LEGAL SERVICES CORPORATION

45 CFR Part 1632

Redistricting

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: The Legal Services Corporation ("LSC" or "Corporation") has as its principal national goal the provision of basic day-to-day legal services to eligible poor individuals. As part of the implementation of this goal, this final rule prohibits any recipient involvement in redistricting activities, as defined in the rule, because basic day-to-day legal services to the poor are not advanced by redistricting activities and redistricting is intertwined with impermissible political activity. The rule is intended to ensure that recipients refrain from becoming involved in any redistricting activity, including anything intended to influence the timing or manner of the taking of a census, since such activity is not consistent with the Corporation's principal national goal for the provision of legal assistance.

alternative organizations are available to handle redistricting matters. Further, recipients would likely be competing with members of the private bar who handle matters such as these, since redistricting cases usually generate attorneys' fees. Finally, redistricting risks entanglement with political activities, which LSC recipients should avoid.

Generally, commenters opposed the new rule on the grounds that LSC lacks authority to restrict redistricting activities by its grantees, especially with regard to the use of private funds; that the proposed rule conflicts with other statutory authority that permits legal representation in such cases; that the definition of "redistricting" is too broad; that the Corporation's justifications for the need to restrict redistricting activities are faulty; and that the effect of the rule will be to deny poor persons access to legal assistance necessary to protect some of their most fundamental legal rights.

Authority to establish goals. Section 1007(a)(2)(C) of the Legal Services Corporation Act, Pub. L. 93-355, as amended, 42 U.S.C. 2996 et seq., gives the Corporation authority not only to establish national goals, but also to determine that a specific activity may not be undertaken by LSC recipients where the activity does not advance Corporation goals. Under section 1007(a)(2)(C), 42 U.S.C. 2996et seq., the Corporation must ensure that recipients, "consistent with goals established by the Corporation, adopt procedures for determining and implementing priorities for the provision of legal assistance." This statutory language gives the Corporation authority to establish goals that constrain the freedom of local programs to set service priorities, because it requires that recipients' priorities be in accord with the Corporation's goals. The fact that this rule is cast as a prohibition, therefore, does not detract from its effect of advancing a Corporation goal.

Certainly, this prohibition can hardly be called unduly intrusive, since it otherwise leaves programs free to determine which cases they will take. This new rule is simply a modest step in the direction of establishing the primacy of basic day-to-day service, and as such it advances the overall effective use of recipients' resources.

The legislative history supports the proposition that, while recipients may establish substantive law priorities, such priorities must comport with any goals established by the Corporation. When recipients were given the role of establishing local priorities by the 1977 amendments to the LSC Act, the House and Senate committee reports discussed the recipients' obligation in the context that such priorities must be consistent with LSC national goals. H. Rep. 310, 95th Cong., 1st Sess. 10-11 (1977); S. Rep. 172, 95th Cong., 1st Sess. 13 (1977). Thus, contrary to the tenor of certain comments, nothing in the legislative history undercuts the Act's clear grant of authority to the Corporation to determine that certain activities so marginally contribute to effective use of program resources that they fall outside the Corporation's goals. The restriction on redistricting activity sets out one perimeter limiting the provision of legal assistance on the grounds that such activity falls outside the goals of the Corporation.

Authority to promulgate legislative rules. To the extent this part constitutes a legislative rule, the Corporation has ample authority to promulgate it. Review of the LSC Act as an integrated whole and consideration of its language, logic, and legislative history confirm that Congress delegated broad general legislative rulemaking authority to the Corporation. A legislative rule creates new law, rights, or duties, while an interpretive rule simply states what an agency thinks the statute means and reminds affected parties of existing duties. Chrysler Corp. v. Brown, 441 U.S. 263, 302 (1979); General Motors Corp. v. Ruckelshaus, 472 F.2d 1561, 1565 (D.C. Cir. 1974). Because the legislative power of the United States is vested in Congress, the exercise of quasi-legislative power by governmental entities must be rooted in a grant of such power by Congress, Chrysler Corp. v. Brown, 441 U.S. 263; American Postal Workers Union, AFL-CIO v. United States Postal Service, 709 F.2d 448, 550 (D.C. Cir. 1983); Joseph v. United States Civil Service Commission, 554 F.2d 1140, 1153 & n. 24 (D.C. Cir. 1977). In order to decide whether legislative rulemaking authority has been delegated by Congress, the language, logic, and legislative history of the enabling act should be probed. Chrysler Corp. v. Brown, 441 U.S. at 308, and the act should be read as an integrated whole, National Petroleum Refiners Association v. F.T.C., 482 F.2d 672, 677-78 (D.C. Cir. 1973). Finally, the fact that Congress includes specific grants of legislative rulemaking authority does not evince a grant of general legislative rulemaking authority. In re Permanent Surface Mining Regulation Litigation v. Peabody Coal Company, 833 F.2d 514, 523 (D.C. Cir. 1988), cert. denied, 489 U.S. 822 (1988). LSC's general authority to promulgate legislative rules and its specific authority to legislate in regard to redistricting activities are rooted in sections 1006(a), 1006(b)(1)(A), and 1006(c)(2)(C) of the LSC Act. Section 1006(a) delegates to the Corporation the authority to promulgate legislative rules to the extent consistent with the provisions of the Act all "the powers conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act" except the power to dissolve itself. 42 U.S.C. 2996et seq.. The Act intended the Corporation to be structured and financed in a way that would assure its substantial independence and freedom from both executive and legislative political interference. S. Rep. 495, 93d Cong., 1st Sess. 2-7 (1973). As a nonprofit corporation, LSC has broad discretion to make substantive, interpretive, and procedural policy and legal decisions that are legislative in nature, as long as they are reasonably related to the purposes of the enabling act. See, e.g., National Clearinghouse v. Legal Services Corporation, 674 F.Supp. 37, 41 (D.D.C. 1987); aff'd, 861 F.2d 303 (D.C. Cir. 1988) (one of the LSC Board's principal functions is to set funding policy).

The Act amends the Corporation to express and implement its legislative decisions through the regulatory process. In conjunction with the authority delegated to LSC in section 1006(a), section 1006(b)(1)(A) gives the Corporation broad general oversight and rulemaking authority. The legislative history of this provision evidences grant of legislative authority to the Corporation. When explaining the independent structure of the Corporation as envisioned in Senate bill S. 2699, Senator Javits explained that the
Corporation was given "very strong authority" to enforce the provisions of the Act by promulgating regulations and ensuring the maintenance of the highest quality of service and professional standards. 119 Cong. Rec. S22413 (Dec. 10, 1973). He considered that Congress should not watch over or interfere with decisions made by the Corporation except in extreme cases. Id. at S22413-22414. A logical reading of the scope of authority and discretion envisioned in sections 1006(a) and 1006(b)(2)(A) requires the conclusion that ESC was intended to be more than an entity with only interpretive authority; it was expected to make substantive legal and policy decisions that would then be implemented through legislative rules.

One type of substantive decisionmaking authority given to ESC is the authority in section 1007(a)(6) to establish redistricting goals. If the Corporation has authority to establish such goals, then it necessarily must have authority to issue rules to implement these goals and to ensure that recipients' priorities are in accord with them, as contemplated by section 1006(b)(1)(A).

In summary, Congress clearly intended to create an independent organization with broad authority to make and implement legislative policy and legal decisions.

Relevant provisions in the ESC Act:

There are no provisions in the ESC Act that expressly give ESC recipients affirmative authority to engage in redistricting activities or to establish redistricting goals. Similarly, there are no provisions in the Act that provide ample authority for a blanket prohibition of all redistricting activities. ESC enabling and appropriation acts contain provisions that provide ample authority for a blanket prohibition of all redistricting activities. This is done on behalf of an eligible client. For example, the LSC enabling and appropriation acts contain provisions that provide ample authority for a blanket prohibition of all redistricting activities. This is done on behalf of an eligible client.

First, these provisions are cast as exceptions to prohibitions. Such exceptions, by their terms, do not establish affirmative mandates to engage in the exceptions; rather, they merely define those activities that are not prohibited as lobbying. Thus, these exceptions do not give affirmative authority for recipients to lobby in any substantive area, such as redistricting matters, when the lobbying activity is done on behalf of an eligible client.

Second, the LSC Act clearly differentiates between prohibitions on program involvement in certain substantive areas of law, such as criminal law, from prohibitions on involvement in matters of general substantive interest. For example, the prohibitions on representation in criminal cases apply even where the eligible client has a right to representation under the Act. However, although this rule will not prevent advice and representation with respect to the types of voter access issues contemplated in the language of section 1007(a)(6), including most cases brought under the Voting Rights Act, it still may prohibit representation in certain redistricting cases.
exceptions might otherwise permit representation.

Finally, however, 45 CFR 1612.1(h) includes activity intended to influence the structure of government itself, such as reapportionment, within the meaning of legislative lobbying. Such lobbying is prohibited, and no exception is provided for eligible clients or requests of legislators. See 45 CFR 1612.4(b).

Thus, the determination to prohibit any redistricting even with an eligible client or a request of a legislator is well within existing precedent.

Private Funds. The Corporation has ample authority to apply this rule's prohibition to private funds. First, LSC's authority to restrict redistricting activities is rooted in a statutory mandate that is not dependent on what funds are used, or even whether or not any funds are used for the activity. The statutory requirement in section 1007(a)(2) that the Corporation ensure that recipients establish priorities in accord with the Corporation's goals is not tied to the use of LSC funds. Rather, it is an affirmative requirement that attaches to the program regardless of whether LSC or private funds are used. For this reason, Part 1620, LSC's regulation implementing section 1007(a)(2) of the Act, applies to all of a recipient's resources. See 45 CFR 1620.2(a) and (b); 1620.5(b).

Likewise, the prohibitions on political activities in section 1007(a)(6) apply to the activities and are not limited by consideration of what funds are used. Of course, section 1007(f)(6) activities are already listed as being within the scope of section 1010(c) of the LSC Act, which prohibits the use of private funds for such activities. See 45 CFR Part 1610. However, a violation of this provision could occur regardless of whether any specified, since the prohibition is directed against the activity, not against the use of funds for such activity.

In summary, the prohibition of any redistricting activity regardless of the source of funds used is consistent with other prohibitions in the Act.

Policy Considerations Bearing on the Regulation of Redistricting. Substantial policy considerations warranted LSC's determination that redistricting activities are not consistent with the Corporation's principal national goal of providing basic day-to-day legal services to eligible poor individuals. Basic services include those that provide an immediate and discrete benefit to eligible clients with specific complaints such as child support, adoption, child abuse, and other family law matters; consumer complaints; and landlord-tenant disputes. Rather than services aimed at broad social and legal reform.

The more esoteric cases, aimed at changing political and social structures with the hope that such changes will eventually benefit the poor, have evoked much public and Congressional criticism, because the benefits to the poor are often attenuated and entangled with social or political issues.

Redistricting activity falls outside day-to-day legal services for the reasons set out below.

First, redistricting cases are not peculiar to the interests of the poor, since the relief sought would affect entire communities, which are composed of poor and non-poor individuals. Since the poor represent a minority, approximately 10 to 15 percent of the United States population, the group of eligible poor in most communities is relatively small. While it is possible to find localities in which a majority of citizens are eligible clients, as pointed out in some cases, in most localities less than 15 percent of the population is denominated as poor. In addition, since most redistricting cases are class actions and certainly affect large blocks of residents, the putative plaintiff class often may consist of a majority of non-eligible individuals. Similarly, the relief sought in redistricting cases often would go to the non-poor. Even in redistricting cases involving discrimination issues, the relief sought would not always go primarily to eligible poor individuals, as only part of the protected minority may be eligible. Consequently, the expenditure of recipients' funds on redistricting activities commonly would result in an allocation of resources for the benefit of non-eligible persons.

Second, redistricting cases generally have not been identified as a priority by LSC recipients. A compilation of the types of cases handled by LSC recipients in 1987 reveals that approximately 27 percent of the cases involved family matters, 21 percent involved housing matters, 16 percent involved income maintenance issues, and 12 percent were consumer-related cases. See Legal Services Corporation 1987/1988 Fact Book at 65. However, the need for this rule is supported by the fact that, regardless of redistricting's non-priority status in the past, LSC recipients have committed substantial resources to redistricting issues.

Specifically, the Corporation estimates that at least 28,000 hours were devoted to handling redistricting cases from 1978 to 1984, years surrounding the 1980 census. Suggestions that redistricting might be included in a recipient's "other issues" category of priorities simply underlines this area as one lacking special concern to clients. Of the 73 comments submitted on the proposed rule, only two stated that their programs are presently involved in redistricting cases and only 10 cited previous involvement in such cases. Three recipients—Legal Aid Society of Central Texas, California Rural Legal Assistance, and Mississippi Legal Services Coalition—said that voting rights or redistricting cases are a priority for their programs.

Third, LSC has determined that recipient funds can be better used elsewhere, since alternative organizations and private attorneys are available to handle redistricting matters. Redistricting cases usually offer incentives to members of the private bar, since under the Voting Rights Act, 42 U.S.C. 1973, and the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. 1988, the right to recover attorneys' fees is specifically given to prevailing parties. Redistricting matters are also undertaken by numerous organizations, including the Mexican American Legal Defense Fund, the Southwest Voters Registration Project, Common Cause, the American Civil Liberties Union, the Native American Rights Fund, the NAACP, the Lawyers Committee for Civil Rights, the League of Women Voters, the Democratic National Committee, and the Republican National Committee. In comments to LSC's proposed rule, several of these organizations conceded that they are heavily involved in redistricting issues, but they claim, without evidence, that there is still a substantial unmet need for which alternative representation is unavailable. Referring to the upcoming 1990 census, one such commenter stated that massive efforts will be required to scrutinize "all of the plans" resulting from redistricting in thousands of jurisdictions nationwide. While it may be true that representation may be unavailable for all cases or in some geographic areas, such comments confirm LSC's assertion that many civil rights organizations already handle redistricting matters on a national and local level. Comments that massive efforts will be required in the next decade for redistricting activities, including litigation that requires inordinate amounts of resources and time, reinforce the need to regulate in this area, since these activities would most certainly draw resources away from the provision of basic day-to-day legal services. It is simply not effective and economical to channel legal services funds into a massive effort that does not primarily affect the poor and that is already the object of
considerable attention from private attorneys and interest groups.

Fourth, in the past, involvement in redistricting activities by legal services recipients has been subject to abuse, because legal services recipients have linked redistricting activities to obtaining favorable Congressional support for their own parochial objectives. One, LSC recipient's grant proposal addressed the need to become involved in State and local redistricting matters in order to develop powerful allies for its clients in what the recipient viewed as a battle over the direction of legal services programs. Influencing redistricting in State and local legislative bodies clearly affects the political character of those legislative bodies.

In response to requests made on April 11 and May 10, 1983, by the Senate Committee on Labor and Human Resources, LSC conducted a study of its grantees to determine their involvement in legislative redistricting activities arising out of the 1980 census. As a result of two separate monitorings and 34 responses to an ESC questionnaire that was mailed to all LSC programs, ESC estimates that at least 26,162 hours were spent handling legislative redistricting cases. Specifically, the ESC study found that LSC recipients, in spite of one recipient's assertion that clients rarely come to the office complaining they have been "malapportioned," had sought resources for specialized computer equipment and a computer specialist to draw new election district boundaries to the recipients satisfaction. In addition, recipients hired lobbyists to work on reapportionment issues, yet for another fee of a section 1906 grant of the LSC Act, 42 U.S.C. § 2966(e)[a][5] had no documented request from an eligible client or elected official to undertake this activity. Further, recipients also sought to orchestrate a State-wide effort of legal services programs to ensure elections of specific persons, who would in turn become powerful allies in any particular political party. It is obvious that any such activity risks an impermissible political alignment under the Act.

In separate instances, LSC recipients were involved in reapportionment cases, with counsel for the Democratic and Republican parties, Upham v. Seattle, 468 U.S. 37 (1982); Thurburn v. Gingles, 478 U.S. 302 (1986). Recipients from attorneys involved in Gingles asserted that LSC recipient involvement was limited to filing amicus briefs and that actions taken by the Republican Party lawyers were totally separate and independent. While the Corporation makes no finding as to whether LSC recipients have aligned themselves with a particular political party, it believes that any such activity risks an impermissible political alignment under the Act.

Many of these same considerations warrant inclusion of "the timing or manner of taking of a census" in the definition of redistricting. Comments challenged the inclusion on the grounds that such activities are not intrinsically political activities, because the census is used for a wide variety of purposes other than drawing election districts. The United States Constitution mandates that a census be taken every ten years for purposes of reapportionment. U.S. Const Art I, Sec. 2, Cl. 3. In essence, any participation by LSC recipients to influence the timing or manner of taking a census would affect the first step in the redistricting process. As such, involvement in census-taking properly may be prohibited as it is a necessary antecedent to redistricting.

Additionally, ample alternative public and private entities are available to pursue census cases. Overwhelmingly, the cases challenging the census have been brought by State and local governments because they have a strong interest in the outcome of the census. See generally, City of New York v. United States Dept. of Commerce, No. 88-CV-5474 (ED Pa. 1988). Citizens, the NAACP, and various mayors, governors and State and national legislators. This wide range of available representation would make any representation by LSC recipients unnecessary. Any countervailing reductions the shane of Federal programs to which State and localities may become entitled—particularly for assistance programs for the poor—thus affecting their interest in the quality and quantity of social services, they can offer their indigent citizens and their own financial status as governments. Fiscal governments are also in a better financial position to make census challenges. Thus, any use of LSC funds for such purposes would clearly not be the economical or effective utilization of resources. See 42 U.S.C. 2966(f)[a]((3).
by this rule. Other suits brought under the act, such as the right to vote itself and physical access cases, are permitted.

Paragraph (b) makes clear that the public and tribal funds are not governed by this part. Thus, the prohibition in this part shall not prevent the use of public or tribal funds for redistricting as long as it is in accord with the purposes for which the funds were provided.

Paragraph (c) provides that employees of recipients may be involved in redistricting activities as long as their involvement does not make use of the program’s resources or time, does not involve identification with the program, and is outside the context of advice and representation. This provision is intended to ensure that the prohibition in this part does not infringe upon the First Amendment rights of recipient employees.

Finally, paragraph (d) provides that this part does not prohibit any activities otherwise permitted by 45 CFR Part 1604, LSC’s regulation on the outside practice of law. Generally, Part 1604 prohibits outside practice of law, except that newly employed attorneys may close cases from previous law practices, and uncompensated representation pursuant to a court order, for a close friend or family member, or for a religious, community, or charitable group may be permitted.5

Under Pub. L. 100-459, 102 Stat. 2228 (1988), the Corporation is required to give 15 days’ notice to the appropriations committees of both Houses of Congress prior to promulgating new regulations. Notice letters duly were sent to the House and Senate Committees on Appropriations. No objection was voiced by the Senate committee. The Chairman of the House Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies responded on July 28, 1989, and his letter appears in Appendix A to this notice.

List of Subjects in 45 CFR Part 1632

Legal services.

For the reasons set out in the preamble, 45 CFR Chapter XVI is amended by adding Part 1632 as follows:

PART 1632—REDISTRICTING

Sec.

1632.1 Purpose.

1632.2 Definitions.

1632.3 Prohibition.

1632.4 Permissible activity.


2906(a)(1)(B), 2906(e)(A), 2005(e).

§ 1632.1 Purpose.

This part is intended to ensure that funds available to recipients will be utilized to the maximum extent for the delivery of basic day-to-day legal services to eligible poor individuals. Involvement in redistricting activities does not constitute the provision of basic day-to-day legal services and is prohibited by this part.

§ 1632.2 Definitions.

As used in this part:

“Advocating or opposing any plan” means any effort, whether by request or otherwise, even if of a neutral nature, to revise a legislative, judicial, or elective district at any level of government.

“Recipient” means any grantee or contractor receiving funds made available by the Corporation under section 1006(a)(1) or 1006(a)(3) of the act. The term “recipient” includes subrecipient and employees of recipients and subrecipients.

“Redistricting” means any effort, directly or indirectly, to participate in the revision or reapportionment of a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of taking a census.

§ 1632.3 Prohibition.

Neither the Corporation nor any recipient shall be involved in or contribute or make available any funds, personnel, or equipment for use in advocating or opposing any plan, proposal, or litigation intended to or having the effect of altering any redistricting at any level of government.

§ 1632.4 Permissible activity.

Nothing in this part shall prohibit:

(a) Any litigation brought by a recipient of the Legal Services Corporation under the Voting Rights Act of 1965, as amended, 42 U.S.C. 1971 et seq., provided such litigation does not involve redistricting; or

(b) The expenditure of public or tribal funds that are used in accordance with the purposes for which they were provided;

c) Activities undertaken by employees of recipients without the use of program resources, including time, and without identification with the recipient and outside the context of advice and representation; or

d) Activities otherwise permitted by 45 CFR Part 1604.

Timothy B. Shea,

General Counsel.

Editorial Note: This Appendix will not appear in the Code of Federal Regulations.

Appendix A—Response From Chairman Neal Smith of House Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies.


Honorable Terrance J. Weer,

President, Legal Services Corporation, 460 Virginia Avenue NW, Washington, DC 20002.

Dear Mr. Weer: This is in response to your letter of July 31, 1989 notifying the Committee of the Corporation’s intent to promulgate 45 CFR Part 1632, the Corporation’s new regulation on redistricting activity.

I note that the prohibition in this regulation is similar to that contained in section 6 of S. 2409, a bill to reauthorize the Legal Services Corporation, which was introduced by Senators Hatch and Bentsen in 1988 and is not in conflict with the provisions further restricting the Corporation from adopting new regulations relating to fee generating cases and use of private funds which were included in the recent appropriations Supplemental [Pub. L. 101-457]. I also have specifically noted your statement in the cover letter that the regulation was amended to make clear that “employees of legal services programs may be involved in redistricting activities, as long as the involvement does not make use of program resources or time, does not involve identification with the program, and is outside the context of advice and representation.”

Conditioned upon the understanding that you agree with the above statements, the Committee has no objection to this regulation. We appreciate your keeping the Committee informed of changes within the Legal Services Corporation.

Sincerely,

Neal Smith,

Chairman, Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies.

[FR Doc. 89-18102 Filed 8-3-89; 8:45 am]

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