:45, used a different scheme of categorization.

18. This exception was first recognized by the Supreme Court in *Trustees v. Greenough*, 105 U.S. 527 (1881), and has been affirmed repeatedly since that time. *See, e.g.,* *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).

19. The common-fund rationale has been sufficiently broadened that it is now more accurately termed a "common benefit" exception in suits that resemble class actions. In *Washington Gas Light Co. v. Baker*, 195 F.2d 29 (D.C. Cir. 1952), attorneys' fees were allowed to a plaintiff who successfully secured a refund for himself and 175,000 other customers of the utility company; attorneys' fees were to be paid from the fund. *Cf. Bakery & Confection Workers Int'l Union v. Rater*, 335 F.2d 691 (D.C. Cir. 1964). *See also Dawson, Lawyers & Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597 (1974).

20. *See F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974) (dictum); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (dictum); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923).

21. The term "private attorneys general" first appeared in *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), which did not involve attorneys' fees. Plaintiffs challenged an administrative action under the Bituminous Coal Act of 1937, ch. 127, §§ 1-18, 50 Stat. 75-90 (repealed Pub. L. No. 89-554, § 8(a), 80 Stat. 649 (1966)). Although affected only as purchasers of coal, plaintiffs were allowed to challenge the action because Congress had implicitly conferred standing. There was no constitutional bar:

[Congress] can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists . . .

Instead of designating the Attorney General . . . to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official

rule had been accepted by a majority of the courts of appeal and rejected

person . . . authority to bring a suit . . . Such persons, so authorized, are, so to speak, private Attorney Generals [*sic*] . . .

134 F.2d at 704 (footnote omitted). *Cf.* *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4 (1942).

This rationale was widely used to broaden standing in suits challenging activities of federal administrative agencies, and the term "private attorneys general" gained currency in the courts. *See* *Office of Communications of United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966). It was first applied to attorneys' fees in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), a suit brought under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1970). The Court found that while the award of attorneys' fees authorized under the statute was discretionary, such fees should ordinarily be awarded to a successful plaintiff who obtained an injunction, "not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402 (footnote omitted). Many district courts seized upon this language and cited it in awarding attorneys' fees under other statutes that did not explicitly provide for such awards. Most of these suits were brought to vindicate civil and constitutional rights. *See* *Red School House, Inc. v. O.E.O.*, 386 F. Supp. 1177 (D. Minn. 1974) (violation of due process in cancelling federal grant); *Gilpin v. Kansas State High School Activities Ass'n*, 377 F. Supp. 1233 (D. Kan. 1973) (civil rights); *Incarcerated Men v. Fair*, 376 F. Supp. 483 (N.D. Ohio 1973), *vacated*, 507 F.2d 281 (6th Cir. 1974) (remanded for proper allocation of award; prisoners' rights); *Palmer v. Columbia Gas, Inc.*, 375 F. Supp. 634 (N.D. Ohio 1974) (challenging utility shut-off procedures); *Kirkland v. State Dept. of Correctional Serv.*, 374 F. Supp. 1361 (S.D.N.Y. 1974), *modified*, 520 F.2d 420 (2d Cir. 1975) (prisoners' rights); *Scott v. Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974) (sex discrimination); *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973) (search and seizure); *Harper v. Mayor & City Council*, 359 F. Supp. 1187 (D. Md. 1973) (civil rights); *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219 (C.D. Cal. 1973) (private antitrust suit seeking injunction); *Ross v. Goshi*, 351 F. Supp. 949 (D. Hawaii 1972) (freedom of speech); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972) (employment rights); *Newman v. State*, 349 F. Supp. 278 (M.D. Ala. 1972), *rev'd as to attorneys' fees*, 522 F.2d 71 (5th Cir. 1975) (prisoners' rights); *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. 1975) (mental patients' right to treatment); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (civil rights); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972) (alternate holding), *aff'd mem.*, 409 U.S. 942 (1972) (legislative reapportionment); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971) (civil rights); *cf.* *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 484 F.2d 1331 (1st Cir. 1973); *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973), *rev'd*, 502 F.2d 43 (5th Cir. 1974) (award to defeated plaintiff). *Contra*, *Bradley v. School Bd.*, 472 F.2d 318 (4th Cir. 1972) (civil rights), *vacated on other grounds*, 416 U.S. 696 (1974); *Gray v. Creamer*, 376 F. Supp. 675 (W.D. Pa. 1974); *Lykken v. Vavreck*, 366 F. Supp. 585 (D. Minn. 1973) (§ 1983 search and seizure).

The doctrine was significantly broadened in *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974), in which the district court set out criteria under which such awards would be made. Plaintiffs were awarded attorneys' fees after successfully enjoining a highway construction project that did not comply with federal requirements for housing displacement, relocation, and environmental quality. The criteria for such an award were given

as "1) the effacement of strong public policies; 2) the fact that numerous people

only by the Fourth Circuit at the time of *Alyeska Pipeline Service Company v. Wilderness Society*.²²

In *Alyeska*, the Supreme Court found that attorneys' fees could only be awarded, if at all, under a private attorneys general theory, but that

received benefits from plaintiffs' litigation success; 3) the fact that only a private party could have been expected to bring this action" 57 F.R.D. at 101. The second criterion clearly contains a strong admixture of the "common benefit" rationale; the people of California having benefited from the litigation, it was felt proper to tax them, through the state government and its officials, with the cost of bringing the suit.

The states have shown little interest in a judicially-created private attorney general doctrine. This is not surprising, considering the doctrine's peculiarly federal origin in issues of standing, its application to federal question cases, and its rationale as the implicit intent of Congress. *See, e.g., Roe v. Board of Regents, — Ariz. —*, 534 P.2d 285 (1975) (successful constitutional challenge to abortion regulations; court declined to accept private-attorney-general exception).

22. At the time *Alyeska* was argued, the private attorney general doctrine had been accepted in the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits. *Souza v. Trivisono*, 512 F.2d 1137 (1st Cir.), *rev'd mem.*, 96 S. Ct. 19 (1975) (prisoners' rights case); *Bond v. White*, 508 F.2d 1397 (5th Cir. 1975) (voting rights case); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974), *rev'd mem.*, 421 U.S. 983 (1975) (civil rights, prisoners' rights); *Fowler v. Schwarzwald*, 498 F.2d 143 (8th Cir. 1974) (civil rights); *Cornist v. Richland Parish School Bd.*, 495 F.2d 189 (5th Cir. 1974), *vacated and remanded for consideration of alternate grounds for award*, 507 F.2d 1032 (5th Cir. 1975) (civil rights case on behalf of black teachers); *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974) (reapportionment); *Stolberg v. Members of Bd. of Trustees for State Colleges*, 474 F.2d 485 (2d Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (freedom of speech); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972) (civil rights case); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972) (civil rights case); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) (civil rights); *United Steelworkers of America v. Butler Mfg. Co.*, 439 F.2d 1110 (8th Cir. 1971).

The private attorney general doctrine had also figured in five cases that had been before the Supreme Court. *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974) (attorneys' fees denied on other grounds); *Bradley v. School Bd.*, 416 U.S. 696 (1974); *Northcross v. Board of Educ.*, 412 U.S. 427 (1973) (decided on other grounds); *Hall v. Cole*, 412 U.S. 1 (1973) (decided on other grounds); *Sims v. Amos*, 409 U.S. 942 (1972), *aff'g mem.* 340 F. Supp. 691 (M.D. Ala. 1970) (alternate holding).

The private attorney general doctrine had been favored by a number of authorities. *Hearings on the Effect of Legal Fees in Pro Bono Publico Cases Before the Subcomm. on Representation of Citizen Interests, Senate Judiciary Comm.*, 93d Cong., 1st Sess. (1973); *Nussbaum, Attorneys' Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 300 (1973); *Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222 (1973). *See also* sources cited note 9 *supra*.

Before *Alyeska*, it was widely assumed that the private attorney general doctrine had been well established, although the Supreme Court had not yet ruled directly on the issue. It is not surprising, therefore, that the parties in *Alyeska* did not dispute the existence of the exception; briefs were devoted almost entirely to whether the presumed doctrine was *applicable* in the case. *See generally* Brief for Petitioner, Brief for Respondent, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

Congress had forbidden awards on that basis.²³ This conclusion was based on a construction of the Fee Act of 1853,²⁴ enacted, the Court found, to reaffirm the rule that "attorneys' fees are not ordinarily recoverable."²⁵ The Fee Act did not alter the courts' equitable power to

23. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

24. The statute upon which the Court principally relied was the modern version of the Fee Act of 1853, ch. 80, 10 Stat. 161 (1853), which has been reenacted regularly and is now 28 U.S.C. §§ 1920-23 (1970). The unilluminating history of the Act is given in 421 U.S. at 244-60, but the Court relied principally upon the present language:

Taxation of costs.

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under Section 1923 of this title.

A bill of costs shall be filed in the case, and upon allowance, included in the judgment or decree.

28 U.S.C. § 1920 (1970).

Docket fees and costs of briefs.

(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 (including a default judgment whether entered by the court or by the clerk) 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.

(b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

\$25 where the amount involved is not over \$1,000;

\$50 where the amount involved is not over \$5,000;

\$75 where the amount involved is over \$5,000.

28 U.S.C. § 1923 (1970).

The statutory language is essentially unchanged from the 1853 Act, and the amounts of docket fees have not changed. What were reasonable fees a century ago have become, by the steady erosion of inflation, inconsequential amounts. It was the small size of the docket fees that allowed the Court to argue that the fee schedule represented, in effect, a denial of attorneys' fees.

25. 421 U.S. at 257. Congressional intent to disallow attorneys' fees awards was found in enactment of a statute that permits those awards; the Court apparently believed, but did not say, that failure to increase the awards revealed a congressional intent to disallow them.

award attorneys' fees under the well-established "common-benefit" and "bad-faith" exceptions. By enacting other statutes that allowed or required the award of attorneys' fees to private attorneys general, however, Congress reserved to itself the power to create that exception in specific circumstances.²⁶ If courts were permitted to adopt a private attorneys general doctrine, the range of discretion necessarily involved would allow the courts to "jettison" the traditional rule entirely.²⁷ Furthermore, the courts would repeatedly come into conflict with Congress' explicit withdrawal of authority to award attorneys' fees in successful suits against the United States.²⁸ It would therefore be an invasion of the legislature's province for the judiciary to fashion a private attorneys general exception.²⁹

Justices Marshall and Brennan dissented, reasoning that the numerous exceptions to the American rule created by the courts were founded, as the majority conceded, on the inherent equitable powers of the judiciary.³⁰ The Fee Act could not be construed as withdrawing this authority, for, Justice Marshall observed, the Supreme Court had held that the statute did not deprive the courts of equitable powers to award attorney's fees; the Fee Act was an "exception" to the American rule, not its "embodiment."³¹ The Mineral Leasing Act³² and National Environmental Policy Act,³³ which were at issue in the courts below, did not provide explicitly for the award of attorneys' fees, but Justice Marshall refused to interpret this silence to mean that awards of fees were prohibited: "[I]mplied restrictions on the power to do equity are disfavored."³⁴ Noting that the Court had awarded attorneys' fees in the face

26. *Id.* at 260-62.

27. *Id.* at 263.

28. *Id.* at 267, citing 28 U.S.C. § 2412 (1970) (costs allowed against the United States "shall not include attorneys' fees").

29. *Id.* at 268. This line of argument, based on statutory construction, was not urged by Alyeska in its petition or brief, and so was not rebutted by respondents; nor had the argument appeared in lower court decisions. Commentaries had customarily treated the Fee Act as an exception to the court-made rule denying attorneys' fees as costs, and most litigation under the statute had been brought by attorneys attempting to recover docket fees according to the statutory schedule. See, e.g., SPEISER §§ 12:22-12:46.

30. 421 U.S. at 272, citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).

31. *Id.* at 280, quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 n.11 (1967) (§ 1923 termed a "general exception" to the American rule).

32. 30 U.S.C. § 185 (1970).

33. 42 U.S.C. § 4321 (1970).

34. 421 U.S. at 281, citing *Hecht v. Bowles*, 321 U.S. 321, 329 (1944).

of much stronger evidence of contrary Congressional intent than was found in *Alyeska*,³⁵ Justice Marshall concluded that the Court should have recognized the private attorneys general exception. He suggested that prevailing plaintiffs recover attorneys' fees, when

(1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiffs' 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.³⁶

The circumstances of this suit, Justice Marshall said, met these criteria.³⁷

Neither the majority nor the dissent dealt explicitly with a severe difficulty in a judicially-established private attorneys general exception—the possibility of conflict between courts and Congress—although

35. In *Hall v. Cole*, 412 U.S. 1 (1973), and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Court accepted the argument that provisions of a statute which did not specify the authority to award attorneys' fees nevertheless implied such authority even though other sections of the same statute included express provisions for recovery of attorneys' fees.

36. 421 U.S. at 285.

37. *Id.* at 285-88. Justice Marshall claimed that the public was the class that benefited from the litigation. The environmental groups forced Congress to revise the Mineral Leasing Act of 1920 rather than permit its continued evasion. More stringent safety and environmental standards were included in the revised statute, 30 U.S.C. § 185 (Supp. III, 1973), and a greater degree of compliance with NEPA was secured, although the environmental issues were never reached by the court of appeals.

Justice Marshall did not indicate what "important right" had been vindicated, nor why the right was important. The second criterion presented no difficulty, but the third required extended discussion. The class that benefited from the litigation, if any, would be the citizenry of the United States, but 28 U.S.C. § 2412 (1970) forbade shifting attorneys' fees to the United States in most cases. A second possibility, taxing the fees to the State of Alaska, had been rejected by the court of appeals. That option would have raised a constitutional question, since some courts have held that such awards are barred by the eleventh amendment. *E.g.*, *San Antonio Conservation Soc'y v. Texas Highway Dept.*, 496 F.2d 1017 (5th Cir. 1974). *Contra*, *Kirkland v. Department of Correctional Servs.*, 374 F. Supp. 1361 (S.D.N.Y. 1974). *See generally* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975). Of the three defendants in the case, *Alyeska* was least able to shift the burden of fees to the public generally, but it was the only one not foreclosed by statutes or, possibly, the Constitution. Marshall argued that the oil companies did business in 49 states and accounted for 20 percent of the national oil market; the companies were therefore able to "redistribute the additional cost to the general public." 421 U.S. at 288. This reasoning strongly resembles the enterprise liability theories gaining some acceptance in tort law. *See, e.g.*, *Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

that difficulty was well displayed in *Alyeska*. Three conservation groups had halted work on the pipeline for three years, and had sought a permanent bar to construction along the route chosen by the oil companies. In such circumstances an award might easily have appeared to be a tax levied on private companies to support efforts to obstruct a program favored by Congress. Justice Marshall's criteria would not assist courts in forestalling such difficulties, for he gave no hint of what "rights" were "important" enough to warrant protection, nor did he say how the importance of the environmental and economic objections raised by plaintiffs should have been measured against the value of the oil the companies wished to transport, or the losses they suffered in delay.³⁸

If Marshall's criteria failed to resolve such difficulties, the majority sought merely to evade them. Justice White noted the difficulty courts would have in determining what were "important" rights whose vindication should be financed by defeated defendants, but concluded only that Congress must unravel this difficult question.³⁹ This conclusion seems disingenuous. Congress could not easily enact a statute permitting courts, in their discretion, to award attorneys' fees to successful plaintiffs who vindicate important public rights or policies. An exception this broad would clearly swallow a rule which Congress approves. To draw the statute more narrowly, Congress would have to specify what is "important," and this is precisely the term that eludes definition. Constitutional rights are important, but to allow the award of attorneys' fees in all suits in which constitutional rights are asserted would again dissolve the rule into the exception. No general category of rights is obviously of more importance than

38. Added construction costs attributable to the three-year delay in construction were estimated by the court of appeals at roughly \$600 million. *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1032, 1043 (D.C. Cir. 1974). An estimate of \$12-15 billion in "resource costs" of the delay was made in Myers, *Federal Decisionmaking and The Trans-Alaska Pipeline*, 4 *ECOLOGY L.Q.* 915 (1975). The three judges who dissented in the court of appeals used extraordinarily strong language in characterizing the plaintiff conservation groups' action as a "substantial disservice to our country." 495 F.2d at 1043. In a separate dissent, Judge MacKinnon said, "When we subsidize lawyers to bring such suits against our national interests we promote our own destruction." 495 F.2d at 1041 (emphasis in original). Strong language has also been used to describe the private attorneys general theory in other settings. See, e.g., *Robinson v. Union Carbide Corp.*, 380 F. Supp. 731, 734 (S.D. Ala. 1974) (footnote omitted): "[C]lothing the 'solicitors' with the grand name of 'private attorneys general' . . . What perfidy."

39. 421 U.S. at 264.

constitutional rights; in fact, general categorization seems no more possible for Congress than for the Court.⁴⁰

Instead of formulating a general rule, Congress might review each existing statute and designate those that involve important rights. Aside from the absurdity of such a procedure, Congress could not foresee that, for instance, the right-of-way limitations in a 1920 statute would be used to protect important public rights fifty years later. In recent years Congress has enacted statutes for attorneys' fee awards to private attorneys general in specific circumstances, but has not attempted to revise the many existing statutes. This behavior is consistent with a determination by Congress that the courts should create exceptions in suitable cases arising under older statutes. The Court, however, held that Congress intended to *prohibit* the courts from making private attorneys general awards under existing statutes.

Although Congress cannot easily enact a general statute providing for private attorneys general awards, lower courts may be able to accomplish a similar result by ingenious application of the remaining exceptions to the rule against awarding attorneys' fees. Within weeks of the *Alyeska* decision, the Court of Appeals for the Fourth Circuit held that an award of attorneys' fees, made under the private attorney general exception before *Alyeska*, could be sustained as within the "obstinate obduracy" exception.⁴¹ Similarly, the private attorneys general doctrine, as formulated by Marshall, and disowned by the majority, strongly resembles the common-benefit doctrine.⁴² A shift in nomen-

40. Three months after *Alyeska*, however, Congress identified one class of rights as of the greatest importance. On August 6, 1975, it added § 14(e) to the Voting Rights Act of 1965, 42 U.S.C.A. § 1973(1)(e) (Supp. 1976), which provides in its entirety:

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.

In *Lytle v. Commissioners*, — F.2d — (4th Cir. 1976) (reapportionment), the district court awarded attorneys' fees on alternative theories of common benefit and private attorneys general. The court of appeals held that *Alyeska* would have required reversal, but that the enactment of § 14(e) of the Voting Rights Act provided authority for the award. The Fourth Circuit quoted with approval the trial court's statement, "If I can find legal authority to award attorney's fees, I want to do that." *Id.* at —, quoting —.

41. In *Thonen v. Jenkins*, 374 F. Supp. 134 (E.D.N.C. 1974), *aff'd*, 517 F.2d 3 (4th Cir. 1975), a 42 U.S.C. § 1983 (1970) free-speech case, attorneys' fees were awarded on a private attorneys general theory. After the Supreme Court's *Alyeska* decision, the Fourth Circuit affirmed, but on an "obdurate obstinacy" theory, 517 F.2d at 6, an alternative ground relied upon in the court below, 374 F. Supp. at 139.

42. See text accompanying notes 19 & 26 *supra*. In *Federation of Civic Ass'ns v. Volpe*, 520 F.2d 451 (D.C. Cir. 1975), the court of appeals ordered the district court to

clature, therefore, may evade the effects of *Alyeska* in many instances that would have been thought of as private attorneys general cases.⁴³ The underlying question of when attorneys' fees should be awarded to the winning party in public-interest litigation remains unanswered.⁴⁴ This question eventually will need resolution, given the increasing number of such suits and the evident inclination of lower courts to award attorneys' fees to those serving the public interest.

reconsider, on a common-benefit theory, its denial of an award of attorneys' fees to successful plaintiffs. The appeal had been urged solely on a private attorneys general theory.

43. See *Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975) (private attorneys general award affirmed as within obstinate obduracy exception); notes 40 & 41 *supra*. The precise effect of *Alyeska* is far from clear. Most of the lower court decisions affirming a private attorneys general doctrine dealt with civil rights statutes and borrowed some of the language of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), see note 21 *supra*, in finding a congressional designation of those statutes or rights as important. Whether the Supreme Court will find that these cases correctly construed the intent of Congress remains to be seen. Although in *Alyeska* the Court said these cases were decided wrongly, 421 U.S. at 270 n.46, the specific issues have not yet been before it. It has been argued persuasively that the private attorneys general exception can be maintained for civil rights cases without otherwise altering the usual American rule. See Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379, 414 (1973). But see *Gilliam v. City of Omaha*, 524 F.2d 1013 (8th Cir. 1975) (*Alyeska* applied to civil rights case). Such an exception based on congressional intent would not conflict with *Alyeska*. In cases in which a money award is possible and a common benefit rationale can easily be applied, *Alyeska* would not alter the present exception to the American rule. The case does preclude the award of attorneys' fees to successful plaintiffs in cases brought under environmental statutes. It is not at all clear why the Court should suppose Congress meant not to encourage such suits. Private suits have consistently been an important factor in the enforcement of environmental statutes. See *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1034 n.4 (D.C. Cir. 1974). Nor is it clear why environmental values, which courts have treated with the utmost gravity, see *Scientists Institute for Pub. Information v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973), as affecting all of the public and generations unborn, should be given less weight than the rights of claimants to an estate, a typical common benefit context.

44. The private attorneys general doctrine first appeared as a result of judicial efforts to broaden standing to challenge administrative action, see note 21 *supra*, and so it is no surprise that this question presents itself to administrative agencies as well as to courts.

The contrast between expansive participation rights in theory and limited public interest representation in practice [because of the high costs of litigation] is likely to generate demands for new measures to ensure adequate funding for public interest representation in agency proceedings.

Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1773 (1975).

The possibility of giving public assistance to intervenors on behalf of the public interest has been considered in some agencies. See, e.g., Nuclear Regulatory Comm'n Press Release, Aug. 25, 1975. See generally Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815 (1975).