



10-1974

Alyeska Pipeline Service Co. v. Wilderness Society

Lewis F. Powell Jr.

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CONFERENCE 10-7-74

Court CA - D.C.

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 73-1977

Submitted, 19...

Announced, 19...

ALYESKA PIPELINE SERVICE COMPANY, Petitioner

vs.

THE WILDERNESS SOCIETY, ET AL.

7/3/74 Cert. filed.

*I stayed out
pending checking to
see whether I should
recess.*

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.		✓	✓										
White, J.		✓											
Stewart, J.		✓											
Brennan, J.		✓	✓										
Douglas, J.		✓	✓										
Burger, Ch. J.		✓											

Pass

Penny - May I see Petition & Brief
in this case.

Court

Discussion

(Having read
opinions below,
I will vote to

Grant)

See
Wilkey's
dissent

CADC allowed attys fees in
Alaska Pipeline case on theory
that Resps acted a "private
attys general" - a theory not
yet approved by this Ct.

I am ~~not~~ not convinced of the
merit of the "private atty gen"
theory - see Baugh Punta. This
would encourage the bringing of

Granted
10/9

Preliminary Memo

a vast amount
of litigation by
lawyers (e.g.
the substantial "bar")

Summer List 17, Sheet 1

No. 73-1977

ALYESKA PIPELINE
SERVICE CO.

v.

WILDERNESS
SOCIETY

Cert to CA D.C. of lawyers
(Bazelon, C.J.,
Wright, Levanthal,
Robinson; MacKinnon,
Robb, Wilkey, dissenting;
en banc)
Federal/Civil

Timely
who find "clever"
to buy one share
of stock to
just derivative
stockholder suits)

1. Petr, a consortium owned by various American oil
companies, seeks review of the decision of the CA D.C., which
awarded expenses and attorneys' fees to the resps, public
interest groups in the environmental protection area, for
litigation seeking to prevent the Secretary of the Interior
from granting right-of-way and contiguous land-use permits
across public lands for the construction of the trans-Alaska
pipeline. Petr contends that the CA erred in extending the

case is so complicated that review of discretionary
exercise would be difficult.
Penny

This suit was brought
against Interior Dept. The
Petr. & State of Alaska
intervened 18 mos. later.
CADC has ordered 1/2 of total
legal fees to be pd by Petr.

This memo is
too long for
the case. It's
true this Ct
hasn't explicitly
approved the
private AG
theory, but
the delay hasn't
yet caused
any harm.
I question the
appropriateness
of this case
for cert, even
if the Court
feels obligated
to address the
question
eventually.
The award of
fees is governed
by equitable
discretion,
and this

This suit was vs Dept. of Int.

Petr & St. of Alaska
intervened 18 mo. later.

Judgment is to pay $\frac{1}{2}$ of fees
- at most should be $\frac{1}{3}$ rd.
X X X

Suit not necessarily in
public interest. Congress
~~was~~ reversed result promptly.
Increased cost \$ 5 billion

Counsel
filed
affidavits
- venue

[RE PRELIMINARY MEMO
9/11/1974]

Gail - Reminded me to take
Briefs to Conference

Briefs are

Separate

(in Book IV)

covered
label
off book
- cover

private-attorney-general doctrine to all cases in which action by a federal official is successfully challenged on the ground of failure of compliance with a federal statute even though that statute does not reflect a policy which Congress considered of high priority; to issues upon which the attorneys did not succeed, in excess of the amounts paid to the attorneys by their clients, and against a private party which had no control over the actions challenged; and in a manner which amounts to an uncompensated taking in violation of the Fifth Amendment.

2. FACTS: On the merits of resps' application for a preliminary injunction, the USDC (D. D.C. 1970) (Hart) concluded that the Secretary of the Interior had not complied with NEPA with respect to the applications for right-of-way and land-use permits by the oil companies planning to build the trans-Alaska pipeline and that the applications for the right-of-way permits exceeded the permissible width under the Mineral Leasing Act of 1920, 30 U.S.C. § 185. A preliminary injunction was issued. Wilderness Society v. Hickel, 325 F. Supp. 422. Subsequently, however, when the question of a permanent injunction was before the DC, the court dissolved the preliminary injunction, denied the permanent injunction, and dismissed the complaints. An expedited appeal was taken to the CA D.C. The CA (Bazelon, C.J., Wright, Leventhal, Robinson; MacKinnon, Robb, Wilkey, concurring in part, dissenting in part) (en banc) reversed on the ground that the Secretary of the Interior did not

have the authority to issue the special land-use permits requested by petr and that granting the permit would violate Section 28 of the Mineral Leasing Act, supra, and applicable regulations of the Bureau of Land Management. The NEPA questions were not decided on the ground that they were not ripe for adjudication. Wilderness Society v. Morton, 479 F.2d 842 (1973). Cert was denied. 411 U.S. 917 (1973).

After this decision by the CA, Congress passed P.L. 93-153 (November 16, 1973), which authorized the issuing of permits such as those sought by petr, provided that there be no further actions taken under NEPA with respect to the construction of the pipeline, and limited judicial review of actions taken by federal officers with respect to the pipeline to constitutional questions, questions of the validity of P.L. 93-153 itself, and to claims that the actions were beyond the authority conferred by the statute. Prior to the enactment of this legislation reps had filed bills of costs in the CA rather than in the DC. Resps do not explain why the DC was by-passed, although petr provides a quotation (presumably of the resps) that the DC "acted merely as a conduit. . . ."

The CA observed that traditional grounds for the awarding of attorneys' fees -- punishment of the bad-faith conduct of the opposing party, the spreading of the costs of litigation which has conferred a benefit on an ascertainable class -- did not apply to this case. It noted this Court's comment that the awarding of attorneys' fees was not a narrow power but rather

one which should be used whenever "overriding considerations indicate the need for such a recovery." Hall v. Cole, 412 U.S. 1, 5 (1973) (quoting from Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-392 (1970)). The CA then found good reason for the adoption in this case of the "private-attorney-general" rule, i.e., awarding attorneys' fees is justified in that the challenged action violates a Congressional enactment causing slight injury to any one individual but great harm to important public interests affecting a large class of persons. The CA conceded that one other CA had been reluctant to award attorneys' fees under this theory, Bradley v. School Board of City of Richmond, 472 F.2d 318, 329-331 (CA 4 1972) (subsequently vacated and remanded on other grounds, 42 U.S.L.W. 4703 (1974)). But the CA concluded that under the specific facts of this case, traditional policies underlying the reluctance to award attorneys' fees actually justified such an award in this litigation.

The main reason for the traditional reluctance is that parties might be improperly discouraged from vindicating their rights in court if the penalty for losing is the payment of opposing counsel's fees. Here, however, petr had a tremendous financial stake in the litigation, and any potential award would appear insignificant in comparison. Thus petr would not be deterred from protecting its interests when the stakes involved were so great. But resps, if they had to bear their own costs, could be significantly deterred from bringing meritorious

litigation. Moreover, the lawsuit was brought to vindicate important statutory rights of all citizens.

As a result of the lawsuit, the Mineral Leasing Act was amended by Congress to permit the building of the pipeline but with new restrictions including a requirement that the recipient of the right-of-way pay all reasonable costs of processing its application and of monitoring the right of way, a provision for strict liability of the operator of the pipeline for damages resulting from the use of the right of way, and a requirement that the operator maintain a \$100 million liability fund to satisfy any claims. Resps' efforts as to NEPA issues also were fruitful in that Congress included provisions in the legislation to ensure protection of environmental interests. The fact that the CA did not decide the NEPA questions and that Congress provided that the environmental impact statement submitted was sufficient does not mean that resps should be precluded from an award of fees. Resps served as a catalyst for change and thereby served an important public function. Prior to this litigation, the Department of the Interior had not prepared an impact statement. The preliminary injunction given by the DC in effect required that such a statement be prepared. The public thereby received valuable environmental information, and environmental protections were written into the subsequent legislation. This litigation helped focus the issues for Congress. Moreover, the right-of-way issues themselves were related to the NEPA questions. Resps

sought summary judgment in the DC on the Mineral Leasing Act questions, but petr opposed the motion and therefore required the briefing of the complex NEPA issues, which because of the leasing question never became ripe for adjudication. All these factors constitute a favorable basis for the equitable award of attorneys' fees.

Of the parties opposed to the resps, only petr could be required to pay the attorneys' fees. Under 28 U.S.C. § 2412, they could not be imposed on the United States. The State of Alaska had voluntarily participated in the lawsuit to present a different version of the public interest involved. Taxing the fees against it would undermine rather than further the interest of having adequate spokesmen for public interests. But in recognition of the government's role in the case, petr would only be taxed one-half of the total fees, with resps assuming the rest. Since the actual assessment of fees necessarily involves factual questions, the case would be remanded to determine the extent and nature of the services rendered. The final determination of the size of the award would turn on the time and labor expended, the benefit conferred to the public, and the skill required by the novelty or complexity of the issues. Resps should be compensated for actual payments made to counsel, but the award should not be limited to the amount paid or owed by the resps to counsel and should reflect the reasonable value of the services rendered. This type of litigation should not depend upon the charity of attorneys volunteering time and services.

The dissents attacked the notion that resps had served a public interest through this lawsuit. They read the legislation enacted by Congress as indicating that the NEPA claims raised by resps were not in the best public interest. Judge MacKinnon stressed that those claims in essence were that foreign sources of oil be considered, and that placing this country's oil supply under foreign control would not be in the public interest. Resps' success with the leasing-permit issue is a narrow basis for the equitable award of attorneys' fees. The majority's actual approach seems to be that it is fair that petr assume some of the attorneys' fees. Judge Wilkey joined in the skepticism directed at the claim that resps have benefited the public in any substantial way. Resps were prepared to bring suits of this sort; indeed litigation of this sort is one of the main reasons for their existence. Resps in fact early in the litigation indicated that there would be no fees charged in this case. This was one of their principal arguments in opposition to a motion for a change of venue to Alaska, i.e., that resps could not afford to send their present lawyers to Alaska and they could not obtain counsel in Alaska who would handle the litigation without fees. The majority responds to this argument by noting that resps at that early stage in the litigation could not presume that they would win in a way that would justify the awarding of fees. Indeed the case law allowing such an award in an environmental protection action on a private-attorney-general theory had not developed.

3. CONTENTIONS:

a. Petr contends that this Court has never decided whether attorneys' fees can be awarded without on a private-attorney-general rationale. statutory authorization/. See F.D. Rich Co. v. United States, 42 U.S.L.W. 4783, 4788 (1974). The issue is now squarely presented in this case. The Court has accepted the theory of the private-attorney-general being entitled to attorneys' fees for vindicating a policy given a high priority by Congress when a statute gives the court that discretion. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). Lower courts have used the theory without statutory authorization in cases involving fundamental constitutional rights. The decision below would extend the theory to any case in which non-compliance by a federal official with a federal law, without any finding of a vindication of a Congressional policy of high priority. Moreover, the decision below is in conflict with the Bradley decision in CA 4. See 472 F.2d, at 330.

b. Petr argues that the CA awarded fees for work on issues as to which resps did not prevail on the merits. They were completely unsuccessful on the NEPA issues. Moreover, there is no justification for the award of fees greater than the salaries actually paid counsel by resps. Any greater payment will subsidize other litigation which may or may not vindicate important Congressional policies. The fees are assessed against the party in the litigation with no control over the actions challenged. The award will work to discourage intervenors to participate in

litigation of this sort, and in that manner violates the policy governing intervention in the Federal Rules of Civil Procedure.

c. The assessment of fees against petr on the ground that there was a public benefit provided by resps amounts to a taking without compensation in violation of the Fifth Amendment. Armstrong v. United States, 364 U.S. 40, 49 (1960).

d. Resps argue that they did have a substantial impact on the manner in which the pipeline will be constructed by bringing this lawsuit. Technological and environmental changes were made in the plans as a result of this litigation. Congress was given an opportunity to decide the specific policy issues presented by the plans to construct the pipeline, and conditions designed to protect the environment were provided. The award of fees was fully consistent with principles previously established by this Court. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391 (1970); Hall v. Cole, 412 U.S. 1, 4-5, 13 (1973); F.D. Rich Co. v. United States, 94 S.Ct. 2157, 2165 (1974); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). There were overriding considerations justifying such an award in this case.

e. Resps next contend that there is no conflict among the circuits on this question. An arguably contrary decision by CA 4 in Bradley, supra, was vacated by this Court. Other circuits are in accord with the position of the court

below. See cases cited in resps' brief in opposition, at p. 18. Indeed even the dissenting judges in the CA did not raise an objection to the theory underlying the award, but only to the finding that resps had served any substantial public interest.

f. Resps argue that the decision is consistent with established principles of this Court and that lower courts are now deciding cases in a manner which does not require this Court to provide more guidelines. The ~~only~~ argument that these cases will stimulate undue litigation or impair governmental decision-making must be based on pure speculation.

g. Resps contend that their environmental efforts served as a catalyst for change and are reflected in the conditions imposed on pipeline construction, that the leasing-permit issues upon which they did prevail were interrelated with the NEPA questions, and that the fact that the NEPA questions were litigated by resps but were not adjudicated as not ripe was the result of petr's insistence. CA 5 has also allowed attorneys' fees based on the attorney-client relationship rather than on the amount owed by the client to the attorneys. See Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 538 (CA 5 1970); Lee v. Southern Home Sites Corp., 444 F.2d 143 (CA 5 1971); Clark v. American Marine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), aff'd, 437 F.2d 959 (CA 5 1971). Any objection to the actual amount to be awarded is clearly speculative, since the DC will explore the issue. Finally, petr's Fifth Amendment

argument is frivolous. This Court has upheld in the past awards of attorneys' fees based on the public interest served by the plaintiffs' lawsuit. See, e.g., Hall v. Cole, supra, and Mills v. Electric Auto-Lite Co., supra. There is no unfairness in compelling petr to pay the fees since petr's actions gave rise to the proceedings, petr entered the proceedings to protect its own interests, and petr's litigation efforts contributed greatly to the cost and complexity of the proceedings.

4. DISCUSSION: As F.D. Rich, supra, indicates, this Court has not decided whether attorney fees can be awarded without explicit statutory authorization on the grounds of the private-attorney-general theory. The decision of the CA below is firmly based on this rationale. Prior decisions of this Court in recent years have pointed to the considerable discretionary powers of a court of equity over the awarding of fees, see Cole v. Hall, supra, and this Court clearly will have to decide eventually whether those powers have the scope which the CA D.C. has indicated. CA 4's opinion in Bradley, supra, although not technically having precedential force since it no longer represents the law of the case, certainly can realistically be taken as expressing the rule in that circuit. There is, therefore, a conflict between circuits on legal theories which may spawn future conflicts in decisions.

This case provides an interesting factual context for the decision of this question. The efforts of resps were not so

clearly to the public's benefit that, given a theoretical basis for the award, they undoubtedly merited the recovery of litigation expenses; but it is also evident that, though not triumphant on the merits of most of their arguments, they did cause the policy-making system to reconsider the problem, with some changes resulting from the reconsideration. Thus the record would provide factual issues which the Court could use to delineate the guidelines which courts should use in determining whether the private-attorney-general rule (if accepted) justifies an award in a particular case. One difficulty posed by the record, however, is the absence of a final determination of the actual amount of the award and the specific factual basis for it (in terms of hours spent working on the issues, the skill required to handle the issues, and the benefit conferred to the public). This case is somewhat different from most in that the CA was the first court to decide the question of awarding attorneys' fees. Thus the Court perhaps would not have a sufficient factual record as a basis for laying down all the necessary guidelines.

Petr's Fifth Amendment argument is frivolous.

There is a response.

9/11/74

Malysiak

CA Opinion in
Petrn. Appx.

ME

MEMORANDUM

TO: Mr. Justice Powell

DATE: January 18, 1975

FROM: Joel Klein

No. 73-1977, Alyeska Pipeline Service Co.
v. The Wilderness Society

*Exxon's interest
is new &
I've decided
not to
participate
in the
decision.
L.F.P.
1/23/75*

Let me state at the outset that my emotional sympathies are with respondents in this case since I believe public interest law firms have served an important function which, as foundation funding disappears, will no longer be served. Nevertheless, I have little difficulty with reversing CADC's decision in this case. There are two ways to write such a decision, either of which I find persuasive.

1. A decision resting on a broad rationale would hold that federal courts lack the equitable power to award fees to private attorneys general absent Congressional authorization. The Court's prior decisions have limited attorneys' fees to "bad faith" cases and "common benefit" cases. CADC readily admits that neither of these categories is applicable here. The justification for a private attorney general approach is that, in certain circumstances, the public interest is not served adequately by government enforcement or the typical ebb and flow of the private market. One need have no quarrel with this premise - I do not - and still be able to conclude that the courts should not, and really cannot, decide when

private attorneys general are necessary. Congress is uniquely situated both to define the public good and to decide how best to implement it. In certain areas, Congress has deemed it desirable to enact ^a statutory right to attorneys' fees in order to encourage private enforcement of the public good. But, where Congress has not decided that such a public need exists, then I think it is anti-democratic for courts even to try to determine what the public interest is and whether a shifting of attorneys' fees is a desirable way of furthering that interest. *To see the problems presented when the courts do get involved,* One need only look at the present case in which four judges thought respondent's suit was in the public interest, while three judges sharply disagreed. (Although I agree with the majority on the merits, I nevertheless believe that it is for Congress, in the first instance, to make these determinations).

2. A more narrow ground on which to reverse is that, irrespective of the general viability of equitable shifting of fees for private attorneys general, there is no justification for requiring petitioner to pay in this particular case. Respondents' action was against the Secretary of Interior seeking to force compliance with the Mineral Leasing Act and NEPA. Thus, the important public policy ^{implicated,} indicated, such as it is, was in requiring the Secretary to enforce existing statutes. Petitioner should not be liable for the Secretary's failure even though it might benefit thereby. CA5 recently rejected CADC's approach on precisely this basis. Sierra Club v. Lynn (Wisdom, Clark and Grooms, d.j.).

Admittedly, the United States is exempt from paying attorneys' fees under 28 U.S.C. § 2412. But here, again, if Congress wanted to induce private citizens to sue to compel the executive to comply with legislative commands, Congress could make the United States liable for attorneys' fees.

J.K.

ss

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

January 23, 1975

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

No. 73-1742 Train v. Natural Resources
Defense Council
No. 73-1977 Alyeska Pipeline v. Wilderness
Society

Dear Chief:

After further reflection since our discussion at last Friday's Conference, I have concluded not to participate in the decision of the above cases.

I repeat the reasons: In 73-1742 (Train v. Natural Resources Defense Council) Exxon filed a brief amicus indicating that it will be directly affected by the outcome of the case. Until I reviewed this brief in preparation for the argument, I was not aware of Exxon's interest.

In 73-1977 (Alyeska Pipeline v. Wilderness Society), it appears that Exxon is one of the eight large companies which formed Alyeska and which presumably retains substantial interest in it.

My former law firm represented Exxon in Virginia, primarily doing the work of local counsel with respect to real estate matters and the occasional damage suit. Although I personally did not do the Exxon work (and know none of its management people), I have followed the practice to date of staying out of cases in which Exxon is a party. Neither of these cases quite fits the "party" classification, and ordinarily - in view of the guidance given me by the Conference last fall - I would not remain out on account of a brief amicus. Nor would I normally stay out of a case because some client of my former law firm owned a minority interest in a party to a litigation here. The doctrine of "remoteness" must come into play at some point. However, in view of the indications on the record in these two cases of Exxon's substantial interest, I think it best for me not to take part in the decision of either.

I continue to be puzzled as to how long one should stay out of cases such as these. Apart from my old firm's representation I have no interest whatever in Exxon.

I will expect you, of course, to make up for my non-participation here by giving me a full quota of opinions to write in other cases.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

March 14, 1975

No. 73-1977 Alyeska Pipeline v. The
Wilderness Society

Dear Byron:

Please note at the end of your opinion that I took
no part in the consideration or decision of this case.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 17, 1975

Re: No. 73-1977 -- Alyeska Pipeline Service Company v.
The Wilderness Society

Dear Byron:

In due course I shall file a dissent in this one.

Sincerely,

T.M.
T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 19, 1975

No. 73-1977 - Alyeska Pipeline Service Co.
v. The Wilderness Society

Dear Byron,

I agree with your proposed opinion
for the Court in this case, and shall join it
when and if it becomes clear to me that at
least three other members of the Court do not
disagree.

Sincerely yours,

P.S.
✓

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

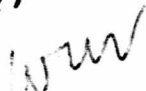
March 19, 1975

Re: No. 73-1977 - Alyeska Pipeline v. Wilderness Society

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 24, 1975

Re: No. 73-1977 - Alyeska Pipeline Service Co.
v. Wilderness Society

Dear Byron:

I shall await the dissent in this case.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1975



Re: 73-1977 - Alyeska Pipeline Service Co. v.
The Wilderness Society

Dear Byron:

Please join me.

Regards,

WRB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 30, 1975

Re: No. 73-1977 - Alyeska Pipeline Service Co.
v. Wilderness Society

Dear Byron:

I have refrained from casting my vote in this case because my initial reaction was like Potter's. Although this is not a constitutional decision, I would be uncomfortable were the case to be decided by a 4 to 3 vote. Such a disposition could occasion difficulty down the road in the next case when a full court might be available. My position in North Georgia Finishing of this Term discloses my discomfort.

The voting situation, however, now appears to be clarified. I therefore am pleased to join your circulation of April 1.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART



May 5, 1975

No. 73-1977, Alyeska Pipeline v. Wilderness

Dear Byron,

This will confirm that I am glad to
join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

[illegible]