

CONSTITUTIONAL ISSUES PANEL

MATTHEW DILLER:

There have been three lawsuits brought that deal with these constitutional issues, two challenges to the Regulations and one opposition to a motion to withdraw, which was the *Varshavsky*¹ case that Valerie Bogart talked about. The decision in the *Varshavsky* case is outside. There is also a preliminary injunction decision from the case brought in Hawaii,² of which Steve Shapiro is one of the counsel, and that decision is outside. And then, still pending is a decision on a preliminary injunction motion in a case called *Velasquez*,³ which was brought in the Eastern District of New York.

Here to address these issues we have three distinguished experts on constitutional law. I'll introduce them in turn before they speak. Going first will be, to my right, Eric Freedman, who is an Associate Professor of Law at Hofstra University School of Law. He is an expert in constitutional law with a special interest in, among other things, the First Amendment. He is also Chairman of the Civil Rights Committee of the Bar Association of the City of New York. The Civil Rights Committee is currently working on a report on the LSC restrictions. He is also a graduate of Yale Law School, where he was an Editor of the *Yale Law Journal*. I'll turn it over to you, Eric.

ERIC M. FREEDMAN:

Thank you.

It's true that the Civil Rights Committee of the New York City Bar Association, which I preside over largely by the device of encouraging everybody else to do work for which I can take credit, is working on a report on the subject of these restrictions. The people who are actually doing the work are Professor Steven Loffredo, who teaches poverty law at CUNY, and Emily Sack, whom you'll be seeing on the next panel. All of you are encouraged to improve our work by providing them with material, thoughts, ideas, and data. But, of course, I speak here only for myself.

1. See *Varshavsky v. Perales*, 608 N.Y.S.2d 184, 202 A.D.2d 155 (1st Dept. 1994).

2. See *Legal Aid Soc'y of Haw. v. Legal Serv. Corp.*, 961 F.Supp. 1402 (D. Haw. 1997).

3. See *Velasquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. Dec. 22, 1997).

I'm glad to go first on this panel, both because I need to be less clever in what I say to distinguish myself from what already has been said, and also because a couple of later speakers — who, as you will hear, have somewhat more credentials in litigation and in constitutional theory — can correct me where I go wrong. And, perhaps not coincidentally, after I say a few brief words about legal theory and the litigation outlook, my conclusion is going to be that neither of those subjects is really where the focus probably ought to be in the larger picture.

Now, the reason I can be fairly brief about the legal theory and the litigation outlook is that, as the litigations to date have shown and as I suspect this panel will demonstrate, as the issues have been framed in court to date, the range of disagreements is actually quite narrow.

To quote Burt Neuborne in his latest brief in the *Velazquez* litigation in the Eastern District (a brief that I recommend to all of you, by the way, because it contains the fullest available constitutional attack on the LSC Regs): “The issue has essentially narrowed to the question whether the LSC’s new Regulations provide a meaningful opportunity for LSC recipients to engage in restricted activities using non-LSC funds.” In short, the parties are contesting the “affiliated entity” issue. And that issue has to date largely been fought out on the terrain of the First Amendment, with a polite bow to a few other theories, like equal protection and access to the justice system, that nobody has devoted very much attention to.

The reason that the issue has narrowed that way is that, unlike some Congressmen, the lawyers on both sides have been quite realistic in their reading of the existing case law. Everybody has done a very moderate, sensible, professional job. And specifically, the plaintiffs have not yet seriously challenged the restrictions on the use of federal funds. The reason is straightforward: the test that emerges from *Rust v. Sullivan*,⁴ a case in which Steve was involved, is that where the government subsidizes an activity it can impose restraints reasonably designed to make sure that only that activity is being subsidized. So, to use Justice Rehnquist’s example from *Rust*, the National Endowment for Democracy can impose restrictions to make sure that it’s not subsidizing Communism or Fascism. And, as everyone implicitly recognizes, this is an objective, not a subjective, determination.

4. 500 U.S. 173 (1991)

To take a slightly different example, I'm sure some of you remember *United States v. O'Brien*,⁵ the draft card burning case. Now, the subjective intent of the legislators in banning destruction of draft cards was to crack down on hippie, war protester, draft card burners. But objectively, a prohibition on the destruction of draft cards could certainly be held to be reasonably related to the administration of the draft, and so it was upheld.⁶

Similarly here, restrictions on representing prisoners, let us say, will in all likelihood be upheld as a decision that other groups are more urgent recipients of subsidized legal services, even though subjectively all the legislators hate prisoners. After all, government subsidies almost always go to favored groups and away from disfavored groups. So the plaintiffs have not really spent a lot of energy — and it is probably a wise use of resources — in attacking restrictions on the use of federal money.

It is possible, of course, to think of extreme circumstances where there's no way that the restriction furthers the objective of the activity at hand. So, for instance, the recent Eleventh Circuit case,⁷ another ACLU case, invalidating a state statute that gave money to all university student groups except the gay group, is an example where there's no possible explanation that the restriction is designed to further the purposes of the program. But, with regard to the restrictions we're talking about, both sides seem to think we're not in that area.

Specifically, the LSC, perhaps a bit belatedly, after losing both in the New York Supreme Court in the *Varshavsky*⁸ case and in the District of Hawaii in *The Legal Aid Society of Hawaii*⁹ case, now recognizes — implicitly if not quite explicitly, because it sometimes likes to keep throwing in these meaningless rhetorical flourishes, like “money is fungible” (a proposition that does not decide any case)— the core rule. The LSC basically argues that, with respect to non-federal money, the government has no business imposing any restraints broader than those needed to make sure that there is the required separation between activities that can and cannot be done with federal funds. And the only legitimate purpose of the affiliate rules is to insure that.

5. 391 U.S. 367 (1968).

6. *See id.*

7. *See Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir.

8. 608 N.Y.S.2d 184, 202 A.D.2d 155 (1st Dept. 1994).

9. 961 F. Supp 1402 (D. Haw. 1997).

In an effort to come up with valid regulations to this effect after the loss in the *Hawaii* case, the LSC promulgated regulations that were modeled on the ones in *Rust v. Sullivan*.¹⁰ So, as Alan Houseman suggested this morning, the issue between the parties, and the one to which Burt's latest brief is addressed, narrows to the restraints on non-federal funds and to whether (a) these regulations are in fact the same as those in *Rust*,¹¹ and (b) if so, whether that is good enough in this context.

On that second point especially, I rather think that Burt Neuborne has the better of it. There is a key distinction between two types of cases. On the one hand, you have the type of case like *Rust* where the government is the speaker and the recipient of the subsidy, the doctor, is just a conduit for the speech of the government.¹² On the other hand, you have the type of case like *Rosenberger v. Rector*,¹³ which involved funding of student activities at the University of Virginia, and *FCC v. League of Women Voters*,¹⁴ which involved a ban on editorializing by stations that received any amount of money from the Corporation for Public Broadcasting, cases where the recipients are speakers on their own behalf who also happen to be receiving subsidies. And this case is of the second type.

However, having said all that, one would also have to say that if this case were to go to the Supreme Court, it's at best questionable how it would come out. Leaving politics entirely aside, one reason for this, which I'm sure Professor Mc Ginnis is going to enjoy commenting on, is *Chevron v. Natural Resources Defense Council*,¹⁵ arising here in all its ironic glory to absolutely persuade anybody who wasn't already persuaded what a fantasy-land Washington is.

The LSC, as was correctly said this morning, has written regulations to make the statute as defensible as possible, even though there's very good ground to question whether those regulations are in accord with Congressional intent. A good ground to question it is, first of all, all the fantastic set of quotes that are lovingly paraded in the *Varshavsky*¹⁶ opinion (which makes great reading) about how we are going to de-fund the Left and how we are going to make sure that these organizations which get any part of our

10. 500 U.S. 173 (1991).

11. *Id.*

12. *Id.*

13. 515 U.S. 819 (1995).

14. 462 U.S. 261 (1983).

money don't get to do all these horrible things that we don't want them to do.

And second, and perhaps more directly to the point, is the very hostile reaction that the LSC representatives got when they last showed up in Congress and were viciously attacked by Congressmen for promulgating regulations that undermined the intent of the statute. And that's entirely true; the regulations did undermine the intent of the statute in an effort to defend the constitutionality of the statute in litigation.

But, having done that, under *Chevron*,¹⁷ the courts are going to defer to the interpretation of the statute given by the agency and, as a result, it's perfectly possible that the statute may be upheld on the basis that these implementing regulations make it constitutional. In short, it is at least possible that because the LSC staff of talented legal professionals has so successfully succeeded in undermining the congressional intent as to make the statute constitutional under *Rust v. Sullivan*.¹⁸

However, enjoyable as all that may be, in the end one has to say that it is really all aimed directly at the capillaries. The truth is that, no matter how idealistic or cynical you are about legal doctrine, at the very best, First Amendment doctrine only provides breathing space before the majority works its will. That's what it's designed to do, and, when it's functioning at its best, that's what it will do.

So whether or not you think these litigations should have been brought, they constitute a holding action at most, and the ultimate answers here, as we just heard from Alex Forger, are going to be legislative. I think it would be simply short-sighted to ignore that and to fail to seize every opportunity for building coalitions, for seeking to appeal to mainstream, centrist, fairness ideas in order to do everything possible to win in the legislative arena. I think we here, sitting on a constitutional panel, have to recognize that, with the possible exception of a few relatively marginal issues, ordinary politics is going to determine how this is resolved, and the outcome of these issues will depend on nothing more or less than the passion with which people mobilize votes. That, after all, is what got us to where we now are, and if we are to get to somewhere else, that is what's going to do it.

Thank you.

17. 467 U.S. 837 (1984).

18. 500 U.S. 173 (1991).

MATTHEW DILLER:

To the extent that Eric has identified the constitutional issue as kind of a *Rust v. Sullivan II*, we are very fortunate in having as our other panelists two experts on constitutional law who are both involved in different ways in the *Rust* litigation.

First, we have John Mc Ginnis,¹⁹ who is a Professor of Law at Cardozo School of Law, where he teaches courses in constitutional law, international trade, law and economics, law and biology, and so forth. He is a graduate of Harvard College and Oxford and Harvard Law School. He also served as Deputy Assistant Attorney General in the Office of Legal Counsel in the administrations of Presidents Reagan and Bush. He writes extensively on constitutional issues, and the First Amendment in particular. He is also the 1997 recipient of the Federalist Society's Paul M. Battor Award given to an outstanding scholar under the age of forty.

Our next speaker is Steven Shapiro. He's the National Legal Director of the American Civil Liberties Union, the nation's oldest and largest civil liberties organization. As Legal Director, he supervises a staff of nearly fifty lawyers that are involved in hundreds of civil liberties cases throughout the country. Among other duties, Mr. Shapiro directly supervises the extensive litigation activities of the ACLU before the U.S. Supreme Court. The ACLU routinely participates in more Supreme Court cases each year than any other private organization. Mr. Shapiro is a graduate of Harvard Law School. Steve.

STEVEN R. SHAPIRO:

Thank you, Matt. I must say I disagree strenuously with Professor Mc Ginnis's view of the Legal Services Corporation, and also with his view of what legal services lawyers do and ought to be doing.

Legal services lawyers do not go into court and win cases because they make policy arguments that judges accept. They go into court and win cases - and they win a lot of cases - because they can convince the courts that the government is acting unlawfully: either that it is disregarding the statutes that it has passed, or that the statutes that the government has passed are inconsistent with overriding constitutional law. When legal services lawyers do that, when they insist that the government comply with the law, it seems to me that they are not advancing a radical welfare state agenda.

19. At the request of the speaker, his remarks have not been included below.

Rather, they are performing the quintessential conservative task — one that I would expect conservatives to applaud — and that is to insist that the government comply with its own law, both statutory and constitutional.

Having said that, let me bring people up to date on where the litigation actually stands. In the Hawaii case, we obtained a preliminary injunction that barred LSC from enforcing many of the restrictions (although, regrettably, not all of the restrictions) included in the prior regulations.²⁰ The Justice Department did not intervene to defend the prior regulations. However, it has now intervened to defend the new regulations. Both sides have filed motions for summary judgment, which are scheduled for argument in the District Court on July 28th. I fully suspect that we will have a decision by Labor Day.²¹

As Matt said, the *Velasquez* case is still sitting in the Eastern District awaiting decision on plaintiff's preliminary injunction motion. The papers in that case focused on the prior regulations. Inevitably, however, the final decision will have to address the constitutionality of the new regulations, which were not promulgated until last week.²²

I also want to address, at the outset, Eric's assertion that the decision to focus only on the restrictions on the use of non-LSC funds somehow reflected a consensus that restrictions on the use of LSC's own funds were beyond constitutional challenge. As a factual matter, it is true that the Hawaii case only challenges restrictions on the use of non-LSC funds.²³ It is not true that the New York case is so limited. The New York case includes a challenge to some of the restrictions on the use of LSC funds, although the preliminary injunction motion was limited to the restriction on the use of non-LSC funds. The decision not to challenge any of the restrictions on the use of LSC funds in Hawaii was primarily a strategic decision and, most definitely, did not reflect a legal judgment that those restrictions were constitutionally proper.

20. *Legal Aid Soc'y of Haw. v. Legal Serv. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997).

21. On August 1, 1997, the district court in Hawaii granted defendants' motion for summary judgment and upheld LSC's revised regulations. *See Legal Aid Soc'y of Haw. v. Legal Serv. Corp.*, 981 F. Supp. 1288 (D. Haw. 1997). The case is now pending before the Ninth Circuit.

22. On December 22, 1997, the district court in Brooklyn denied plaintiffs' motion for preliminary injunction and also upheld LSC's revised restrictions. *See Velasquez v. Legal Serv. Corp.*, 985 F. Supp. 323 (E.D.N.Y. Dec. 22, 1997). That case is now pending before the Second Circuit.

23. *See Legal Aid Soc'y of Haw.*, 981 F. Supp. at 1288.

Indeed, my own view is that the real nub of the legal dispute becomes clearer if you focus for a moment on the restriction on the use of LSC's own funding. We talk about the restrictions - and there has been a lot of talk about the restrictions this morning - as though all the restrictions were created equal. I do not believe that is true. There are different kinds of restrictions. I think they have different legal validity. I think some would be harder to challenge; others would be easier to challenge.

But I feel very, very strongly that it is unconstitutional for the government to say, even with its own money: "We will pay legal services lawyers to represent welfare clients. They can go into court and they can claim that a welfare statute does not apply to their client, but they may not, as long as we are paying them, challenge the constitutionality of the underlying statute." I think that is a due process violation, and I don't think that the government can do that, even with its own money, any more than I think the government could say to a public defender: "We are paying you to represent this indigent criminal defendant, but because we are paying you, we will not permit you to file a suppression motion." I think it would be unconstitutional if the government said that to a public defender, and I think it's unconstitutional for the government to tell a legal services lawyer: "You can undertake this representation, but you can't with our money make the arguments that you believe are in your clients' best interests." I think, likewise, there are very, very serious equal protection arguments that can, and ultimately will be, raised when the government says to one group of people: "You may not have access and utilize the procedural devices that are otherwise available to all other plaintiffs within the legal system."

Those are not issues that are the forefront of these litigations at this moment in time, but we can't lose the forest for the trees. As much as we talk about unconstitutional conditions, and that is the legal ground on which these issues are being fought out, what is offensive about what the Congress has done in this case is the attack on equal justice for poor people. That is fundamentally a due process and an equal protection issue, and I think that there is something to be gained by continuing to think of it in those terms.

Having said that, let me just come back to the unconstitutional conditions issue for a moment. As we saw in the Hawaii case, the restrictions imposed by Congress, at least as initially interpreted and implemented by the Legal Services Corporation, were consti-

tutionally indefensible.²⁴ I think Judge Kay was correct about that. I think he was incorrect in not striking them all down. I think they should have all been struck down. But I think there can be no serious dispute, under current constitutional doctrine, that the government may not use its own funds as a lever to require individuals to forfeit the exercise of privately funded constitutional rights. That's what the statute and the Regulations were designed to do, and I think they were properly enjoined.

The case has become more complicated in the last week. The new Regulations are going to be more difficult to challenge. They do very closely track *Rust v. Sullivan*.²⁵ They do not precisely track *Rust v. Sullivan*. There are some differences between even the new Regulations and the *Rust* Regulations, and I think the differences between them are significant and revealing. But I also think they're very different in context, and in that regard I agree more with Eric than with John.

It seems to me the government has every right to say: "We are paying you money to perform a job, and with our money you can only do the job that we are paying you to do." Two principles flow from that proposition. First, the government has the right to ensure that its money is being used for the purposes it intends, and not for other purposes. Second, it has the right - or at least the Supreme Court said in *Rust v. Sullivan* it has the right - to ensure that the consumers of those services are not getting a mixed message, and are not confusing what it is the government is saying and providing with what it is that private funders are saying and providing.²⁶

In both of those ways, the legal services context is fundamentally different than the Title X family planning context that was at issue in *Rust*. For example, there is absolutely no need for the physical separation requirements and the separate personnel requirements imposed by LSC. The Legal Services Corporation has for many years conducted audits of legal services programs (which for many years have operated both with LSC funds and with non-LSC funds) to ensure that the LSC funds were being properly spent and only spent for their intended purposes. LSC has cited no empirical evidence in the Hawaii case to support the claim that legal services programs have been using federal money improperly. Lawyers are accustomed to keeping time records that segregate how they spend

24. *Id.*

25. 500 U.S. 73 (1991).

26. *Id.*

their time. It is not a big deal, and I don't think these regulations ever had anything seriously to do with the improper diversion of federal funds into impermissible activities.

Likewise, the risk that somehow legal services clients walking into a legal services office will be confused about what the government's message is and what the government's message is not has very little relevance in a legal services context. What the Supreme Court said in *Rust v. Sullivan*, at least as amplified by its later decision in *Rosenberger*, was that Title X is a government program in which the government is delivering its own message about how best to achieve family planning.²⁷ When the government pays for legal services it is not delivering a message. Those lawyers are not the mouthpiece of the government, they are in many instances the adversary of the government, which is precisely what the Supreme Court held when it ruled that public defenders could not be deemed state actors for Fourteenth Amendment purposes.²⁸

So I do not think that there is any legitimate need whatsoever to impose anything more than a stringent bookkeeping requirement on legal services programs, and to the extent that even the new Regulations go beyond that, they ought to be found unconstitutional. Now, whether the lower courts are going to be willing to say that is another question. LSC's latest briefs have a superficial appeal. When you line up the new LSC regulations in one column and the *Rust v. Sullivan* regulations in the other column, they look very much alike. However, it is an argument that ultimately elevates form over substance. If one analyzes the regulations carefully and in context, the resemblance fades. In the end, the differences are more important than the similarities. Nevertheless, in some ways I am more confident if and when this case gets to the Supreme Court than I am at the lower court level.

Let me just say one last thing and then I'll stop, because I would like to open this up for questions. Just as I don't believe this case and these regulations or the underlying congressional enterprise ever had anything really to do with protecting the federal fisc, I don't think this dispute has anything at all to do with economic theories like cross-subsidization. I take a much more basic and cynical view about all of this. I think what Congress was intending to do was to make it extraordinarily difficult, if not impossible, for legal services lawyers to bring cases that Congress disfavored for

27. See *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 832-37 (1995).

28. See *Polk County v. Dodson*, 454 U.S. 312 (1981).

ideological reasons. Unfortunately, they have now largely succeeded.

If we wind up with the *Rust v. Sullivan* rules, we will be in a better shape than if we had wound up with the rules that LSC initially adopted when the statute was first passed. But, the situation will still be dire. As Congress understood perfectly well, it will not be easy for legal services programs around the country to comply with these regulations. There is simply not enough money out there to create dual programs. And if there is enough money out there, we ought not to be spending it to create dual programs. We ought to be spending it to provide legal services for poor people who already have too little of it in this country in the first place. So I think it is very unfortunate at many, many levels that we have come to this pass. We are now on a two-track process in Congress and in the courts. Like Alex Forger, I have no better crystal ball than anybody else to know where it is all heading.

Still, having been involved in numerous conversations about these lawsuits for many months, I feel two impulses with equal fervor. Sometimes I think they are complementary and sometimes I think they are not, which is what has made this so difficult. On the one hand, I feel very strongly that we have to do virtually anything we can do to help legal services survive. It has been an immensely valuable force in this society for the last twenty-five years. On the other hand, I feel that we can't survive and lose our soul: that somehow we have to protect our right to represent our clients fully and not allow ourselves to be put in the position where we're giving our clients second-hand legal representation that no wealthy person in this country would accept for five minutes.

And so, we will see where it all heads.

MATTHEW DILLER:

Thank you.