

May 4, 1977

LEGAL SERVICES

The Issue:

At the end of the 94th Congress, opponents of statist economic intervention had reason to congratulate each other: the proposed Agency for Consumer Advocacy had failed to get off the ground. Ironically, the House Judiciary Committee is now considering a bill which would create similar opportunities for Federal harrassment of private enterprise but which goes under a completely different name. The bill is H.R. 5528, the "Legal Services Corporation Amendments Act of 1977."

The Legal Services Corporation has already shown great ingenuity in using its legislative mandate as a base for aggressive social activism. The original justification for the legal services program was rather similar to that of a local Legal Aid Society: to funnel assistance to impoverished persons who need legal counsel. Through imaginative interpretation of poverty standards, generous use of "class action" suits -- in which only some of the members of the affected class may actually be poor -- and end runs around restrictions on lobbying, the LSC has learned how to use tax dollars for basic institutional "reform." In the words of veteran LSC official E. Clinton Bamberger, "There's going to be a change in this country. If the lawyers want to watch it and not participate in it, that is your decision."

LSC Activities:

Some examples of LSC activities -- all of which have taken place under current law:

1. The LSC-funded Massachusetts Law Reform Institute openly lobbied in a referendum for a graduated state income tax. It also worked on a court case which forbade corporate financial contributions to the campaign against the graduated tax.
2. The LSC-funded Legal Aid Bureau of Baltimore argued for restructuring of utility rates before the Commission of Electric Utility Rate Structure in Maryland.
3. The LSC-funded Pine Tree Legal Assistance, Inc. and Native American Rights Fund have been involved in the effort to force the state of Maine to give two-thirds of its territory back to the Passamaquoddy and Penobscot Indians. The case has affected

the ability of the state and of several municipalities to sell government bonds, and could potentially affect the timber industry's access to the disputed lands.

H.R. 5528 would give the LSC even more flexibility than it already has. Such, in fact, is one of its acknowledged goals, according to sponsor, Rep. Robert Kastenmeier in an April 6 memo to fellow members of his Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

Key Provisions:

Section 5(a) of the bill would make it even easier for LSC grantees to take up cases on the basis of their own ideological agendas rather than on the basis of clients' legal needs. In Kastenmeier's words, it would give the LSC "exclusive jurisdiction" in determining clients' eligibility, and would "prevent opposing parties from making, and courts from considering challenges to a client's eligibility for free legal services, or other challenges based on the Act or regulations that are irrelevant to the legal issues in a client's case."

In short, no one outside LSC could challenge the use of LSC resources in a court case on the basis of the claim that the party supported by those services was not in fact "poor" and therefore not eligible for the services of LSC or of the local Legal Services Projects which are funded by LSC. One thinks of such activities as the aid given to the NAACP in *Bradly v. Milliken*, the Detroit school busing case. As Rep. Edith Green later noted, there was no more reason to think of the NAACP as "poor" than to ascribe that quality to the municipality of Detroit. This section would render the LSC's judgments on these matters invulnerable to adjudication or correction by anyone outside LSC itself.

Section 7(c) of the Kastenmeier bill might be called the "auxiliary Congressional staff" section. It would allow the backup centers and other recipients of LSC funds to use those funds to draft model legislation, as long as such drafting activity was specifically in response to a request from an elected legislator. It's as if Boeing could use Federal dollars to draft legislation authorizing higher military procurement levels at the request of a Senator from Washington State. The backup centers are allowed, but not required, to perform this service--which lets them discriminate against legislators they don't like.

Section 8 of the Kastenmeier bill repeals the prohibition of LSC recipients' involvement in school desegregation cases. There is no question which side the Center for Law and Education in Cambridge, Massachusetts, will assist in these cases if it gets the chance. As noted earlier, it intervened on the pro-busing side in Detroit before the Green Amendment was passed.

Section 8 also weakens the language restricting legal services attorneys from helping to organize groups like the National Welfare Rights Organization or the National Tenants Organization: the new

language would forbid them only "to initiate the formation of or organize directly" such groups. (Emphasis added.)

Of all the bill's sections, the one with the most far-reaching implications is Section 4(a) which repeals the 1974 Green Amendment.

Green Amendment:

The Green Amendment was intended to prevent the LSC's backup centers from devoting their resources to aggressive litigation designed to change broad social policy rather than to responses to the specialized needs of individual poor clients. As Rep. Green said when she introduced her amendment, "These offices have become the cutting edge for social change in this country." She cited cases of legal services attorneys working to loosen anti-abortion laws, to promote national health insurance, to encourage rent strikes. She contended -- and no other Member seriously challenged her facts but only her recommendations -- that there were "millions of dollars being spent for nothing but efforts to change social policy. I suggest that responsibility for changing policy belongs to State legislatures and to the Congress of the United States. I have listened many long hours -- and share in the complaints -- of those who object to the executive usurpation of legislative prerogative. I find it incredible now to find myself confronted with a bill which would create another body (i.e., the Legal Services Corporation) to perform that Constitutionally mandated function of the Congress. I cannot, will not legislate away the responsibilities of the Congress to some federally funded corporation under the guise of providing legal aid to the poor."

Behind Mrs. Green's position lie several assumptions about law and government which cannot be reconciled with the kind of Legal Services Corporation she was resisting -- or with the kind of LSC the Kastenmeier bill would promote. The backup centers which receive LSC funds are private corporations. Their employees are not civil servants, and they may not be fired, transferred, or supervised in detail by the executive branch. They are not accountable to elected officials in either the executive or the legislative branch for their activities. If the Green Amendment goes, the government formally relinquishes to these bodies, and to their employees, something far more basic than the implementation of Federal policy. It relinquishes the power to make policy -- one of the basic attributes of sovereignty, an attribute which no state has willingly delegated to private groups or individuals since the age of feudalism.

Conclusion:

The analysis of Professor Geoffrey Hazard of the Yale Law School is worth careful attention. Professor Hazard expressed his reservations about the legal services program as follows:

The question in test-case litigation, as in legislative law reform, boils down to the propriety of constituting a publicly funded agency to lobby for the special benefit of a limited sector of the general community....There is a serious, if simple, question of principle involved, namely, whether government predicated on equal

participation of all members of the electorate is compatible with providing some of them with special political equipage at public expense.

...in a constitutional regime partisan political activity is supposed to be a matter of private initiative...a government which creates agencies to formulate what shall be taken as the people's will is no longer a government by the people.

The point can be stated somewhat more simply as follows: Would Congress be willing to provide public subsidies to the lobbying activities of Nader's Raiders and Common Cause? If not, how can it justify public subsidies to the privately managed legal services backup centers? Yet more simply still, one can apply Justice William O. Douglas's elegant formulation: we need not and should not "subsidize the First Amendment."

Current Status:

Subcommittee mark-up is now complete, and the House bill is now pending before the full Judiciary Committee under a new number: H.R. 6666.

The corresponding Senate bill is S. 1303. Markup is to begin on May 6 in the Committee on Human Resources.

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