The People's Lawyer

Public Citizen Litigators Win Legal Battles for Consumers

By Alan Morrison

Like runners in a marathon, the lawyers in the Public Citizen Litigation Group have been pounding the legal pavement for almost three decades, slogging through political storms and courtroom dramas to uphold constitutional principles, force the government and corporations to obey the law and win major legal reforms for consumers.

Our legal work has been an inseparable part of Public Citizen's success, because it is through the judiciary that we as citizens have been able to enforce the law, whether that involves obtaining public records or ensuring that an agency carries out its statutory duties to protect the health and safety of citizens.

When the Litigation Group opened its doors in February 1972, it had two basic missions: First, it would provide legal support for the entire Public Citizen organization, making it one of the few public interest groups that had a full-time team of litigators. Second, it would bring precedent-setting law reform cases. The bulk of our work has been at the appellate level, where we often are challenging government decisions or seeking to force action to protect the health, safety and pocketbooks of consumers. Usually, we are arguing aspects of the law, as opposed to the facts of a case, as in a typical trial.

Soon after our founding we became embroiled in a series of lawsuits to unlock documents kept by agencies such as the Food and Drug Administration (FDA), the Department of Justice and the Department of Transportation. Through the years, Public Citizen has filed approximately 300 lawsuits under the Freedom of Information Act (FOIA). We have used the FOIA and other open-record laws to gain access to an array of government records, including documents relating to government regulatory actions as well as items such as the Nixon tapes, e-mails relating to the Iran-Contra Affair and grand jury testimony from the infamous Alger Hiss spy case. Moving into the electronic age, in a series of lawsuits in the 1990s, we secured landmark court victories ensuring that White House e-mails as well as other electronic government records would remain part of the public record.

Alan Morrison is co-founder of the Public Citizen Litigation Group.

Although some other public interest groups occasionally bring FOIA cases, no one has a constant docket of them as we do, serving not only Public Citizen, but other civic organizations, journalists and ordinary citizens who are seeking access to important secret materials.

Much of our work has been in support of Public Citizen's work on health and safety issues. We have sued federal agencies when they failed to carry out laws passed by Congress or performed their work in an arbitrary manner. Early lawsuits included claims involving the illegal use of nitrates in meat and the unlawful settlement of a government antitrust case against International Telephone and Telegraph Co. We have forced the Occupational Safety and Health Administration (OSHA) again and again to issue to critical safety standards for exposure to toxic substances. For example, after eight years of litigation, we forced OSHA to regulate worker exposure to the carcinogen ethylene oxide. We also forced the FDA to remove four carcinogenic food dyes from the market.

One of the hallmarks of our work is that we have litigated in areas of the law in which no other group is doing anything remotely similar — for instance, regulation of the legal profession itself. Soon after we began, we got involved in a lawsuit to challenge "minimum fee schedules" promulgated by the Virginia State Bar and three bar associations in the counties just south of Washington. The case eventually reached the U.S. Supreme Court, where we won a unanimous decision that lawyers were not exempt from antitrust laws and that minimum fee schedules are a classic form of illegal price-fixing. Soon thereafter we began our challenges that led to the elimination of the absolute prohibition on lawyer advertising. This prohibition served largely to deny consumers access to information about the availability and affordability of legal services. We later challenged other bar practices that made it more difficult for average citizens to obtain the

services they needed at prices they could afford. Finally, in recent years we have been active in objecting to class action settlements that largely seemed to benefit plaintiff lawyers and defendants while doing little for the individuals who were wronged in the first place.

Another area of law in which the Litigation Group has stood virtually alone in representing the public interest is in questions involving the separation of powers principle enshrined in the Constitution. While we never set out to be a defender of this principle, events brought us to the place where that became a significant element of our work. In the early 1970s, President Richard Nixon was claiming the power to "impound," or refuse to spend, money that Congress had appropriated for specific purposes. In the first of many impoundment cases, we filed an amicus brief on behalf of the chairmen of every standing committee in the Senate, other Senate leaders and three members of the House of Representatives, leading to a court ruling that the impoundment money was unlawful. And when Nixon tried to fire special Watergate prosecutor Archibald Cox, our lawsuit resulted in a judgment that the firing was illegal. The court ruling gave the special prosecutor's office a firm sense of independence, even though Cox declined to reclaim his office. In future years, we successfully sued to strike down the "legislative veto" statute that gave Congress power to overturn regulatory decisions of the executive branch. We also successfullychanllenged the "line item" statute that gave the president the power to veto portions of appropriations statutes approved by Congress.

The Litigation Group has worked in other areas of law as well. We brought a number of consumer cases, including those attacking unfair practices by banks and the case that ended the airlines' practice of regularly bumping passengers while falsely claiming that it was unintentional. We have worked to protect the rights of workers to have democratically governed labor unions. We have been involved in a number of important First Amendment cases, both suing to attack unjust laws that infringed free speech and to defend reasonable laws from First Amendment challenges. Recently, we have successfully defended the rights of people to post anonymous messages on the Internet.

Our work in the consumer area and in federal regulatory cases led us to develop a specialty in the law known as "preemption" — the claim that a federal statute or regulation precludes a state from enforcing its laws, often in the context of a lawsuit seeking damages for injured persons.

Finally, in 1990, we began our highly successful Supreme Court Assistance Project in which we help lawyers who have little or no Supreme Court experience handle their cases in the high court by providing assistance in writing briefs and preparing for oral arguments.

During the past 30 years we have learned a number of lessons that continue to be of great importance in our case selection and our thinking about our work.

First, litigation is essential. If the government won't release a document you want, the only way to get it is to sue. If an agency refuses to obey the law, only a court can order it to do so. If Congress passes a law that violates principles of separation of powers, only the federal courts can declare it unconstitutional. If lawyers for plaintiffs and defendants settle a class action case with little benefit to consumers , only groups like ours will raise objections to assure that the rights of the class members are protected.

Second, if people know that you will sue and that you have the skills to properly handle the case and often prevail, the threat of litigation will often be enough to bring about change.

Third, in some situations, the only way to improve the law is through legislation or amendments to existing rules. But before those changes can take place, it is often necessary to show those in power, through litigating, that

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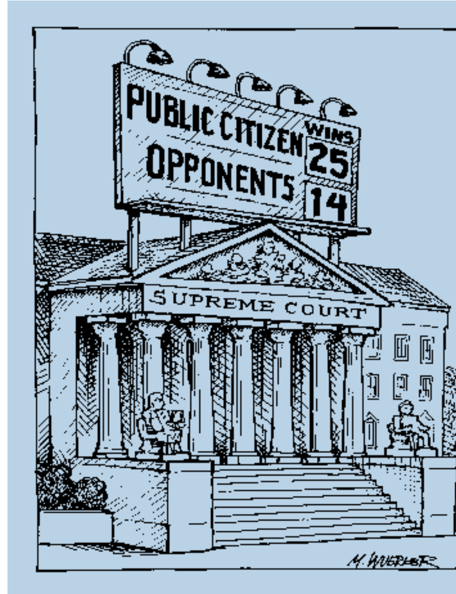

The Docket

The Public Citizen Litigation Group has:

- argued 40 cases in the U.S. Supreme Court, winning 25, losing 14 and tying 1.
- filed lawsuits in every one of the 12 regional federal circuits.
- been counsel in lawsuits in more than 20 state courts and in more than 20 out of 94 federal district courts.

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the current law is flawed.

Fourth, the process of litigation is partially a process of education. Perhaps the most striking example of that is our lawsuit challenging the efforts by the White House to destroy the e-mail records from the Reagan and Bush administrations. The defendants claimed there was nothing of substance in the e-mails and that the few messages of importance were printed out. Not only did our lawsuit succeed in preventing the destruction of these records and securing their eventual release, it also showed how important the use of electronic mail had become for the White House, leading to a massive change (that is still under way) to alter the system for maintaining electronic records throughout the government.

Sometimes there is no choice but to litigate.

Fifth, sometimes there is no choice but to litigate. When a case reaches the Supreme Court, the Court is going to decide the issue at hand, and it is vital that the interests of average citizens be represented to the greatest extent possible, particularly since the government and large business entities will surely take the opportunity to present their views to the Justices.

Sixth, litigation is a vital tool, but it is not the only one that we use. Many times the answer to a problem will be legislative, and our lawyers frequently are asked to participate in the analysis of a proposed law (in particular its constitutional soundness and its practical implications). We will make suggestions in the drafting and provide testimony to the relevant congressional committees. Similarly, when administrative agencies propose new regulations, we often comment on them and consult with agency officials. When they are not considering an action that Public Citizen considers necessary, the Litigation Group works with others at Public Citizen to file petitions to urge the agency to remedy the problem. We also keep a watchful eye on the rules under which court cases are conducted and often comment on proposed changes and make suggestions of our own. And we take advantage of opportunities to set forth our ideas by writing articles, teaching, appearing on educational programs and being available to the media.

Seventh, persistence and long distance matter. Over the years we have accumulated vast knowledge about the law and the way courts and agencies conduct their business. But perhaps even more important, the fact that we are around for the long-term helps us assure that the victories we win today are not lost tomorrow because no one is there to prevent backsliding. We have seen all too often that if no one remembers what happened before, the past is likely to recur.

Most of the issues on which we have worked continue to need our attention, although perhaps in somewhat different forms than in the past. The advent of the Internet and the increasing globalization of our economy have required us to adapt to a new era. Like the law itself, we will continue to evolve as we meet the legal challenges of the 21st century. |PC|