

The Burger Court Opinion Writing Database

Alyeska Pipeline Service Co. v. Wilderness Society

421 U.S. 240 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1975

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

Dear Byron:

Please join me.

Regards,

WEB

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: 4/29/75

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service Company, Petitioner,
v.
The Wilderness Society et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[May —, 1975]

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." 495 F. 2d, at 1036.

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

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P

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 3-14-75

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service Company, Petitioner,
v.
The Wilderness Society et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit.

[March —, 1975]

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, — U. S. — (1974), to determine whether this award of attorneys' 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 consti-

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, 28 Am. U. L. Rev. 337 (1973).

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 8, 19, 20, 25-28

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr.~~ Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated:

Recirculated: 4-1-75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service Company, Petitioner,
v.
The Wilderness Society et al.] On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit.

[April —, 1975]

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✓ —
pp 27, 28

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service Company, Petitioner,
v.
The Wilderness Society et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[April —, 1975]

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

p. 28
From: White, J.

Circulated: _____

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service
Company, Petitioner,
v.
The Wilderness Society
et al. | On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit.

[April —, 1975]

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 attorneys' fees was appropriate. We reverse.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 18, 24-25, 30

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

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6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service
Company, Petitioner,
v.
The Wilderness Society
et al. | On Writ of Certiorari to the
United States Court of Appeals
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[April —, 1975]

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18, 24-25

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated:

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7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service Company, Petitioner,
v.
The Wilderness Society et al. | On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit.

[May —, 1975]

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4, 8, 9, 16, 18, 19, 26

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

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8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service Company, Petitioner,
v.
The Wilderness Society et al. On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit.

[May —, 1975]

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 20, 1975

MEMORANDUM FOR THE CONFERENCE

Re: Cases Held for Alyeska v. Wilderness Society,
No. 73-1977

This memorandum covers the remaining two cases held for Alyeska.

1. Tiidee Products, Inc. v. NLRB & Int'l Union of Elec., Radio & Machine Workers.

In unfair labor practice proceedings brought by the respondent union against petitioner, unfair labor practices were found, including a § 8(a)(5) violation. The Court of Appeals in affirming the findings characterized the case as involving a "clear and flagrant violation of the law." It termed petitioner's legal position as "palpably frivolous" and "palpably without merit." It remanded the case to the Board for further consideration of the proper remedies, including the possible "assessment of costs of litigation." Upon that remand in Tiidee I, the Board ruled that "in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order [petitioner] to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including the following costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs and expenses."

Subsequently, the Union brought further charges of unfair labor practices, which again were found, and the Court of Appeals affirmed. Upon remand from Tiidee II for consideration of the proper remedies, the Board, although noting that the Court of Appeals had not termed petitioner's position in defense as frivolous, concluded that litigation

costs should again be assessed against it. It found that the entire course of proceedings between petitioner and the Union had to be viewed together and that petitioner's actions here were a continuation of the practices involved in Tiidee I. ✓

The Court of Appeals, upon the authority of its earlier decision in Food Store Employees v. NLRB, 476 F. 2d 546, 550-551 (1973), affirmed the award of litigation costs to the Union (and reversed the award to the Board, an issue not presented), but limited the award to the costs assumed by the Union in litigating the unfair labor practices themselves in Tiidee I and Tiidee II. Thus the litigation costs arising from petitioner's opposition to the remedies imposed would not be assessed.

The rule that has been adopted below is that the NLRB has authority to shift litigation costs against the charged party where its legal position in the proceedings can be characterized as frivolous since the violation charged is clear. We granted certiorari in Food Store Employees v. NLRB, supra, but did not reach the question "whether the Board's broad powers under § 10(c), 29 U.S.C. § 160(c), to fashion remedies include power to order reimbursement of litigation expenses and excess organizational costs." 417 U.S. 1, 8 n. 9 (1974). Mr. Justice Brennan's opinion for the Court notes that there were facial inconsistencies between the Board's position in Food Store Employees and later in Tiidee. The case was remanded to the Board for further proceedings. On remand the Board has reconciled the cases by saying that the rule followed was "to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful,' where the defenses raised by that respondent are 'debatable' rather than 'frivolous.'" 215 NLRB, No. 142, at 8-9.

The question left open in Food Store Employees is now presented by petitioner. Although the authority to award costs, including attorneys' fees, is premised upon § 10(c), that provision does not expressly authorize cost-shifting. Both the Board and the Court of Appeals, however, have construed the statute to permit an award of costs. There is no conflict on the question. Although I am not certain how I would vote if the merits of the case were before the Court, I would be content with denying certiorari.

John F. Sorenson

2. Jordon v. Gilligan, No. 74-403.

Petitioners brought this suit under 42 U.S.C. § 1983 to challenge a reapportionment plan adopted by respondent state officials. The District Court declared the plan unconstitutional, and the court eventually approved a new plan submitted by respondents. Petitioners then filed applications for an award of attorneys' fees totalling over \$27,000. There was no objection, and the District Court entered an order awarding that amount. Months passed without payment of the award, and petitioners attached a bank account maintained by the State in an Ohio bank. The District Court vacated the attachment upon voluntary payment of the award by respondents. It also denied a motion to vacate the award of attorneys' fees award on the grounds of the Eleventh Amendment. It did not reach the Eleventh Amendment question since it found that its prior order was res judicata.

✓ CA 6 reversed. It concluded that the respondents' failure to oppose the initial request for the award did not result in the order being res judicata or in a waiver of the Eleventh Amendment defense by respondents.

There is some ambiguity in the opinion of the District Court as to the basis of an award of fees here absent the Eleventh Amendment. The District Court quoted at length from another case giving a "private attorney general" rationale for such awards, petition appendix at 4a-5a, but also referred to respondents' failure to object initially. Id., at 3a. The Court of Appeals, however, seems to have viewed Hall v. Cole and the "private attorney general" theory as the underlying basis. Id., at 25a-26a, 34a-35a.

Petitioners have also challenged the reversal by the Court of Appeals of the award of costs in the amount of \$1,262.65.

Since the Court of Appeals seems to have viewed Hall v. Cole and the "private attorney general" rationale as the basis for an award of fees absent the Eleventh Amendment, I would deny certiorari.

[Handwritten signature]
B.R.W.

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

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

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1st DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service
Company, Petitioner,
v.
The Wilderness Society
et al. } On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit.

[April —, 1975]

MR. JUSTICE MARSHALL, concurring in the result.

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 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

Wm Brewer DA 74

PP. 1, 3, 11, 13-17

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

Circulated:

Recirculated: APR 29 1975

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1977

Alyeska Pipeline Service Company, Petitioner,
v.
The Wilderness Society et al. On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit.

[April —, 1975]

MR. JUSTICE MARSHALL, dissenting.

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Wm Brewer 06/74

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

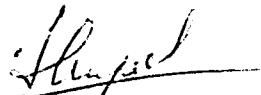
May 28, 1975

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

Dear Henry:

While I acknowledge the technical correctness of the use of hyphens with unit modifiers, I would prefer that no hyphens be used in the term "private attorney general." Since that phrase appears so often in this dissent, I believe it would be cumbersome to have the term hyphenated. Additionally, the terms "public benefit and public interest" on page 11 and "land use" on page 15 are terms of art which, in my view, do not require hyphens. Otherwise I agree with your proposed editorial changes as indicated on the copy.

Sincerely,


Thurgood Marshall

Supreme Court of the United States
Washington, D. C. 20542

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
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,

Harry

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

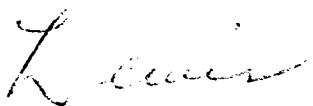
March 14, 1975

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 WILLIAM H. REHNQUIST

March 19, 1975

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

Dear Byron:

Please join me.

Sincerely,

WW

Mr. Justice White

Copies to the Conference

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