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Book Review

BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA. By the Council for Public Interest Law. Washington, D.C. 1976. Pp. xvi, 361. \$3.50 paper.

*Reviewed by Robert L. Graham**

Although the record of public interest law¹ in this country amply demonstrates the valuable and significant contributions made by public interest lawyers,² the future of public interest law has never been less secure. The decision by the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*,³ which limited awards of attorneys' fees in federal courts almost entirely to those situations where an award is specifically authorized by statute, has sharply limited fee awards as a potential source of funding

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1. "Public interest law" has traditionally been defined as "representation of the unrepresented and underrepresented." When the Ford Foundation first began to support public interest law in 1970, the term was so defined. In August, 1975, the American Bar Association House of Delegates approved a resolution defining "public interest law" as legal services provided without fee or at a substantially reduced fee, which fall into the areas of poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice. Jaffe, *Public Interest Law—Five Years Later*, 62 A.B.A.J. 982 (1976).

2. As Justice Thurgood Marshall has stated in reviewing the importance of public interest law within the legal profession:

Public interest law seeks to fill some of the gaps in our legal system. Today's public interest lawyers have built upon the earlier successes of civil rights, civil liberties and legal aid lawyers, but have moved into new areas. Before courts, administrative agencies, and legislatures, they provide representation for a broad range of relatively powerless minorities. . . . They also represent neglected interests that are widely shared by most of us as consumers, as workers, and as individuals in need of privacy and a healthy environment.

These lawyers have, I believe, made an important contribution. They do not (nor should they) always prevail, but they have won many important victories for their clients. More fundamentally, perhaps, they have made our legal process work better. They have broadened the flow of information to decision-makers. They have made it possible for administrators, legislators, and judges to assess the impact of their decisions in terms of all affected interests. And, by helping to open the doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.

Marshall, *Forward*, in *PUBLIC INTEREST LAW: FIVE YEARS LATER* (1976).

3. 421 U.S. 240 (1975). In *Alyeska*, the Supreme Court held that the federal courts could not award attorneys' fees to successful plaintiffs in public interest cases without express statutory authorization from Congress, without a showing of bad faith, or unless the case involved the common fund or common benefit doctrine.

for public interest lawyers. Coming on the heels of a number of lower federal court decisions which had encouraged public interest litigation by awarding fees in cases involving the vindication of significant public policies,⁴ the *Alyeska* decision severely jolted the public interest bar.

Despite these difficulties, public interest advocates are not without resources for developing creative solutions to these funding problems. In *Balancing the Scales of Justice: Financing Public Interest Law in America*, the Council for Public Interest Law sets forth a number of proposals for the future financing of public interest law. The Council gathers information and statistics on public interest law financing and evaluates the impact of funding patterns on the shape of public interest law practice. Based upon this data and analysis, the Council frames a number of recommendations concerning the future funding of public interest law.

Fundamental to the Council's approach is its concern with assuring the survival and expansion of public interest law in our society. This is both the strength and the weakness of the Council's analysis. In reviewing the growth and the prospects for public interest law, the Council develops a sophisticated justification for public interest law, noteworthy for its statistical basis and its policy analysis. At the same time, however, the Council also promotes its own position within the public interest law community, envisioning itself as the new leader of the public interest bar destined to play a major role in the future funding of public interest law.

The result is a study whose effectiveness is diminished by the Council's desire to perpetuate itself as the spokesman for all public interest law groups. Instead of providing an unquestionably independent look at the public interest bar, the Council is an advocate for its own growth and expansion. As a result, the Council is subject to the criticism that its study is based upon self-serving assumptions. Hence, the Council's primary conclusion—that public interest law is an important development in our jurisprudence and should be fostered and institutionalized—is unfortunately undermined by the Council's own desire to be in the vanguard of that institutionalization.

The Council, however, is not disingenuous about its commitment

4. See, e.g., *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), cert. denied, 409 U.S. 890 (1972), where a federal district court granted an award of expert witness and attorneys' fees in a public interest lawsuit on the grounds that the plaintiffs had conferred a substantial public benefit by enforcing a federal statute through their lawsuit. The court, in rendering a decision considered a landmark in public interest law prior to *Alyeska*, ruled that citizens succeeding in acting as "private attorneys general" are entitled to an award of fees.

to the growth of public interest litigation. The Council readily admits that its members share a number of common premises which have influenced its work.⁵ Furthermore, despite these shared premises and commitments, the Council has produced a comprehensive and thoughtful analysis which provides data critical for effectively evaluating the financial needs of the public interest bar.

The Council begins its study by reviewing the historical foundations of public interest law. As the Council points out, the seeds of public interest litigation can be traced to the development of legal aid in 1876. The legal aid movement made the first systematic effort to serve the unrepresented in American society and developed the concept of a salaried staff to advise its clientele. From these beginnings emerged the recognition, usually identified with the work of Louis D. Brandeis, that government agencies have the obligation to consider the public interest in their decision-making. However, for government to act with due concern for the public interest, there was the concomitant need for independent groups to monitor, in turn, the activities of the government itself. In pursuit of this goal, the American Civil Liberties Union and the NAACP Legal Defense and Education Fund, among others, developed organizations using law in a strategic way to evolve new precedents in an effort to create social change and monitor governmental action. From these beginnings, there emerged in the late 1960's the public interest law centers of today, staffed by lawyers funded by private foundations and the general public to serve a number of unrepresented or underrepresented interest groups in the decision-making processes of government. The public interest law advocates have broadened their focus to include not only the more traditional civil rights cases, but also a host of new areas of concern, including the environment, the rights of consumers, health care, corporate responsibility, and education reform. The modes of action, as always, involved litigation before courts and agencies, but also included investigative research reports, lobbying, public education, and arbitration.

5. Formed after a meeting in the Spring of 1974 attended by leaders of the private bar, representatives of public interest law centers, and executives of major foundations, the Council began its work in January, 1975, with the mandate to address a set of critical issues in public interest law. As the Council states, its members share a number of common premises including the beliefs that (1) citizens whose lives may be affected by governmental policies have a right to participate in the formulation of those policies; (2) the decision-making processes of government are most effective and legitimate when all viewpoints are permitted the opportunity for full airing and scrutiny; and (3) access to the courts and administrative agencies depends upon the availability of lawyers. *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA*, Preface at viii-ix (1976) [hereinafter *BALANCING THE SCALES OF JUSTICE*].

In scrutinizing the status of the public interest bar today, the Council provides a comprehensive inventory of public interest law organizations. The Council also develops significant economic data concerning the financial needs of public interest lawyers. In particular, the Council makes a number of findings, including the determination of the number of public law centers and lawyers; the location, distribution, and income of public interest law centers; the proportion of efforts by public interest law centers devoted to various issues and client groups; the distribution of public interest law center income by funding source and program types; the foundation grants for public interest law centers and activities; public contributions received by public interest law centers; government funding reported by public interest law centers; and public interest law centers adversely affected by the decision of the Supreme Court in the *Alyeska* case.⁶

The most significant findings by the Council concern the rapid growth of the public interest bar. From only 15 non-profit centers staffed by less than 50 full-time attorneys in 1969, public interest law centers increased to 92 in number by 1975 with almost 600 full-time lawyers.⁷ This substantial increase in the number of centers and lawyers was also paralleled by a significant growth in funding through the early 1970's. From 1972 to 1975, contributions to public interest law totaled \$130.4 million and the funding of public interest law centers increased from \$25.8 million to \$40 million.⁸

In the last several years, however, a growing pattern of instability and sense of impending financial crisis has plagued public interest law centers. The Council accurately identifies the primary causes of this phenomenon. The key factor was the sharp downturn in the economy in 1974-1975.⁹ As a result, a number of foundations which traditionally provided critical support of public interest law centers

6. See BALANCING THE SCALES OF JUSTICE, Appendix D.

7. BALANCING THE SCALES OF JUSTICE at 79.

8. Despite this increase in funding, the total contributed to public interest law centers from 1972 to 1975 was, in fact, quite small compared to the \$10.8 billion in gross receipts received by private lawyers in 1972 alone; and total income received by public law centers in that period was also small, compared to the total income of other types of tax-exempt organizations. Furthermore, the income received by the centers is heavily concentrated, as 59 percent of all income went to the 11 largest centers despite the fact that these centers constitute only 13 percent of all public interest law groups. Nearly one-third of all funding for public interest law has gone to three centers—the NAACP, the ACLU, and the related ACLU Foundation. BALANCING THE SCALES OF JUSTICE at 90-91, 96.

9. The economic recession severely depressed the securities market, causing sharp drops in the value of foundation and private portfolios, thereby reducing the willingness of foundations and individuals to fund public interest law centers. Furthermore, the recession-inflation also resulted in a decline in the real worth of gifts plus an increase in the operating costs that the gifts were designed to cover. BALANCING THE SCALES OF JUSTICE at 220-21.

either pressed their grantees to look elsewhere for funds, or dropped out of the funding picture altogether. This development, coupled with the impact of the *Alyeska* decision upon public interest litigation, has significantly hampered the growth and, indeed, the viability of the public interest bar.

Of course, the fact that economic conditions have greatly affected the growth and continued viability of the public interest bar is not a recent development. Public interest law has been defined by economic forces since its inception. Not only has public interest law been a response to the failures of the private market place to provide legal services to certain disadvantaged groups, but also has only survived by virtue of the subsidies provided by public and private benefactors.¹⁰

The Council appropriately recognizes this to be the case, but in its report strikes a fresh tone of concern. Despite a number of federal statutes permitting fee awards, many large awards were eliminated by the decision in *Alyeska*,¹¹ and a growing number of foundations are reluctant to continue to fund public interest bar projects. As the Council concludes, public interest advocacy is approaching a critical stage in its financial history.

In recognition of these problems of future funding, the Council seeks to identify alternative sources of financial support for public interest litigation. It is here that the Council makes its most significant contribution. Not only does the Council review the pros and cons of these sources of funding, but the Council also develops recommendations prescribing a proper role for each source of funding in the future funding of public interest law.

Six key recommendations are made: (1) government support for the public interest bar should be expanded; (2) administrative agencies should underwrite the cost of citizen participation in their proceedings; (3) attorneys' fees should be awarded, pursuant to legislation, to parties successfully bringing suits to vindicate significant public interests; (4) the legal profession should provide support for public interest advocacy, including a voluntary check-off system to be established by the American Bar Association inviting members to contribute a portion of their dues to public interest law activity; (5) foundations should continue to play a substantial role in funding public interest law centers; and (6) legal doctrines should be

10. See generally Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

11. Of the 44 private public interest law firms surveyed by the Council, 34 stated that they had claims for fees that were adversely affected by *Alyeska* and further reported that they would be unable to do as much public interest work in the future as a result. BALANCING THE SCALES OF JUSTICE at 318.

revised to improve access to the courts, including the reduction of limitations on standing and class actions.

In addition, the Council describes in detail a number of practical means to implement these recommendations. Concerning attorneys' fees, for example, the Council specifically suggests that Congress should pass legislation authorizing the courts to award reasonable attorneys' fees and other costs to a party whose participation in a civil suit has vindicated a significant public interest, and whose economic interest is small compared to the cost of effective participation, or who does not have sufficient funds adequately to compensate counsel and pay its cost.¹²

The Council also urges that interim fee awards should be authorized in protracted cases. Furthermore, the Council recommends that the statute barring attorneys' fees against the federal government—namely 28 U.S.C. § 2412—should be abolished; that Congress should calculate attorneys' fee awards in public interest cases at marketplace rates; and that the Internal Revenue Service should relax its limitations on the acceptance of fees by tax-exempt public interest law centers by permitting centers to weigh the potential for a fee recovery in selecting cases as long as the cases taken fall within their basic charitable mandates.

The Council further submits that it should take the leadership role to implement these recommendations. In particular, the Council states that it will establish a Fund for Public Interest Law to explore and develop new funding sources and make grants to public interest law programs. The Council will also develop a revolving fund that will make loans to clients and lawyers to promote public interest law work. In addition, the Council plans to serve "as a representative for the public interest law community and the clients served by public interest lawyers on matters of common concern; provide technical assistance to smaller public interest law programs on fund-raising; and provide a communications network among public interest lawyers."¹³

12. In this regard, the Council submits that a statute like the following may be appropriate:

In any civil action arising under a statute of the United States or Constitution, the Court may allow the prevailing party reasonable attorneys' fees, in the interest of justice, if the Court determines that (a) the prevailing party has conferred a substantial public benefit; and (b)(1) the economic interest of the prevailing party is small in comparison to the costs of effective participation, or (2) the prevailing party does not have sufficient resources adequately to compensate counsel.

BALANCING THE SCALES OF JUSTICE at 320.

13. BALANCING THE SCALES OF JUSTICE at 345. In taking this position and formulating these plans, the Council undercuts the effectiveness of its study by promoting its own perpetuation as an advocate of the public interest bar. Despite the volume of statistics supporting its

The recommendations are, of course, easily framed in theory but difficult to implement in practice. Although the Council plans to direct its energies in the future towards implementing its many suggestions, the task of implementation will be an onerous one. Indeed, even since the publication of the Council's work, one federal agency relying in part upon the *Alyeska* rationale, has already announced that it will not begin a broad program of financial assistance for private groups wishing to express their views concerning government policies at agency hearings.¹⁴

In short, the recommendations of the Council will aid those supporting the further expansion and growth of the public interest bar. Proposals like those of the Council will assuredly be debated in the halls of Congress and will undoubtedly serve to facilitate that debate. But the prime conclusion of the Council's study—that public interest law is an important development in our jurisprudence and should be fostered and institutionalized—is certain to encounter substantial opposition and resistance.

recommendations, the Council's desire to be the leader of the public interest bar diminishes the independence of its recommendations. Although a clearinghouse organization to develop funding and improve communication among public interest centers may be desirable, it is at least questionable whether the Council should nominate itself for this role in a study designed to take a hard, independent look at the public interest bar.

14. On November 12, 1976, the Nuclear Regulatory Commission issued a document entitled *Financial Assistance to Participants in Commission Proceedings—Statement of Considerations Terminating Rulemaking*, which resulted from an informal rulemaking proceeding and considered the matter of possible financial assistance to participants in its proceedings. The NRC determined not to initiate a program to provide funding to participants in its licensing, enforcement, and antitrust proceedings, and as a general proposition, in its rule-making proceedings. 41 Fed. Reg. 50, 829 (1976).

This action by the NRC should be contrasted with that of two other federal agencies. A program to help support the expression of opposition view recently has been initiated by the Federal Trade Commission, and the Environmental Protection Agency is scheduled to start a similar program in the near future. Both the FTC and EPA efforts were specifically authorized and funded by Congress. For an example of specific congressional authorization to the FTC to award direct compensation to public participants in trade regulation rulemaking proceedings, see the Magnuson-Moss Warranty and FTC Improvement Act of 1975, 15 U.S.C. § 2301 *et seq.* (Supp. V 1975), adding a new § 18(h) to the Federal Trade Commission Act.

*The Loyola University of Chicago Law Journal
respectfully dedicates this issue to
the late Judge John Cornelius Hayes.*



Honorable John Cornelius Hayes
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