"Bridging the Gap Between Congress and the Supreme Court: Judicial Interest Groups and the Erosion of the American Rule Governing Awards of Attorneys Fees"

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ABSTRACT

In this paper we examine the relationship among the Supreme Court, Congress and judicial interest groups--those that rely primarily but not exclusively on judicial lobbying. Through a case study of the evolution of the American rule concerning judicial awards of attorneys fees, we conclude that (1) judicial interest groups provide a key linkage between Congress and the Supreme Court; and, (2) judicial interest groups expedite policy change.

While this study was confined to an analysis of this interrelationship in one area of policy change, its findings may be useful in explaining other interactions between Congress and the Supreme Court. Further, and perhaps more important, we hope that this study highlights the need to expand our working definition of interest groups and to recognize the increasing role of judicial interest groups in the political process.

INTRODUCTION

Since 1908, political scientists have studied the origins and activities of interest groups in the United States.[1] Interest groups have been defined, typologized, analyzed, and scrutinized by hundreds of political scientists.[2] These analyses have provided useful information about why certain groups form and how they affect government policy. By and large, recent definitions scholars have used and the activities that they have examined have focused on "voluntary associations in the United States which are open to membership and are concerned with some aspects of public policy at the national level."[3] Because these kinds of definitions exclude nonmembership groups and because definitions of public policies usually are limited to the products of legislative and executive decision-making, few analysts take into account organizations that regularly lobby the judiciary. Nevertheless, these kinds of organizations have a major impact on the entire governmental process.

Thus, because scholars have restricted their research by adoption of narrow definitions, a void exists in our understanding of all kinds of interest groups and their pervasive influence on all branches of government. More specifically, we have little understanding of the way in which judicial interest groups--those that rely most heavily but not exclusively on the courts--affect public policies in the United States. Judicial interest groups, in fact, provide a key linkage between Congress and the Supreme Court just like "traditional" interest groups provide a key linkage between Congress and the President.

While many scholars have analyzed the relationship among interest groups, Congress and the federal courts as it affects the judicial selection process,[4] most have ignored the affect of this relationship on public policy. Those who have studied this phenomenon, however, have found that interest groups play an important role in the relationship between Congress and the Supreme Court. According to Walter F. Murphy, for example,

> Court-congressional relations can be partly explained in terms of the judiciary's involvement in the struggle among competing groups to influence public policy. Groups which cannot achieve their goals in the legislative or administrative processes can often do so through the judicial process. Groups whose interests have been frustrated by the courts can likewise seek redress through legislators or executive officials.[4a]

We take this argument one step further by positing that a unique set of groups--judicial interest groups--are those primarily responsible for the phenomenon observed by Murphy. More specifically, when judicial interest groups fail to obtain a desired policy either from Congress or the Supreme Court, they regularly go to the other providing a key linkage between those two branches of government. This practice results in a complex and often competitive relationship regularly acting to spur one or the other "target" branch to action. Interest groups, in fact, regularly act as catalysts, translating adverse decisions from Congress to the Court or vice versa.

This study explores the role that judicial interest groups play in the interaction that occurs between Congress and the Supreme Court in the

context of two propositions: (1) judicial interest groups provide a key linkage between Congress and the Supreme Court; and, (2) judicial interest groups expedite policy change.

To perform this analysis, we examine the demise of what is known as the American rule in regards to judicial awards of attorneys fees for litigation brought by judicial interest groups. We decided to examine this issue because (1) it has never been studied by political scientists, and (2) it is an issue of paramount interest to all parties involved. Judicial interest groups litigating in the public interest depend on attorneys fees awards for a substantial proportion of their operating expenses. Congress was especially concerned with implementation of civil rights laws and with appeasing affected "friendly" groups, and the Supreme Court, which was innundated with public interest lawsuits, quickly came to view attorneys fees provisions as impediments to the orderly administration of justice.

To facilitate an examination of the relationship that exists among the Court, Congress, and interest groups, this paper is divided into two sections. In the first, we trace the evolution of the American rule. In the second, we analyze the interaction among these three actors in the context of the propositions stated above.

THE EVOLUTION OF THE AMERICAN RULE

Either by statute or in equity, English courts traditionally have awarded litigation costs to prevailing parties. American courts and legislatures, however, did not follow suit. Rejection of this tradition stands in sharp contrast to the colonists' adoption of most other English common law traditions.[5] Yet, rejection of "attorney subsidies" can be readily explained by the prevalent distrust of lawyers. As many have noted,[6] attorneys symbolized the worsts facets of British rule and thus it

is not surprising that the colonies and subsequently the states, drafted laws that severely limited fee awards. According to Charles Warren,

> In every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing of power in the community the ruling class, whether it was the clergy as in New England, or the merchants as in New York, Maryland and Virginia, or the Quakers as in Pennsylvania, was extremely jealous. In many of the Colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the courts; in all, they were subjected to the most rigid restrictions as to fees and procedures.[7]

While this is the most widely accepted explanation for the rejection of the English rule, others have posited that colonists believed that the rule was "undemocratic" because it limited the poor's access to the courts as they could not risk liability for attorneys fees.[8]

Regardless of the reasons why the English rule was not adopted, the "American rule" as it has come to be known generally has stood as a bar to recovery of plaintiffs' costs in litigation. Thus, as historically applied, the American rule prohibits the recovery of attorneys fees unless there is a specific statute empowering the courts to make such an award.[9]

Since 1796 when the Supreme Court first examined the attorneys fees issue in Arcambel v. Wiseman,[10] it consistently has enforced the view that in the absence of specific statutory provisions, the federal courts would not award attorneys fees to prevailing plaintiffs. In response to this

judicial interpretation, Congress periodically has provided for awards of attorneys fees in specific pieces of legislation.[11] Until the 1960s, however, the vast majority of these allowed for recovery in only highly technical areas of economic relations.[12] These provisions varied; some required the courts to award attorneys fees while others left awards to the discretion of the presiding justice.

In the 1960s, a major change occurred in congressional policy toward attorneys fees. Recognition of the fact that the resources of the federal government would be inadequate to enforce fully the provisions contained in sections of the Civil Rights Act of 1964, Congress, at the urgings of the NAACP and other organizations, voted to include specific authorizations for awards of attorneys fees. Specifically, Title II of the Act stated that: "In any action commenced pursuant to this title, the court, in its discretion may allow the prevailing party other than the United States a resasonable attorney's fee as part of the costs . . .[13] Congress' inclusion of that attorneys fees provision led many commentators to conclude that Congress finally had institutionalized the notion that private enforcement of civil rights laws was necessary because the government lacked the resources to pursue the problem adequately. This is known as the private attorney general concept.

The full import of the private attorney general concept was realized in Newman v. Piggie Park Enterprises, Inc.[14] in 1968. Newman was a lawsuit filed under Title II of the Civil Rights Act of 1964 by the NAACP Legal Defense Fund (LDF) to enjoin the actions of five drive-in restaurants and a sandwich shop that refused to serve black patrons. After a U.S. Court of Appeals enjoined the practice, the LDF sought a writ of certiorari from the U.S. Supreme Court on the question of the proper construction of Title II's

attorneys fees authorization. In a per curiam opinion, the Court, following the lead of Congress, endorsed the private attorney general concept. The Court stressed that:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.
>
> When a plaintiff brings an action under that Title [II], he cannot recover damages. If he obtains an injunction, he does so not for Himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.[15]

This ruling immediately was hailed by civil rights leaders as a major victory and viewed as one that would increase litigation filed in the public interest. According to Roy Wilkins, then-Executive Director of the NAACP, Newman would make "it possible for poor persons denied services to file suit without fear of having to pay legal fees beyond their means."[16]

Even more important, perhaps, was that Newman was partially responsible for the proliferation of liberal judicial interest groups and of existing interest groups' increasing reliance on litigation to achieve their aims. Almost simultaneously with the Newman decision, the Ford Foundation began to provide seed money for the establishment of diverse kinds of judicial interest groups as well as for the creation of litigating arms within "traditional" interest groups.[17] Ford's facilitation of the creation of these judicial interest groups, which were expected to contribute to and increase their own budgets through recovery of attorneys

fees,[18] led to the phenomenal growth of these kinds of interest groups as revealed in Figure 1 below.

(Figure 1 about here)

The proliferation of these firms and the expectation that they could recover their operating expenses subsequently led to a dramatic increase in litigation being initiated by "private attorneys general." And, even though Newman involved fee recovery for race discrimination litigation, most judicial interest groups interpreted the decision to apply to all areas of public interest law. Buttressing this assumption was the fact that Congress was beginning to include specific authorizations providing for attorneys fees recovery in most major pieces of legislation of interest to existing judicial interest groups. Thus, in the period after Newman, it appeared that the vitality of the American rule was seriously in doubt; Congress, the Court, and judicial interest groups accepted the private attorney general interpretation.

In 1975, the Supreme Court, however, severed this alliance and dealt Service Co. v. Wilderness Society.[19] In Alyeska, the Wilderness Society, the Environmental Defense Fund (EDF), and the Friends of the Earth, represented by the Center for Law and Social Policy (CLSP), a D.C. based judicial interest group, had successfully sued to stop the Secretary of the Interior from issuing permits necessary for the construction of the trans-Alaska pipeline. Litigation on the merits, however, was terminated after Congress amended the Mineral Leasing Act to allow issuance of the permit. After passage of that amendment, the CLSP attempted to recoup its attorneys fees. Its lawyers argued that they had acted as private attorneys general, litigating on behalf of the public interest. The Court of Appeals accepted this argument and allowed the CLSP to recover one-half

of the fees to which it was entitled[20]--over 100,000 dollars for more than 4,000 hours of legal work. In its opinion, the Court of Appeals held that:

> . . . respondents had acted to vindicate 'important statutory rights of all citizens . . .,' had ensured that the governmental system functioned properly, and were entitled to attorneys' fees lest the great cost of litigation of this kind, particularly against well-financed defendants such as Alyeska, deter private parties desiring to see the laws protecting the environment properly enforced.[21]

The Court further noted that:

> It may well be that counsel serve organizations like [respondents] for compensation below that obtainable in the market because they believe the organizations further a public interest. Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties volunteering to serve as private attorneys general. The attorneys who worked on this case should be reimbursed the reasonable value of their services, despite the absence of any obligation on the part of [respondents] to pay attorneys' fees.[22]

In a 5 to 2 decision, the U.S. Supreme Court rejected this reasoning.[23] Writing for the Court, Justice Byron White presented a lengthy history of the relations between Congress and the courts on the issue of attorneys fees provisions. On the basis of that analysis, Justice White concluded that attorneys fees were not recoverable absent specific

statutory authorization. Thus, since Congress had not included specific provisions allowing for recovery in any of the statutes relied on by CLSP, the Court of Appeals award was reversed.

In Alyeska, Justice White recognized, however, that prevailing sentiment favored erosion of the American rule. Not only did he note numerous law review articles, lower court decisions and congressional hearings concerning the advisability of abandoning the American rule, he also claimed that:

> It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desireable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy. . .

Yet, writing for his brethren, Justice White reiterated the Court's unwillingness "to invade the legislature's province by redistributing legislative costs."[24]

Further analysis of Justice White's opinion also reveals that the Court did not wish to encourage additional lawsuits, which already were beginning to have a noticeable impact on its caseload. The Court noted that the attorneys fees provisions recently enacted by Congress had quickly acted as incentives to litigation and that the Court would not add to that phenomenon without specific authorization.[25]

The reaction from judicial interest groups was immediate; groups throughout the country claimed that Alyeska had sounded the death knell for public interest law. As noted by Charles Halpern, a founder of CLSP, "Until Alyeska . . . I would have probably said that attorneys' fee awards

were the number one factor inthe future of public interest law financing."[26] Similarly, Sid Wolinsky of Public Advocates in San Francisco noted:

> It increases our burden about tenfold. The decision is an unmitigated disaster for the legal profession. It expressly and implicitly recognizes the law as a place for money-grubbers only.
>
> If you can get an award, or if your client can afford to pay you a fat fee, then you are welcome in U.S. courts. But if you want to do something as lowly as advance the public interest, then you are clearly discouraged from coming into the courts.[27]

Thus, just as Justice White predicted, Alyeska discouraged the initiation of litigation by judicial interest groups.

Other public interest lawyers were less pessimistic about the decision, realizing that there was still one institution potentially sympathetic to their cause--Congress. According to Bruce Terris, a D.C. based, public interest attorney:

> Perhaps now the issue will be so squarely focused before Congress that it will act. . . I don't think this ruling was the most devastating thing in the world. It did halt a trend, but it's best to go through Congress, not the courts, to establish attorneys' fee awards. I'm hopeful that since Congress has been challenged by the courts to make clear what it wants, that's what it will do.[28]

Unwilling to rely on Congress to accept the Court's cue, however, leaders of these organizations immediately went to Congress to ask for a more favorable policy proclamation. After hearings in 1975, which were heavily attended by judicial interest groups, Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976. The Act provided for awards of attorneys fees at a court's discretion to participants bringing actions under all civil rights legislation passed since 1876. Under the terms of this Act, plaintiffs could recover fees from the states as well as from private parties. According to Congress, the purpose of the Act was "to remedy anomalous gaps in our civil rights laws created by the U.S. Supreme Court's recent decision in Alyeska and to achieve consistency in our civil rights laws."

While Congress passed the Attorneys Fees Act at the urgings of several groups, taking their cue from Justice White in Alyeska, these same groups simultaneously began to pressure Congress for legislation that would allow them to recover attorneys fees awards from the federal government.[29] Yet, because of the potentially tremendous costs to the federal government,[30] passage of this type of blanket legislation required far longer pressure.

During the period from 1975 to 1980, however, judicial interest groups and environmentalists in particular, were able to convince Congress to add such provisions to legislation on a piecemeal basis. The 1976 Toxic Substance Control Act, for example, allows the party challenging the federal government to recover fees whether or not they actually win the entire suit. Finally in 1980, Congress succombed to the wishes of judicial interest groups and passed the all encompassing Equal Access to Justice Act, which "authorizes the federal government to pay attorneys fees for

individual and small businesses that defend themselves against "overreaching' government actions."[31]

Since passage of the Civil Rights Attorneys' Fees Awards and Equal Access to Justice Acts, judicial interest groups have taken full advantage of their provisions. Some groups, in fact, claim to derive up to 50 percent of their operating budgets from these awards. Yet, the success of these groups in translating adverse judicial decisions into favorable congressional legislation has prompted some members of the Reagan administration to seek to limit recovery of fees against the federal government. Specifically, Michael Horowitz, legal advisor to the Office of Management and Budget, has proposed legislation that would limit the hourly dollar amounts that attorneys and judicial interest groups could recover for their services.[32] Horowitz believes that such legislation is necessary because "liberal groups have come to rely on attorneys fees awards as a 'permanent financing mechanism'."[33]

While liberal judicial interest groups plan to lobby against the Horowitz plan, conservative judicial interest groups wholeheartedly endorse proposals for limits on fee awards. Groups such as the Washington and Pacific Legal Foundations believe that they should not accept fee awards because their financial "support must come from the public."[34]

Even if liberal judicial interest groups are able to fight off challenges from the Reagan administration and conservative groups, they may still face erosion of their congressional victories from the Court--the institution that thus far has most often limited those victories. During its 1982 term, for example, the Supreme Court decided two cases that revealed the Justices' disinclination to construe specific statutory fee awards provisions liberally. In the first, Hensley v. Eckerhart,[35] the

Court rejected claims made by the Legal Services of Eastern Missouri, the NAACP LDF, the Lawyers Committee for Civil Rights Under Law, and the ACLU concerning construction of the Civil Rights Attorneys Fees Awards Act.[36] The Court held that the Act's authorization of attorneys fees to prevailing parties meant that fees were recoverable only for the time spent on successful portions of the suit. Later, on July 1, 1983, the Supreme Court further limited the application of an attorneys fees authorization contained in the Clean Air Act. Ruchelshaus v. Sierra Club, et al.[37] arose out of litigation in which the Sierra Club and the EDF questioned air pollution control standards promulgated by the Environmental Protection Agency (EPA). While EDF and the Sierra Club lost the case on the merits, they petitioned the Court of Appeals of the District of Columbia to recover their attorneys fees. Even though neither group prevailed on the merits of the case, the Court of Appeals awarded 45,000 dollars to the Sierra Club and 46,000 dollars to the EDF. The EPA then asked the Supreme Court to review this decision to determine whether the award was appropriate given that neither group had won any part of their challenge.

Although the Clean Air Act stated that a court could award attorneys fees "whenever it determined that such an award is appropriate," the Supreme Court chose to construe that provision narrowly. Writing for the Court, Justice Rehnquist stated that, "absent some degree of success on the merits by the claimants it is not appropriate for a federal court to award attorneys fees."[38]

Justices Stevens, Brennan, Marshall, and Blackmun strongly dissented from this interpretation of the Act. Writing for the dissenters, Justice Stevens noted that:

> If one reads that statute and its legislative history without any strong predisposition in favor or against the 'American Rule' endorsed by the Court in Alyeska Pipeline Service Co. v. Wilderness Society, and repeatedly rejected by Congress thereafter, the answer is really quite plain--and it is not the one the Court engrafts on the statute.[39]

Thus, once again, judicial interest groups may be forced back to Congress to overcome these adverse judicial decisions.

ANALYSIS

The foregoing discussion provided one example of the way in which judicial interest groups affect policy. The purpose of this analysis was to examine the interactions between Congress and the Court in the context of two propositions: (1) judicial interest groups provide a key linkage between Congress and the Court; and, (2) these same judicial interest groups act as catalysts for expedited policy change. The remainder of this paper examines those two propositions.

Key Linkages

Prior to 1964, the American rule was well entrenched in American courts. During the hearings for the Civil Rights Act of 1964, several well established judicial interest groups testified for the need for statutory provisions for awards of attorneys fees for private parties. Subsequently, Congress passed 42 U.S.C. 1988 in recognition of the need for private attorneys general to enforce provisions of the civil rights legislation. Some of the same groups that had lobbied Congress then turned to the courts to take full advantage of their legislative victories. And, with this

legislative mandate in hand, the courts had little option but to award attorneys fees in race discrimination cases.

By lobbying Congress and the Court, the older civil rights groups not only created a linkage between the two branches but helped to create an environment favorable to the expansion of judicial interest groups in the United States. The formation of numerous other judicial interest groups in turn led to further pressure on Congress and the Court to expand the private attorney general concept. And, between Newman in 1968 and Alyeska in 1975, this strategy was quite successful. Congress enacted numerous pieces of legislation, continuing to authorize the payment of attorneys fees. And, these acts reflected the heterogeneous composition of the expanding public interest law movement. Attorneys fees provisions were included in statutes protecting the environment, natural resources, and access to government documents and other information. In 1975, however, the bridge that judicial interest groups had established between Congress and the Court collapsed. The Supreme Court reverted back to the traditional American rule, sensing that attorneys fees awards were an incentive for increased litigation. The potential repercussions of Alyeska immediately prompted judicial interest groups to restore the link so critical to their very survival. They quickly convinced Congress to remedy defects in existing civil rights laws while at the same time pressuring Congress to expand the private attorney general concept by allowing judicial interest groups to recover fees from the federal government.

While the extent of these victories is now in question, it is clear that judicial interest groups provided the impetus for both branches to act. Not only did numerous groups testify concerning the critical nature of these laws, but judicial interest groups also brought cases to the

Supreme Court testing their parameters. Without these groups' involvement, it appears that no change would have been forthcoming in the American rule. Because judicial interest groups rely so heavily on these awards for their very existence, they were forced to forge a link between these two branches of government.

Catalysts

Our second proposition suggests that judicial interest groups not only provide a key linkage between Congress and the Supreme Court, but also that they act as catalysts for expedited policy change. Three illustrations that support this proposition emerge from our analysis of the evolution of the American rule. The first of these involves dramatic policy changes regarding race discrimination. After lobbying Congress for the inclusion of attorneys fees provisions, judicial interest groups were able to initiate lawsuits against obvious discriminatory practices as private attorneys general, confident that they would be reimbursed for their efforts. As indicated by numerous scholars, these early lawsuits resulted in major changes in race discrimination law, which may not have occurred so rapidly in the absence of their actions.

A second example of expedited policy change was passage of the Civil Rights Attorneys' Fees Awards Act in 1976. Immediately after the defeat of several groups in Alyeska, judicial interest groups realized the need to link adverse judicial policy with congressional action. Thus, groups brought the words of Justice White to Congress, which responded by holding hearings on the issue immediately. Within one year after Alyeska, judicial interest groups obtained a policy change favorable to their interests with congressional passage of the Act.

The third example of this phenomenon also occurred as a result of the Court's actions in Alyeska. Taking cues from Justice White's concern with the inequities in prohibiting prevailing parties from recovering fees from dilatory or discriminating governments, judicial interest groups immediately pressured Congress to hold hearings concerning the adviseability of legislation permitting recovery of fees from the federal government. Soon thereafter, numerous individual pieces of legislation containing such provisions were enacted and in 1980 the comprehensive Equal Access to Justice Act was passed.

Based on these findings, it is clear that judicial interest groups acted as catalysts for political change. Yet, one of the major reasons that these changes occurred so quickly was that at the time all judicial interest groups agreed on the desireability of this change. Groups with diverse interests uniformly agreed on the need for attorneys fees awards to facilitate litigation brought in the public interest.

In recent years, however, further expedited change may be difficult because of the lack of agreement among judicial interest groups concerning this issue. No longer do all judicial interest groups agree on the need for litigation brought in the public interest, or, in fact, about the definition of the public interest, itself. Thus, this philosophical disagreement among judicial interest groups may affect further rates of change.

CONCLUSION

In this paper we examined two propositions concerning relations between Congress and the Supreme Court. Both propositions involved the vital role that judicial interest groups play in this process. While this study was confined to an analysis of this interrelationship in one area of

policy change, its findings may be useful in explaining other interactions between Congress and the Court. Further, and perhaps more important, we hope that this study highlights the need to expand our working definition of interest groups and to recognize the increasing role of judicial interest groups in the political process.

Notes

[1]The beginning of this tradition generally is assumed to have begun with publication of Arthur Bentley's The Process of Government (Bloomington, Ind.: The Principia Press, 1949, reissue of 1908 publication).

[2]For a comprehensive treatment of many of these works see David Truman, The Governmental Process, 2nd ed. (New York: Alfred A. Knopf, 1971). For a more recent bibliography see Jack L. Walker, "The Origins and Maintenance of Interest Groups in America," American Political Science Review 77 (June 1983):404-406.

[3]Ibid, p. 391.

[4]See for example, Howard Ball, Courts and Politics: The Federal Judicial System (Englewood Cliffs, N.J.: Prentice-Hall, 1980), chap. 5; Harold Chase, Federal Judges (Minneapolis, Minn.: University of Minnesota Press); Joel Grossman, Lawyers and Judges: The ABA and the Politics of Judicial Selection (New York: John Wiley); and Truman, Governmental Process, chap. 15.

[4a]Walter F. Murphy, Congress and the Court: A Case Study in the American Political Process (Chicago, Ill.: University of Chicago Press, 1962), p. 251.

[5]See Herbert B. Newberg, ed., Public Interest Practice and Fee Awards (New York, New York: Practising Law Institute, 1980), pp. 15-17 and the notes contained therein.

[6]Richard V. Falcon, "Award of Attorneys' Fees in Civil Rights and Constitutional Litigation," Maryland Law Review 33 (1973):379-381 and Note, "Distribution of Legal Expense Among Litigants," Yale Law Journal 49 (1940):699-701.

[7]Quoted in Falcon, "Attorneys' Fees," p. 379.

[8]Note, "Awarding Attorneys' Fees to the 'Private Attorney General': Judicial Green Light to Private Litigation in the Public Interest," Hastings Law Journal 24 (1973):733.

[9]Three equitable, albeit narrow, exceptions exist to the American rule. The first, the "common fund" exception, was created in Trustees v. Greenough, 307 U.S. 161 (1882). The "bad faith" exception was articulated by the Court in Vaughan v. Atkinson, 369 U.S. 527 (1962). And, the "common benefit" exception was carved out in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

[10]3 U.S. (3 Dall.) 306 (1796). But see, n. 9.

[11]The first of these came in 1853 when Congress "undertook to standardize costs allowable in federal litigation." 95 S.Ct. 1618 (1975).

[12]See, Newberg, Public Interest Practice, pp. 145-148.

[13]Title II of the Civil Rights Act of 1964, 42 U.S.C.S. §2000-3(b).

[14]390 U.S. 400 (1968).

[15]390 U.S. at 401-402 (1968).

[16]"High Court Orders Defendants to Pay Rights Case Fees," The New York Times, March 19, 1968, p. 30.

[17]Robert B. McKay, Nine for Equality Under Law: Civil Rights Litigation. A Report to the Ford Foundation (New York, N.Y.: Ford Foundation, 1977).

[18]According to the Ford Foundation,

> (f)oundations tend to provide 'seed money' for projects for a few years at most, but then expect the recipients to make it on their own . . . a possible way . . . by which public interest law can become a self-supporting

> complement to private-interest and government litigation . . . is to collect fees from a defendant when a public interest law firm wins a case . . .

The Public Interest Law Firm: New Voices for New Constituencies (New York, N.Y.: Ford Foundation, 1973), p. 36.

[19]95 S.Ct. 1612 (1975).

[20]The remaining one half of those fees were not recoverable against the federal or state government.

[21]495 F.2d 1029.

[22]495 F.2d 1037.

[23]Justices Douglas and Powell did not participate.

[24]95 S.Ct. at 1628.

[25]In Alyeska the Court noted that "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." 95 S.Ct. at 1624.

[26]Elder Witt, "After Alyeska: Can the Contender Survive," Juris Doctor, October 1975, p. 35.

[27]Ibid.

[28]Ibid., pp. 35-38.

[29]Writing in Alyeska, Justice White noted:

> . . . one of the main functions of a private attorney general is to call public officials to account and to insist that they enforce the law, it would follow in such cases that attorneys' fees should be awarded against the Government or the officials themselves. Indeed, that very claim was asserted in this case. But [the provision] on its face, and in light of its

legislative history, generally bars such awards, which, if allowable at all, must be expressly provided for by statute . . . 95 S.Ct. at 1626 (1975).

[30]The Congressional Budget Office estimated outlays for the Equal Access to Justice Act were:

FY	Millions
1982	69
1983	115
1984	126
1985	20

House Report 96-1418.

[31]Dawn P. Jackson, "Paying Lawyers to Sue the Government--An Expense that OMB Could Do Without," National Journal, April 17, 1982, p. 680.

[32]Ibid. Interview with Michael Horowitz in Washington, D.C., January 13, 1983.

[33]Jackson, "Paying Lawyers," p. 680.

[34]Interview with Dan Popeo, General Counsel, Washington Legal Foundation in Washington, D.C., December 11, 1982. Also, interview with Raymond Momboisse, Managing Attorney, Pacific Legal Foundation in Washington, D.C., November 3, 1982.

[35]51 U.S.L.W. 4552, May 16, 1983.

[36]Legal Services of Eastern Missouri sponsored the case. The other groups appeared as amicus curiae.

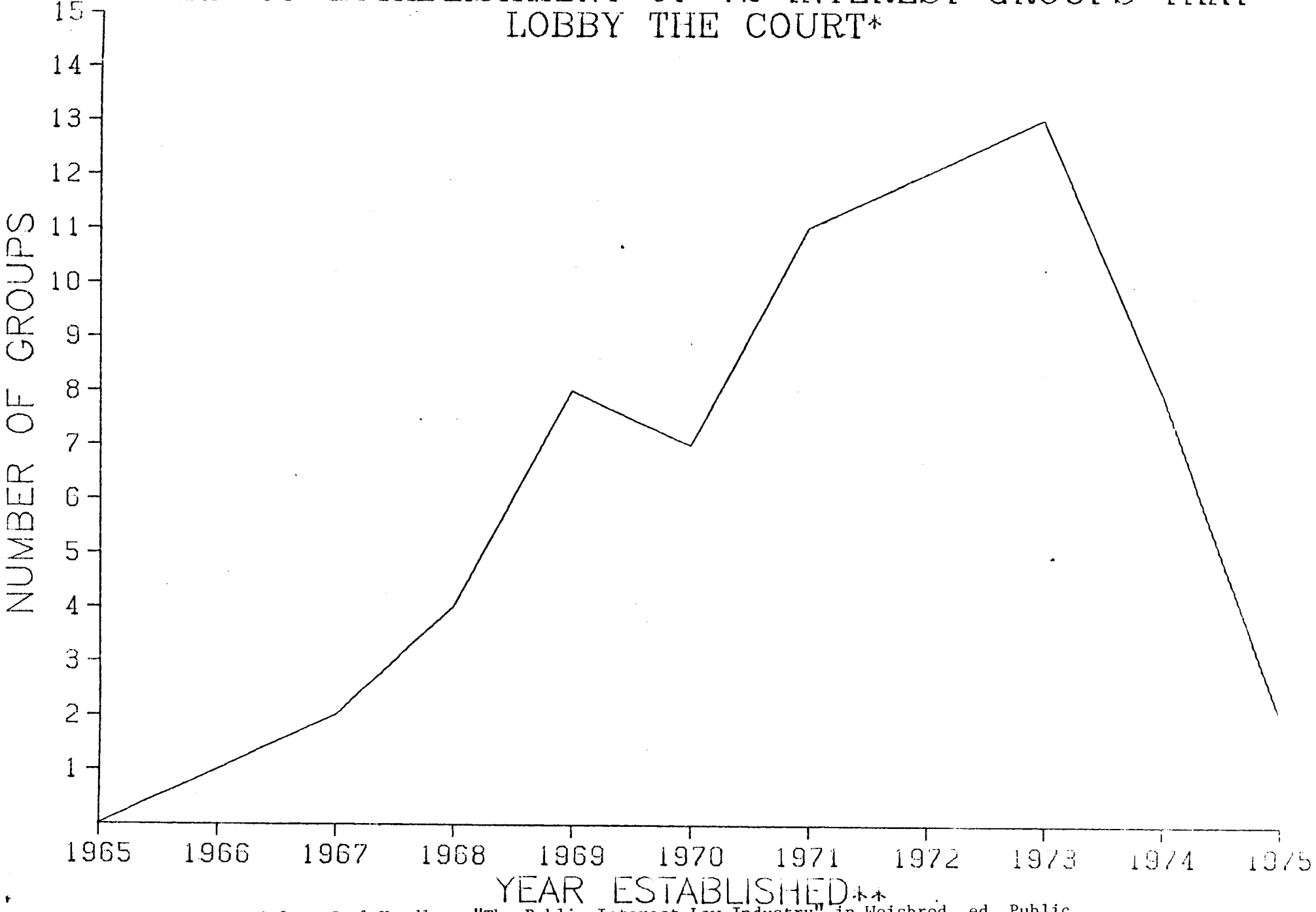
[37]51 U.S.L.W. 5132, July 1, 1983.

[38]51 U.S.L.W. at 5136.

[39]Ibid.

Figure 1

YEAR OF ESTABLISHMENT OF 72 INTEREST GROUPS THAT LOBBY THE COURT*



*Data derived from Joel Handler, "The Public Interest Law Industry" in Weisbrod, ed. Public Interest Law (Berkeley: University of California Press, 1978), p.50.

**Only four groups existed prior to 1965.