THE CONSTITUTIONALITY OF RESTRICTIONS ON THE LEGAL SERVICES CORPORATION

Testimony of David Cole, Professor, Georgetown University Law Center,

before the United States Commission on Civil Rights

May 9, 1997

This testimony discusses the constitutionality of restrictions imposed on the activities of legal services corporations and lawyers by the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, § 504(d)(1) ("1996 Budget") and the Omnibus Consolidated Appropriations Act of Fiscaly Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, §502(a) ("1997 Budget"). These laws place unprecedented limits on the type of legal representation that legal services lawyers can provide to their clients. In addition, while the restrictions are attached to funding of legal services corporations, they apply not only to the federal government's money, but also to any non-federal monies that the legal services corporation might have. It is my belief that the extension of these restrictions to non-federal monies is unquestionably unconstitutional.

Under the 1996 and 1997 Budgets, any agency that receives Legal Services Corporation (LSC) funds is prohibited from: (1) advocating or opposing any reapportionment; (2) influencing any executive order, adjudicatory proceeding, or legislation; (3) participating in any class action lawsuit; (4) litigating or lobbying to reform federal or state welfare laws; (5) representing prisoners, illegal aliens, or anyone charged with illegal drug activity in a housing eviction proceeding; (6) participating in any litigation with respect to abortion; (7) collecting attorneys'

fees; and (8) conducting a training program for the purposes of advocating a particular public policy or encouraging a political activity. 1996 & 1997 Budgets.

These restrictions are plainly unconstitutional to the extent that they restrict what agencies receiving legal services funds can do *with their own money and on their own time*. All of the restricted activity -- lobbying and litigating for social change -- is protected by the First Amendment. NAACP v. Button, 371 U.S. 415, 429-31 (1963) (holding that the First Amendment right of association and the right to petition for redress of grievances protect litigation for social change); In re Primus, 436 U.S. 412, 426 (1978) ("collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-12 (1972) (First Amendment protects right to lobby legislators and administrators).

The LSC restrictions do not *prohibit* these activities altogether. Rather, they condition receipt of federal funding on an agency surrendering the right to engage in the conduct. Thus, some have argued that the First Amendment is not implicated, because any lawyer or entity that wants to engage in such activity may do so, as long as they do not accept federal LSC funds. This argument, however, is flawed. It would permit the government to "buy" off people's constitutional rights by dangling benefits before them on the condition that they surrender their constitutional rights. Given the amount of public money in the economy, such an argument would give the government the power to run roughshod over constitutional rights. Accordingly, the Supreme Court has consistently held that the government may not place "unconstitutional conditions" on its funding. See, e.g., Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342 (1996); O'Hare Truck Service, Inc. v. Northlake, 116 S. Ct. 2353 (1996) (both holding that

government contracts generally may not be conditioned on the recipients avoiding certain political speech or affiliations).

The "unconstitutional conditions" doctrine provides that government may not condition access to a government benefit on the surrender of a constitutional right. In Rust v. Sullivan, 111 S. Ct. 1759 (1991), for example, the Supreme Court upheld a regulation barring federally-funded Title X family planning projects from advocating abortion with project funds. In doing so, however, the Court expressly distinguished the Title X regulation from laws that restrict what grant recipients can say or do *beyond* the scope of a federally-funded project, on their own time and with their own resources. The former restriction, limited to a federally funded project, is generally permissible; the latter restriction is unconstitutional.

The Rust Court explained that the unconstitutional conditions doctrine applies where "the government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 111 S. Ct. at 1774 (original emphasis). By contrast, the Court found, the Title X regulations "govern the scope of the Title X project's activities, *and leave the grantee unfettered in its other activities*." Id. (emphasis supplied).

Thus, Rust teaches that while government may generally regulate the use of government funds, it may not regulate what a recipient of such funds does with non-government resources. In FCC v. League of Women Voters, 468 U.S. 364, 402 (1984), for example, the Court struck down a law requiring that public television stations receiving federal funds not editorialize with any of their funds, whether federal or not. See also Perry v. Sindermann, 408 U.S. 593, 597-98

(1972). By contrast, the Court has upheld regulations that regulate *only* the use of government funds. Rust v. Sullivan, supra; Regan v. Taxation With Representation, 461 U.S. 540, 546 (1983) (no infringement on First Amendment rights where Congress "has simply chosen not to pay for [plaintiff's] lobbying").

The restrictions at issue here plainly fall on the unconstitutional side of the line drawn in Rust v. Sullivan. They do not restrict merely what can be done with federal funds; they go further to restrict what the *recipient* can do even with non-federal funds. Thus, insofar as they restrict what recipient agencies can do with non-federal funds, the restrictions are plainly invalid.[1]

---

[1] Some of the restrictions may also be unconstitutional even as applied to the use of federal funds. While it is clear that the government may not use funding conditions to seek to restrict what a recipient does with his or her own money, it does not follow that the government is free to impose *any* restrictions whatsoever on the use of government resources. The First Amendment may impose restrictions even on the conditions government imposes on the use of its own funds. Thus, for example, in Rosenberger v. Rectors and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995), the Court held that the University of Virginia could not prohibit the use of government funds for a religious student magazine, where it had offered funding for other student magazines. The Court in that case distinguished Rust v. Sullivan, stating that the government may control the content of the speech it directly funds *only* where the government is speaking, or is hiring others to express a governmental message, but *not* where a funding program is designed to support a diversity of private expression. Along similar lines, the Court has held that government cannot selectively subsidize the press on content grounds, and cannot determine the content of speech in traditional public forums. Thus, even where only the government's own money is at stake, First Amendment restrictions may apply.

An argument can be made that when the government imposes content or viewpoint-based restrictions on what a legal services lawyer can do to assist his or her client, it is infringing upon the attorney-client relationship in a way that violates the First Amendment. I have developed the argument in David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 New York Univ. L. Rev. 675, 743-47 (1992). Rosenberger supports the argument, because it is quite clear that the government is not seeking to communicate its own message when it funds legal services lawyers. Under this theory, viewpoint-based restrictions would be unconstitutional, and perhaps restrictions that interfere

When the LSC was founded, Congress understood that its independence was critical. The enabling legislation included findings that "the legal service program must be kept free from the influence of ... political pressures," and that its attorneys "must have full freedom to protect the best interests of their clients." Yet because it is dependent on federal financing for survival, the LSC is in fact extremely vulnerable to political pressures, as last year's budget bill makes all too clear, and today its attorneys have nothing like "full freedom" to protect their clients' best interests. I believe that in the long term, the LSC's survival depends on preserving and defending the principle upon which it was established -- a group of *independent* lawyers with full freedom to protect the rights of indigent clients.

---

with the lawyer's ability to provide full and zealous representation to her client. Of the current restrictions, the limits on lobbying and participating in class actions may be the most problematic, as a lawyer's obligation to represent her client may require using these techniques to respond effectively to her client's legal needs. In addition, the restrictions on challenging welfare and abortion laws may be viewpoint-based.