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Legalizing theft by lawsuit

by [Paul Tinder](#) September 29, 2009 03:17 PM.

"When public officials prosecute lawbreakers, those officials are fulfilling a legitimate role of government," observed Robert Levy of the [Cato Institute](#) in a 2001 commentary that resonates even more today. "Most of the time, that prosecutorial role is unobjectionable, and it is often commendable. But the latest rounds of litigation -- tobacco, then guns -- are different in three respects," he contended, "each of which threatens the rule of law."

Levy noted first that "coordinated actions by multiple government entities can impose enormous legal fees on defendants. Such actions have been used to extort money, notwithstanding the fact that the underlying case is without merit." To discourage this "extortion parading as law," he recommended "a 'government pays' rule for legal fees when a government unit is the losing plaintiff in a civil case."

Levy was also concerned about "the recent emergence of an insidious relationship between the plaintiff's bar and some government officials. That relationship -- common to tobacco and gun litigation -- is a second major threat to the rule of law," he asserted. "Both rounds of litigation were concocted by a handful of private attorneys who entered into contingency fee contracts with the government," Levy recalled. "In effect, members of the private bar were hired as government subcontractors, but with a huge financial share in the outcome." He worried that a private lawyer subcontracting his services to the government under these terms might forget that he has become, at least temporarily, "a public servant beholden to all citizens, including the defendant," and that "his overriding objective is to seek justice."

Levy pointed out that "the states in their tobacco suits doled out multibillion contracts to private counsel -- not pursuant to per-hour fee agreements, which might occasionally be justified to acquire unique outside competence or experience, but as contingency fees, a surefire catalyst for abuse of power. And those contracts," he added, "were awarded without competitive bidding to lawyers who often bankrolled state political campaigns."

Levy emphasized government's status as "the single entity authorized, in narrowly defined circumstances, to wield coercive power against private citizens. When government functions as prosecutor or plaintiff in a legal proceeding in which it also dispenses punishment," he cautioned, "adequate safeguards against state mischief are essential." Levy argued that "contingency fee contracts between government and a private attorney should be illegal" and that private lawyers should not be "enforcing public law with an incentive kicker to increase the penalties."

Of paramount importance, said Levy, is the fact that "laws are supposed to be enacted by legislatures, not by the executive or judicial branches. In too many instances," he lamented, "government-sponsored litigation has been a substitute for failed legislation. That violates the principle of separation of powers -- a centerpiece of the federal Constitution and no less important at the state level. Evidently," Levy concluded, "none of that matters to many of the attorneys general, mayors, and their allies in the private bar. In an attempt to circumvent the legislative process, they intend to pursue through litigation what was rejected by the legislature."