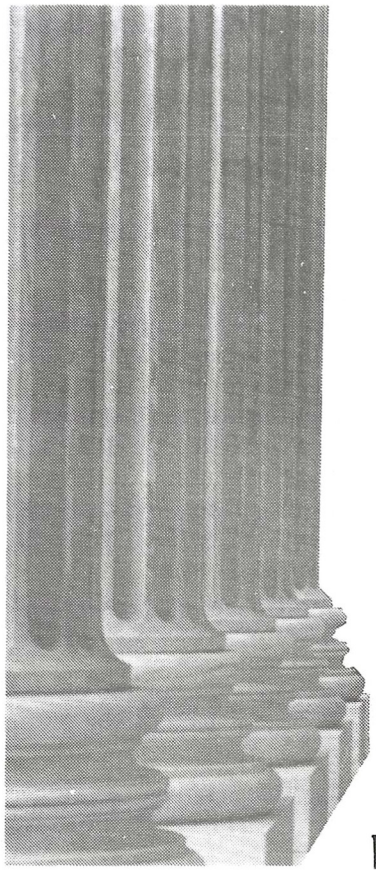
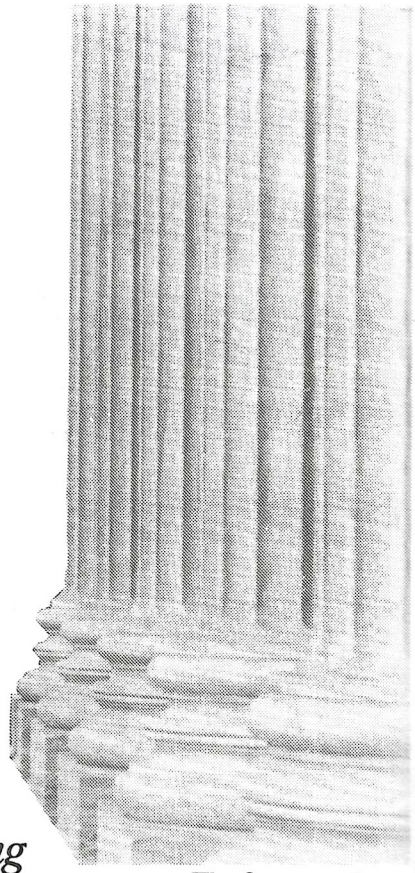


# Do Charities Have a Legal Right to Solicit Employees at Their Workplaces?

## *The Courts and Workplace Fund Raising*



*The Supreme Court*

For months, the charity world waited anxiously for the nation's highest court to make up its collective mind. Is it okay for the Reagan Administration to ban activist charities from the federal government's $123 million workplace fund-raising drive? Or do these charities have a free speech right to tell employees that an excellent way to help people is to support charities that fight for the rights of the disadvantaged?

Finally, on the last day of its 1985 term, the Court made up its mind—partly. A sharply divided Court decided that it is constitutional for a government to ban charities as long as its reasons for doing so are rational, a test the Reagan Administration passed.

But, the Court added, a government cannot exclude a charity for reasons—no matter how rational—that are "merely a pretext" for discriminating against that charity's views. And the Court couldn't decide whether the Reagan Administration really wanted to eliminate activist charities because of their views.

The case *(NAACP Legal Defense and Educational Fund v. Cornelius)* was important not only because of the size of the federal campaign but also because it involved legal arguments that have been used to open up several workplace campaigns run by state and local governments. Lawsuits or the threats of suits have helped open campaigns run by states such as New Jersey and Rhode Island and cities such as St. Louis and Philadelphia. However, in other states, including Minnesota, Illinois and South Carolina, suits have been less successful.

As a result of the Supreme Court's decision, the courts will probably be used less often by charities that want access to employee gifts.

However, the decision does not mean that these charities will have no recourse to the courts, according to Steve Ralston of the NAACP Legal Defense and Educational Fund, the group that took the issue to the nation's highest court. Ralston says that the narrowness of the decision (4-3 with two justices not participating), as well as its vagueness on the crucial issue of whether the Administration banned activist charities because of their views mean that the court fight will continue.

He acknowledges, however, that the heart of the decision will hurt. "It gives broad discretion to governments to keep any charity out of their workplace campaigns as long as the governments' reasons sound rational."

"The courts were very valuable in helping begin the initial wave of openings in government-run campaigns," explains James Abernathy, a co-founder of NCRP and a board member of the Women's Funding Alliance in Seattle. "But now groups are going to have to rely more on persuasion and lobbying and personal contacts."

However, both Abernathy and Ralston believe that alternative legal strategies may evolve, such as using antitrust laws to challenge governments or private companies that only allow United Way to solicit their employees.

Indeed, one charity has already successfully challenged a United Way attempt to restore its "monopoly" over workplace fund raising.

Until the Supreme Court's decision, most litigation argued that charities have a free speech right to ask for the gifts of government workers.

The argument is simple. First, according to a 1980 Supreme Court decision, charitable solicitation is a form of free speech *(Village of Schaumburg v. Citizens for a Better Environment)*. Second, a government-run workplace solicitation drive is, at least to some extent, a forum for free speech. As such, rules that exclude certain charities from this forum must meet some strict legal tests.

In three separate cases, the federal government's eligibility rules for its $123 million workplace drive—the Combined Federal Campaign (CFC)—failed these tests.

In 1980, U.S. District Court Judge Barrington Parker struck down requirements that charities participating in the CFC must have chapters in all or most states and must spend no more than a quarter of their income on fund raising and administration *(National Black United Fund v. Campbell)*. These limits, the court found, discriminated against newer and minority-run groups, particularly those working on controversial issues.

In January 1981, U.S. Judge Gerhard Gesell struck down a requirement that eligible charities provide direct services *(NAACP Legal Defense and Educational Fund v. Campbell)*. Gesell said this requirement was vague and arbitrary. His decision was not appealed.

Finally, in July 1983, U.S. Judge Joyce Green declared unconstitutional a Reagan executive order that excluded any charity that tries to influence public policy through "advocacy, lobbying or litigation."

In February 1984, an appeals court upheld her decision, calling the Reagan Administration's attempt to exclude activist charities from the CFC "patently capricious and unreasonable."

In part as a result of these decisions, the number of national charities eligible for the CFC swelled from 33 in 1979 to 155 in 1983. In addition, hundreds of independent local charities became eligible.

But in late June 1985, in a 4-3 decision, the Supreme Court overturned much of Judge Green's decision.

Yes, asking for gifts at a government workplace is a forum of free speech, wrote Justice Sandra Day O'Connor. She acknowledged that the brief descriptions of charities that are given to federal employees "directly advance the speaker's interest in informing readers about its existence and goals."

However, the Court determined that the "forum" in which this solicitation takes place—the CFC—is a "nonpublic forum," not a "limited public forum" as Judge Green had concluded.

It is much easier for a government to exclude a speaker from a "nonpublic forum." It must merely show that its reasons for excluding a speaker are "reasonable in light of the purpose served by the forum and are viewpoint neutral." In contrast, in a "limited public forum," rules that exclude speakers must be "narrowly tailored" to meet a "compelling governmental interest."

The Court concluded that the Administration's reasons for excluding activist charities were reasonable. "Here the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy," Justice O'Connor wrote. "Moreover, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum."

Finally, the "record amply supports an inference" that the participation of controversial advocacy groups in the CFC "jeopardized the success of the CFC."

However, while avoiding controversy may be an acceptable reason for excluding certain charities, the Court acknowledged that the desire to avoid controversy "may conceal a bias against the viewpoint advanced by the excluded speakers," which would be "impermissible." O'Connor said the Court could not decide whether the Administration's rules reflected a bias against the activist charities which had brought the case, and she remanded the case back to the lower court to hear more evidence on this crucial issue.

In a strong 21-page dissent that was joined by Justice Brennan, Justice Harry Blackmun contended that the exclusion of activist groups was "on its face, viewpoint-based discrimination." In a separate dissent, Justice John Paul Stevens agreed. Justice Thurgood Marshall did not participate in the decision because he used to be legal director of the NAACP (the NAACP LDEF was one of the original plaintiffs). Justice Lewis Powell did not participate because he was ill.

Blackmun called meaningless the majority's argument that it's better to support charities that are directly helping the needy. Using the Washington, DC CFC as an example, Blackmun pointed out that nearly three fourths of the charities that the President would allow to remain in the Campaign do not directly aid the needy.

Blackmun also dismissed the argument that advocacy groups should be excluded to avoid "the appearance of political favoritism." He said that a "simple disclaimer in the brochure" would be enough to avoid the appearance of support.

Finally, Blackmun criticized at length the argument that advocacy groups should be kept out because they generate controversy that might hurt the campaign. For one thing, Blackmun pointed out a key fact ignored by

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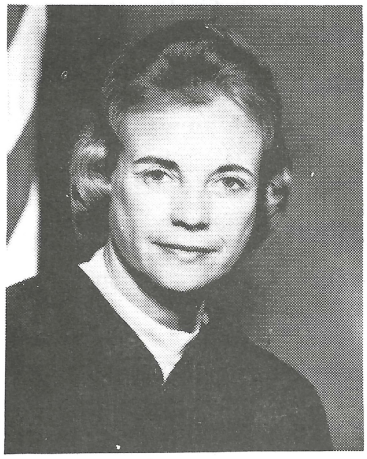

the majority: giving through the CFC has gone up sharply since the inclusion of controversial charities.

But even if giving had not increased, Blackmun argued, the "controversy hurts" rationalization is not valid. Saying a "central purpose" of the CFC is to give employees an opportunity to choose among charities, Blackmun wrote that "the free exchange of ideas about which of those causes one should support is not to be infringed merely because a vocal minority does not wish to devote their charitable dollars to a particular charity."

Blackmun also made a strong argument that banning charities that seek to influence public policy is viewpoint-based discrimination, which would still be unconstitutional.

According to Blackmun, the fact that a few of the excluded charities (such as the National Right to Work LDEF) are conservative doesn't matter. The key issue is a charity's views about how to accomplish its purpose. "By devoting its resources to a particular activity, a charity expresses a view about the manner in which charitable goals can best be achieved," Blackmun wrote.

Reagan would allow government employees to hear only from charities that believe the best way to achieve a charitable goal is to provide a service such as medical research or care for the sick. Charities that believe the best way to help people is to fight for their rights could not communicate their views.

As a result, Blackmun concluded, "Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo."

Blackmun's dissent may be very useful for charities that believe they have been excluded from a workplace drive because of their views.

According to the NAACP LDEF's Ralston, the Supreme Court's decision is vague in a way that may help activist charities. In saying that a government cannot exclude a charity because of its viewpoint, the Court does not explicitly state what it means by "viewpoint." It could mean strictly a charity's political views—is it liberal or conservative? Or, as Blackmun suggests, it could mean its views about the best way to help people in need—does it provide direct services or pursue litigation?

For a charity to prove that it was excluded because of its political views would be difficult, Ralston believes, partly because a government can argue that a ban on advocacy and litigation would affect both liberal and conservative groups.

But proving that a charity was excluded because of its view that litigation is the most effective way to help people would be much easier.

"There's a long history of Reagan hostility toward groups that provide legal services. It goes back to when he was governor of California and he attacked California Rural Legal Assistance. He is clearly hostile toward organizations that believe that the best way to help people is to fight for their rights in the courtroom."

Ralston says legal strategies will change. "We used to attack a rule that excluded us on its face. We'd say that, as written, this rule is unconstitutional. Now we'll say that, no matter how reasonable this rule sounds on its face, the reason for it is to exclude us because of our views. We'll argue that it is unconstitutional *in effect*."

Ralston is concerned that some governments will misinterpret the decision. "I'm sure United Way will be telling states that they can close up now, or even that they should close up. The reality is that there's still a free speech issue here and there's still a lot of uncertainty about who can be excluded and why. Some of the state statutes that hand the campaign to United Way are particularly vulnerable."

Litigation has been used to open up only a few state and local government campaigns, though the threat of litigation has doubtlessly influenced several other governments.

In three states, suits based on the early CFC court decisions have failed to produce many employee gifts for the plaintiffs. In Minnesota, the Cooperating Fund Drive (CFD) sued the state, which at the time only allowed United Way to solicit its employees. The suit was dropped when the legislature agreed to change the campaign, but the resulting eligibility rules still prevent CFD from participating in the campaign.

Steve Paprocki, CFD's former director, is skeptical about going to court to gain access. "I was never very enthusiastic about the legal route in the first place. The suit we got involved in was the single biggest mistake CFD made. I spent half my time for seven months on that damn lawsuit."

In Illinois, the local ACLU went to court on behalf of four Chicago-based community organizations, claiming it was unconstitutional for the state to allow only United Way to receive employee gifts and that taxpayers

were unfairly subsidizing one organization *(Pilsen Neighbors Community Council et al. v. Roland W. Burris).*

After a confusing court decision, the state legislature opened the state campaign. But the criteria for eligibility are so restrictive (e.g., a charity must collect 4,000 signatures of state employees just to get in and get 2,500 donations to stay in) that few if any non-United Way charities will benefit.

In South Carolina, The Human Endeavor (THE), a social action fund, had to go to court twice to gain access to the state charity drive. It won both times, but the revised rules still severely limit the number of gifts it can receive.

However, in other places lawsuits have been crucial in helping alternative funds gain access to the gifts of government employees.

In 1983, the Fund for Community Progress, a Rhode Island social action fund, went to court to force the state to allow the Fund to participate in the state employee campaign. In a consent agreement, the state not only opened up its campaign, it gave the Fund $1,000 in damages and paid its legal fees. The Fund raised $38,000 from state employees in 1984.

"The lawsuit is the best thing we ever did in terms of results," states Joe Vanni, the Fund's director.

An out-of-court settlement also allowed the United Black Community Fund to gain access to the St. Louis charity drive. (However, in 1985, the city gave UBCF the boot, claiming its fund-raising costs were too high.)

In Philadelphia, a federation of women's charities didn't even have to go to court to convince city officials to open up the city's campaign: the threat of a suit sufficed.

In New Jersey, however, it took a court decision *(Black United Fund v. Thomas H. Kane)* to get state officials to begin planning for an open state campaign in the fall of 1985. In that case, a federal judge ruled that it is unconstitutional for the state to give United Way exclusive access to the gifts of state employees. The judge based his decision on the lower courts' ruling concerning the federal charity drive.

Not all suits intended to help charities gain access to workplace campaigns have used free speech arguments.

In New York in 1980, a state court ruled that United Way could not be allowed to completely control the state's charity drive *(International Service Agencies v. James O'Shea et. al.)*. The court said that, "Fortunately, the reins of government cannot be turned over to private interest groups to be utilized to preserve their interests." Thanks in part to this decision, by 1984 ISA was raising $150,000 from New York state workers and several other federations were also receiving gifts.

In Los Angeles in 1976, Associated In-Group Donors, a fund-raising organization that was raising $18 million a year in workplace gifts, sued United Way. AID said United Way was trying to eliminate it by convincing corporate officials to stop allowing AID to solicit their employees. Plus, United Way threatened to cut off funds to any member agency that accepted support from AID.

Brought by a former Justice Department antitrust lawyer, the suit charged that United Way's actions violated federal antitrust laws, federal fair trade practice laws and the state's charitable trust laws. Faced with damning evidence (including a memo in which United Way spelled out its intent to "reduce/eliminate competitive federated campaigns such as AID in Los Angeles"), United Way backed down after only 15 days. AID attorney Richard I. Fine, who specializes in antitrust cases, called it "the most classic case I've ever seen. And I'm the lawyer who indicted Ford and General Motors in the fleet price-fixing case in 1971 for the federal government. With United Way in Los Angeles," he told the *Grantsmanship Center NEWS*, "you have some actual intent to destroy someone and to monopolize."

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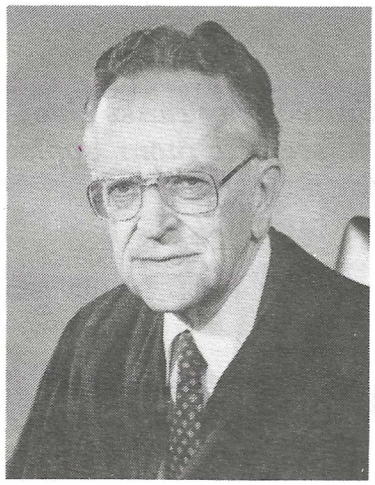

Despite a court-ordered agreement in its favor, AID was badly hurt by the controversy; the following year it merged with United Way.

A second antitrust suit, brought by a California health agency, never really got off the ground. In August 1977 the Santa Clara Combined Health Appeal sued United Way on the basis of interference with contractual relations, attempts to set up boycotts and antitrust violations. The CHA lost the first round and decided to forego a second after a superior court judge informed the group that it would have to meet a number of stringent requirements before returning to court *and* foot the bill for bringing an appeal.

Ralston believes more suits might be based on antitrust issues. "If charitable solicitation is covered by antitrust laws—and I don't see any reason why it shouldn't be—allowing only United Way to solicit workers certainly looks like restraint of

*(continued on page 57)*

divided among member agencies based on each agency's share of designated gifts.)

The national office provides the state committees with some advice and technical assistance, but "they function autonomously," says Barr, "and don't contribute anything to our support."

NHAs are not Combined Health Appeals by another name, although both kinds of funds raise money for local affiliates of national health organizations—often the same ones—and depend on payroll deduction for most or all of their income.

NHAs were created to solicit through the CFC and even now they participate only in government campaigns. CHAs, by contrast, were created to collect from business and local government, and several now also solicit in state campaigns. Unlike the more loosely structured NHAs, Combined Health Appeals are always incorporated, staffed organizations, complete with boards and by-laws.

Because of their different focuses, CHAs and NHAs often aren't even aware of each other. But recent events—in particular the increasing attention of both types of federations to state and municipal campaigns—are bringing them into closer contact. Several of the newer CHAs grew out of the NHA structure, such as those in Iowa, Florida and Wisconsin. In each of those states, the same person runs the NHA and the CHA.

Like nearly all other alternative funds, NHAs have their share of trouble with United Way. The director of a midwestern NHA notes that since the federal Office of Personnel Management (OPM) put United Way in charge of running most CFCs in 1982, United Way has gained almost complete control over the campaign, shutting out once equal partners such as NHA and International Service Agencies. The director claims that all too often the result has been inefficiency, mismanagement, poorly designed campaign materials and distribution problems.

By far the biggest source of contention is the fate of the third of CFC donations that are not earmarked or "designated" to any specific charity. Overall United Way gives 90 percent of these funds to its own agencies (in some CFCs 100 percent). It gives NHA only 2.8 percent—despite the fact that 32 percent of all designated gifts are pledged to national health charitites. For years the health agencies have argued that the division of undesignated funds should be based on the percentage of designated money that agencies receive.

In at least one CFC—in Norfolk, VA—health agencies didn't even get all of the money designated to them during the 1984 campaign. A General Accounting Office study found that the Norfolk United Way was not honoring designations unless employees signed their pledge cards twice. Instead, the United Way put this money—as much as $1.5 million—into its own coffers.

Some of the NHAs participating in state charity drives have also sought fairer distribution of undesignated funds. In Pennsylvania, for example, where until 1982 United Way (as campaign manager) was taking an average of 97¢ out of every undesignated dollar, the local NHA asked the court to establish a more equitable system for parcelling out undesignated funds. The court urged the charities involved to come up with a fairer formula themselves.

In response, a state campaign oversight committee was reactivated; it developed what state NHA executive director Shirley Ertel calls a "moving" formula for distributing undesignated funds. The new formula "moves the campaign toward equity," reports Ertel.

On some issues, some health agencies and United Way see eye to eye. In 1983, for example, several NHA members, including the Cancer Society and the Heart Association, joined with United Way to support President Reagan's attempt to limit eligibility for the CFC to traditional health and welfare agencies.

***"We have a menu that's varied, which is healthy. It generates greater participation and greater enthusiasm."***

—Shirley Ertel

But not all NHA officials are concerned about increasing competition, pointing out that health agencies have done extremely well in workplace campaigns in the past few years despite more players. Shirley Ertel of the Pennsylvania NHA is enthusiastic about having more charities participate in the state employee campaign. "We have a menu that's varied, which is healthy. It generates greater participation and greater enthusiasm."

—*Z.M.*

## The Courts...

*(continued from page 27)*

trade. What United Way is trying to maintain is a monopolistic marketplace. I can see suits going after private employers or United Way itself."

Also, some charities may appeal to state courts instead of federal court.

Ralston also believes another case involving the free speech rights of activist charities may well be heard again by the Supreme Court. "A decision made by only four justices ups the possibility that the Court will hear it again. We believe there's a very good possibility that both Justice Marshall and Justice Powell [the two justices who didn't participate in the recent decision] would agree with our view of the law."

"The problem," Ralston adds, "is that it takes time to litigate."

Paprocki believes that, "across the country we'll lose a few workplaces. But I don't think it will be that many. Most governments are satisfied with open campaigns—they can see that more money is being raised, more charities are being helped and that employees like having a choice."

—*Z.M. & T.S.*