A Call For The Repeal Or Invalidation Of Congressional Restrictions On Legal Services Lawyers

Committee on Civil Rights
Committee on Professional Responsibility

The Association of the Bar
of the City of New York

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A CALL FOR THE REPEAL OR INVALIDATION OF CONGRESSIONAL RESTRICTIONS ON LEGAL SERVICES LAWYERS

by The Committee on Civil Rights and
The Committee on Professional Responsibility

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In 1996 Congress imposed sweeping new restrictions on the activities of legal services attorneys for the poor. These restrictions, which include a ban on challenging the legality of welfare reform measures, a ban on communicating with public officials to "influence" public policy, and a ban on participation in class actions, apply not only to activities funded by the Legal Services Corporation, but to all activities that a legal services attorney might undertake, even if supported wholly by non-federal funds. This Report examines the constitutionality of the new restrictions, considers their ethical and professional responsibility implications, and recommends these provisions be repealed or invalidated.

INTRODUCTION

Two decades ago, Congress created the Legal Services Corporation in recognition of the principle that "equal access to justice is the *sine qua non* of a just society."[1] The nation had come to realize that allowing substantial disparities in access to justice based upon ability to pay undermines the legitimacy of our legal system. Congress therefore mandated that LSC fund the provision of high quality legal services to low-income people, free from political restraints and "with full freedom to protect the interests of clients in keeping with the Code of Professional Responsibility, the Canons of Ethics and the highest standards of the profession."[2] Congressional appropriations for legal services, however, have never been adequate to redeem this commitment to equal justice. As a result, legal services for the poor have come to depend on financing from non-federal donors and on the private bar's contribution of time and resources. This partnership of resources has become indispensable in helping to realize the rule of law for all citizens and to secure for the poor the protections that the law provides.

The very idea of legal services for the poor has repeatedly found itself under intense political assault.[3] Most recently, the leadership of the 104th Congress proposed to "zero out" the

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1 *See* Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981).

2 42 U.S.C. § 2996(6). *See generally* Paula Galowitz, *Restrictions on Lobbying By Legal Services Attorneys: Redefining Professional Norms And Obligations*, 4 B.U. PUB. INT. L.J. 39 (1992).

3 *See, e.g.*, Marie Falinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 2-6 (1984); Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971).

Legal Services Corporation as part of a campaign pledge to "defund the left."[4] On the floor of Congress, representatives denounced legal services lawyers as members of "an advocacy group for liberal causes"[5] that helps "unpopular individuals [bring] unpopular lawsuits."[6] Court cases that aimed at no more than enforcing the law of the land were recast as LSC-led efforts to "push social policies down the throats of local governments and citizens"[7] and "to socially engineer change in our laws and rules."[8] On examination, the law suits cited by the Congress in its criticisms of the LSC are no more than garden variety requests that state and local government conform their public behavior to the requirements of law. One case, for example, tried simply to stop the government from denying critical health benefits to the homebound elderly and disabled without first determining, at a hearing, whether they were entitled to relief.[9]

The 104th Congress failed to eliminate the LSC. But it slashed LSC's annual appropriation from $415 to $278 million and imposed unprecedented restrictions on the professional activities of poor persons' lawyers. These restrictions alter the basic contours and content of the conventional lawyer-client relation and severely limit an LSC lawyer's basic independence and autonomy. They impose a virtual bar on administrative or legislative advocacy; a blanket prohibition on using the class action device or even appearing as a friend of the court in an on-going class action litigation; restrict the representation of most immigrants and other disfavored individuals, such as prisoners; and bar any lawsuit challenging the legality or even the constitutionality of welfare laws or policies.

Significantly, these restrictions do not apply only to the activities of LSC lawyers that are funded by the federal government. They extend to all the activities of the lawyers at any entity receiving any LSC funding, even if the activities in question are funded entirely from non-federal sources. Indeed, a law office that receives any LSC funds is now prohibited from "accepting funds from any [other] source . . . unless [it] . . . notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or [the Budget Act]."[10] It is the projection of these restraints onto privately-funded speech and advocacy that

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4 142 Cong. Rec. H8185 (July 23, 1996) (statement of Rep. Dornan).

5 142 Cong. Rec. H8181 (July 23, 1996) (statement of Rep. Doolittle).

6 142 Cong. Rec. H8182 (July 23, 1996) (statement of Rep. Schiff) (summarizing colleagues' statements). *See* Part III. C, *infra*.

7 141 Cong. Rec. S8948 (daily ed. June 22, 1995) (statement of Sen. Helms).

8 141 Cong. Rec. E1220 (daily ed. June 9, 1995) (statement of Rep. McCollum).

9 *See, e.g., Varshavsky v. Geller*, 608 N.Y.S. 2d 184 (1st Dept. 1994).

10 Budget Act of 1996, § 504(d)(1).

most sharply distinguishes the Budget Act from past LSC regulations,[11] and that gives rise to the most troubling ethical, constitutional, and policy issues.

The Budget Act has already had a devastating impact on the provision of necessary legal services to the poor. Over the years, the LSC community had developed a wealth of expertise and information that made the delivery of legal services more effective and efficient. Critical to this development was a network of training centers, information clearinghouses, and backup centers. All 16 of the LSC's National Support Centers and all 50 State Support Units have been defunded, and many have ceased to exist. In addition, LSC's five Regional Training Centers, six CALR Units, and the National Clearinghouse for Legal Services (which, among other activities, published a law journal for poverty-law practitioners) lost all federal funds. Personnel and caseload statistics suggest the deleterious impact that these budget cuts and restrictions have had on poor people themselves. Between 1995 and 1997, full-time legal services staff dropped by 12.9 percent (9,561 to 8,364) and the number of legal services offices fell by 12.7 percent (1,064 to 929). Combined, these staff and office reductions resulted in an enormous shortfall in casehandling capacity, so that open cases fell by 14.6 percent -- or approximately 315,000 cases. Pro bono activities by the private bar will not be able to come close to filling this service-delivery gap. The situation has been worsened by the fact that many of the most experienced LSC lawyers, who had become nationally-acknowledged specialists in poverty law, including administrative and constitutional issues, have been required to withdraw from pending class action cases that affect the rights of hundreds of thousands of poor people.

Consistent with its long-held belief that equal access to the ability to enforce the rule of law is a cornerstone of a just society,[12] the Association urges the repeal or invalidation of the Budget Act and calls for the restoration of full and adequate funding for the Legal Services Corporation.

This Report discusses only one constitutional infirmity of the Act: its effort to prevent lawyers who work for LSC-funded organizations from using even private funds to engage in lawyering and other advocacy activities for indigent clients. The Act abridges the rights of lawyers and clients to engage in a broad range of constitutionally protected activity including the right to petition government, the right to associate, and the right to speak on matters of public importance. Indeed, at a time of monumental changes in federal and state welfare systems, the prohibitions against welfare advocacy are plainly calculated to silence a particular perspective in the public discourse

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11 Prior to the 1996 Budget Act, Congress had never attempted to limit legal services activities funded through non-LSC public sources, like IOLTA and state and local governments. These public funds represent the vast majority of non-LSC moneys available to legal services organizations. Prior federal law did prohibit LSC grantees from using *private* funds to undertake certain types of litigation, including school desegregation litigation, abortion litigation and litigation concerning alleged violations of the Military Selective Service Act. See 45 C.F.R. §§ 1610.1, 1610.2, 1612.7(a) (1995).

12 The Association has uniformly opposed efforts to undermine the equal justice mission of the Legal Services Corporation. *See, e.g., City Bar Hits Reagan Stand on Legal Services*, N.Y.L.J., Mar. 11, 1981 at p.1, col. 4.

about poverty, economic inequality, and the treatment of our nation's poor. The Supreme Court has repeatedly condemned such official efforts to "manipulate the public debate"[13] or otherwise "drive certain ideas or viewpoints from the marketplace,"[14] especially where, as here, the goal is to suppress criticism of governmental policies.[15] In addition, the Budget Act impermissibly interferes with the independent lawyer-client relation by, among other things, restricting the autonomy and professional judgment of lawyers who work for LSC-funded organizations.

Under existing constitutional doctrine, of course, Congress has no general obligation to fund civil legal services for poor people, and there are those who argue that if the restrictions are invalidated, Congress may respond by eliminating such funding entirely. We recognize this concern, but consider it an insufficient basis on which to remain silent. Not only are the limitations unconstitutional in themselves -- an issue currently before the courts for resolution -- but they undercut the provision of effective legal services to a population whose critical needs Congress has recognized for three decades.

We believe that most Senators and Representatives have a fundamental understanding of the importance of maintaining legal services for the needy. Even with the recent funding cutbacks, nearly 2,000,000 people each year use legal services lawyers to cope with family crises, preserve a roof over their heads, escape abusive situations and otherwise address legal problems that can be overwhelming to people without resources. Regardless of the perceptions of some that legal services lawyers have made some missteps, the fundamental issue is whether Congress is prepared to abandon principles of fundamental fairness, to leave millions of people in this increasingly complex society without any legal recourse. We believe that the collective conscience of the Congress will support legal services even if the restrictions on privately-funded speech and advocacy are lifted.

This Report proceeds as follows: Part I briefly reviews the history and current structure of the Legal Services Corporation. Part II describes the Budget Act, the restrictions that it imposes on the privately-funded activities of lawyers whose other activities are funded through the LSC, and their regulatory and judicial history to date. Part III analyzes the Budget Act's constitutionality as a matter of First Amendment principle. Part IV discusses the inconsistency between the Act's restrictions and well-established precepts of professional ethics that Congress has hitherto been at pains to honor. Part V is a brief conclusion and recommendation.

I. BACKGROUND

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13 *Turner Broadcasting System v. Federal Communications Commission*, 114 S. Ct. 2445, 2458 (1994).

14 *Simon & Schuster Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 116 (1991).

15 *See, e.g., Mills v. Alabama*, 384 U.S. 214, 218-219 (1966) ("a major purpose of [the First] Amendment is to protect the free discussion of government affairs").

A. The Legal Services Corporation

Organized legal assistance in the United States dates back to 1876 with the establishment of The Legal Aid Society of New York. This collective, private-charity model of assistance marked a dramatic change in efforts to deliver assistance to the poor, which previously had depended on the individual contribution of private lawyers, and sometimes of bar associations, to assist individual indigent clients.

By the time of the Great Society, legal aid offices had enlarged their reach, and there were 247 offices in 1967 servicing 414,000 cases. But the gaps in service delivery were glaring: one hundred and thirty cities lacked any legal aid society at all. Offices that did exist were frequently not in poor communities and were thus geographically inaccessible to the clients needing assistance. Commentators also expressed the philosophical concern that local legal aid offices, rooted in the model of private charity, did not adequately reflect the experience or perspective of the clients they were meant to serve.

The prototype of the modern legal services office has its genesis in community-based projects, such as Mobilization for Youth, that emerged in the 1960s under the auspices of the Economic Opportunity Act, with supplemental financial assistance from national philanthropies such as the Ford Foundation. By 1973, more than 265 new-style legal services offices were operating in all states. Bar leaders, through a National Advisory Committee, participated in the expansion and evolution of these new initiatives, whose salient characteristics were the delivery of legal services by dedicated private entities funded by a mix of public and private sources.

In 1974, President Richard Nixon signed legislation that established a national legal services corporation. Its purpose was to create a national mechanism through which to provide federal grants to local entities that could then deliver high quality legal services to the poor. These entities were not intended to be government agencies. Nor were they designed as government law offices. Instead, they were to function with independent policy-making boards, comprised in part of community and indigent members, and were to operate free from the political pressure of local, state or national government. The new law's purpose was explicit: to provide funding to private lawyers whose missions was to dedicate their time and talent to the legal needs of the poor.

The Legal Services Corporation is thus a private, nonprofit corporation established and existing under the laws of the District of Columbia, which provides "financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[16] From its inception, the LSC was intended as a funding vehicle through which private lawyers could delivery high quality legal services subject to the same rules and ethical constraints as attorneys working for pay. Such attorneys would, it was envisioned, form a full fledged attorney-client relationship with their clients in order to protect their rights under law. In establishing the LSC, Congress affirmed six critical principles:

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16 Pub. L. 88-452, Title X, § 1001 (1974) (codified as amended at 42 U.S.C. § 2996).

- The "need to provide equal access to the system of justice";
- The "need to provide high quality legal assistance" to those who are unable to afford adequate legal counsel;
- The recognition that "providing legal assistance" to the poor "will serve best the ends of justice";
- The further recognition that "the availability of legal services" to the poor "has reaffirmed faith in our government of laws";
- The goal that "to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures"; and
- The mandate that "attorneys providing legal assistance must have full freedom to protect the best interest of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."[17]

To accomplish these goals, LSC receives funds that are appropriated by Congress, as well as non-federal funds that are received by gift or otherwise, and distributes them to independent local legal organizations through grants and contracts.[18] LSC thus acts as a clearinghouse for funds from a range of sources. LSC's activities are governed by an 11-member board of directors, appointed by the President and confirmed by the Senate, which has authority to make rules concerning the application for, and receipt and use of its funds.[19] It also has power to promulgate rules concerning recordkeeping and related matters.[20]

The actual delivery of legal services to the poor is done by local law offices ("entities" in the language of the statute), some of which existed even before the establishment of the LSC. Congress has never appropriated sufficient funds to underwrite the full cost of high quality legal services to the poor nationwide, and these local law offices depend to a large extent on funding from private sources in addition to their federal grants. Such other sources include private donations, IOLTA programs, court-awarded fees, and state and local governmental funding. Thus, the term "LSC office" is something of a misnomer: although the organizations receive some federal funding, which assists significantly in the delivery of legal services to the poor, these offices are not supported entirely -- and in many cases, not even principally -- by the federal government.

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17 *Id.*

18 42 U.S.C. §§ 2996e(a), 2996i.

19 42 U.S.C. § 2996g.

20 *Id.*

A. Historic Restrictions on LSC Funding

Until the most recent wave of LSC restrictions, Congress has never attempted to interfere with the independence or autonomy of lawyers who deliver assistance to the poor, whether their activities were funded by the local, state or federal government or by private sources. This is not to ignore the fact that, from the outset, LSC-funded lawyers were barred from using LSC or private funds for litigation involving nontherapeutic abortions, desegregation, or the Military Selective Service Act.[21] The 1974 LSC Act also imposed certain limits on lobbying and on participation in class actions by LSC recipients. Those limits, however, expressly allowed the activities where necessary to provide appropriate client representation. Specifically, with respect to class actions, the Act merely provided that no class action representation could be undertaken "by a staff attorney" except "with the express approval of a project director of a recipient [of LSC funds] in accordance with the policies established by the governing body of such recipient," thereby allowing use of the class action device at the discretion of the recipient organization or project.[22] With respect to lobbying, no LSC funds could be used except where "necessary to the provision of legal advice and representation with respect to [a] client's legal rights and responsibilities" or where "a governmental agency, legislative body, a committee or member thereof" either requested the input or was "considering a measure directly affecting the activities under this subchapter of the recipient or the [LSC]."[23]

Although the 1974 Act forbade recipients from using non-federal funds for any purpose for which federal funds could not be used under the Act's provisions, two notable exceptions enabled LSC recipients to undertake and/or support such activities. First, the Act permitted public funds and tribal funds to be used for whatever purpose was assigned to them by the entity that provided them.[24] In addition, the Act allowed recipients full freedom to contract or to make other arrangements with private attorneys, state or local governmental entities or other organizations for the provision of unrestricted legal services to individuals who meet the financial eligibility criteria for LSC-funded services.[25]

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21 42 U.S.C. 2996f(b)(7)-(9). LSC later also barred the use of LSC and private funds for litigation involving redistricting. *See* 45 C.F.R. pt. 1632.

22 42 U.S.C. § 2996e(d)(5).

23 42 U.S.C. § 2996f(a)(5).

24 This section has been interpreted to prevent LSC from penalizing a recipient organization from participating in litigation challenging a law requiring parental consent for a minor to obtain an abortion, where funds used to pay for such litigation came from a trust fund established by the state bar for the purpose of serving the needs of the indigent population generally. The court found that the recipient's activities were undertaken to serve the needs of its client base -- indigent minors -- and that it did not matter than no actual minor client of the recipient was a named plaintiff in the litigation. *National Center for Youth Law v. Legal Services Corp.*, 749 F. Supp. 1013, 1017-18 (N.D. Cal. 1990).

25 42 U.S.C. § 2996i(c).

Thus, although from the inception of LSC there have been certain constraints on the use of federal funds, the limitations were narrowly circumscribed consistent with Congress's expressly stated intent that lawyers funded through LSC grants exercise their independent professional judgment, in keeping with their professional responsibilities, as all other lawyers are expected to do.[26] Indeed, the 1974 Act specifically provided that LSC "shall not, under any provision of [the Act], interfere with any attorney in carrying out his [or her] professional responsibilities to his [or her] client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under [the Act] the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction."[27]

II. THE CURRENT RESTRICTIONS

B. The Budget Act of 1996

Congress attached the most recent set of LSC restrictions to the Corporation's 1996 appropriation[28] and has retained the restrictions essentially unchanged through the 1997 and 1998 budget processes.[29] These restrictions bar lawyers employed by an LSC grantee from engaging in any of a broad array prohibited activities -- *even if those activities are funded by non-LSC, non-federal sources.* The restrictions fall roughly into four categories: (1) a virtual bar against administrative or legislative advocacy; (2) restrictions on the subject-matter and substantive content of advocacy; (3) restrictions on the representation of disfavored groups; and (4) restrictions on the procedural tools that may be deployed.

1. Bar on administrative and legislative advocacy

The Budget Act prohibits any activity that seeks "to influence the issuance, amendment, or revocation of any executive order, regulation or other statement of general

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26 As indicated above, one of the six key principles on which the LSC was founded is that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility and the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6).

27 42 U.S.C. § 2996e(b)(3).

28 Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (1996).

29 *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, 110 Stat. 3009; Appropriations Act of 1998 (H.R. 2267, Title V). In addition to retaining the 1996 restrictions, these Acts maintained LSC funding at essentially the FY 1996 level. The 1998 Act requires immediate termination of an LSC grant to any office found to have engaged in prohibited advocacy.

applicability . . . by any Federal, State or local agency,"[30] bars any attempt "to influence" any administrative adjudicatory proceeding "designed for the formulation or modification of any agency policy of general applicability,"[31] and forbids any effort "to influence the passage or defeat" of federal, state or local legislation.[32]

2. Subject-matter and substantive argument restrictions

The Act imposes a sweeping ban against any activity that questions the propriety of or suggests alterations to welfare laws or policies. Included in this prohibition is a bar against participation in any "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system," and representation of any individual "seeking specific relief from a welfare agency" if that representation "involve[s] an effort to . . . challenge existing law."[33] The Act also prohibits any advocacy or litigation relating to electoral apportionment or the taking of the census,[34] and bars participation in any litigation relating to abortion.[35]

3. Bar on representation of disfavored groups

The Act prohibits the representation of immigrants who are not lawful permanent residents,[36] bars participation in any litigation on behalf of incarcerated individuals,[37] and bars representation of public housing residents threatened with eviction on grounds of alleged "illegal drug activity."[38]

4. Suspension of generally available procedural rights

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30 Budget Act, § 504(a)(2). Section 504(e) permits an LSC grantee to use non-LSC funds to comment on public rulemaking or to respond to an unsolicited written request from a governmental agency or legislative body to provide information.

31 Budget Act, § 504(a)(3).

32 Budget Act § 504(a)(4).

33 Budget Act, § 504(a)(16).

34 Budget Act, § 504(a)(1).

35 Budget Act, § 504(a)(14).

36 Budget Act, § 504(a)(11). The Act provides for certain limited exceptions to this rule.

37 Budget Act, § 504(a)(15).

38 Budget Act, § 504(a)(17).

The Act prohibits initiation or participation in any class action suit[39] and bars any claim for statutory attorneys fees.[40] In addition, the Act prohibits the commencement of any litigation or participation in any pre-complaint settlement negotiation unless each plaintiff is "specifically identified by name," has signed a statement that "enumerates the facts known to the plaintiffs on which the complaint is based," and the statements are kept on file and "made available to any Federal department or agency" auditing LSC and to litigation adversaries through discovery.[41] The Act also bars "unsolicited advice" to a prospective client that he or she should "obtain counsel or take legal action."[42]

As noted, these prohibitions apply even to the non-LSC funds of a legal services organization. Although Congress has previously imposed modest restrictions on LSC-recipients' *private* funds,[43] the 1996 Act breaks new ground by dramatically expanding the kinds of activities prohibited and by projecting those restrictions, for the first time, onto *public* non-LSC funds.[44] These public moneys -- from IOLTA programs and other State and local sources -- constitute the "overwhelming majority" of non-LSC funds received by legal services organizations.[45] Thus, prior to the 1996 Act, LSC recipients could use non-federal public funds as they wished, subject only to accounting requirements for verifying the segregation and appropriate expenditure of LSC funds. Now, by contrast, any entity that receives any LSC funds is flatly prohibited from engaging in any activity barred by the Act, regardless of how the activity is funded. To emphasize the reach of the restrictions, section 504(d)(1) of the Budget Act bars legal services offices from accepting any non-LSC funds unless the recipient notifies the donor that its funds may not be used for advocacy proscribed by federal law.

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39 Budget Act, § 504(a)(7).

40 Budget Act, § 504(a)(13).

41 Budget Act, § 504(a)(8).

42 Budget Act, § 504(a)(18).

43 *See, e.g.*, 42 U.S.C. § 2996i(c).

44 Budget Act § 504(d). LSC noted this novel aspect of the 1996 Act in the preamble to the initial implementing regulations:

> [T]he restrictions imposed by the [1996 Budget Act] . . . apply to both a recipient's LSC funds and to its non-LSC funds. Past appropriations acts have applied restrictions contained in those acts only to funds appropriated thereunder. In contrast, the [1996 Act] prohibits LSC from funding any recipient that engages in certain specified activities or that fails to act in a manner consistent with certain [of the Act's] requirements.

61 Fed. Reg. 41960 (Aug. 13, 1996).

45 *SeeVelazquez v. LSC*, No. 97-CV-182, 1997 WL 789369, at *2, n.6 (E.D.N.Y. Dec. 22, 1997) (citing Memorandum in Support of Preliminary Injunction at 3, n.2).

C. Implementation by LSC

In August 1996, LSC issued interim regulations closely tracking the restrictions imposed by the 1996 Budget Act.[46] The regulations add interpretive detail to the statutory restrictions in several areas.

1. Bar on administrative and legislative advocacy

The regulations interpret the statutory ban on legislative and administrative advocacy as outlawing communications between legal services lawyers and government officials on matters of public policy and as prohibiting public expressions of opinion on particular public policies.[47] Specifically, the regulations forbid:

- any "attempt to influence" the passage or defeat of any legislation, including any testimony before legislative or administrative entities, unless in response to an unsolicited written request by a government official;[48]

- any "communications . . . designed to influence the public to contact public officials to support or oppose pending or proposed legislation;"[49]

- participation in public rulemaking, including any communication to an agency in response to notice-and-comment rulemaking procedures that are open to the general public under the federal Administrative Procedure Act and similar state laws;[50]

- training that advocates "particular public policies" or expresses a viewpoint regarding proposed statutes or regulations;[51]

- the "[d]isseminat[ion]" of "information about such policies;"[52]

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46 *See* 61 Fed. Reg. 41960 (Aug. 13, 1996), 61 Fed. Reg. 45740 (Aug. 29, 1996).

47 45 C.F.R. §§ 1612.2(c), 1612.8.

48 45 C.F.R. 1612.3, 1612.6.

49 61 Fed. Reg. 45742 (Aug. 29, 1996), 45 C.F.R. 1612.2(a), 1612.4.

50 45 C.F.R. 1612.6; *but see* 1612.6(e)(which appears to permit such activity under certain circumstances with non-LSC funds.)

51 *Id.* at 1612.2(c), 1612.8.

52 *Id.*

- participation in any "public demonstration" or the "encourage[ment]" of others to engage in such activities;[53] and

- the formation of any coalition, association, network, alliance or similar organization.[54]

2. Bar on advocacy related to welfare reform

The regulations prohibit any advocacy or litigation that challenges or otherwise seeks to alter state or federal "welfare reform" laws or regulations.[55] The regulations not only forbid litigation attacking the constitutionality of state and federal social welfare statutes, but also bar any challenge to the lawfulness of agency policies implementing those statutes. In addition, the regulations prohibit use of LSC funds for participation in public rulemaking related to federal or state welfare reform legislation, and prohibit the use of any funds for supplying testimony or information to any legislative or administrative body, unless there has been an unsolicited written request from a government official.[56]

3. Bar on representation of disfavored groups

The regulations forbid representation in proceedings to evict a public housing recipient accused of "illegal drug activity," even where there has been no finding of guilt,[57] and prohibit representation of incarcerated individuals, including pre-trial detainees, "even though they are persons who have not been convicted of a crime."[58]

4. Suspension of generally available procedural rights

The regulations interpret the Budget Act as barring any "involvement" in class actions, and include in this proscription a ban on any co-counsel arrangement or appearance at the appellate level; a ban on amicus curiae submissions; and a ban on representing individual clients who wish intervene to modify relief or to challenge the adequacy of class representation.[59] The Act's ban on

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53 *Id.* at 1612.7(a).

54 *Id.* at 1612.9(a).

55 61 Fed. Reg. 45757 (Aug. 29, 1996), 45 C.F.R. pt. 1639 (amended by 62 Fed. Reg. 30763 (June 5, 1997)).

56 45 C.F.R. 1639.3.

57 61 Fed. Reg. 41965 (Aug. 13, 1996).

58 61 Fed. Reg. 45754, 45 C.F.R. pt. 1637.

59 61 Fed. Reg. 41963 (Aug. 13, 1996), 45 C.F.R. pt. 1617 (as modified by 61 Fed. Reg. 63755 (Dec. 2, 1996)).

attorney-fee claims is interpreted as extending to any claim for an award of attorneys fees pursuant to a federal or state statutory or common-law fee-shifting provision.[60]

LSC also included in its August 1996 interim regulations a separate rule "to implement the statutory restrictions on [an LSC] recipient's use of non-LSC funds."[61] LSC explained in its notice of rulemaking that, unlike prior appropriations measures, the FY 1996 Act imposes its restrictions not only on the use of the LSC *funds*, but on all activities of LSC *recipients*, even activities supported wholly by non-LSC money.[62] The August 1996 interim rules also prohibited LSC recipients from transferring their non-LSC funds to an entity that could use those non-federal funds to engage in prohibited activities.[63]

D. Judicial Disapproval of LSC's Interim Regulations

Two courts reviewed the LSC's interim regulations and disapproved various restrictions as inconsistent with the First Amendment. In *Varshavsky v. Geller*, a New York State court declared the class action prohibition unconstitutional.[64] The state court held that participation in class litigation is a "constitutionally privileged form of political expression" and that the LSC proscription violates the First Amendment because it is not narrowly tailored to achieve a compelling interest. The court further observed that the class action ban is not even rationally related to a legitimate governmental interest and appears to have been enacted for the impermissible purpose of "inhibit[ing] the First Amendment rights of LSC lawyers, their clients and anyone who agrees with them."[65] The court rejected the notion that the LSC restrictions should be sustained as "legislation that simply declines to fund a particular form of free expression" because the restrictions "penaliz[e] the LSC recipient for engaging in [disfavored] political expression . . . using funds wholly independent of the federal government, even if the recipient segregates those funds by giving them away."[66]

In *Legal Aid Society of Hawaii v. Legal Services Corporation (LASH I)*,[67] a federal district court preliminarily enjoined the Budget Act provisions that proscribe legislative and administrative advocacy, litigation relating to abortion, welfare, and redistricting, and representation

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60 61 Fed. Reg. 45762 (Aug. 29, 1996), 45 C.F.R. pt. 1642.

61 61 Fed. Reg. 41960 (Aug. 13, 1996), 45 C.F.R. pt. 1610.

62 61 Fed. Reg. 41960.

63 *Id.* at 41963 (former 45 C.F.R. 1610.6(a)(3)).

64 No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996). The court issued the declaration on motion by a legal services attorney for conditional withdrawal from a pending class action. The motion sought leave to withdraw as mandated by the Budget Act ban on class action representation, or, in the alternative, a declaration that the prohibition is unlawful.

65 *Id.*, slip op. at 10-15.

66 *Id.* at 16.

67 961 F. Supp. 1402 (D. Hawai'i 1997).

of prisoners and public housing residents accused of illegal drug activity.[68] Following a line of analysis similar to that in *Varshavsky*, the Court first ruled that these prohibitions implicate First Amendment rights to freedom of expression, freedom of association, freedom to petition for redress of grievances and access to the courts.[69] The Court next concluded that the "unconstitutional conditions" doctrine prevents Congress from conditioning LSC grants on the surrender of all meaningful opportunities to pursue First Amendment activities with non-federal funds.[70] The Court then held that the Budget Act and regulations imposed just such a condition because the LSC restrictions closed off any adequate channel for "voicing un-subsidized opinions."[71] In reaching this conclusion, the Court noted that the LSC's regulations sharply limited the ability of a legal services program to create a non-LSC affiliate that could engage in prohibited activities with non-LSC funds.[72]

E. LSC's Regulatory Response to Judicial Rulings

In direct response to the *LASH* injunction, the LSC amended its regulations on March 14, 1997 (interim rule)[73] and again on May 21, 1997 (final rule).[74] These regulations continue to bar legal services organizations and attorneys from using non-LSC funds for any activity prohibited by or for any "purpose inconsistent with" the Budget Act.[75] The new regulations also forbid LSC grantees from associating with any entity that engages in prohibited advocacy except under certain narrowly defined circumstances.[76] The concession to *LASH I* is that the regulations now permit an LSC recipient to affiliate with a separately incorporated entity not subject to the Budget Act restrictions so long as LSC's standards for "program integrity" are met.[77] The difficulty is that LSC's "program integrity" standards impose stringent and costly requirements that as a practical matter, will prevent most, if not all, LSC grantees from creating non-LSC, non-restricted affiliates. Most notably, the regulations demand the clear "physical and financial separation" of LSC recipients from any entity involved in prohibited advocacy, and expressly provide that "[m]ere bookkeeping separation of LSC

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68 The district court declined to enjoin the prohibitions against class actions, attorney fee claims or representation of immigrants.

69 961 F. Supp. at 1408-09.

70 *Id.* at 1411-14.

71 *Id.* at 1414-17.

72 961 F. Supp. at 1415 & n.17.

73 62 Fed. Reg. 12101 (March 14, 1997) (amending 45 C.F.R. pt. 1610).

74 62 Fed. Reg. 27695 (May 21, 1997). In the preamble to the amended regulations, LSC notes that the "[t]he revisions are intended to address constitutional challenges [to the restrictions on non-LSC funds] while ensuring that no LSC-funded entity engages in restricted activities." *Id.*

75 45 C.F.R. § 1610.3 (May 21, 1997).

76 45 C.F.R. § 1610.8 (May 21, 1997).

77 *Id.*

funds from other funds is not sufficient."[78] This standard appears to require that any non-restricted affiliate obtain, equip and staff separate offices that are physically removed from the offices of an organization receiving LSC funds.[79]

Beyond the "physical separation" requirement, the regulations list as "factors" for assessing "program integrity" the existence of "separate personnel," the "degree of separation of facilities," and "the extent to which indicia, such as signs, distinguish the [LSC] recipient from the other organization."[80] Taken together, these requirements seem to preclude mutually beneficial economies that would accrue through shared library, copying, word-processing and like facilities, and LSC has strongly suggested that it will not tolerate such arrangements. In the preamble to its new regulations LSC noted that "[s]ome commenters stated that it is not financially possible to duplicate everything and that programs should be allowed to use a recipient's facilities, equipment or staff as long as there is appropriate documentation and allocation of funds."[81] The Corporation responded that such sharing of facilities, equipment or staff "would violate the Congressional requirement that entities it funds not engage in restricted activities."[82] And while the scope of the new regulations is uncertain, because they prescribe a "case-by-case," "totality of the circumstances" method for assessing "program integrity," the apparent impact is to prohibit legal services attorneys and managerial personnel from working, even part-time, for any associated, non-restricted organization.[83] Moreover, the new regulations make clear that the "program integrity" restrictions apply to an LSC recipient's relationship with *any* non-restricted organization, even organizations with which the LSC

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78 45 C.F.R. 1610.8(a)(3) (May 21, 1997).

79 LSC declined to respond to comments seeking clarification on "whether the 'program integrity' requirement would automatically fail to be satisfied" absent "completely separate" facilities. 62 Fed. Reg. 27695 at 27698 (May 21, 1997). At least one court, however, has suggested that the new regulations demand "separate facilities and separate personnel." *LASH v. LSC*, 981 F.Supp. 1288, 1297 (D. Hawai'i 1997).

80 45 C.F.R. 1610.8(a)(3) (May 21, 1997).

81 62 Fed. Reg. 27695 at 27698.

82 *Id.*

83 LSC officials interpreted the March 1997 regulations as (1) barring LSC recipients' staff attorneys from working part-time for an affiliate organization or engaging in prohibited representation on their own time; and (2) barring recipients' managerial personnel from working part-time for *any* entity -- even a non-affiliated one -- that engages in prohibited activities. *See* LSC Brief in Opp. to Prelim. Inj. in *LASH I*, at 6. A footnote in the preamble to the May 1997 regulations makes an oblique reference to these interpretations and suggests that they may not reflect current policy in certain unspecified respects because "program integrity" under the new regulations is to be determined "case-by-case" on the "totality of the circumstances." 62 Fed. Reg. 27698, n.1. The explanation, however, does not disavow the earlier official statements and it remains the case that an LSC recipient may lose funding if its managers or staff participate in prohibited advocacy "on their own time" in the employ of another organization. *See also* 45 C.F.R. §§ 1604.4, 1604.5 (prohibiting legal services attorneys from practicing law outside the scope of their employment for the LSC funded entity except under certain narrowly defined circumstances.)

entity has no formal relationship and over which it exercises no control.[84] Despite these obstacles, the LSC contends that the new regulations give grant recipients a constitutionally adequate "avenue through which to engage in restricted activities."[85]

LSC consciously modeled its new regulations on the Title X, family planning clinic regulations upheld by the Supreme Court in *Rust v. Sullivan*,[86] though the LSC regulations are in several respects more onerous. LSC also borrowed from *Rust* the justification for its stringent "program integrity" standards, stating that strict separation of LSC recipients from organizations engaged in banned advocacy was necessary to "ensure that there is no identification of the recipient with restricted activities and that the [non-restricted] organization is not so closely identified with the [LSC] recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities."[87]

F. Pending Litigation Against the New Regulations

Legal services attorneys and clients have challenged the constitutionality of the new regulations in two federal class actions, *Legal Aid Society of Hawai'i v. LSC*[88] ("*LASH II*"), and *Velazquez v. LSC*.[89] Thus far the regulations have been sustained at the district court level. On August 1, 1997, the district court in *LASH II* awarded summary judgment to defendants, holding that the LSC's amended regulations are constitutional because they are "in basic compliance with *Rust* [*v. Sullivan*, 500 U.S. 173 (1991).]"[90] Four months later, on December 22, 1997, the district court in *Velazquez v. LSC* denied a motion for a preliminary injunction, ruling that plaintiffs had not demonstrated a likelihood of succeeding on their facial challenge to the amended regulations' constitutionality. Both district judges summarily concluded that *Rust v. Sullivan* controls the First Amendment issue and that the LSC regulations pass constitutional muster because they mirror the family planning regulations upheld in *Rust*. We analyze both cases in Part III.D, *infra*.

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84 62 Fed. Reg. 27697 (May 21, 1997) (new "program integrity" standards govern an "[LSC] recipient's relationship with any organization, independent or affiliated. . .").

85 62 Fed. Reg. 27697 (May 21, 1997).

86 62 Fed. Reg. 27697 (May 21, 1997) (stating that the "program integrity" standard adopted by LSC "was fashioned after the program integrity standard found to be constitutional in *Rust v. Sullivan* by the Supreme Court.")

87 62 Fed. Reg. 27698 (May 21, 1997); *see also* 62 Fed. Reg. 12101 (March 14, 1997). (deletes restriction on transfer of non-LSC funds) (45 C.F.R. 1610.7).

88 *Legal Aid Society of Hawai'i v. LSC*, 981 F. Supp. 1288 (D. Hawai'i 1997).

89 *Velazquez v. LSC*, 1997 WL 789369 (E.D.N.Y. 1997).

90 *LASH II*, 981 F. Supp. at 1289.

III. THE LSC RESTRICTIONS VIOLATE THE FIRST AMENDMENT

As we have seen, legal services for the poor have come to depend on a partnership of resources from three sources: the LSC itself; public moneys from state and local government and other sources such as IOLTA; and private moneys, including individual lawyer and organized bar donations of time and resources. The Budget Act does not simply restrict the representation legal services lawyers may provide to the poor with LSC funds. That Act goes further and effectively restricts lawyering activities even if they are funded from non-LSC sources. The reach of the government's restraint is thus all-encompassing: in effect, it amounts to an outright ban on conventional lawyering activities by lawyers for the poor -- barring attorneys who work for offices that receive even modest support from the LSC from using non-LSC funds for lawyering activities that the federal government has chosen not to support.

These lawyering activities lie at the core of the First Amendment and are entitled to strict protection. The interests at stake are several and should be viewed from a number of perspectives: that of the indigent client, who has an interest in voicing political opinions and in enforcing rights under law; that of the LSC grantee and its attorneys, who have an interest in associating with clients to promote particular legal views and in exercising independent and autonomous judgment on behalf of a client; and that of the non-LSC donor -- such as an individual private lawyer or a bar association -- who wishes to endorse particular views and activities of poor people by providing financial or other support. Although the government is presently not obliged to fund legal services for the poor, it may not -- absent a compelling interest which is not here present -- condition receipt of LSC funds on a waiver of such important First Amendment activities.[91] For, as the Supreme Court has explained, "If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.'"[92] Under the doctrine of unconstitutional conditions, the Budget Act's attempt to ban lawyers who work for offices that receive some LSC funds from using non-LSC moneys for lawyering activities is plainly inconsistent with the First Amendment.

G. Congress May Not Condition Receipt of LSC Grants on the Waiver of First Amendment Rights

Congress's power to impose conditions on the receipt of federal benefits is limited by the Bill of Rights. The Supreme Court has consistently relied on the "unconstitutional conditions" doctrine to prevent the government from "buying up" the Bill of Rights when it bestows public

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91 *See* Part III. A. 2, *infra.*

92 *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

benefits. The scope of the doctrine is broad, and has been applied by the Court to invalidate many different kinds of restrictions that the government has tried to impose on the recipients of federal subsidies, such as conditioning tax exemptions on the disavowal of subversive political beliefs,[93] withholding unemployment benefits from individuals who declined to work on their sabbath,[94] and denying welfare benefits to families who exercise their right to travel from state to state.[95]

Commentators recognize that the unconstitutional conditions doctrine affords an important set of protections for individual rights in the post-New Deal period -- a time when government subsidies, contracts, employment, tax regulations and benefit programs are pervasive and touch on virtually every aspect of modern society. The Supreme Court initially established the doctrine during the *Lochner* era as a means of protecting corporate and property interests against Progressive-era legislation.[96] After a period of legal desuetude, the doctrine reemerged forty years ago in the service of individual rights.[97] Although the exact parameters of the doctrine are somewhat indeterminate,[98] the Supreme Court has consistently reaffirmed a set of principles that stand as an important limitation on government regulatory power. Even if the government has no obligation to fund a particular activity, it may not condition the receipt of even a discretionary benefit on an individual's waiver of a constitutional right. The corollary of this principle likewise holds that the "'government may not deny a benefit to a person because he exercises a constitutional right.'"[99]

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93 *Speiser v. Randall*, 357 U.S. 513 (1958); *see also Woodward v. Rogers*, 344 F. Supp 974 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir 1973) (unconstitutional to condition grant of passport on loyalty oath).

94 *Sherbert v. Verner*, 374 U.S. 398 (1963).

95 *Shapiro v. Thompson*, 394 U.S. 618 (1969). Recently, the Supreme Court invalidated a city's attempt to condition the granting of municipal towing contracts on a company owner's political affiliation. *See O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct 2353 (1996). Similarly, last Term the Court held that a county's decision to terminate an at-will trash hauling contract in response to an independent contractor's criticism of county government violates the First Amendment *See Wabaunsee County v. Umbehr*, 116 S. Ct. 2342 (1996).

96 *See* Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U.L. REV. 989, 992 (1995); Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415-1416 (1989).

97 The academic literature on this doctrine is extensive. For some insightful general accounts *see, e.g.*, Richard Epstein, *Foreword: Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV. L. REV. 4 (1989); Albert Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Seth Kreimer, *Allocational Sanctions: the Problem of Negative Rights in a Position State*, 132 U. PA. L. REF. 1293 (1984).

98 *See, e.g.*, Epstein, *supra*, 102 HARV. L. REV. at 6 (complaining that the unconstitutional conditions doctrine has "bedeviled" courts and commentators).

99 *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983)(quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

In applying the doctrine in the First Amendment context, the Court has drawn a clear line between regulations that seek to control those who speak for the government and convey a public message, and those who speak for themselves and convey a private message. As one constitutional scholar explains, "[u]nconstitutional conditions doctrine seeks to identify those conditions on funding that have a coercive effect on the recipient's freedom to exercise her constitutional rights on her own time and with her own resources."[100] When the government itself is the speaker it ordinarily may say what it wishes. But it may not use its spending power to censor or control the private speech of those whom it chooses to subsidize. When it comes to the First Amendment, the old adage, "he who pays the piper calls the tune," simply does not hold. The doctrinal line between public and private speech reflects the reality of post-New Deal society. As one scholar explains, "with government now so large, and government affiliation so ubiquitous, . . . freedom of speech would be rendered an empty guarantee if government retained carte blanche to attach any restrictions on speech that it pleased, based on receipt of government benefits."[101] Courts have echoed this theme, warning that if government were able to regulate the private messages of non-governmental speakers who participate in programs that receive public support, "the result would be an invitation to government censorship wherever public funds flow [and] an enormous threat to First Amendment rights of American citizens and to a free society."[102]

1. LSC grants, by intent and design, subsidize the private speech of private individuals

The key distinction in applying the unconstitutional conditions doctrine -- and for determining the government's interest in regulating subsidized speech -- is whether the speaker is an "independent participant[]" in the marketplace of ideas or, rather, is an "instrumentalit[y]" of the government, who is funded to provide a government message.[103] The Supreme Court in *FCC v. League of Women Voters* drew a sharp distinction between regulation of public-employee speech and that of "independent nongovernmental entities."[104] More recently, the Court in *Rosenberger v. Rector the University of Virginia*, cast this inquiry as whether a federal subsidy program "employ[s] private

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100 David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U.L. REV. 675, 679 (1992).

101 RODNEY A. SMOLLER, SMOLLER AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT, S 10.01[3], 10-11 (1994).

102 *Trustees of Leland Stanford Jr. Univ. v. Sullivan*, 773 F. Supp. 472, 478 (D.D.C. 1991).

103 Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 152 (1996).

104 468 U.S. at 401 n.27. *See also Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2458 (1994) (holding that "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance government control over the content of messages expressed by private individuals").

speakers to transmit specific information pertaining to [the government's] own program," or, conversely, "encourages private speech."[105]

When the government itself acts as a speaker, or funds private parties to convey a governmental message, the First Amendment permits it to prescribe the content of the funded speech and to take reasonable measures to protect its public message from distortion or dilution. As Professor Jesse Choper explains, the First Amendment "does not ordinarily prevent government from telling its employees what advice they may give in the course of their employment."[106] Thus, in *Rust v. Sullivan*,[107] the federal government provided subsidies to doctors who were enlisted to convey a public message about reproductive choice, and the Court upheld the restrictions against a First Amendment challenge.[108]

Lawyers who work for LSC-funded offices are, however, not governmental employees, federal bureaucrats, or public attorneys. They are not government spokespeople or conduits for a government message. They are, instead, private lawyers whose work is partly funded by the federal government. Their receipt of public money for their private activities does not transform them into state actors. Indeed, as a matter of statute and of professional ethics, legal services attorneys are obliged to act as independent advocates, and their advice, strategy, and counsel must be free from political pressure.[109] As the Supreme Court explained in *Polk County v. Dodson*, raising the analogous question of whether public defenders are "state actors":

> a public defender is not amenable to administrative direction in the same sense as other employees of the State. . . . [A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "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."[110]

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105 115 S. Ct. 2510, 2518-19 (1995).

106 Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POLICY 460, 461 (1995).

107 500 U.S. 173 (1991).

108 The Court subsequently explained in *Rosenberger v. Rectors of the University of Virginia*, 115 S. Ct. 2510 (1995), that since the federal Department of Health and Human Services had "disburse[d] public funds to private entities to convey a governmental message," it was entitled to prescribe the content of that message.

109 42 U.S.C. § 2996(6); ABA Model Code of Professional Responsibility, DR 5-107 (B) (1997).

110 454 U.S. 312, 321 (1981)(citing Model Code of Professional Responsibility DR 5-107(B)(1976)).

Since legal services attorneys frequently stand in direct adversarial relationship with the government, it would be incongruous to regard them as government spokespeople or carriers of some official government message.[111]

2. The Budget Act and regulations unconstitutionally condition the receipt of LSC funds on the surrender of First Amendment rights

When the government subsidizes private speech, it cannot compel the recipient to surrender constitutional rights as the price of public support. It is precisely this impermissible condition that the Budget Act imposes, compelling the recipients of LSC grants to waive their right to engage in First Amendment activity -- including litigation and lobbying -- even when funded from non-LSC sources. The protected status of these prohibited activities is unassailable.

a. The First Amendment protects the right to lobby and litigate

The First Amendment has long been understood to extend the most robust protection to communications between an individual and the government on matters of public concern. The First Amendment applies whether these communications are made in a legislative, administrative, or judicial forum.[112] Most interest groups in the United States are organized as lobbies with paid staff. Poor people, however, do not have PACs or access to other political resources, and their communications with government are conventionally mediated through an attorney.[113] The Budget Act explicitly bans this protected activity, barring any lawyer whose office is funded in any way by the LSC from using non-LSC funds:

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111 Indeed, the Legal Services Corporation has correctly characterized its own juridical status "as a private corporation . . . intended to function as an independent entity," and has insisted that "LSC is not an arm of the Government." Brief of the Defendant Legal Services Corporation in *LASH I* at 34 n. 39 and 36 n. 42.

112 *See, e.g., Buckley v. Valeo*, 421 U.S. 1 (1976)(according stringent constitutional protection to political speech); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)(holding "lobbying" and other communications concerning legislation or governmental policies political speech protected by the First Amendment); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)(same).

113 *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1373 (1993) (quoting Sen. Robert Dole that "there aren't any Poor PACs or Food Stamp PACs or Nutrition PACs").

- to persuade a public official to issue, withdraw or modify an executive order, agency regulation, or other statement of general applicability;[114]

- to "influence" agency adjudicatory proceedings related to the adoption or modification of any agency policy of general applicability;[115] or

- to "influence the passage or defeat" of federal, state or local legislation, with a special prohibition on lobbying on the issue of "welfare reform."[116]

Implementing regulations make clear that the goal is to bar all communications between a poor person's lawyer and the government on issues of extreme public importance -- matters affecting policy development and statutory interpretation.[117] The government has thus not simply refused to subsidize the political speech of poor people through their lawyers. It has taken the further and impermissible step of suppressing the political speech of poor people, even when paid for from non-federal sources. This restriction comes at a time when the Nation is engaged in a historic debate about welfare reform and the shape that post-New Deal approaches to poverty ought to take. The purpose, if not the effect, of the Budget Act's ban is to shut poor people out of public discourse on important policy issues that vitally affect not only their daily lives but also the future prospects of their children.[118]

The First Amendment also clearly protects the right of poor people and their attorneys to use litigation both as an expressive and instrumental measure: to communicate political and social views, and to vindicate statutory and constitutional claims.[119] The Supreme Court has repeatedly affirmed the principle that litigation, especially when aimed at conforming governmental policies to constitutional and statutory requirements, is both a means of "petition[ing] for redress of grievances" and a form of "political expression,"[120] and thus "a fundamental right within the meaning of the First Amendment."[121] The association of attorney and client for the purpose of "advocating lawful means

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114 Budget Act § 502(a)(2).

115 Budget Act § 504(a)(3).

116 Budget Act § 504(a)(3), (a)(16).

117 *See* 45 C.F.R. pt. 1612 (1996).

118 *See* HELEN HERSHKOFF & STEPHEN LOFFREDO, THE RIGHTS OF THE POOR xiii-xv, 1-4 (1997).

119 *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (holding that the right to file a lawsuit is constitutionally protected).

120 *NAACP v. Button*, 371 U.S. 127 (1963).

121 *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971).

of vindicating legal rights" has likewise been recognized as comfortably within the preserve of the First Amendment.[122]

Arguably, the government is free to withhold subsidies from litigation that it deems too sensitive or controversial to command public support. But the Budget Act goes further and bars poor people and their attorneys from participating in litigation that the government has chosen not to fund if the attorney's law office receives money, however minimal, from the LSC. In particular, the Budget Act prohibits lawyers employed by an LSC recipient from participating in any law suit that questions the constitutionality of welfare laws or the legality of state welfare policies.[123] Attorneys from LSC-funded offices -- the majority of lawyers who represent the poor -- have historically played an important role in enforcing the constitutional rights of their clients and in ensuring that welfare programs conform to legal requirements.[124] These lawsuits have been critical in securing for the poor the services that are guaranteed to them under law. They have had an important ancillary effect in realizing the rule of law and so helping to "reaffirm[] faith in our government of laws."[125] The Budget Act's flat ban on such activity clearly has no place in a nation built on the principle of "equality before the law." The damage to First Amendment interests here is particularly acute because the LSC restrictions have the effect of insulating governmental policies from criticism and silencing dissenting voices on matters of broad public importance.

In addition to this substantive restriction on the provision of legal services, even when financed by private moneys, the Budget Act also prohibits legal services lawyers from using non-LSC funds on behalf of clients who seek to participate in a class action litigation, whether as a named representative plaintiff or merely as an unnamed class member. In the landmark civil rights decision of *In re Primus*, the Supreme Court reaffirmed the principle that certain forms of "cooperative, organizational activity," including litigation, are part of the "freedom to engage in association for the advance of beliefs and ideas," and "this . . . freedom is an implicit guarantee of the First Amendment."[126] As the Supreme Court explained in *California Motor Transport Co.*, "it would be destructive of rights of association and petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view."[127] "Unit[ing] to assert legal rights" and the "association for litigation" are thus "fundamental rights" secured by the First Amendment.[128] Accordingly, while there may be no

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122 *Button*, 371 U.S. at 437; *see, e.g.*, *In re Primus*, 436 U.S. 412 (1978).

123 Budget Act, § 504(a)(16); 45 C.F.R. pt. 1639.

124 *See* MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993).

125 *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

126 *In re Primus*, 436 U.S. at 412 (internal citations omitted).

127 404 U.S. at 510-11.

128 *United Transportation Union*, 401 U.S. at 580. *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("an individual's freedom to speak, worship and petition the government for redress of grievances (continued...)

constitutional entitlement to the class action device, the First Amendment does protect associational activity conducted through such a procedure once the federal government has chosen to make it generally available according to neutral terms and conditions.[129]

b. The First Amendment protects the formation, autonomy and independence of the lawyer-client relationship

The First Amendment protects not only the right to use litigation and lobbying for the expression of social and political views; it also protects the right to associate with lawyers and to benefit from a lawyer's autonomous and independent judgment. The attorney-client relation is built on a theory of trust and confidence that assumes the ability of the lawyer to take all steps that are necessary to promote his or her client's best interest. As a matter of core First Amendment doctrine, the relation is one of a number of private, autonomous spheres that the Constitution shields from government interference.[130]

The Budget Act intrudes into this autonomous sphere in at least two ways. At the outset, it prevents the formation of an attorney-client relation by banning the most skilled and expert poverty lawyers in the nation from using non-LSC funds to represent members of politically disfavored groups or to provide "unsolicited advice" that would inform an individual that he or she should consider forming such a relation. And after an attorney-client relation is formed, the Act interferes with the lawyer's independent exercise of autonomous judgment by placing certain conventional professional choices out of bounds.

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128 (...continued)
could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed"). Although the Supreme Court has not specifically discussed the First Amendment implications of class action litigation, one noted commentator has emphasized "as implicit in the first amendment . . . a right to join others to pursue goals independently protected by the first amendment" -- the very definition of the class action procedure. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1013 (2d ed. 1988).

129 *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-436 (1983) ("The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.") Hence the district judge in *LASH I* erred in sustaining the exclusion of legal services lawyers and clients from class actions on the ground that there is no "constitutional entitlement" to Rule 23 procedures. *LASH I*, 961 F. Supp. at 1410.

130 *See* Part III.B, *infra*.

The Budget Act forbids LSC-funded lawyers from representing certain immigrants[131]; the incarcerated[132]; and public housing tenants faced with eviction because of alleged drug activity[133] -- again, even when only non-LSC funds are at play. The federal government may be free to decide whether or not to fund a lawyer-client relationship: a general duty to subsidize such a relationship in all civil and criminal cases has yet to be recognized.[134] But the government may not, consistent with the First Amendment, bar a lawyer from using private funds to maintain such a relationship. The lawyer's First Amendment right to form such a relation is entitled to protection even if he or she chooses to advocate for a non-citizen who arguably has a weaker associational interest.[135] Indeed, the justification for First Amendment protection is heightened where resort to the judicial branch -- as for poor people and certain immigrants-- "may well be the sole practicable avenue open to a minority to petition for redress of grievances."[136]

3. The LSC restrictions go far beyond any legitimate need to avoid subsidization of prohibited activities

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131 Budget Act §§ 504(a)(11); (a)(15); (a)(17).

132 Budget Act § 504 (a)(15).

133 Budget Act § 504(a)(17).

134 *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981). *See also* Part V, *infra*.

135 The district judge in *LASH I* wrongly held the ban on representing immigrants implicated no First Amendment right, reasoning that "'[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government'" and ought not be disturbed by the courts. 961 F. Supp. at 1410 (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)). While it may be true that the federal government possesses "near plenary power" over immigration policy, it does not follow that the attorney-client relationship loses its character as a constitutionally privileged association in the single configuration of an attorney employed by an LSC recipient and a client who is an immigrant. Whatever associational rights *the immigrant* may or may not have, legal services attorneys who are U.S. citizens retain their First Amendment rights even when they choose to advocate for non-citizens. *See Lamont v. Postmaster General of the United States*, 381 U.S. 301, 307 (1965); *Kleindeinst v. Mandel*, 408 U.S. 753 (1972). Moreover, the Budget Act prohibition cannot plausibly be described as an exercise of Congress's power to regulate immigration policy. The Act prescribes no general policy of denying immigrants -- or any subgroup of them -- the right to retain counsel; nor does it bar counsel from any category of claim or proceeding, nor affect immigrants' access to counsel in any other context. Rather, the provision's sole aim and effect is to prevent a particular group of U.S. citizen attorneys -- singled out by Congress for their supposed adherence to "liberal" ideas -- from associating with or advocating for non-citizens. This is no regulation "pertaining to the entry of aliens," but rather an attempt to rein in certain American lawyers who have actively criticized and advocated against governmental policies in a range of areas, including immigration.

136 *Button*, 371 U.S. at 430.

The Budget Act's restriction of these important First Amendment activities goes far beyond any legitimate need to ensure that LSC funds are used for their intended purposes. The Association recognizes that the government has a legitimate interest in monitoring LSC-funded law offices to safeguard the public fisc and to hold federal grantees accountable to their designated mission. LSC regulations surely can require recipients of LSC funds to maintain hourly records that can be audited in determining whether federal moneys are used exclusively for legal services to the poor. Likewise, the government can require that LSC-grantees conform their behavior to the highest standards of the profession as prescribed by the Code of Professional Responsibility and the Canons of Ethics. The government may not, however, "impose stringent requirements [on LSC recipients] that are unrelated to the congressional purpose of ensuring that no . . . [LSC funds] are used to pay" for legal services that Congress does not intend to subsidize.[137]

The restrictions here at issue go far beyond any legitimate need to safeguard public funds. In order to ensure that public subsidies are used for their authorized purpose, the government may constitutionally require a funded entity to maintain a "dual structure" consisting of a subsidized entity that provides only government-funded services and a separately incorporated, privately-funded affiliate to provide services that the government declines to subsidize. But where the subsidized entity engages in purely private speech -- and is not a conduit for a government message -- the Supreme Court has never tolerated restrictions that go beyond a "set of bookkeeping requirements."[138]

Thus, in *Taxation With Representation of Washington*, the Court rejected a First Amendment challenge to a provision of the Internal Revenue Code that provides a subsidy (through the granting of a tax exemption) to nonprofit entities that do not engage in lobbying. Plaintiff did not challenge the "dual structure" requirement: the subsidized entity was free to perform nonsubsidized activity through a separate corporation, and the Internal Revenue Code required "only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying."[139] Justice Blackmun, in concurrence, emphasized that the dual-structure requirement did not impermissibly burden the grantee's right to lobby "because it is free to make known its view on legislation through its ... [separately incorporated] affiliate without losing tax benefits for its nonlobbying activities."[140] The concurrence warned, however, that any "significant restriction" on this channel of communication would create "insurmountable" First Amendment problems:[141]

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137 *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 n. 6 (1983).

138 *Id.*

139 *Id.*

140 *Id.* at 552.

141 *Id.* at 552-53.

> Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying.[142]

Two years later, in *FCC v. League of Women Voters*,[143] the Court invalidated a section of the Public Broadcasting Act that forbade federal grantees, educational broadcasting stations funded by the Corporation for Public Broadcasting, to "engage in editorializing." In particular, the Court rejected the government's justification that the restriction was simply an application of the "dual structure" approach previously endorsed in *Taxation With Representation* and thus proper as a way to monitor Congress's decision "that it 'will not subsidize public broadcasting station editorials.'"[144] Significantly, the Court explained that any restriction that "barred [a subsidized entity] from using even wholly private funds to finance" First Amendment activity that the government had chosen not to subsidize would be constitutionally flawed:

> In this case, . . . unlike the situation faced by the charitable organization in Taxation With Representation, a noncommercial educational station that receives only 1% of its overall income from . . . [federal] grants is barred absolutely from all editorializing. Therefore, in contrast to the . . . [plaintiff] in Taxation With Representation, such a station is not able to segregate its activities according to the source of its funding.[145]

The Court emphasized that the dual structure approach would be constitutional only if it "permitted noncommercial broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds."[146]

This constitutionally-required avenue for First Amendment activity is completely closed to LSC grantees. Far from requiring only separate incorporation and separate bookkeeping ledgers, LSC has required its grantees to establish separately incorporated affiliates that are "physically and financially separate" and that maintain "a sufficiently separate identity and operational

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142 *Id.* at 553 (Blackmun, J., concurring).

143 468 U.S. 364 (1984).

144 *Id.* at 399.

145 *Id.* at 400. *See also* Part III.A. 5, *infra*.

146 *Id.* at 400.

independence." The regulations specifically provide that "[m]ere bookkeeping separation of LSC funds from other funds is not sufficient."[147] In determining the appropriate degree of separation, LSC also plans to examine such conditions as the existence of separate personnel and physical plant. Indeed, some LSC officials have interpreted the restrictions as banning legal services lawyers from using even their non-work time to pursue lawyering activities that the government has refused to fund.[148] The regulations would thus bar attorneys who work part-time in an LSC-funded office from engaging in prohibited lawyering activities anywhere -- even through a completely separate law office that receives no LSC funds.[149] While the scope of the restrictions is uncertain, since they prescribe a "case-by-case," "totality of the circumstances" approach in assessing "program integrity," the manifest impact is to control the professional choices of a lawyer even when his or her representation of a particular client is funded exclusively from non-LSC sources.[150]

The restrictions thus are not on government funds, but rather on the First Amendment activities of their recipients -- precisely what the Supreme Court has condemned.

4. The restrictions cannot be justified by a governmental interest in protecting LSC's message against distortion or dilution

The LSC self-consciously modeled its "program integrity" restrictions on the regulatory scheme that was upheld against First Amendment challenge in *Rust v. Sullivan*.[151] As described in Part III.A.1, *supra*, however, the Supreme Court has made clear that *Rust*-style restrictions are constitutionally appropriate only when, as in *Rust*, "the State is the speaker."[152] Thus, for example, the government may have a legitimate interest in regulating the Office of the Independent Counsel to ensure that publicly-financed counsel, who are spokespeople for the government, do not issue private messages that conflict with their subsidized public message. The

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147 45 C.F.R. 1610.8(a)(3)(May 21, 1997).

148 *See* Part II.D., *supra*.

149 *See* Tull Decl. at 13, filed in *LASH I*, *supra*. *See* Part II.D., *supra*.

150 62 Fed. Reg. 27697 (May 21, 1997)(stating that "program integrity" standards govern an "[LSC] recipient's relationship with any organization, independent or affiliated . . ..").

151 62 Fed. Reg. 27697 (May 21, 1997).

152 *Rosenberger*, 515 U.S. at 831. *See* Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151 (1996) (after *Rosenberger* the key distinctions in First Amendment and unconstitutional conditions doctrine are "whether speakers should be characterized as independent participants in the formation of public opinion or as instrumentalities of the government.") The Department of Justice characterized *Rust* in hearings before the Senate Judiciary Committee, as standing for the principle that "when government funds a certain view, the government is speaking. It therefore may constitutionally determine what is to be said." *See* Hearings on the First Amendment Implications of the Rust v. Sullivan Decision Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 102 Cong. Rec. 11 (1991).

government has no interest, however, in ensuring that a public message is "neither garbled nor distorted" by an LSC-grantee's speech for the simple reason that there is no public message to protect. The purpose of the Legal Services Corporation is to fund private legal services for the poor, not to establish a legal arm of the federal government or to delegate private lawyers as conduits for a government message. An LSC entity is like a public defender, who is funded by the government to provide legal services for a particular client base, but who by no means stands as a government lawyer.[153]

5. The restrictions are unconstitutional even under the analysis set forth in *Rust*

In each of the cases in which the LSC restrictions have been challenged, the LSC has argued that *Rust* provides the appropriate legal framework for analysis of the constitutionality of the regulations and the statute under which they were promulgated. For the reasons just discussed, however, *Rust* is inapposite here.

In any event, even the *Rust* analysis itself should lead to the conclusion that the restrictions are unconstitutional. Although they do bear some facial resemblance to the restrictions approved in *Rust*, the LSC restrictions impose upon recipients additional limitations of a type that the Supreme Court has already stated would not withstand constitutional scrutiny.

Specifically, unlike the restrictions approved in *Rust*, which applied not to Title X grantees in their entirety but only to the "projects" they set up with Title X funds, the LSC restrictions apply to every aspect of the conduct of the "recipient" of LSC funds. This difference is a crucial one. In *Rust*, the Court found it important that the Title X grantee could "continue to perform abortions, provide abortion-related services and engage in abortion advocacy" so long as it did so "through programs that are separate and independent from the project that receives Title X funds."[154] In contrast, the LSC restrictions unquestionably prohibit any entity that receives LSC funds from engaging in certain activities under any circumstances whatsoever.

The bow to *Rust* contained in the current regulations is to permit LSC recipients to set up, or to affiliate with, entirely separate organizations that engage in the prohibited activities using non-federal funds. As the Court noted in *Rust* itself, however, it has not hesitated to strike down as unconstitutional statutory and regulatory schemes "in which the Government has placed a condition on a 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

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153 *See Polk v. Dodson*, 454 U.S. 312 (1981) (distinguishing public defenders from prison doctors for state action purposes); *see* Part III.A.1., *supra*.

154 500 U.S. at 196. *See also* Part III.A.3, *supra*.

funded program."[155] The provision allowing LSC fund recipients to affiliate with organizations that engage in activity prohibited to the recipients themselves would not appear to save the LSC restrictions under this analysis -- they plainly do "place a condition on a recipient of the subsidy" and their primary purpose is to "effectively prohibit[] the recipient from engaging in . . . protected conduct outside the scope of the federally funded program."

LSC has so far successfully defended the restrictions against this argument by pointing out that the imposition of the prohibitions on "recipients" of LSC funds rather than on "programs" undertaken by such recipients amounts merely to a requirement that entities receiving LSC funds be incorporated separately from affiliated entities that engage in the prohibited activities. As the court noted in upholding the final LSC regulations in *LASH II*,[156] the Supreme Court's opinion in *Taxation With Representation* -- a case in which the "dual structure" requirement was not challenged -- commented that the requirement "that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying" is "not unduly burdensome."[157]

Based on this language, the *LASH II* court held that LSC could permissibly prohibit the activities of a "recipient," instead of a mere "program," because a requirement of separate incorporation alone would not violate the constitution. Starting from the premise that program separation requirements identical to those in *Rust* would necessarily pass constitutional muster, the *LASH II* court reasoned that the addition of the further requirement of corporate separation, which under *Taxation With Representation* would also be constitutionally permissible standing alone, should not render the LSC regulations constitutionally infirm.[158]

This reasoning represents a flawed reading of the precedents. The *Taxation With Representation* Court took pains to note that there was no evidence before it that the IRS required anything more than formal corporate separation between lobbying entities and their non-lobbying affiliates, nor was there a claim that the level of separation required would interfere with any entity's ability to engage in lobbying activities through an affiliated entity. The plain suggestion of this language is that if there were such a requirement or such a claim, the result in *Taxation With Representation* may have been different. The *Rust* Court, for its part, specifically held that the Title X restrictions were constitutionally permissible despite their imposition of strict requirements of separation between the Title X program and other activities precisely <u>because</u> the recipient itself would still be permitted to engage in those activities. To say that because each of these decisions upheld a requirement that was analogous to <u>one</u> aspect of the LSC restrictions, those restrictions,

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155 500 U.S. at 197.

156 *LASH II*, 981 F. Supp. at 1294-95.

157 461 U.S. at 544 n.6.

158 *LASH II*, 981 F. Supp. at 1297.

which impose both requirements, must pass constitutional muster ignores the very rationale of the decisions themselves.

Thus, even under the *Rust* analysis, the LSC restrictions impose impermissible burdens on First Amendment activity.[159] For this reason, too, the restrictions should be invalidated.

6. The restrictions cannot be justified by a governmental interest in avoiding association with the views and activities of Legal Services attorneys

No doubt the federal government believes that it has an important theoretical interest in avoiding association with the views and activities of LSC grantees.[160] The Supreme Court, however, has consistently disfavored First Amendment restrictions that aim to prevent confusion as to whether the government endorses a privately-expressed message.[161] The government's power to regulate expressive activity on this ground is constrained in at least two ways. First, the government cannot justify a speech restriction with a speculative or hypothetical concern that the public will be misled or confused; rather, the government must demonstrate "that the recited harms are real, not

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159 Further, the *Rust* Court noted that, based on its previous holdings, "the existence of a Government 'subsidy', in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' . . . or have been 'expressly dedicated to speech activity,'" and observed that "[i]t could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government," 500 U.S. at 200 (citations omitted). But the Court found it unnecessary to rule on this issue because, it said, doctors in a Title X program provide care limited to pre-conception family planning services, and thus expressly do not develop full fledged doctor-patient relationships with their clients. *Id.* In contrast, the LSC restrictions go to the heart of a full-fledged attorney-client relationship, a relationship that the First Amendment treats with solicitude. This point is developed in detail in Part III.B *infra*.

160 LSC and the federal government have advanced this interest in litigation, but the only evidence that Congress relied upon it is a statement in the Senate Labor and Human Resources Committee report that "the public cannot differentiate between LSC advocacy subsidized with public versus private funds. As a result the public grows weary watching LSC attorneys lobby legislators -- even if that dismay might sometimes be misplaced.". S. Rep. No. 104-392 at 6 (1996). LSC expressly justified its "program integrity" regulations on the ground that they are necessary to "ensure there is no identification of the recipient with restricted activities" and further to ensure that a non-restricted affiliate "is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities." 62 Fed. Reg. 1202 (March 14, 1997).

161 *See Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440, 762 (1995)(rejecting First Amendment challenge based on fear of "perception that . . . [religious speech] bears the State's approval").

merely conjectural."[162] Second, any burden on speech that the government does impose must be no more restrictive than necessary to prevent the threatened confusion.[163] LSC's regulations fail both prongs of this test.

The Supreme Court has repeatedly made clear that a governmental interest that is "important in the abstract" will not justify an abridgment of First Amendment rights. Instead, Congress must have demonstrated evidence that shows "'the existence of the disease sought to be cured.'"[164] In determining whether the government's asserted interest is empirically sufficient, the Court gives "substantial deference to the predictive judgments of Congress" while undertaking an "'independent judgment of the facts bearing on an issue of constitutional law.'"[165] As Justice Kennedy has explained,

> This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.[166]

The legislative history of the Budget Act reveals no studies, polls or any empirical evidence whatever to suggest that the public has mistakenly associated the government with positions advanced by legal services attorneys. Nor did the LSC, in promulgating its regulations, undertake any inquiry into the reality of this supposed threat. This is not surprising: the suggestion that the public is apt to believe that the federal government is endorsing the views and activities of legal services attorneys is manifestly implausible -- particularly since the most publicized and controversial of legal services activities are lawsuits against that very government.

Even if a plausible threat of such confusion existed, however, any restriction on First Amendment activity would have to be no greater than necessary to prevent the predicted harm. As the Court has explained, "[n]arrow tailoring . . . requires . . . that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[167] Because the restricted activity in this case -- political speech and association -- is at the core of the

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162 *Turner Broadcasting System, Inc v. FCC*, 512 U.S. 622, 663 (1994).

163 *FCC v. League of Women Voters*, 468 U.S. 364, 395 (1984).

164 *Turner Broadcasting System*, 512 U.S. at 664. *See also Central Hudson*, 115 S. Ct. at 1592 (government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

165 *Turner Broadcasting System*, 512 U.S. 622, 665-66 (quoting *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989).

166 *Id.* at 666.

167 *Id.* at 662 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

First Amendment, the appropriate test for determining whether the condition is excessively burdensome is whether it is the least restrictive means available to foster the governmental interest.[168] Even under a more highly deferential rational-fit test, applicable to commercial speech, the restrictions cannot pass muster for their scope is not "in proportion to the interest served."[169]

Thus, in *FCC v. League of Women Voters*,[170] the Court rejected the government's contention that it had a sufficient interest in banning subsidized noncommercial broadcasting stations from engaging in editorializing in order to "ensur[e] that the audience . . . will not be led to think that the broadcaster's editorials reflect the official view of the government."[171] The Court found that the government could "address this important concern" through the less restrictive method of requiring "public broadcasting stations to broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding."[172] Similarly, Congress could deal with any demonstrable threat of confusion that might exist by requiring legal services lawyers to include a disclaimer whenever they undertake lobbying or litigation that the government has chosen not to subsidize, *e.g.*, "The views expressed in this document are those of the undersigned counsel and in no way are to be attributed to the Federal Government or the Legal Services Corporation."

H. The Government May Not Deploy its Spending Power to Intrude on a "Traditional Sphere of Free Expression" Such as the Attorney-Client Relation

Congress's use of the spending power as an indirect means to intrude on a "traditional sphere of free expression . . . fundamental to the functioning of our society"[173] violates the First Amendment rights of LSC attorneys no less than those of their clients.

The relationship between attorney and client occupies a "traditional" and honored place in our constitutional system and plays a fundamental role in the maintenance of the rule of law and the effective operation of an independent judiciary -- functions believed by the Constitution's

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168 *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

169 *Florida Bar v. Went For It., Inc.*, 515 U.S. 618 (1995).

170 468 U.S. 364 (1984).

171 *Id.* at 395.

172 *Id.*

173 *Rust v. Sullivan*, 500 U.S. 173, 199 (1991)(relying on *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 605-06 (1967)).

framers and the Supreme Court to be foundations of a democratic society and essential to the values that the First Amendment was intended to secure.[174] As Justice Frankfurter aptly observed:

> all the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield" to quote Devlin, J., in defense of right and to ward off wrong.[175]

The relationship between lawyer and client is one built on a trust and confidence that the professional will exercise his or her best judgment, free from outside constraint, in pursuit of the client's cause. Thus, "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."[176] The Court has described lawyers as "'trusted agents of their clients,'"[177] emphasizing the importance of a lawyer's "honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client."[178]

The Budget Act, however, prevents an LSC-funded attorney from conferring undivided loyalty on his or her client; professional autonomy is limited -- even when exercised on "her own time and with her own resources."[179] The attorney cannot choose to enter into a professional relationship with individuals whose lawsuits the LSC has chosen not to subsidize; the attorney cannot assert constitutional claims or defenses in lawsuits involving welfare programs; and the attorney cannot provide representation in a class action even when she believes that mechanism is the best procedural avenue for enforcement of the client's rights. The attorney's First Amendment interests in speech and association are thus seriously curtailed, and in a way that is highly subversive of the best interest of the client -- a client who, in the context of poverty law, is particularly dependent on his or her lawyer for service and support.[180]

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174 *See* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (5th ed. 1995) 992.

175 *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

176 2 TRIAL OF QUEEN CAROLINE 8 (J. NIGHTINGALE ed., 1821), quoted in STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 15 (4th ed. 1995).

177 *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 460 (1978)(quoting *Cohen v. Hurley*, 366 U.S. 117, 124 (1961).

178 *In re Griffiths*, 413 U.S. 717, 724 n. 14 (1973). The Supreme Court has long recognized the special nature and vital role of the attorney-client relationship. *See e.g. Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850).

179 David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government - Funded Speech*, 67 N.Y.U.L. REV. 675, 679 (1992).

180 *See*JOHN T. NOONAN, JR. & RICHARD W., PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES (continued...)

By attempting to prevent an LSC-funded lawyer from taking all steps necessary to protect a client's interest -- even with non-federal funds -- the government intrudes impermissibly into a "traditional sphere of free expression" in violation of the First Amendment and at a great cost to the rule of law on which our nation is based.

I. The LSC Restrictions Unconstitutionally Discriminate on the Basis of Viewpoint

It is axiomatic that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts."[181] The legislative history of the Budget Act, coupled with the absence of any legitimate interest advanced by the Act's restrictions on unsubsidized attorney speech, demonstrates that the Act rests upon just such an impermissible basis. Congressional proponents of the LSC restrictions made clear that their aim was to reduce or eliminate advocacy of disfavored positions. House members unabashedly stated that the LSC restrictions were needed to neutralize legal services attorneys whose "aggressive advocacy of abortion, support for homosexual rights, opposition to parental authority and general disdain for the family unit" evidenced a "hostility toward even the most basic family values."[182] Other members echoed this ideological theme, complaining that legal services organizations had "become a place for attorneys to put forth their liberal agenda;"[183] that they permitted attorneys to "engag[e] in left-wing liberal advocacy;"[184] and that they were "advocacy group[s] for liberal causes."[185] The motive was not simply to prohibit the use of federal funds for advocating disfavored positions and viewpoints, but rather, to prevent legal services lawyers from "pursu[ing] their liberal agenda with private funds."[186]

Senate detractors of LSC also made clear that their purpose was to prevent legal services attorneys from "promoting a political agenda" that included advocating against welfare reform policies and "hassling American agriculture" -- a reference to legal services representation of impoverished farmworkers.[187] A report by the Senate Committee on Labor and Human Resources called for restricting the non-subsidized activities of legal services attorneys in order to halt their

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180 (...continued)
OF THE LAWYER 48 (1997).

181 *Rosenberger*, 115 S. Ct. at 2517.

182 142 Cong. Rec. H8149-50, 8184-85, 8190 (daily ed. July 23, 1996) (statement of Rep. Dornan).

183 *Id.* at 8179 (statement of Rep. Ballenger).

184 *Id.* at 8182 (statement of Rep. Weldon).

185 *Id.* at 8181 (statement of Rep. Doolittle).

186 *Id.* at 8179 (statement of Rep. Burton).

187 141 Cong. Rec. S14573, 14593, 14597 (daily ed. Sept. 29, 1995)(statement of Sen. Gramm); *id.* at 14603 (statement of Sen. Faircloth).

advocacy of "controversial" positions, such as challenging welfare reform efforts and advocating other unpopular causes.[188]

As Justice Cohen found in *Varshavsky*, this legislative history powerfully demonstrates that the LSC restrictions "were designed to minimize, if not prevent, the political impact of the causes of the poor and their champions."[189] More importantly, it shows that the restrictions were motivated by a "desire to curtail expression of a particular point of view on controversial issues of general interest,"[190] in this case a point of view Congress regarded as too "liberal" or "left-wing." The restrictions thus fall squarely within the First Amendment's prohibition against the regulation of speech "based upon its substantive content or the message it conveys" or based upon "the specific motivating ideology or the opinion or perspective of the speaker."[191]

J. The District Court Rulings in *LASH II* and *Velazquez* are Incorrect

As noted earlier, the district courts in *LASH II* and *Velazquez* both sustained the LSC restrictions on the ground that the amended regulations are "in basic compliance with *Rust*."[192] These rulings are deeply flawed because they ignore the sharp doctrinal distinction that the Supreme Court has drawn between government regulation of private entities that receive subsidies for private speech and government regulation of private entities that receive subsidies "to convey a governmental message."[193] The *Rust* paradigm controls in the latter situation. It has no application where, as in the legal services context, the government funds purely private expression.[194] Further, even if *Rust* did provide the proper framework for analysis, its proper application to this case would result in the invalidation of the restrictions.[195]

Compounding these fundamental errors, the district court in *Velazquez* analyzed the LSC's regulations under the relaxed First Amendment standard applicable to commercial speech restrictions.[196] The Supreme Court has repeatedly cautioned that this "'intermediate' scrutiny

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188 Sen. Rep. No. 104-392 (Sept. 30, 1996) at 1, 8.

189 *Varshavsky v. Geller*, No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996), slip op at 15.

190 *League of Women Voters*, 468 U.S. at 383-84 (quoting *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530 (1980 (Stevens, J., concurring)).

191 *Rosenberger*, 515 U.S. at 828-29.

192 *LASH II*, 981 F. Supp. at 1284; *Velazquez*, 1997 WL 789369 (E.D.N.Y.) at *16-*20 & n.15.

193 *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 831 (1995).

194 *See* Part III.A.1, *supra*.

195 *See* Part III.A.5, *supra*.

196 *Velazquez*, 1997 WL 789369 at *17. The district court drew its First Amendment standard from (continued...)

framework" for assessing "restriction[s] on commercial speech," does not provide adequate protection for noncommercial speech and must not be used in that context.[197] Worse still, the district court omitted crucial elements of this more lenient standard, including the requirement that the government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" and the requirement that any speech restriction be "in proportion to the interest served."[198] The government did not -- and could not -- make such showings in justification of the LSC restrictions.[199] Only by overlooking these key requirements was the district court able to conclude that an entirely conjectural interest in avoiding public conflation of LSC activities and governmental policies justified sweeping restraints on the unsubsidized political speech of legal services attorneys and clients.[200]

In light of the fundamental legal errors upon which they rest, we consider the constitutional conclusions of both district courts to be unsound.

IV. THE LSC RESTRICTIONS ARE INCONSISTENT WITH BASIC PRINCIPLES OF PROFESSIONAL RESPONSIBILITY

The Budget Act also purports to regulate the lawyer's exercise of judgment on behalf of his or her client once the attorney-client relationship is established. Indeed, the Act even seeks to

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196 (...continued)
Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995).

197 In *Florida Bar* itself, the Supreme Court explained:

> We have always been careful to distinguish commercial speech from speech at the First Amendment's core." '[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' "
> Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720, 115 L.Ed.2d 888 (1991); *In re Primus*, 436 U.S. 412, 98 S. Ct. 1893, 56 L.Ed.2d 417 (1978). This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment.

515 U.S. at 623, 634-35.

198 *Id.* 515 U.S. at 626, 632 (internal quotes omitted); *compare Velazquez*, 1997 WL 789369 at *17 (district court's selective quotation from *Florida Bar*).

199 *See* Part III.A.6, *supra*.

200 *Velazquez*, 1997 WL 789369 at *17-*20.

restrict the attorney's conduct before such a relationship is formed by prohibiting "unsolicited advice" to a prospective client to "obtain counsel or pursue legal action." Despite Congress' original intention to give LSC attorneys "full freedom to protect the best interests of their clients in keeping with" ethical codes[201], the Budget Act restrictions on the steps an attorney can take on behalf of a client and the advice an attorney can render conflict with the basic ethical precepts requiring an attorney to act in the client's best interest, to represent the client zealously and to exercise independent judgment.

K. Competent and Zealous Representation

Model Rule 1.1 requires a lawyer to "provide competent representation to a client," which is defined to include the "thoroughness . . . reasonably necessary for the representation." The Comment to the Rule adds that competence requires "use of methods and procedures meeting the standards of competent practitioners." In turn, Model Rule 1.2 delineates the right of the client to consult about the means to be used in achieving the objectives of the legal representation, and the Comment states explicitly that, while the scope of services provided by a lawyer may be limited by agreement with the client, "an agreement concerning the scope of representation must accord with the Rules of Professional Conduct or other law." Thus, a client cannot be asked -- directly or indirectly -- to agree to representation that does not comport with the competency requirements of Rule 1.1. (Comment [5] to Model Rule 1.2).[202]

Closely related is the requirement that a lawyer represent a client "zealously" despite opposition from third parties. Model Rule 1.3 states that "a lawyer shall act with reasonable diligence . . . in representing a client." Comment [1] to this rule explains:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Canon 7 of the Code of Professional Responsibility articulates this fundamental duty of a the lawyer: "A lawyer should represent a client zealously within the bounds of the law." EC 7-1 states: "The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." Each lawyer is directed to achieve "the [client's] lawful objective through legally permissible means, and to present for adjudication any lawful claim, issue or defense."

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201 42 U.S.C. § 2996; *see* Part I, *supra*.

202 Similarly, New York's Code of Professional Responsibility contains provisions requiring an attorney to represent a client competently (Canon 6) and to seek a client's lawful objectives "through reasonably available means permitted by law." DR 7-101(A)(1).

The limitation on filing class actions flies in the face of these rules. In federal court, Rule 23 of the Federal Rules of Civil Procedure makes class action representation available to any litigant who satisfies the enumerated statutory criteria. Commentators recognize that the class-action mechanism is an efficient and effective procedure allowing for the group vindication of rights. In short, in cases involving poor people, the class action has become a significant tool for the cost-effective delivery of legal services as well as a powerful weapon to enforce the rights of the disadvantaged.

Preventing an LSC lawyer from considering a class action as a means to achieve the objectives of the representation deprives that lawyer of the means and procedures that a reasonably competent lawyer would wish to consider, if not implement. The class action mechanism is a legally available mechanism and, frequently, the best mechanism for a poor person's lawyer to succeed. In a significant number of cases, the inability to use the class action will result in the inability to achieve the client's objectives. A lawyer who is constrained from using a class action in such a case has fallen short of the lawyer's professional obligation to use the tools that other reasonably competent lawyers would use under the same circumstances. Nevertheless, although a client cannot be asked to forego competent representation, the Budget Act essentially mandates it.

Moreover, the restriction on the use of an otherwise lawful and permissible means conflicts with the lawyer's duty of zealous representation, particularly insofar as it may prevent that lawyer from presenting for adjudication a lawful claim, issue or defense. As one Bar Association has noted, the lawyer's duty under Canon 7 to represent the client zealously "entitles the client to a full loaf, not one with several slices missing."[203]

L. Independent Professional Judgment

A lawyer is also professionally bound to exercise "independent professional judgment" without interference by a third party, and to provide sound advice that considers the range of facts relevant to the lawyer's client. Model Rule 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

New York's Code of Professional Responsibility adds that a lawyer's independent judgment on behalf of the client may not be affected by the lawyer's own financial, business or personal interests. DR 5-101. Nor can any third party, including one who employs or pays the lawyer, "direct or regulate his or her professional judgment."[204]

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203 Florida St. Bar Ass'n Comm. On Prof. Ethics, Op. No. 81-5, March 13, 1981.

204 DR. 5-107. *See also* Model Rules 5.4; 1.8(f)(2) (lawyer shall not accept compensation from third party unless "there is no interference with the lawyer's independent of professional judgment or with the client-lawyer relationship") and 1.7 Comment [10] (lawyer may be paid by third party only if the client is (continued...)

A lawyer "must disregard the desires of others that might impair the lawyer's free judgment," EC 5-21, and must "constantly guard against erosion of professional freedom" that may arise from the interests or motives of a third person. EC 5-23. Indeed, EC 2-33 specifically addresses issues of potential interference by the legal services organization with representation of individual clients: "An attorney . . . should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent, professional representation of the interests of the individual client."

Case law in this area has consistently stressed that an attorney may not permit a third party to interfere with client representation. In an opinion by the Michigan Bar's Standing Committee on Professional and Judicial Ethics involving lawyer referral service programs, the Committee emphasized that a lawyer may not participate in a referral service program whose rules "purport to control the substance of the representation provided."[205] In a later opinion, the Michigan committee considered whether a probate judge could hire a lawyer as an employee of the court to represent juveniles in delinquency and neglect proceedings. The committee found, although an employer could normally control the "details and means" by which a task is accomplished, it may not so control a lawyer-employee or otherwise interfere with the lawyer's independent professional judgment.[206]

It is beyond cavil that the decision whether to commence an individual or a representative suit is a question of professional judgment that involves not only an assessment of the merits, but also strategic considerations. At bottom, the decision whether to assert a class action – and the decision to seek statutory attorneys fees – implicates the lawyer's ethical obligation to act in the best interest of his or her client and to seek justice on behalf of that client. The mandated inability of an LSC lawyer to use the tools that would be at the ready disposal of a non-LSC lawyer patently infringes on that lawyer's ability to represent a client with "independent professional judgment" and imposes the will of a third party on the attorney-client relationship. Far from the "full freedom" to practice law contemplated by the Legal Services Act,[207] the Budget Act imposes on lawyers the untenable choice of either accepting employment and providing representation that is less than the professional standards for competent and zealous representation or foregoing employment and abandoning the profession's commitment, codified in EC 2-33, to providing high quality legal services to all.

Moreover, quite apart from the First Amendment implications of directing a lawyer not to render "unsolicited advice" to a client to "obtain counsel or pursue legal action," this restriction

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204 (...continued)
informed and consents and the arrangement does not compromise duty of loyalty). (Florida St. Bar Ass'n Comm. on Prof. Ethics, Op. No. 81-5, March 13, 1981).

205 *See* 1989 WL 428549 (Mich. Prof. Jud. Eth.), Op. R-6, Dec. 15, 1989.

206 1992 WL 512420 (Mich. Prof. Jud. Eth.), Op. J1-50, March 19, 1992.

207 42 U.S.C. § 2996(6).

offends bedrock ethical principles. EC 2-1 of New York's Code notes the importance of the public's recognition of their legal problems, and the need "to educate people . . ., to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." As stated in EC 2-3, volunteering advice that a person should take legal action "could well be in fulfillment of the duty of the legal profession to assist the public in recognizing legal problems." An attorney consulted by a client is obliged to exert best efforts to "ensure that decisions of the clients are made only after the client has been informed . . . ." EC 7-8

The ethical standards are especially emphatic on the question of advising the poor. EC 8-3 states: "The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and *should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services."* (emphasis supplied).

The Budget Act's attempt to limit the ability of an attorney to counsel a prospective client regarding the identification of legal problems and the selection of counsel turns the rules on their head. The Act implies that a public that is ignorant or unaware of legal rights is preferable to an informed public that can obtain an attorney when necessary. The Act also suggests that a lawyer's duty to improve the legal system and to educate the public must take a back seat if the lawyer is paid with public funds. This assertion, like the attempt to regulate the lawyer's judgments on behalf of a client, reflects a misinterpretation of the importance of ethical standards in the legal profession and should, accordingly, be rejected as infringing on professional standards.

V. CONCLUSION

In his recent Leslie H. Arps Memorial Lecture before the members of the Association, Judge Robert W. Sweet[208] asked the important question: "What . . . needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society operating under a rule of law?" The answer, according to the learned judge, "is easy to state, but up to now difficult to achieve": "a civil Gideon, that is an expanded constitutional right to counsel in civil matters."[209] The country is far from achieving this constitutional aspiration. But Congress's decision to provide public funding for legal services has been a critical resource in moving our nation toward the ideal of "Equal Justice Under Law."

The current LSC restrictions are bad social policy, antithetical to the cost-effective delivery of legal services, and inconsistent with the ethical norms designed to assure the quality of those services. The restrictions are, moreover, in violation of the First Amendment, and inconsistent

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208 District Court Judge of the Southern District of New York.

209 Robert W. Sweet, *Civil "Gideon" and Justice in the Trial Court (the Rabbi's Beard)*, 52 The Record of the Association of the Bar of the City of New York 912, 924 (Dec. 1997).

with our nation's historic realization that the autonomy and independence of the Bar is a powerful force for securing the rule of law.

For all these reasons, the Association urges the repeal or invalidation of the restrictions on legal services attorneys and calls for the restoration of full and adequate funding for the Legal Services Corporation.

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