

RECENT LEGISLATION

CONSTITUTIONAL LAW — CONGRESS IMPOSES NEW RESTRICTIONS ON USE OF FUNDS BY THE LEGAL SERVICES CORPORATION. — Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

Fierce political battles have raged about the Legal Services Corporation (LSC) for much of its twenty-three year history.¹ Critics have attacked LSC for pursuing a “radical agenda” and for “engaging in dubious litigation that is of no real benefit to poor people,”² while supporters have termed LSC “the one program in the entire war on poverty that made a difference”³ and have decried the “campaign to deny the right of legal representation to the poor.”⁴ Last year, in the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA),⁵ Congress reduced LSC funding by thirty percent — to \$278 million in fiscal year 1996,⁶ a reduction of \$122 million from 1995⁷ — and imposed new restrictions on how LSC funds may be used. Congress banned legal services providers from using non-LSC funds to engage in certain activities and prohibited legal services attorneys from challenging welfare reform laws. The restrictions on non-LSC funds impose an unconstitutional condition on LSC grantees; the ban on welfare reform litigation assaults values protected by the First Amendment and the Due Process and Equal Protection Clauses.

Section 504 of OCRAA imposes nineteen restrictions on recipients of LSC funds.⁸ OCRAA’s restrictions differ from prior controls in two

¹ See LEGAL SERVS. CORP., 1994 ANNUAL REPORT 5 (1994); Clifford M. Greene, David R. Keyser & John A. Nadas, Note, *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734, 734-35 (1976). LSC “is a private, nonprofit corporation established by Congress to help provide equal access to justice under the law for all Americans.” LEGAL SERVS. CORP., *supra*, at 1.

² *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before the Subcomm. on Commerce, Justice, State and Judiciary of the House Appropriations Comm.*, 104th Cong. pt. 9, 129, 130 (1996) (testimony of Rep. Dan Burton).

³ James Ridgeway, *Legal Disservices*, VILLAGE VOICE, Aug. 6, 1996, at 20.

⁴ Editorial, *Cheating the Poor in Court*, BOSTON GLOBE, July 17, 1996, at A14.

⁵ Pub. L. No. 104-134, 110 Stat. 1321.

⁶ See *id.* tit. V. The fiscal year 1997 budget provides \$283 million in funding, virtually the same level as in 1996. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.A.N. (110 Stat.) 3009, [273].

⁷ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1759 (1994) (providing \$415 million in funding for LSC in fiscal year 1995); Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, tit. II, ch. I, Pub. L. No. 104-6, 109 Stat. 73, 84 (rescinding \$15 million of LSC’s 1995 funding).

⁸ See OCRAA § 504. Section 504(a) states that “[n]one of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity” engaging in activities listed in the 19 subsections of section 504(a). *Id.* § 504(a). These

crucial ways.⁹ First, OCRAA prohibits LSC grantees from using non-LSC funds to engage in certain activities, including class action suits and lobbying.¹⁰ Second, restriction 16 prohibits LSC from funding a legal services provider "that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system."¹¹ Previous restrictions limited the types of cases in which LSC lawyers could engage; restriction 16 goes even further by limiting the arguments LSC lawyers may make on behalf of their clients.¹²

OCRAA unconstitutionally restricts the use of non-LSC funds. In contrast to past acts, which "applied restrictions contained in those acts only to the funds appropriated thereunder," the 1996 restrictions "prohibit[] LSC from funding any recipient that engages in certain specified activities,"¹³ regardless of whether LSC funds are used to support such activities.¹⁴ By conditioning LSC funding on the surrender of such rights as the right to file a lawsuit¹⁵ and the right to engage in advocacy,¹⁶ the restrictions implicate the First Amendment.

restrictions are incorporated into the 1997 appropriations bill by reference. *See* Omnibus Consolidated Appropriations Act, 1997, § 502(a). Prohibited activities include participation in redistricting matters, lobbying, class actions, representation of illegal aliens, abortion-related litigation, litigation on behalf of prisoners, and eviction proceedings of individuals charged with selling drugs. *See* § 504(a)(1)-(4), (7), (11), (14)-(15), (17).

⁹ The Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (1994)), prohibits LSC grantees from using the funds in most fee-generating cases, criminal cases or civil cases arising out of criminal cases, political activities, labor-related activities, certain abortion cases, and litigation relating to desegregation. *See id.* § 1007(b). The fiscal year 1995 appropriations bill restricted LSC recipients from representing illegal aliens and from lobbying. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, § 403(b)(1) (applying the restrictions from Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, § 606(a), 104 Stat. 2101, 2149-51 (1990)).

¹⁰ *See* OCRAA § 504(d)(1).

¹¹ *Id.* § 504(a)(16). Section 504(a)(16) permits representation of "an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law." *Id.*

¹² Most notably, the new restrictions effectively ban LSC recipients from making constitutional challenges to welfare laws. Both OCRAA and accompanying LSC regulations mistakenly assume that LSC lawyers can easily separate representation of individual clients from challenges to the legitimacy of welfare reform. *See* Welfare Reform, 61 Fed. Reg. 45,747, 45,759 (1996) (to be codified at 45 C.F.R. pt. 1639). Effective representation of an individual client, however, may require challenges to the constitutionality of state or federal welfare programs. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970).

¹³ Use of Non-LSC Funds, 61 Fed. Reg. 41,960, 41,960 (1996) (to be codified at 45 C.F.R. pt. 1610).

¹⁴ Prior to OCRAA, certain restrictions applied to LSC grantees' use of private funds, but none to non-LSC public funds. *See* 45 C.F.R. §§ 1610.1, 1610.2, 1610.3, 1612.7(a) (1995).

¹⁵ *See* *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

¹⁶ *See* *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

The restrictions on LSC grantees directly contradict the Supreme Court's ruling in *FCC v. League of Women Voters*.¹⁷ In that case, the Court held unconstitutional a ban on public television stations' airing editorials because the ban prohibited a station "from using even wholly private funds to finance its editorial activity."¹⁸ Even cases in which the Court has upheld government restrictions on speech strengthen this protection of the use of private funds. In *Regan v. Taxation with Representation*,¹⁹ the Court held that § 501(c)(3) of the Internal Revenue Code, which grants tax-exempt status only to nonprofit organizations that do not engage in lobbying,²⁰ does not violate the First Amendment, in part because such organizations still had the right to use nondeductible private funds to lobby.²¹ Similarly, in *Rust v. Sullivan*,²² in upholding regulations that prohibited recipients of federal family planning funds from using such funds "in programs where abortion is a method of family planning,"²³ the Court noted that a "grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy" with independent funds.²⁴ OCRAA denies LSC grantees similar leeway to use independent funds to support restricted activities and is thus unconstitutional.²⁵

Even without the restrictions on non-LSC funds, OCRAA is unconstitutional in that it makes LSC funding contingent on forfeiture of the right to challenge welfare laws. Restriction 16 is unconstitutional for three reasons. First, it undermines the First Amendment by invading the lawyer-client relationship. The Court has recognized that certain professional relationships constitute "spheres of free expression" in which government's ability to regulate speech is limited.²⁶ The fact

¹⁷ 468 U.S. 364 (1984).

¹⁸ *Id.* at 400.

¹⁹ 461 U.S. 540 (1983).

²⁰ See I.R.C. § 501(c)(3) (1994).

²¹ See *Taxation with Representation*, 461 U.S. at 544-45.

²² 500 U.S. 173 (1991).

²³ 42 U.S.C. § 300a-6 (1994), quoted in *Rust*, 500 U.S. at 178.

²⁴ *Rust*, 500 U.S. at 196 (emphasis omitted).

²⁵ The only court to have ruled on the constitutionality of the restrictions has agreed. See *Varshavsky v. Geller*, No. 40767/91, slip op. at 14-16 (N.Y. Sup. Ct. Dec. 24, 1996), reprinted in N.Y. L.J., Dec. 30, 1996, at 22; see also *Legal Aid Soc'y v. Legal Servs. Corp.*, Civil No. 97-00032 ACK, slip op. at 35-36 (D. Hawaii Feb. 14, 1997) (enjoining the LSC from enforcing nine of the restrictions as applied to the use of non-LSC funds). LSC responded to the Hawaii decision by issuing new regulations under which LSC grantees can transfer non-LSC funds to organizations that are sufficiently separated from the grantees. See *Use of Non-LSC Funds*, 62 Fed. Reg. 12,101, 12,103-04 (1997) (to be codified at 45 C.F.R. pt. 1610).

²⁶ In *Rust*, the Court suggested that "the Government's ability to control speech" may be limited in certain "sphere[s] of free expression" — such as universities — that are "fundamental to the functioning of our society." *Rust*, 500 U.S. at 200. The *Rust* Court suggested without deciding that the doctor-patient relationship also may be such a sphere. See *id.*; see also David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 746-47 (1992) (arguing that restrictions on the speech of government-funded lawyers would be unconstitutional).

that lawyers, whether defense lawyers representing criminal suspects or legal services lawyers representing welfare recipients, are often at odds with the state argues strongly for extending such limitations to the lawyer-client relationship. Indeed, the Court has recognized that lawyers must be free to argue as they see fit: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."²⁷ Under restriction 16, a legal services lawyer may no longer make certain arguments on a client's behalf and thus no longer has full freedom to pursue a client's interests. Even if Congress is free to limit the types of cases in which LSC-funded attorneys may engage, once Congress sets such boundaries, it should not intrude into the lawyer-client relationship by regulating the viewpoint of attorney speech.²⁸ To do so runs directly counter to the right of lawyers and their clients to challenge laws in court.²⁹

Second, restriction 16 violates the First Amendment by explicitly restricting the speech of private actors. The Court has distinguished a government's legitimate pursuit of policy objectives from unconstitutional constraints on speech by examining whether affected individuals are state actors.³⁰ In holding unconstitutional a state university's refusal to subsidize a Christian magazine, the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*³¹ emphasized that the speech in question was neither government speech nor speech on behalf of the government.³² In this context, government funding was designed "to encourage a diversity of views from private speakers."³³ The Court distinguished *Rust* — in which the Court allowed Congress to prohibit doctors in federally funded family planning programs from discussing abortion with their patients³⁴ — as a case in which the state, as speaker, could "make content-based choices."³⁵

LSC-funded attorneys fall on the private-actor side of the *Rosenberger/Rust* divide. Although created by Congress, LSC is an independent, non-government, nonprofit corporation intentionally

²⁷ *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1976)) (internal quotation marks omitted).

²⁸ *Cf. Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [the] right not only to advocate [one's] cause but also to select what [one] believe[s] to be the most effective means for so doing.")

²⁹ *See Lenhart v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) ("We long have recognized the important political and expressive nature of litigation."); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (declaring that litigation is "a form of political expression" that "may well be the sole practicable avenue open . . . to petition for redress of grievances").

³⁰ *See Robert C. Post, Subsidized Speech*, 106 YALE L.J. 151, 155 (1996).

³¹ 115 S. Ct. 2510 (1995).

³² *See id.* at 2518-19.

³³ *Id.* at 2519.

³⁴ *See Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991).

³⁵ *Rosenberger*, 115 S. Ct. at 2518-19.

insulated "from the influence of . . . political pressures."³⁶ Moreover, LSC's organic act provides that LSC "shall not, under any provision . . . , interfere with any attorney in carrying out his professional responsibilities to his client."³⁷ In contrast, title X of the Public Health Service Act,³⁸ the law at issue in *Rust*, authorizes the Secretary of Health and Human Services "to make grants and enter into contracts with public or nonprofit private entities" to assist in establishing "family planning projects."³⁹ Government funds are available to clinics and doctors under title X "to transmit specific information pertaining to [the government's] own program."⁴⁰ The doctors in *Rust* were conveying the government's message in a way that LSC-funded attorneys explicitly and deliberately are not. The *Rosenberger* Court's admonition is particularly relevant: "Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the [state] may not silence the expression of selected viewpoints."⁴¹

Third, restriction 16's prohibition on challenging welfare laws denies equal protection and due process to LSC clients. Restriction 16 prohibits LSC clients — and only LSC clients — from challenging welfare laws. In *Romer v. Evans*,⁴² the Court recently declared that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."⁴³ Even more recently, in *M.L.B. v. S.L.J.*,⁴⁴ in which an indigent mother faced a challenge to her retaining parental rights over her child, the Court reaffirmed that, in cases involving "[t]he basic right to participate in political processes as voters and candidates" and in "cases criminal or 'quasi criminal in nature,'"⁴⁵ states may not condition appellate review on the ability to pay court fees.⁴⁶ Taken together, the pronouncements in *Romer* and *M.L.B.* on the requirements of the Due Process and Equal Protection Clauses suggest two reasons why restriction 16 is invalid. First, litigation challenging welfare laws is inherently political and deserves the same rigorous protec-

³⁶ 42 U.S.C. § 2996(5) (1994). In introducing recommendations for the establishment of LSC in 1971, President Nixon stressed that, "if we are to preserve the strength of the program[,] we must make it immune to political pressures and make it a permanent part of our system of justice." H.R. REP. NO. 93-247, at 2 (1973) (internal quotation marks omitted).

³⁷ 42 U.S.C. § 2996(e)(b)(3) (1994).

³⁸ 42 U.S.C. §§ 300-300a-6a (1994).

³⁹ *Id.* § 300(a).

⁴⁰ *Rosenberger*, 115 S. Ct. at 2519.

⁴¹ *Id.* at 2519.

⁴² 116 S. Ct. 1620 (1996).

⁴³ *Id.* at 1628.

⁴⁴ 117 S. Ct. 555 (1996).

⁴⁵ *Id.* at 568 (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971)).

⁴⁶ *See id.* at 561.

tion that other forms of political participation receive.⁴⁷ Second, unlike in cases in which the court has refused to require government to subsidize the exercise of rights, the government here — as in *M.L.B.* — has created LSC clients' legally disadvantaged status.⁴⁸ Practically, restriction 16 requires LSC clients to rely on lawyers who are precluded from asserting their clients' rights and interests zealously, and thus violates both due process and equal protection.

Furthermore, the vital role the legal system plays in our political framework argues strongly for prohibiting government from selecting which arguments citizens may make in court. Speech deserves First Amendment protection when "particular speakers in particular circumstances ought constitutionally to be regarded as independent participants in the process of democratic self-governance."⁴⁹ In issuing courtroom challenges — especially constitutional challenges — to federal and state laws, lawyers and their clients play crucial roles in the American democratic process. "[T]he Framers . . . expected that the federal courts would assume a power . . . to pass on the constitutionality of actions of the Congress and the President, as well as of the several states";⁵⁰ a statute prohibiting lawyers from bringing constitutional challenges undermines the courts' ability to serve this vital function.

Many in the legal services community have been reluctant to oppose OCRAA, fearful that any challenge might incite congressional Republicans to actualize threats to eliminate LSC altogether.⁵¹ The Act must be challenged, however, for it sets a dangerous precedent. Congress cannot control the speech of private actors, and the congressional hold on the federal purse strings should not be permitted, whether by intimidation or by legislation, to insulate congressional activity from judicial scrutiny.

⁴⁷ See Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights — Part I*, 1973 DUKE L.J. 1153, 1215 ("There is something sharply jarring about a set of rules which firmly inveighs against exclusion of persons from the vote, while rather freely allowing their exclusion from the litigation arena."); see also *Romer*, 116 S. Ct. at 1628 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.")

⁴⁸ The *M.L.B.* Court distinguished *Taxation with Representation* and *Lyng v. International Union*, 485 U.S. 360 (1988), as cases in which complainants "sought state aid to subsidize their privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action." *M.L.B.*, 117 S. Ct. at 568. In contrast, the complainant in *M.L.B.* was seeking "to be spared from the State's devastatingly adverse action," the stripping of her parental rights. *Id.*

⁴⁹ Post, *supra* note 30, at 162.

⁵⁰ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 15 (1962).

⁵¹ See Jan Hoffman, *Counseling the Poor, But Now One by One*, N.Y. TIMES, Sept. 15, 1996, at 47; Ridgeway, *supra* note 3, at 21. Three cases challenging the restrictions have been filed. See Amended Class Action Complaint, *Velazquez v. Legal Servs. Corp.*, Civil Action No. 97 CV 00182 (E.D.N.Y. Jan. 27, 1997); Motion for Preliminary Injunction, *Legal Aid Soc'y v. Legal Servs. Corp.*, Civil No. 97-00032 ACK (D. Hawaii Jan. 9, 1997); *Varshavsky v. Geller*, No. 40767/91, slip op. at 14-16 (N.Y. Sup. Ct. Dec. 24, 1996), reprinted in N.Y. L.J., Dec. 30, 1996, at 22.