Supplementary Material

Chapter 9: Liberalism Divided—Constitutional Authority and Judicial Power

Congressional Hearings on Attorney Fees and Public Interest Litigation (1975)[1]

In many common-law countries, the attorney fees of the winning party in a civil suit are part of the award levied against the losing party. By contrast, the courts in the United States adopted the "American rule," by which each party pays its own attorney costs regardless of the outcome of the suit. Fee shifting between parties is limited to a few exceptional circumstances. The Warren Court had chipped away at the American rule, but the Burger Court reaffirmed the American rule and held that the federal courts did not have a general equity power to award attorney fees to the winning party in cases that might create common benefits. By the time of that decision, Congress had increasingly included fee-shifting arrangements in federal statutes to encourage "private attorneys general," litigation by private parties to vindicate public policy commitments. The Civil Rights Act of 1964 was an important model, authorizing courts to award attorney fees in employment and housing discrimination lawsuits. Such incentives for private litigation were advocated by some as a way of supplementing or circumventing the enforcement activities of the executive branch. A number of civil rights, plaintiff lawyer, and other interest groups eagerly lobbied Congress to adopt more such provisions that might provide financial assistance to their own litigation campaigns. In some areas of law, including constitutional law, such financial incentives were seen by many as valuable tools for helping individuals to effectuate their rights and for bringing contested questions before the courts. Some advocated that Congress take an even broader approach, overturning the American rule as a general feature of the American legal system or in a broad class of cases involving public interest litigation. Although generally included in statutes favored by liberal interests, some conservative legislators also urged the adoption of fee-shifting provisions for civil suits by private actors defending themselves against government tax or regulatory actions.

Under what circumstances do civil suits serve "the public interest," as distinct from private interest? Are there ever any situations in which the public does not benefit from the resolution of a civil suit? When the government is involved in a civil suit, does the public only benefit if the government wins? Why should the government only pay attorneys' costs in cases in which a private actor is successful in asserting a right in court? What is the difference between suits in which rights are successfully asserted and cases in which rights are not successfully asserted? Are rights asserted by property owners "an entirely new thing," or are the National Association for the Advancement of Colored People and the National Association of Realtors similarly situated when advancing constitutional rights claims against the government? Are there circumstances in which the costs of advocacy in administrative hearings and the development of regulations by agencies should be borne by the government? Should government pay the attorneys' fees in criminal cases that are won by the defendant? Are constitutional rights underenforced because of the cost of litigation? Should the American Civil Liberties Union be paid by the government every time it wins a case?

REPRESENTATIVE JOHN F. SEIBERLING (Democrat, Ohio)

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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

[1]Excerpt taken from Hearing before the Committee on the Judiciary, U.S. House of Representatives, *Awarding of Attorney's Fees*, 94th Cong., 1st Sess. (1975).

of public interest law is primarily concerned, at this time, with civil rights, environmental protection, consumer protection, and anti-poverty law. . . .

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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 action becomes too great, there will be no private enforcement. . . . [W]hen a private lawsuit vindicates public policy and the public receives a substantial benefit, the private litigator should normally be awarded attorneys' fees.

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. . . . 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.

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REPRESENTATIVE ROBERT F. DRINAN (Democrat, Massachusetts)

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. . . . When citizens are acting as "private attorneys general" in representing the public interest, it seems to me that 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.

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REPRESENTATIVE PHILIP M. CRANE (Republican, Illinois)

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What brings me here this morning is a deep-seated concern that the rise of the independent and the semiautonomous Federal regulatory agencies . . . 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 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.

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. . . . [W]ith 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.

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MARY FRANCIS DEFNER, Lawyer's Committee for Civil Rights

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[T]he 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.

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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 and 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.

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REUBEN B. ROBERTSON III, Public Citizen Litigation Group

. . . . 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 . . . 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. Representation 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. . . . 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. . . .

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The bills presently before the subcommittee fail to address an 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 regulations 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

largely dominated by the supposedly regulated firms. . . . 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. . . .

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REX E. LEE, Assistant Attorney General

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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 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 . . . was responsible for the entire costs of it, he should be required to pay the costs of 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.

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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. . . .

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.

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Attorneys' fees paid by the Government do not 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'.

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. . . . 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.

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REPRESENTATIVE ROBERT F. DRINAN (Democrat, Massachusetts)

. . . . 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?

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LEE

. . . [M]aybe 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.

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?

LEE

Because . . . 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 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.

WILLIAM D. NORTH, National Association of Realtors

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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. . . .

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The Constitution . . . 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 the Constitution will remain unknown, and hence, unremedied.

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[I]f 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.

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REPRESENTATIVE ROBERT F. DRINAN (Democrat, Massachusetts)

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I am afraid that I am not sympathetic to your [NORTH] 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.

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