Legal Times
WEEK OF DECEMBER 12, 2005 • VOL. XXVIII, NO. 50
ALM

Let's Heal Legal Services

For nine years, Congress has forced legal aid groups to split public and private dollars.

By Bob Barr

For the last nine years Congress has imposed a wasteful, anti-libertarian, and downright dangerous restriction on how legal aid organizations funded by the federal Legal Services Corp. can spend *private* donations and state grants.

I know. I was partly responsible. But the LSC has improved in the years since I voted to impose this restriction. And now, for the sake of our nation's low-income families in need of legal representation, often to fight oppressive government power, it's time to rethink some of these financial constraints.

A few years ago I said, plain and simple, "I'm not a fan of spending federal money on the Legal Services Corporation." As a member of Congress in 1996, I voted for a series of restrictions—which President Bill Clinton signed into law—that put a severe damper on the controversial LSC. To depoliticize (and thereby improve) legal services for our nation's indigent, we prohibited LSC-funded groups from filing class actions and collecting attorney fees. We also banned LSC attorneys from representing anyone in prison and many classes of immigrants.

Ten years later, the LSC is here to stay, and, more important, it's improved since 1996. As the chair for two years of the House oversight committee that monitors the LSC and as a member of the Judiciary Committee for the entire eight years I served in Congress, I know the organization's problems better than almost anyone. The LSC needed cleaning up, and with that done, many conservatives can and should support much of its work.

Surprised? Many others would be too, but think about it: Empowering citizens to fight oppressive or overly powerful government is a very conservative notion. And there are many examples of the important work that legal services programs do every day.

Take one: I have been pleased—and more than a little shocked—to learn that South Jersey Legal Services, an LSC-funded program, is helping low-income individuals and families in Camden defend their property rights against an expansive eminent domain seizure by the city. They don't want to leave their homes so that a private company can come in, redevelop the neighborhood, and turn a healthy profit. But not all low-income families will be so lucky to have such legal representation.

COMPLETELY SEPARATE

Unfortunately, a restriction on the LSC, the "physical-separation requirement," limits the work LSC grantees can do. The requirement forces them to strictly quarantine privately funded activities from those financed with federal money. Civil legal aid groups can perform restricted activities—such as seeking court-ordered attorney fees and helping incarcerated people plan for re-entry—only with nonfederal money and only if they carry out those activities in a physically separate facility with separate staff.

However, from a practical standpoint, because setting up a separate organization with its own office, executive director, computers, copiers, and personnel costs so much, few organizations can bear the financial burden of complying with physical separation.

The effect? State, local, and private donations get washed away. Funds are siphoned off to cover unnecessary administrative expenses. And lawyers fighting civil legal battles each year on behalf of our nation's low-income families must turn away thousands of poor Americans who need legal representation.

Frustrated and fed up, three legal services offices in New York City challenged the physical-separation requirement in 2001. The case is *Velazquez v. Legal Services Corp.* In court the LSC, defending the legislative restriction, claimed that physical separation is necessary to ensure that the federal government does not subsidize or appear to support activities Congress has chosen not to fund. A more lenient regime, it argued, simply would not suffice.

On the other side, the legal services programs aptly argued that the physical-separation requirement is unconstitutional because it limits speech protected by the First Amendment. They

pointed out that less burdensome measures, such as precise bookkeeping, could ensure that government grants don't fund restricted activities.

U.S. District Judge Frederic Block of the Eastern District of New York agreed with the three legal services providers. Last year, in a sound, well-written opinion, he issued a preliminary injunction barring the LSC from enforcing the physical-separation requirement against the three plaintiffs. He also set out a sensible model for tracking funds that would allow the government to determine how federal money is spent without meddling unnecessarily with local, state, and private funds.

But the LSC and the Department of Justice appealed Judge Block's decision. The case is fully briefed, and the U.S. Court of Appeals for the 2nd Circuit heard oral argument on Nov. 2.

I hope that the appeals court will agree with Judge Block and allow the plaintiffs to do their important work in a much more efficient manner, one less controlled by the federal government. But even if the 2nd Circuit upholds the lower court's ruling, the decision will apply at most to the LSC programs in that jurisdiction—not to all LSC grantees across the country. Other legal services offices, state and local governments, and private donors will not be free of this onerous restriction. This means that the vast majority of local, state, and private donations will remain tangled up in this federal rule.

If the LSC and the Justice Department insist on wasting time and taxpayer dollars defending an unconstitutional and unwise law, it is up to Congress to correct this mistake. Just as we don't want a nanny state telling us not to smoke cigarettes, we don't want a nanny Congress telling government partners how to spend nonfederal dollars.

It's one thing to disfavor a federal program; it's quite another to tell private citizens and states how *their* money can or cannot be used. Yet that is the practical effect when states and private donations must be diverted to separate organizations for poor families to obtain legal representation in certain types of civil cases.

FAITH-BASED SEPARATION

In other areas, the government does not require such stringent separation between federally and nonfederally funded activities. Take, for example, grantees of President George W. Bush's Faith-Based and Community Initiatives. Faith-based organizations guarantee that government money intended to fund social services does not support religious activities in violation of the establishment clause. They ensure this by keeping careful records. But they are not forced to run their religious activities and social services out of two separate facilities with two separate staffs. Why not apply the same standards for separation to civil legal aid groups?

Or, perhaps more important for many conservatives, what if the courts accept the government's argument in *Velazquez* that physical separation is a necessary requirement for legal services programs?

If physical separation's web of waste grows to entangle faith-based organizations, these groups could very well themselves be required to cordon off religious activities from their hugely successful, government-funded social services initiatives.

With this risk looming, faith-based groups are beginning to rally to stave off what could lead to the death of public-private partnerships as we know them. Just last month, 31 leading faith-based groups—including Evangelicals for Social Action, the National Council of Churches of Christ, the Exodus Transitional Community, the Virginia Interfaith Center for Public Policy, and the National Baptist Convention—signed a letter urging Congress to lift the physical-separation requirement. These groups represent more than 55 million Americans of faith.

Last year groups committed to helping prisoners re-enter society and rebuild their lives, such as Chuck Colson's Prison Fellowship International, also sent a letter to Congress expressing their concern about the physical-separation requirement. Clearly, it is time for the broader conservative community to mobilize against this pernicious restriction.

The physical-separation requirement prevents thousands of Americans from receiving adequate civil legal representation. It wastes both taxpayer dollars and charitable contributions. It needlessly trespasses into the affairs of private citizens, and it threatens to destroy the public-private partnership model that has reaped great benefits since the Reagan years.

Today, no American should be proud of this wasteful restriction. I'm certainly not, and neither should my fellow conservatives.

Bob Barr represented the 7th District of Georgia in the U.S. House of Representatives from 1995 to 2003. He currently is president of Liberty Strategies and practices law in Atlanta.