The Burger Court Opinion Writing Database

Roadway Express, Inc. v. Piper

447 U.S. 752 (1980)

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

June 4, 1980

RE: 79-701 - Roadway Express v. Piper

Dear Lewis:

In Williamsburg I drafted a memo to you stating that although I am in sympathy with your view expressed in Part III, I am reluctant to go that far on an issue not really here.

I now have Potter's memo to the same effect. I would "flag" the point but not decide it.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1980
PERSONAL

RE: 79-701 - Roadway Express, Inc. v. Monk

Dear Lewis:

Your June 5 suggestion as to my position is satisfactory.

Regards,

WEB

Mr. Justice Powell

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 19 1980

Recirculated: _____

No. 79-701

Roadway Express, Inc. v. Piper, et al.

Mr. Chief Justice Burger, dissenting.

I dissent from the Court's holding that it was improper for the District Court to look to 42 U.S.C. §§ 1988 and 2000e-5(k) to determine whether attorneys' fees were assessable as part of the excess costs which the respondent attorneys could be made to pay under 28 U.S.C. § 1927.

Section 1927 does not itself attempt to define the costs which an attorney may be forced to pay because of vexatious, dilatory tactics and conduct, except to state that the attorney may be forced to pay only the excess costs generated by his misconduct. One must look elsewhere to determine the types of

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1980

Re: No. 79-701 Roadway Express, Inc. v. Piper

Dear Lewis:

Because I have now myself stated I would not reach the issue in Part III, there is no longer any need for my name to be included in note 11 on page 11 of your June 18 draft.

Regards,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 28, 1980

RE: No. 79-701 Roadway Express, Inc. v. Monk

Dear Potter, Byron and Thurgood:

Byron has agreed to undertake the dissent in the above.

Sincerely,

Bill

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 29, 1980

Re: Roadway Express v. Monk, 79-701

Dear Lewis:

I can go along with your memorandum.

Sincerely,

Bill

Mr Justice Powell
cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1980

RE: No. 79-701 Roadway Express v. Piper

Dear Lewis:

I join your opinion for the Court circulated June 4.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 27, 1980

Re: No. 79-701, Roadway Express v. Monk

Dear Lewis,

I agree with Parts I and IIA of your Memorandum, but am not so sure about your discussion of the Rule 37 and inherent power issues. I do not necessarily disagree with what you say with respect to those issues, but I wonder if so much should be said at all about issues that were hardly briefed or argued here, and perhaps not comprehended in the question on which we granted certiorari.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1980

Re: No. 79-701, Roadway Express v. Piper

Dear Lewis,

My problem with Part III of your opinion is not only that it decides an issue that was not considered by the District Court or Court of Appeals in this litigation, was not properly briefed or argued by the parties in this Court, and was not, I think, comprehended in the question contained in the certiorari petition, but that it decides an issue that has never before been decided by any federal court anywhere. I would have no objection whatever to an opinion pointing out that this issue remains open on remand and that it is a substantial issue.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

David - Give me the draft of a Note & I'll send it to the three Justices before we add it to Opinion

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1980

Re: No. 79-701, Roadway Express, Inc. v. Monk

Dear Lewis,

Responding to your note of today, I would be quite satisfied by the addition of a note to Part III of your opinion along the lines you suggest. I leave the wording of the note to you, reserving the right to edit it.

Sincerely yours,

PS.

Mr. Justice Powell

Copies to The Chief Justice
Mr. Justice Rehnquist

David - Look at PS op. in Mendenhall - FN on first page. It may possibly be helpful

David to Note

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 9, 1980

Re: No. 79-701, Roadway Express v. Piper

Dear Lewis,

Mr. Lind's suggested manner of dealing with your recalcitrant colleagues is quite satisfactory to me. I suppose that if Harry and/or John were to join your entire opinion, you would not need the first footnote. If, on the other hand, they both join the three of us, then your Part III would not be the prevailing opinion.

Sincerely yours,

P.S.

Mr. Justice Powell

Copy to The Chief Justice
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 30, 1980

Re: 79-701 - Roadway Express, Inc. v. Monk

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 30, 1980

Re: No. 79-701 - Roadway Express, Inc. v. Monk

Dear Lewis:

I am with you.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 18 1980

Recirculated: _____

No. 79-701 - Roadway Express v. Piper

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join the Court's opinion except Part IIA thereof and except the first sentence of Part IV thereof.

Essentially for the reasons stated in the first three paragraphs of MR. JUSTICE STEVENS' dissent, I do not join Part IIA. I add to those reasons my concern that the Court's analysis means that 28 U.S.C. § 1927 does not permit imposition on opposing counsel of "excess" attorney's fees generated by his vexatiousness and otherwise shifted to his client under 42 U.S.C. § 2000e-5(k), 42 U.S.C. § 1988, or any other specialized attorney's fees provision. See Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 260 n. 33 (1975)

pp. 1, 2

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 2 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-701

Roadway Express, Inc., Petitioner,
v.
Robert E. Piper, Jr., et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join the Court's opinion except Part II-A thereof and except the first sentence of Part IV thereof.

the respective opinions of

Essentially for the reasons stated in the first three paragraphs of THE CHIEF JUSTICE and of MR. JUSTICE STEVENS, I do not join Part II-A. I add to those reasons my concern that the Court's analysis means that 28 U. S. C. § 1927 does not permit imposition on opposing counsel of "excess" attorney's fees generated by his vexatiousness and otherwise shifted to his client under 42 U. S. C. § 2000e-5 (k), 42 U. S. C. § 1988, or any other specialized attorney's fees provisions. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240, 260, n. 33 (1975) (collecting statutes). This construction of the statute penalizes the innocent client, while insulating his wrongdoing attorney. That result, in my view, clashes with common sense, basic fairness, and the plain meaning of the statute. See *Owen* v. *City of Independence*, — U. S. —, — (1980) (slip op., at 31) ("Elemental notions of fairness dictate that one who causes a loss should bear the loss"). See also 122 Cong. Rec. 31832 (1976) (regarding proposed § 1988: "Mr. *Abourezk*. So if somebody thought, some lawyer thought, he was going to make a lot of money by bringing civil rights suits *he would be subject to being penalized himself;* is that

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 21, 1980

79-701 Roadway Express v. Monk

MEMORANDUM TO THE CONFERENCE:

The Conference vote in the above case was 5 to 4 to reverse.

My notes are not too full. They indicate some diversity of opinion among the five of us who voted to reverse as to the appropriate line of analysis. I also have Harry's vote recorded as "tentative".

In any event, after examining the statutes more carefully, I have come to the conclusion that the Court of Appeals was correct in its holding that §1927 does not authorize attorney's fees. Accordingly, my vote is now to affirm on that issue.

I nevertheless would vacate and remand the case for reconsideration on two other grounds. The first of these relates to the failure of the District Court to consider what costs and fees should be assessed against respondents under Rule 37. The second is a ground that I stated at Conference: where bad faith is shown, courts have inherent power to assess attorney's fees as an appropriate sanction. Accordingly, I also would remand for a consideration of whether conduct of counsel in this case constituted bad faith.

In these circumstances, the draft that I am circulating herewith is labeled a "memorandum" rather than an opinion for the Court. On the basis of my notes, my present view will provide at least five votes to affirm on the §1927 issue. I cannot anticipate how the "chips will fall" on the Rule 37 and the inherent power issues.

L.F.P.

L.F.P., Jr.

SS

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 21 1980

Recirculated: _____

No. 79-701, Roadway Express, Inc. v. Piper

5/21/80

FIRST DRAFT

MEMORANDUM OF MR. JUSTICE POWELL:

This case presents the question whether federal courts have statutory or inherent power to tax attorney's fees directly against counsel who have abused the processes of the courts.

I

In June 1975, two former employees and one unsuccessful job applicant brought a civil rights class action against petitioner Roadway Express, Inc. (Roadway). The complaint filed in the United States District Court for the Western District of Louisiana alleged that Roadway's employment policies discriminated on the basis of race, and asked for equitable relief. 1/

Counsel for the plaintiffs -- Robert C. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile -- are now the respondents in the present case. In September 1975, respondents served interrogatories on Roadway. Having secured an extension from the District Court, Roadway answered the interrogatories on January 5, 1976 and served its own set of interrogatories at the same time. Thereafter, however, the litigation was stalled by respondents' uncooperative

1,6,7,9,11,14

The Chief Justice
Justice Brennan
Justice Stewart
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice Powell

5-22-80

MAY 23 1980

Circulated: _____

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-701

Roadway Express, Inc., Petitioner, v. Robert E. Piper, Jr., et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

Memorandum of MR. JUSTICE POWELL.

This case presents the question whether federal courts have statutory or inherent power to tax attorney's fees directly against counsel who have abused the processes of the courts.

I

In June 1975, two former employees and one unsuccessful job applicant brought a civil rights class action against petitioner Roadway Express, Inc. (Roadway). The complaint filed in the United States District Court for the Western District of Louisiana alleged that Roadway's employment policies discriminated on the basis of race, and asked for equitable relief.[1]

Counsel for the plaintiffs—Robert C. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile—are the respondents in the present case. In September 1975, respondents served interrogatories on Roadway. Having secured an extension from the District Court, Roadway answered the interrogatories on January 5, 1976, and served its own set of interrogatories at the same time. Thereafter, however, the litigation was stalled by respondents' uncooperative behavior.

[1] The initial complaint also named a local of the International Brotherhood of Teamsters as defendant.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 26, 1980

79-701 Roadway Express, Inc. v. Piper

Dear John:

I am glad that you agree that the District Court on remand should consider whether under Rule 37 Roadway may recover those costs and fees caused by respondents' failure to comply with the District Court's discovery order.

With respect to the inherent powers of a court, I have no doubt - for the reasons stated in my memorandum - that these include the power to impose appropriate sanctions on an attorney who is found guilty of bad faith in the conduct of litigation. The "bad faith" exception to the American rule is predicated on the inherent power to control lawyers and parties where they have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons". See my memorandum, p. 11-13. Moreover, lawyers are officers of the court, with all that this relationship implies. I consider it proper and desirable that a court have authority to order counsel to reimburse an opposing party for expenses, including attorney's fees, caused by willful misconduct.

Your letter suggests the possibility of "standardless" imposition of sanctions. In both the District Court and the Court of Appeals, Roadway argued simply that the courts have inherent power to award attorney's fees against counsel whose vexatious conduct has caused the fees to be incurred. Neither party discussed whether some limiting standard should be required.

My memorandum, as presently drafted, would allow the District Court on remand to consider whether the conduct of respondents constituted "bad faith" that would justify the imposition of a fee sanction. That court also would be free to determine whether all or some part of petitioner's

attorney's fees should be borne by respondents. This is my understanding, generally, as to how the "bad faith" exception to the American rule operates. The trial court's discretion would not be unbridled, as it would be subject to review for abuse.

I would have no objection to including in an opinion for the Court a statement that there must be a correlation between the misconduct of the offending attorneys and the fees imposed upon them. In this case, for example, it may well be that the District Court will find that only some percentage of petitioner's attorney's fees fairly are the result of bad faith conduct by respondents.

As to the statutory issue, I suppose we simply disagree. Although I expressed the hope at Conference that we could predicate a liability under §1927 (in addition to the "inherent power" view that I also expressed), a careful examination of all of the relevant statutes persuaded me to the contrary. I would clarify one point mentioned in your letter. I do not suggest that the costs recoverable under §1927 were frozen in 1853. Rather, I have concluded that we should not expand §1927 and §1920 costs in the absence of congressional action. Indeed, Congress is now considering proposed changes in §1927. Congress also could expand the list of costs recoverable under §1920, as it did in 1978. I would hesitate, for the reasons detailed in my memorandum, to read into §1927 the attorney's fees language of wholly unrelated statutes (e.g., §1988) in the absence of any evidence of congressional intent to mandate this.

In sum, I do appreciate your thoughtful letter. I view this case as an opportunity - fully argued by the parties - to make clear that courts have residual, inherent power to exercise somewhat greater control over what we all know to be the frequent abuse of our system by counsel.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss
cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 27, 1980

79-701 Roadway Express v. Piper

Dear Potter:

I welcome your agreement with the construction of § 1927 in my memorandum in this case. I would appreciate, however, your taking a second look at the appropriateness of addressing the Rule 37 and "inherent powers" questions.

The Rule 37 issue was squarely before the District Court, which did not reach it in view of its broader ruling under § 1927. See Tr. of Record on Appeal, at 346 (Memorandum in Support of Defendant Roadway Express, Inc.'s Motion to Dismiss Complaint of J.D. Monk, et al. for Failure to Answer Interrogatories, June, 14, 1976, at 3); id., at 563-564 (Memorandum of Authorities in Support of An Award of Attorneys' Fees to Defendants on Dismissal, October 4, 1976, at 4-5). Thus, the Rule 37 issue was not directly before the Court of Appeals. The only effect of Part II-B of my memorandum is to flag for the District Court on remand the continued relevance of Rule 37. (In its brief amicus curiae, the Equal Employment Opportunity Commission noted this same fact; see Brief of EEOC, at 12, n.12.) It appears to me that the Rule 37 issue would be before the District Court regardless of what this Court says. Thus, I think the brief discussion in Part II-B represents no extension of the Court's jurisdiction and performs the salutary function of identifying the full range of options before the District Court.

Petitioner fully presented its inherent powers argument to both the District Court and the Court of Appeals. Again, in view of the District Court's ruling, there was no occasion for that court to address the issue. Petitioner repeated the inherent powers argument to the Court of Appeals, which should have reached the question but failed to do so. In the petition for certiorari, as you note in your memorandum, the question presented is stated as whether attorneys "may be personally assessed, pursuant to 28 U.S.C.

§ 1927, with attorneys' fees as part of the 'excess costs' incurred by an opposing party as a result of such conduct." I find several persuasive reasons for concluding that the inherent powers argument is "fairly comprised in" this question under our rule 21.1(a).

First, because the issue was raised below, there can be no claim that the issue is not "in" the case. The failure of a lower court to address a question cannot limit the jurisdiction of this Court. Second, the question is close to a "pure" legal issue, on which we do not require particular findings of the lower courts. Although we might prefer to have the views of the courts below, I do not believe we are limited by their failure to consider the issue. Third, the question was addressed in the briefs submitted to this Court, see Brief for Petitioner, at 19-20; Brief for Respondent, at 18-19; Brief for Equal Employment Opportunity Commission as amicus curiae, at 15-16, and at oral argument by counsel for both sides. Tr. of Oral Arg., at 23, 33. Those discussions may not have been exhaustive, but the arguments on all of the issues in this case were somewhat limited.

Finally, as petitioner presented its inherent powers argument, the claim falls within the bounds of the Question Presented. In Petitioner's Brief, at 19, it argues that courts have inherent powers to levy attorney's fees against parties under the "bad faith" exception to the American rule. Petitioner then insists that § 1927 would authorize "shifting" those costs from parties to culpable attorneys. Thus, petitioner did make its inherent powers claim "pursuant to § 1927," as the Question Presented states. Thus, I believe that petitioner properly placed before this Court the inherent powers issue.

My memorandum does not track petitioner's two-step analysis, but rather focuses directly on the inherent powers of courts over attorneys. That approach, in my view, represents the correct resolution of the question that petitioner presented.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

June 2, 1980

PERSONAL

79-701 Roadway Express v. Piper

Dear Chief:

I need your vote for a Court on Part III of my memorandum. This approves the inherent power of a court to order an attorney who has acted in bad faith to pay, as a part of the assessed costs, the fee of opposing counsel - as determined by the trial court.

As my letters to Potter and John make clear, the issue was in this case in both the District and Court of Appeals. It was briefed and argued before us. It therefore is properly before us.

Byron, Bill Brennan and Thurgood have joined Part III of my memorandum. Potter and John have advised me that they would prefer to leave this question open on remand, and I believe that Bill Rehnquist wishes to hold - without reaching the inherent power issue - that attorney's fees may be so assessed under §1927.

Even if you should agree with Bill Rehnquist as to §1927, it would still be appropriate for you to say - in addition - that the inherent power of a Court also would include this right. As state courts may not have statutory authority, I consider it important - even though our decision would not be binding on them - for state judges to have a Supreme Court decision affirming what I view as the unquestioned and traditional right of a court to impose effective sanctions on counsel whose conduct reaches the level of bad faith. As we all know, some lawyers grossly abuse the system.

We have this clear opportunity now. One can never know when we will have it again.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1980

79-701 Roadway Express v. Piper

MEMORANDUM TO THE CONFERENCE:

As there are now "courts" for Parts I and II of my memorandum, I have converted it into an opinion for the Court and circulate a second draft thereof. Some changes, largely stylistic, are indicated.

There are four votes for Part III. When the final count is in, I will add an appropriate note with respect to Part III, if this should be necessary.

L.F.P.

L.F.P., Jr.,

ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1, 4-8, 10, 13, 14

6-3-80

From: Mr. Justice Powell

Circulated: JUN 4 1980

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-701

Roadway Express, Inc., Petitioner, v. Robert E. Piper, Jr., et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether federal courts have statutory or inherent power to tax attorney's fees directly against counsel who have abused the processes of the courts.

I

In June 1975, two former employees and one unsuccessful job applicant brought a civil rights class action against petitioner Roadway Express, Inc. (Roadway). The complaint filed in the United States District Court for the Western District of Louisiana alleged that Roadway's employment policies discriminated on the basis of race, and asked for equitable relief.[1]

Counsel for the plaintiffs—Robert C. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile—are the respondents in the present case. In September 1975, respondents served interrogatories on Roadway. Having secured an extension from the District Court, Roadway answered the interrogatories on January 5, 1976, and served its own set of interrogatories at the same time. Thereafter, however, the litigation was stalled by respondents' uncooperative behavior.

[1] The initial complaint also named a local of the International Brotherhood of Teamsters as defendant.

June 5, 1980

No. 79-701 Roadway Express, Inc. v. Monk

Dear Potter:

Thank you for your note of June 4.

For the reasons set forth at some length in my letter to you of May 27, we simply disagree as to whether the inherent power issue is properly here. As there are three votes (WJB, TM and BRW) in addition to mine for Part III, I will retain it in my opinion.

Bill Rehnquist told me this morning that he was inclined to go along with your view, and the Chief's note of June 4 is to the same effect.

This brings me to my question. Should I simply add a note stating, in substance, that the CJ, PS and WHR would not address the inherent power issue, but would remand it as an appropriate issue for consideration by the courts below?

The advantage of recording your view briefly in this manner is that we would avoid a debate as to whether the issue is properly here. There can be no question as to our jurisdiction to decide an issue that actually has been in the case since the district court level. Your view, as I understand it, is that we should not address it because neither of the courts below found it necessary (although for different reasons) to reach it.

I am sending copies of this note to the Chief and to Bill Rehnquist. I have not yet heard from Harry.

Sincerely,

Mr. Justice Stewart

cc: The Chief Justice
Mr. Justice Rehnquist

LFP/lab

June 6, 1980

79-701 Roadway Express v. Piper

Dear Chief, Potter and Bill:

I have consulted with Mr. Lind as to how best to record your position in this case, and he suggests that at the beginning of the opinion, there should be a footnote saying:

> "Part III of the opinion is joined only by Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall."

Then, at Part III, add a footnote as follows:

> "The Chief Justice, Mr. Justice Stewart, and Mr. Justice Rehnquist would not reach the inherent power question considered in Part III of the opinion. Rather, they view that question as a substantial issue that should be addressed by the District Court on remand."

Although I have not yet heard from Harry and John, I will go ahead with the adding of these changes to my opinion. When I hear from them, the additional changes - absent further writing - can be made promptly.

I will, of course, make an appropriate change in Part IV with respect to the inherent power issue.

Sincerely,

The Chief Justice
Mr. Justice Stewart
Mr. Justice Rehnquist

lfp/ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1, 5, 11

6-18-80 Footnotes Renombered

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: JUN 18 198

SUPREME COURT OF THE UNITED STATES

No. 79-701

Roadway Express, Inc., Petitioner,
v.
Robert E. Piper, Jr., et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether federal courts have statutory or inherent power to tax attorney's fees directly against counsel who have abused the processes of the courts.

I

In June 1975, two former employees and one unsuccessful job applicant brought a civil rights class action against petitioner Roadway Express, Inc. (Roadway). The complaint filed in the United States District Court for the Western District of Louisiana alleged that Roadway's employment policies discriminated on the basis of race, and asked for equitable relief.[1]

Counsel for the plaintiffs—Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile—are the respondents in the present case. In September 1975, respondents served interrogatories on Roadway. Having secured an extension from the District Court, Roadway answered the interrogatories on January 5, 1976, and served its own set of interrogatories at the same time. Thereafter, however, the litigation was stalled by respondents' uncooperative behavior.

[1] The initial complaint also named a local of the International Brotherhood of Teamsters as defendant.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1980

Re: No. 79-701 Roadway Express, Inc. v. Monk

Dear Lewis:

I am in substantial agreement with Potter, and your suggestion to him of June 5th and his response to it are entirely satisfactory to me.

Sincerely,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1980

Re: No. 79-701 Roadway Express v. Piper

Dear Lewis:

Please join me in Parts I, II, and IV of your opinion in this case.

Sincerely,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 23, 1980

Re: 79-701 - Roadway Express v. Monk

Dear Lewis:

Further study may persuade me that either Rule 37(b) or your "inherent power" theory may support the assessment of fees in this case, but I have serious reservations with respect to both of these theories.

The relevant language of Rule 37(b) is its last paragraph, which reads as follows:

> "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including the attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

I think the words "reasonable expenses . . . caused by the failure" are a good deal narrower than what the District Court did here. Moreover, I think the authority is limited to expenses resulting directly from failure to comply with court order, which is only a part of the misconduct in this case. I would agree, however, that the Rule 37(b) issue should be left open on remand.

With respect to "inherent power," I agree that an attorney may be held in contempt and punished by the court, but I wonder if it necessarily follows that a judge has inherent power to order him to pay money to another private party. Would he, perhaps, be entitled to a jury trial? Is the amount to be paid measured by the other party's injury or by the judge's concept of appropriate punishment? Would you not invite the same sort of "standardless judicial lawmaking" that you find objectionable in your statutory analysis?

Finally, on the statutory question, I am still not persuaded that Roadway's argument is without merit. The fact that a particular item of expense was not treated as a taxable cost in 1813 or in 1853 surely cannot be controlling. If Congress should authorize the recovery of the expense of recording depositions, or perhaps making sophisticated computerized market studies in antitrust litigation, by stating that such litigation expenses shall be recoverable by the prevailing party as a part of costs, surely they would constitute "costs" within the meaning of § 1927.

The fact that potential liability for costs varies widely in different kinds of litigation also should not be controlling. Consider, for example, the Black Panther litigation in which the costs are truly staggering--in that case the lawyers' potential § 1927 liability is a function of the unique character of that litigation. I would see no real difference if, for example, Congress allowed the recovery of an appraiser's fee as an item of costs in condemnation litigation. In such a case, in my judgment, that fee would constitute a part of the cost for § 1927 purposes as well as for purposes of making the normal assessment of costs at the end of the case.

Congress has decided that counsel fees may be allowed as a part of the cost in some types of litigation even though that is not the general rule. That legislative decision by Congress provides for me the "persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct." (Typewritten Memo at p. 9). By virtue of that congressional determination, lawyers in these cases are more likely to be well paid than other lawyers and, conversely, their misconduct may subject their clients to liability for the fees of opposing counsel. Frankly, it does not strike me as

frivolous or imaginative to suggest that they have a special duty to observe the normal proprieties that obtain in litigation.

In all events, however, my reading of the statutes does not reach the policy question. As far as I am concerned, the term "costs" as used in § 1927 must be defined by other federal statutes, and fees are allowable as an item of costs in this case under the plain language of § 1988. The fact that the allowance itself depends on which party prevails is no more significant than for any other item of costs. Even if the defendant could not recover transcript costs without finally prevailing, I think an interlocutory award of such costs under § 1927 would be proper.

In sum, I am still inclined to adhere to the position I took at Conference.

Respectfully,

Mr. Justice Powell

Copies to the Conference

To: The Chief Jus
Mr. Justice Bren
Mr. Justice Stew
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackm
Mr. Justice Powell
Mr. Justice Rehnquis

From: Mr. Justice Stevens

Circulated: JUN 13 '80

Recirculated: _____

79-701 - Roadway Express v. Monk

MR. JUSTICE STEVENS, dissenting.

By its terms, 28 U.S.C. § 1927 applies to "cases in any court of the United States" and allows the recovery of excess costs from "[a]ny attorney" who vexatiously multiplies the proceedings "in any case."[1/] This language is broad enough to encompass a civil rights class action alleging racial discrimination in employment. Two separate statutes specifically authorize the recovery of attorney's fees "as part of the costs" in this kind of litigation.[2/] Of course, such fees, like any other cost items, are normally recoverable only from the losing litigant rather than from the attorney personally. But it seems to me that § 1927 gives the Court the power to assess against counsel any item of cost that could be assessed against a party when that attorney unreasonably and vexatiously multiplies the proceedings.

1/ See ante, at 3 n. 3.

2/ 42 U.S.C. § 1988 and § 2000e-5(k) both authorize the recovery to the prevailing party of attorney's fees "as part of the costs" of the litigation.

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

1, 2

From: Mr. Justice Stevens

Circulated: _____

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Recirculated: JUN 18 '80

SUPREME COURT OF THE UNITED STATES

No. 79-701

Roadway Express, Inc., Petitioner,
v.
Robert E. Piper, Jr., et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE STEVENS, dissenting.

By its terms, 28 U. S. C. § 1927 applies to "cases in any court of the United States" and allows the recovery of excess costs from "[a]ny attorney" who vexatiously multiplies the proceedings "in any case."[1] This language is broad enough to encompass a civil rights class action alleging racial discrimination in employment. Two separate statutes specifically authorize the recovery of attorney's fees "as part of the costs" in this kind of litigation.[2] Of course, such fees, like any other cost items, are normally recoverable only from the losing litigant rather than from the attorney personally. But it seems to be that § 1927 gives the Court the power to assess against counsel any item of cost that could be assessed against a party when that attorney unreasonably and vexatiously multiplies the proceedings.

The Court seems concerned about the fact that the standards for allowing a *party* to recover fees differ for plaintiffs and defendants in civil rights litigation. *Ante*, at 9. I simply do not understand the relevance of that concern. As I read § 1927, the sanction may be applied to an obstreperous lawyer regardless of whether his client prevails, so long as fees may be awarded as part of the costs in the litigation.

[1] See *ante*, at 3, n. 3.

[2] 42 U. S. C. § 1988 and § 2000e–5 (k) both authorize an award of attorney's fees to the prevailing party "as part of the costs" of the litigation.