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May the Government Exclude "Nontraditional" Charities from a Federally-Sponsored Charity Drive?

by Joel M. Gora

**Donald J. Devine, Director,
Office of Personnel Management**

v.

NAACP Legal Defense and Educational Fund, Inc.
(Docket No. 84-312)

Argued February 19, 1985

This case directly pits the Reagan administration against several liberal organizations in a controversy with real dollars and cents consequences. For a quarter of a century, the federal government has sponsored the Combined Federal Campaign (CFC), which allows a wide variety of private charities that promote "health and welfare" to solicit contributions from federal civilian employees and military personnel in the federal workplace. Last year, the CFC raised over \$100 million for the designated charities. Participation in the CFC is the exclusive method for soliciting contributions from federal employees at work.

In 1980, the NAACP Legal Defense and Educational Fund and other public interest groups petitioned the federal government to be included in the annual CFC drive as organizations to which federal workers could make contributions. These legal advocacy groups are all recognized as nonprofit charitable entities under the tax laws. After an initial rejection of their request (a ruling later overturned by a court on procedural grounds) various legal defense funds and public interest groups were admitted to the campaign and participated for two years as designated charities.

In February, 1983, however, a Presidential Executive Order announced that: "Agencies that seek to influence the outcomes of elections or the determinations of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign."

The excluded groups filed suit to challenge their expulsion from the CFC. Two lower courts (504 F. Supp. 1365 (D.D.C. 1981) and 560 F. Supp. 667 (D.D.C. 1983)), agreed that removing them from the charity

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drive was unconstitutional under the First Amendment guarantee of freedom of speech, ruling that the government had no valid reason to permit other charities to solicit contributions, while barring the legal rights organizations.

ISSUE

The case now before the Supreme Court, *Devine v. NAACP Legal Defense Fund*, involves the government's appeal from those rulings. The issue is whether excluding the advocacy groups from participating in the Combined Federal Campaign, on the ground that they are not "traditional" charities, violates the First Amendment.

FACTS

In 1961, to control and simplify the process of charitable solicitation in the federal workplace, President Kennedy created the CFC. Ad hoc, sporadic solicitation would be replaced by a single, annual drive, supervised by federal employees—through which "national voluntary health and welfare agencies and such other national voluntary agencies as may be "appropriate" would be allowed to solicit funds from federal workers at their places of employment or duty stations. Direct onsite solicitations would be prohibited and replaced by participation in the CFC, which would be open to "nonprofit tax-exempt agencies having specific functions in the fields of health, welfare or recreational services" with an active and efficient program directed at the welfare of the public and the persons served.

The campaign, as it developed over the next two decades, is under the supervision of the Director of the Office of Personnel Management (OPM). Apart from this national supervision, the fundraising drives are conducted locally at federal installations—usually through the joint operation of a local private voluntary organization (the "Principal Combined Fund Organization" or PCFO) overseen by a local federal coordinating committee. The local PCFO's costs are reimbursed from the funds secured by the participating charities.

Each local campaign consists of a single annual drive of several weeks in the fall of the year. The participating federal agencies conduct the solicitation among their employees using materials supplied by the local PCFO. Federal workers are encouraged to contribute and volunteer their time to help with the fund drive. Included in the material provided is a brochure describing all the

participating charities in brief statements prepared by the charities themselves. Employees who choose to contribute to the CFC may either designate one or more of these charities to receive their contributions or make an undesignated contribution which the local PCFC will allocate among the participating charities as it sees fit. Importantly, these contributions can be made through payroll deductions.

In effect, the federal government, through the CFC provides the structure, mechanism and opportunity for private charitable organizations to directly solicit contributions from federal workers. Through the OPM, and local committees, the federal government supervises the overall program.

Participating in the CFC is a two-step process. First, the organization must apply to the Office of Personnel Management for certification of national eligibility. A charity that obtains this national clearance is then allowed to apply separately to each of the approximately 550 local campaigns in which it wishes to participate.

In 1980, two civil rights organizations—the NAACP Legal Defense and Educational Fund and the Puerto Rican Legal Defense and Educational Fund—were denied the right to participate in the CFC on the ground that they did not provide “direct services,” but rather serve as “advocates for groups,” and were thus ineligible under the regulations. The two groups brought suit and a federal district court agreed with their contention that the CFC is a government-sponsored channel of communication, exclusion from which must conform to First Amendment safeguards. Since the term “direct services” was found too vague a criterion to determine eligibility for participation, the court ordered the organizations admitted to the campaign.

Instead of appealing this ruling, the government revised its regulations to permit legal advocacy groups to participate in the campaign. Accordingly, in 1982 and 1983, in addition to the two challengers, other participants in the campaign included the Conservative Legal Defense and Education Fund, the National Right to Work Legal Defense Foundation, the Center for Auto Safety and the National Organization for Women Legal Defense Fund. Although there was some controversy over including certain of these groups—particularly union opposition to the right to work group—the 1983 campaign set a new record for charitable contributions. The NAACP Fund alone received over \$525,000 in contributions in the two-year period.

But OPM Director Devine clearly bridled at having these “controversial” groups in the campaign. He strongly lobbied the White House for authority to expel such groups, and, in February of 1983, he got it. President Reagan issued the contested Executive Order excluding legal defense funds from the CFC. A number of such groups, including the Sierra Club Legal Defense Fund, the Lawyers Committee for Civil Rights Under

Law and the Natural Resources Defense Council, joined the two civil rights funds in filing suit to challenge their exclusion. These groups contend that their legal rights activities do provide “health and welfare” charitable services to countless people in the form of securing equal employment rights, educational opportunities, welfare benefits and environmental protection. They claim that they fulfill charitable purposes as much as “legal aid societies,” which are not excluded, and more than groups such as the National Parks and Conservation Association, the United States Olympic Committee and the wilderness Society—all of which have been admitted to the CFC. Accordingly, they maintain, their exclusion must result either from the fact that their charitable activities are “controversial” or because their charitable work takes the form of litigation—neither of which is permissible basis of exclusion under the First Amendment. In addition, Planned Parenthood, which was singled out for special condemnation by Director Devine, filed separate litigation, which is still pending.

The government, however, argues that the CFC historically has been made available only to “traditional” charities whose goals are universally considered “worthwhile,” although these terms nowhere appear in the applicable regulations. In its view, excluding legal advocacy groups serves these purposes and protects the viability and success of the CFC by minimizing controversy and disaffection, preventing disruption in the federal workplace, avoiding the appearance that federal resources are being used to further partisan causes and preventing the CFC’s from being inundated by a wide variety of “nontraditional” organizations.

BACKGROUND AND SIGNIFICANCE

The basic issue for the Court is whether, in setting up the CFC and allowing charities to use it to solicit contributions, the government has created a forum for communication and expression. If so, the Court must next determine what kind of a forum has been created and what standards should govern the propriety of denying certain charitable groups access to that forum.

First Amendment “public forum” law—not untypically—traces to an 1895 observation by Oliver Wendell Holmes, then a Massachusetts appellate judge, that “for the (government) absolutely or conditionally to forbid speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his home.”

The law has come a long way since then. In 1939, Justice Roberts proclaimed that using streets and parks for assembly, communicating thoughts between citizens and discussing public questions has “from ancient times” been a part of the privileges and liberties of citizens. Thus originated the concept of “the public forum”—those places which by long tradition have been devoted

to assembly and debate. When use of such a traditional public forum for speech is involved, the government's power to interfere with the speaker is severely limited. Only speech which is illegal, such as incitement or pornography, can be banned, and the government's ability to impose reasonable rules for competing uses of the forum cannot depend on the speaker's message or point of view.

In this case, there is no claim that the messages of the legal advocacy groups are in any way illegal or subject to suppression. In fact, the Court has clearly ruled that legal advocacy is a protected form of political and social expression under the First Amendment, and that solicitation for charitable contributions is protected as well. Thus, if the legal defense funds wished to solicit contributions in a traditional public forum, they could not be prohibited from doing so, as the government concedes. But the challengers are not content, figuratively speaking, to stand on a street corner and ask for contributions. Instead, like other advocates before them, the legal defense groups want to be able to communicate their messages in the most direct fashion to an appropriate audience. To do so, they need access to places and methods of communication, such as the CFC, which are not traditional public forums.

The Court has had to deal with such claims of access frequently in recent years, determining whether a particular facility, location or channel of communication could be closed or restricted to certain groups, individuals or messages. Such sought-after "forums" have included: public libraries, prison and jail property, schoolgrounds, the advertising spaces on city buses, municipally-owned theatres, the open portions of military bases, a meeting room at a public university, state fairgrounds, home letter boxes and the internal mail distribution system of a school district. In these cases, most particularly the last one, the Court has fashioned a series of rules to catalog such nontraditional forums and identify the extent to which government may control use of them.

The Court has defined a "limited public forum" as public property which government "has opened for use by the public as a place for expressive activity." Even though the government is not obliged to create or continue such forums and may limit their use to certain kinds of groups or the discussion of certain kinds of subjects, so long as the forum already exists, the government is sharply restricted in determining who may use the forum to communicate. Examples include a university meeting hall and a schoolboard public hearing. Fewer restrictions apply to government's allocation of access to so-called "nonpublic forums," places which are not by tradition or designation a forum for communication, but where government has granted speakers access for certain purposes. In such nonpublic forums, the government *may* pick and choose among speakers and

messages, "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Examples include a school's interoffice mail system and a military base.

In the lower court proceedings, there was extensive debate over whether the CFC should be labeled a limited public forum—making it harder to justify excluding legal advocacy groups, or a nonpublic forum—where the government only need show its action is reasonable and not disguised censorship. In the Supreme Court, however, both sides seem to concede that the CFC is probably a nonpublic forum, rather than a limited public forum, and direct most of their legal fire at the question of whether the exclusion of legal defense funds from participation in the annual charity drive is "reasonable."

As a result, the legal significance of the case is not likely to involve a major doctrinal change in the method of labeling different types of forums, but rather will probably witness further elaboration of the standards to judge the reasonableness of excluding certain individuals or groups from such a nonpublic forum. In a 1983 case (*Perry Education Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)), the Court narrowly ruled, 5 to 4, that it was reasonable for a school system to allow its internal mail system to be used by a certified teacher's union, but not by a rival union which was trying to get back into power. On the reasonableness point in this case, the legal defense funds claim that the CFC has not been limited to "traditional" charities, and that, in any event, they are not significantly different from such charities and their inclusion in the fund drive is compatible with its purposes. The government asserts, however, that the CFC was intended for and must be restricted to more "traditional" charities to avoid disruption and controversy and impermissibly change the basic nature of the campaign.

By comparison, the practical significance of the case will be considerable in terms of the ability of a wide range of public interest charities to solicit contributions from the millions of federal and military employees. If such groups do establish that it was wrong to exclude them, they will be able to participate and attract more funds for their worthy causes at the possible expense of contributions to other charities. At the same time, the government's brief contains the veiled threat that court-ordered inclusion of such advocacy groups "ultimately would force the President to restrict the campaign quite substantially or, alternatively, to abolish the campaign entirely." For a President who has frequently spoken of the need to increase private voluntary support for basic social welfare services, that may be a different dilemma indeed. Ironically, the President may be spared this difficult choice because Justice Thurgood Marshall, who could be expected to support the legal defense funds,

has excused himself from participating in the case. Presumably, he did so because, prior to joining the Court, he was chief counsel for the NAACP Legal Defense and Educational Fund—the very group challenging the President's order.

ARGUMENTS

For Devine, Director of the Office of Personnel Management (Counsel, Paul Blankenstein, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)

Limiting participation in the Combined Federal Campaign to traditional health and welfare charities is consistent with the First Amendment.

1. The case involves a nonpublic forum, thus giving government much leeway in determining access to it.
2. Limiting participation in the campaign to traditional charities is a reasonable regulation of that forum in light of:
 - (a) the common understanding of the purpose of charitable drives conducted in the workplace,
 - (b) the government's purposes in creating the forum, and
 - (c) the alternative channels of charitable solicitation available to the legal defense funds.

For the NAACP Legal Defense and Educational Fund (Counsel of Record, Charles Stephen Ralston, NAACP Legal Defense and Educational Fund, Inc., 99 Hudson Street, New York, NY 10013; telephone (212) 219-1900)

1. The expulsion of legal defense funds from the CFC violates the First Amendment.
2. Whether the CFC is a limited public forum or a nonpublic forum, excluding legal defense funds is unreasonable, since such funds are compatible with the purposes and methods of the campaign.
3. The government's justifications for excluding such groups—to avoid controversy, preserve neutrality and prevent inundation of the CFC by a wide range of other charities—are factually or legally unsound.
4. No adequate alternative means for seeking contribution from federal employees are readily available.

AMICUS BRIEFS

In Support of the Government

The government's position is supported by, among others, the United Black Fund of America and various local chapters or branches of the American Cancer Society, the American Red Cross, the Boy Scouts of America and the Salvation Army, as well as certain other local Washington, DC charities.

In Support of the NAACP

The American Civil Liberties Union, Planned Parenthood, the National Committee for Responsive Philanthropy, Independent Sector, the National Black United Fund, the American Jewish Congress and the Public Citizen Foundation.

ARGUMENTS: March SESSION

Monday, March 18

1. Tennessee v. Street (83-2143) (*Preview* 311-313)
2. City of Cleburne v. Cleburne Living Center (84-468)
3. Black v. Romano (84-465)
4. Mitsubishi Motors v. Soler Chrysler-Plymouth, Soler Chrysler-Plymouth v. Mitsubishi Motors (83-1733)

Monday, March 25

1. Alamo Foundation v. Donovan (83-1935)
2. Supt., Mass. Corr. Inst. v. Hill (84-438)
3. Jean v. Nelson (84-5240)
4. Atascadero State Hosp. v. Scanlon (84-351)

Tuesday, March 19

5. Commodity Futures v. Weintraub (84-261) (*Preview* 314-315)
6. Ramirez v. Indiana (84-5059) (*Preview* 309-310)
7. Liparota v. United States (84-5108) (*Preview* 289-290)
8. Williams v. Vermont (*Preview* 307-308)

Tuesday, March 26

5. Sch. Committee of Burlington v. Dept. of Ed., Mass. (84-433)
6. Landreth Timber Co. v. Landreth (83-1961)
7. Gould v. Rufenacht (84-165)
8. Thomas, Acting Admin., EPA v. Union Carbide (84-497)

Wednesday, March 20

9. United States v. Bagley (84-48)
10. Oklahoma v. Castleberry (83-2126)
11. McDonald v. Smith (84-476) (*Preview* 299-300)
12. INS v. Rios-Pineda

Wednesday, March 27

9. Walters v. Radiation Survivors (84-571)
10. Ct. Dept. of Income v. Heckler (83-2136)
11. Aspen Skiing v. Aspen Highlands (84-510)
12. Baldwin v. Alabama (84-5743)