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EFFORTS TO RESTRICT THE ADVOCACY RIGHTS OF NONPROFITS THAT PARTNER WITH GOVERNMENT

*Rebekah Diller**

This talk will address efforts over the last decade to restrict the free speech rights of nonprofits that get at least part of their funding from the federal government. First, I will discuss why it is important that nonprofits retain their First Amendment rights to speak out on issues of public concern. Then, I will explore some of the specific federal proposals over the last decade to restrict those rights, as well as some of the court cases brought on First Amendment grounds to combat those restrictions.

Nonprofits play an important role in our democracy. They contribute to the democratic process through advocacy activities. They are a wellspring of new and innovative ideas for policy and government. This is just as true when nonprofits partner with government to deliver services, because they are then in the best position to make policy recommendations based on the needs of the communities they serve. The Supreme Court has recognized this unique aspect of nonprofits and has held that advocacy activities and the solicitation of funds by nonprofits are core First Amendment activities.¹ Nonprofits can only engage in these activities if they are able to establish effective partnerships with government without unnecessary and burdensome government control. This principle has, in some instances, been recognized across the political spectrum. President Bush's Faith-Based Initiative,² for exam-

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¹ *See, e.g.*, *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 799 (1985) (holding that nonprofits soliciting funds through the Combined Federal Campaign is protected speech); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932-34 (1982) (holding that advocating for change through lawful conduct, such as speeches, boycotts, marches, and threats of social ostracism, is protected under the First Amendment).

² In January 2001, President Bush created the White House Office of Faith-Based and Community Initiatives. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/01/20010129-2.html>.

ple, takes great pains to ensure that religious organizations can partner with government to provide services without having to sacrifice their First Amendment-protected religious activities.³ Unfortunately, the First Amendment activities of other parts of the nonprofit sector have not been similarly protected.⁴

The granddaddy of proposals to restrict the advocacy rights of nonprofits was first considered by Congress in 1995. Known as the Istook Amendment, this proposal would have severely curtailed the ability of nonprofits to obtain federal grants if they engaged in lobbying or a broad array of advocacy activities.⁵ This proposal was kicked around Congress over the course of 1995, and largely due to a sustained effort by the nonprofit sector, it never passed. However, it put a chill in the air, and some aspects of it were visited upon particular sectors of the nonprofit world.

In 1996, a set of binding restrictions was imposed on nonprofit organizations that receive federal funding to provide legal assistance to low-income clients from the federal Legal Services Corporation (LSC).⁶ Many of these community-based organizations received only part of their funding from the federal government; they received city and state funding, money from private donors, and money from private foundations. By 1996, the activities of some legal services organizations had become a *bête noire* for the right, which was engaged in a large effort to eliminate the LSC altogether.⁷ Out of that battle emerged a set of compromises to preserve funding for legal services but under a severely restricted regime. Rules prohibited LSC recipients from engaging in class actions on behalf of their clients;⁸ seeking court-ordered attorney's fees;⁹ representing various categories of immigrants, including cer-

³ See WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT 10–14 (2006), available at http://www.whitehouse.gov/government/fbci/guidance_document_01-06.pdf.

⁴ Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53–1321-57 (prohibiting a range of legal representation by nonprofits that receive federal LSC funds, even with non-federal funds).

⁵ See OMB WATCH, *Serving the Public Good: A Position Statement on Advocacy By Non-profit Organizations*, in HANDCUFFING AMERICA'S CHARITIES: CASE EXAMPLES OF ORGANIZATIONS AFFECTED BY THE ISTOOK AMENDMENT (1995), <http://www.ombwatch.org/article/articleview/465/1/51>.

⁶ § 504(a), 110 Stat. at 1321-53–1321-57.

⁷ See NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, HISTORY OF CIVIL LEGAL AID (2004), http://www.nlada.org/About/About_HistoryCivil. For all eight years of his presidency, President Reagan recommended zero funding for the LSC. *Id.*

⁸ § 504(a)(7), 110 Stat. at 1321-53.

⁹ § 504(a)(13), 110 Stat. at 1321-55.

tain documented immigrants;¹⁰ and from lobbying.¹¹ Congress also took the step of restricting not only the expenditure of federal funds, but also the expenditure of all state, local, and private money that these entities received.¹² At the time, this was unheard-of for federally funded nonprofits.

The Brennan Center has litigated against these restrictions for the last decade. During the first phase of litigation in *Legal Servs. Corp. v. Velazquez*, the Supreme Court struck down one restriction on the use of federal funding.¹³ This restriction prohibited lawyers from challenging the constitutionality of welfare laws in the course of representing their clients.¹⁴

Over the last several years, we have focused on litigation challenging the application of the restrictions to the non-federal or "private" money possessed by LSC grantees. Congress enacted a blanket restriction prohibiting LSC-funded nonprofits from spending private money on activities that Congress has restricted. However, faced with a court ruling that such a sweeping restriction on private funds violates the First Amendment, LSC issued a regulation that theoretically provides an opportunity for nonprofits receiving LSC funds to spend their private money free of these substantive restrictions.¹⁵ The LSC regulation permits organizations to spend private money on restricted activities, but only if they set up a separate organization in a separate physical facility and hire separate staff.¹⁶ The government thought that this regulation might save the constitutionality of the restriction, but in practice, no organization in the country has been able to comply with it.

Several years ago, on behalf of three legal services organizations, we challenged the separate-facilities requirement. In December 2004, Judge Frederic Block of the Eastern District of New York issued a preliminary injunction barring LSC from enforcing this requirement against the three programs because it unduly burdened their First Amendment rights.¹⁷ He ruled that this requirement was so burdensome that it was next to impossible for the

¹⁰ § 504(a)(11), 110 Stat. at 1321-54-1321-55.

¹¹ § 504(a)(2)-(6), 110 Stat. at 1321-53.

¹² § 504(d), 110 Stat. at 1321-56.

¹³ 531 U.S. 533, 548-49 (2001).

¹⁴ § 504(a)(16).

¹⁵ Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 45 C.F.R. § 1610 (1997).

¹⁶ 45 C.F.R. § 1610.8.

¹⁷ *Velazquez v. Legal Serv. Corp.*, 349 F. Supp. 2d 566, 613 (E.D.N.Y. 2004), *clarified in* 356 F. Supp. 2d 267, 271-72 (E.D.N.Y. 2005), *vacated in part, aff'd in part*, Brook-

government to advance a sufficient justification for it, and therefore that it violated the First Amendment.¹⁸ The case is now before the Second Circuit and we are awaiting a decision.¹⁹ The separate-facilities restriction is of tremendous concern to the nonprofit community at large, and organizations such as Independent Sector and the Council on Foundations have taken a great interest in this case, for which we are grateful. They understand that if this model was imposed on the rest of the nonprofit sector, it would be disastrous. Imagine a museum that got National Endowment for the Arts funding for one show having to open a separate building to show work from a private donor. For this reason, we have had a lot of participation from the nonprofit sector on this case, including an amicus brief filed on behalf of more than one hundred nonprofit organizations.²⁰

Another restriction, passed in 2003, attaches to funding that the government provides for international AIDS prevention and care. This restriction is part of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act,²¹ which carries out President Bush's five-year plan to fight AIDS around the world, particularly in the developing world and sub-Saharan Africa. The approach taken by the Act is generally very solicitous of the public-private partnerships. Most of the money that the U.S. is giving to the fight against HIV/AIDS goes to private partners who work with government to provide services around the world. In some respects, the Act is also quite protective of the speech rights of those private partners. For example, one of the Act's priorities is promoting the effective use of condoms, but the Act also provides that grantees are not required to endorse condom use, protecting religious organizations that might oppose condom use from being required to take a position in favor of it in order to receive money.²² However, in another section, the Act severely restricts the speech

lyn Legal Services Corp. v. Legal Services Corp., 462 F.3d 219 (2d Cir. 2006); *see infra* note 19.

¹⁸ *Velazquez*, 349 F. Supp. 2d at 610.

¹⁹ In September 2006, the Second Circuit rejected the District Court's analysis under the undue burden test, *Brooklyn Legal Services Corp.*, 462 F.3d at 229–30; and remanded to find whether the plaintiffs had adequate alternative channels to exercise their First Amendment rights despite the burdens imposed. *Id.* at 232–33.

²⁰ Brief of Amici Curiae The National Legal Aid and Defender Association et al. Supporting Plaintiffs, *Velazquez v. Legal Serv. Corp.*, No. 05-0340 (2d Cir. Filed July 6, 2005).

²¹ 22 U.S.C. §§ 7601–82 (2006).

²² 22 U.S.C. § 7631(d) (2006). (Organizations “shall not be required . . . to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.”).

rights of recipients by requiring that they adopt a policy “explicitly opposing prostitution and sex trafficking.”²³ Any nonprofit seeking funding must certify that it has such a policy, although the government has not specifically defined what it means to oppose prostitution.²⁴ The government has said that recipients’ privately funded work must also be sufficiently opposed to prostitution.

While many of the affected groups do not consider themselves pro-prostitution, they do engage in outreach to sex workers as a major part of their efforts to combat HIV/AIDS. This restriction flouts one of the major lessons learned during the last two decades of the HIV crisis: You cannot reach out to people with public health messages while at the same time judging or condemning their behavior. You must engage them; try to earn their trust; and try to convince them to take steps to protect themselves and be conscious of the spread of HIV. Under these restrictions, organizations are forced to judge the very people to whom they are reaching out. They are also told not to engage in “pro-prostitution” activities without being told what activities these are. Even if organizations certify that they have the required policy, they have to live with the possibility that, one day, something they have done will be considered to be pro-prostitution. Interestingly, the Justice Department initially told USAID (United States Agency for International Development) and the Department of Health and Human Services—the primary agencies that give out this money—not to enforce this restriction, which extends to the privately funded speech of recipient organizations. Unfortunately, that opinion was withdrawn in June 2005, and the agency began enforcing the restriction.

Over the past summer, the Brennan Center was involved in filing two cases to challenge this restriction. One case was filed in federal district court for the District of Columbia by DKT International, an organization that distributes condoms to the developing world.²⁵ This organization refused to certify that it had an “anti-prostitution” policy and was therefore denied a contract for federal aid.²⁶ The second case was filed here in New York on behalf of The Open Society Institute and its affiliate the Alliance for Open Soci-

²³ 22 U.S.C. §7631(e).

²⁴ 22 U.S.C. §7631(f).

²⁵ *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 435 F. Supp. 2d 5 (D.D.C. 2006). The court enjoined enforcement of the policy because it was not narrowly tailored to a compelling government interest under strict scrutiny and was a content-based restriction on speech. *Id.* at 14, 18.

²⁶ *Id.* at 9–10.

ety International.²⁷ In both of those cases, our first argument is that the government cannot condition federal funding on an organization's agreement with a particular ideological view. Our second argument is that the government cannot impose an entity-wide restriction that allows no opportunity for privately funded speech.

Before Congress now is a proposal to restrict the activities of groups that receive funding for affordable housing work as part of the Federal Housing Finance Reform Act.²⁸ This bill would create an affordable housing fund to support the creation of new housing for low-income and extremely low-income families. The House version of the bill makes ineligible any organization that engages in voter registration, voter identification, "get out the vote" activities, or lobbying a year prior to or during the grant cycle. In an especially chilling provision, the bill also makes an organization ineligible if any organization with which it is affiliated engages in any of these activities. "Affiliation" is defined as having overlapping board members; sharing physical space; employees; supplies; or internet services. If two organizations shared a fax machine, they would be considered affiliated. Many believe that this provision is aimed at ACORN (Association of Community Organizations for Reform Now), a community organizing group that engages in many of these activities. This proposal passed the House in 2005, but we are hopeful that it will not pass the Senate, especially if we all commit to working on this issue this year.

²⁷ *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006). The policy was held unconstitutional because it was not narrowly tailored to a compelling government interest and was both viewpoint-based discrimination and compelled speech. *Id.* at 269, 274, 276.

²⁸ Federal Housing Finance Reform Act of 2005, H.R. 1461, 109th Cong. (proposing to disqualify nonprofits from receiving affordable housing grants if they have participated in voter registration or other nonpartisan voter activities).