Time for a party

What did S.D. City Manager Jack McGrory do the morning after announcing he's resigning to take a top post with Price Enterprises? Changed his voter registration — from Independent to Democrat. A Democrat in younger days, McGrory changed his registration when he got in the City Manager's Office because he wanted to avoid partisan politics. On Tuesday, he switched back. "I don't have to be an objective bureaucrat any more," he says . . .

One parting shot: McGrory took time out from notifying council colleagues Sunday to play some tennis with Ralph Inzunza, Vargas' chief of staff. Inzunza tore a ligament lunging for a McGrory slam. McGrory's still on his game. Inzunza's on crutches.

CCR
Committee on Chicano Rights, Inc

April 22, 1997

Judy McCarry
City Councilwoman
202 "C" Street
San Diego, CA 92101

Dear City Council Member:

Our organization is calling on you and the San Diego City Council to launch an immediate investigation into reported printed statements (which involves public taxpayers' monies) that San Diego City Manager, Jack McGrory (with the apparent political backing of San Diego Mayor, Susan Golding), "is giving serious thought to withdrawing it's advertising from La Prensa San Diego because of a pattern of defamatory and racist comments." (see article)

It is our organization's position that if the printed statement is true, then the City Manager is planning to utilize public taxpayers monies to attempt to silence and censor a Chicano newspaper thru economic coercion, for blantant "political" reasons. The City Manager and the City of San Diego are then in violation of the First Amendment which guarantees the free exercise of freedom of speech, and freedom of the press. You as a City Council have the duty and the responsibility to immediately move to fire City Manager Jack McGrory, if in fact he acted on his own without authority of the City Council.

Since the City Manager speaks and acts on behalf of the City Council, we would appreciate if you were to demand a clarification from Mr. McGrory of his statement to the press which stated "why pay money in advertising to a newspaper that's violating the values of this organization?." Who's or what value is Mr. McGrory making reference to? Is it Mayor Susan Golding's values (who Mr. McGrory objects to being called a "Jewish Queen," the Bible makes references to Jews calling sellouts in ancient Egypt "Jewish Princess,") who in 1986 falsely stated to the news media that Mexicans were responsible for 61.5% of all rapes, 34% of all car thefts, and 25% of all burgularies in San Diego county? The value of the City of San Diego refusing to ban the "Saturday Nite Special" gun? Or the value of Mayor Golding and

710 E. 3rd Street
National City CA 91950
(619) 477-3800

the City Council not allowing the voters of San Diego to vote on the stadium issue?, etc.

City Manager Jack McGrory, along with I wannabe California U.S. Senator candidate, Susan Golding, have raised a serious constitutional issue (freedom of the press and their right to criticize public officials), for you and the City of San Diego which you or the courts are going to have to address.

Awaiting a response,

Herman Baca

Herman Baca, President

cc all media
ACLU

CCR

Committee on Chicano Rights, Inc

April 23, 1997

FOR IMMEDIATE PRESS RELEASE

INVESTIGATION & FIRING OF SAN DIEGO CITY MANAGER CALLED FOR!

National City, CA...The Committee on Chicano Rights (CCR) today in a letter to San Diego City Council members has called for an investigation and the firing of San Diego City Manager Jack McGrory. According to CCR President Herman Baca " we have requested that the San Diego City council iniate an immediate investigation into printed statements (see enclosed article) in the San Diego Union that San Diego City Manager Jack McGrory (with the apparent political backing of San Diego Mayor Susan Golding) "is giving serious thought to withdrawing it's advertising from La Prensa San Diego because of a pattern of defamatory and racist comments over the past few months". "If in fact the statement is true" said Baca " then the city Council should move to fire City Manager McGrory, for illegally proposing to utilize public taxpayers monies to carry out a watergate type "political vendetta" to censor and silence a Chicano newspaper and for unconstitutionality violating the First Amendment (that guarantees freedom of speech and freedom of the press) of the U.S. constitution".

In his letter to San Diego city council members Baca also requested clarification of City Manager McGrory printed statement in the San Diego Union in which he stated " why pay money in advertising to a newspaper that's violating the values of this organization?" Whose or what values is Mr. McGory making references to,? asked Baca. "Is it Mayor Golding's values who in 1986 falsely accused Mexicans of being responsible for 61.5% of all rapes, 34% of all car thefts, and 25% of all burglaries in San Diego County? The value of the City of San Diego refusing to ban the "Saturday Night" specials? Or the value of Mayor Susan Golding and the City Council not allowing the citizens and voters of San Diego to vote on the stadium issue, etc?

In closing, Baca accused "City Manager McGrory and wannabe California U.S. Senator candidate Susan Golding of raising a serious constitutional issue (freedom of the press and their right to criticize public officials) which the City Council or the courts are going to have to address."

For Further information contact Herman Baca
(619) 477-3800

710 E. 3rd Street
National City CA 91950
(619) 477-3800

PETER ROWE
293-2432

CCR
Committee on Chicano Rights, Inc

May 16, 1997

ACLU
Linda Hills, Director
P.O. Box 87131
San Diego, CA 92138

Ms. Hills

Question? Does freedom of the press and the U.S. Constitution first amendment rights apply to the Chicano community in San Diego, California? Case in point. On April 19, 1997 (see enclosed article) City Manager Jack McGrory (along with San Diego Mayor Susan Golding) threaten to withdraw advertising from La Prensa San Diego because of "a pattern of defamatory and racist comments", and "why pay money tin advertising to a newspaper that's is violating the values of this organization?"

On May 8, 1997 (see enclosed article) San Diego Mayor Susan Golding, the entire city council (who to date have been silent) and City Manager Jack McGrory made good on their threat by cutting city advertising ($29,000) from La Prensa San Diego citing defamatory content. This action, of public officials utilizing public taxpayers moneys to attempt to censor, silence, intimadate punish, and even destroy La Prensa San Diego is a clear violation and a serious attack on protected first amendment rights. Our organization is requesting that the ACLU launch an immediate investigation into this matter and iniate appropriate legal action to stop the city of San Diego from carring out there illegal and unconstitutional attacks on La Prensa San Diego and on first amendment rights.

Sincerely;

Herman Baca

Herman Baca

c.c. MALDF
News Media

710 E. 3rd Street
National City CA 91950
(619) 477-3800

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OF SAN DIEGO AND IMPERIAL COUNTIES

P.O. Box 87131
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PRESIDENT

Candace M. Carroll
NATIONAL BOARD REPRESENTATIVE

Linda Hills
EXECUTIVE DIRECTOR

Jordan C. Budd
MANAGING ATTORNEY

July 1, 1997

Mr. Herman Baca
Committee on Chicano Rights, Inc.
710 E. 3rd Street
National City, CA 91950

Dear Mr. Baca:

I write in response to your letter dated May 16, 1997, regarding the decision of the City of San Diego to stop advertising in La Prensa San Diego. I apologize for the delay in responding; I've been out of town for the last three weeks.

The First Amendment issue that you raise is a difficult one. While government entities are barred from *regulating* speech in a manner that favors one viewpoint over another, different rules apply when government acts to *subsidize* speech through its own expenditures — which arguably is the case with the advertising purchases at issue here. The cases addressing the government's discretion to subsidize speech draw a rather murky line between permissible and impermissible conduct. Some cases hold that government may not use its expenditures to suppress particular viewpoints, while other cases hold that government may withhold funds (for instance, in the context of purchasing pieces of art) that will be used to promulgate objectionable speech (e.g., obscenity).

Here, the City of San Diego claims to withhold expenditures from La Prensa San Diego because of allegedly "racist and defamatory" speech. In such a situation, the outcome of any legal challenge is difficult to predict.

I have enclosed portions of an ACLU publication, The Right to Protest, which address this issue in some detail. I hope the enclosed is of some assistance as you consider this issue.

Sincerely,

Jordan C. Budd
Managing Attorney

109. *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).
110. *Vanasco v. Schwartz*, 401 F. Supp. 87 (E.D.N.Y. 1975), *aff'd*, 423 U.S. 1041 (1976); *see also Galliano v. United States Postal Service*, 836 F.2d 1362 (D.C. Cir. 1988); *Friends of Phil Gramm v. Americans for Phil Gramm*, 587 F. Supp. 769 (E.D. Va. 1984); *Tomei v. Finley*, 512 F. Supp. 695 (N.D. Ill. 1981) *cf. Commonwealth of Pennsylvania v. Wadzinski*, 492 Pa. 35, 422 A.2d 124 (1980).
111. *See Pestak v. Ohio Elections Commission*, 670 F. Supp. 1368, *clarified* 677 F. Supp. 534 (S.D. Ohio 1987); *Dewine v. Ohio Election Commission*, 61 Ohio App. 2d 25, 399 N.E. 2d 99 (1978); *Treasurer of Committee to Elect Lostracco v. Fox*, 150 Mich. App. 617, 389 N.W. 2d 446 (1986).

VI
The Funding of Protest

A leading California politician, Jesse Unruh, once observed that "money is the mother's milk of politics." The Supreme Court recognized the same thing in the campaign finance case: "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."[1] Printing leaflets and handbills, holding speeches and rallies, using the print or electronic media—all these methods of political communication are indispensable, yet may be costly. And what is true of partisan politics is no less true of protest speech and activities generally.

Of course almost all individuals and groups generate money to support and facilitate their speech and protest "the old-fashioned way": they raise it. The costs of protest are underwritten by people's own resources and support from contributions to and membership in groups and organizations. People often respond to significant events and issues by increasing (or decreasing) their support for the groups and organizations involved in those issues.

For the most part, such funding matters are wholly removed from legal or constitutional questions. There are two important areas, however, where the funding of protest does raise significant constitutional questions: (1) where government tries to restrict or discourage the funding of protest and (2) where government provides financial and other subsidies, but tries to withhold them from groups or individuals espousing particular, disfavored causes or points of view.

RESTRICTIONS ON PRIVATE FUNDING OF PROTEST

Can the government restrict the use of personal or organizational funds for political protest activities?

No. Where persons or groups wish to use their own funds or resources for political activities, the government may not impose direct restraints on their right to do so. The campaign finance cases show that, except for the limited power to restrict campaign contributions to and by political candidates and committees, government may not control the amount or nature of expenditures for partisan political activities or, certainly, for nonpartisan issue speech and protest. The Court has repeated that the First Amendment prevents government from restricting the funding of political advocacy and protest.[2]

Can government compel disclosure of membership in or contributors to protest groups?

No. Except for explicitly partisan campaign activities, government cannot even require reporting and disclosure of funding by protest groups or individuals. (And even in the partisan context, it cannot require financial information from controversial groups and parties.)

During the 1950s and 1960s, many Southern states tried to compel groups like the NAACP to disclose their members and contributors in order to harass and deter civil rights activities under the guise of regulating business or charitable groups. It was clear that such disclosure would have exposed members to economic reprisal, loss of employment, threat of physical assault, and other manifestations of public hostility. The Supreme Court ruled that such efforts interfered with freedom of speech and association with no compelling justification: "[c]ompelled disclosure of affiliation with groups engaged in advocacy may constitute [an effective] restraint on freedom of association."[3] These principles have also protected the ACLU and other nonpartisan advocacy groups from having to disclose their members and contributors.[4] The Court departed somewhat from these principles where disclosure was targeted on groups such as the Communist party that were deemed to pose national security concerns.[5]

Can government regulate the methods of fundraising that protest and advocacy groups use?

Generally not. Solicitation of funds for protest, advocacy, or charitable groups is protected speech under the First Amendment: "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagating of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues and for the reality that without solicitation the flow of such information and advocacy would likely cease."[6]

In one case, the Supreme Court rejected a local ordinance that barred door-to-door or street solicitations by any charitable organization—there an environmental group—that did not use at least 75 percent of its receipts for "charitable purposes." The Court ruled that such a restriction improperly intruded on the group's choice to advance its cause by employing professional staff to generate position papers and advocacy statements. While government has a legitimate interest in protecting the public from fraud, crime, and undue annoyance by solicitors for charitable or other causes, the 75-percent rule did not directly achieve that purpose. The Court also threw out a similar rule that restricted the fundraising and advocacy work of a police benevolent organization and its ability to hire a professional fundraiser.[7] Finally, the Court has invalidated regulations of the fees that professional fundraisers can charge and the information they must disclose to potential contributors; the state could more narrowly achieve its concerns with regulating fraud and financial irregularities by direct prohibition of such practices and by requiring that information reports be filed with the state.[8] But government can neutrally and narrowly regulate the time, place, and manner of fund solicitation that takes the form of door-to-door canvassing or occurs in a crowded setting like a state fair or airport.[9] See part 2 below.

Can the government restrict public advertising and solicitation of funds by protest or public interest organizations?

No. Advancing and soliciting support for a cause through advertisements, direct-mail campaigns, and other forms of public solicitation are just as protected as the views the funds and support would advance. Indeed, in the landmark defamation

case of *New York Times Co. v. Sullivan*,[10] the Court ruled that the alleged libelous statements did not lose their First Amendment protection just because they were contained in a paid advertisement that solicited funds for civil rights causes. Advertisements for services with a public interest dimension—such as ads for abortion clinics and legal services—are protected speech as well and cannot be banned by government.[11] Indeed, even soliciting clients for ACLU or NAACP cases has been held protected by the First Amendment, despite the fact that the organizations may benefit financially through court-awarded attorneys' fees if such cases are won.[12]

GOVERNMENT REFUSALS TO ALLOW PUBLIC FUNDS TO SUBSIDIZE SPEECH AND PROTEST

Is government required to subsidize political advocacy and protest?

No. The First Amendment, which is designed to serve as a negative check against government restrictions on speech, does not mean that government has an affirmative obligation to support or subsidize protest activities. Of course government does facilitate speech to the extent it must allow the streets, parks, and public forums to be used for speech and protest and usually picks up the incidental costs of doing so (police protection, sanitation, traffic control). But government generally is not required to pay for protest either directly through financial grants or subsidies or indirectly through tax credits and deductions.

That does not mean, however, that government can use the financial clout of its taxing and spending powers to deter or penalize political protest and advocacy. Even the power of the purse is subject to considerable First Amendment limitations. But it is often difficult to draw a line between government's merely withholding a financial subsidy from views and activities it disapproves, which it may do, and imposing a financial penalty on groups and views it disapproves, which it may not. The issue generally comes up in two contexts: indirect subsidies through tax deductions and credits and direct subsidies through government-provided funds and forums.

Does government have to give a tax deduction or advantage to political advocacy?

Basically, no. For example, government can decline to subsidize lobbying activities—clearly protected by the First Amendment—by refusing to allow a business or other deduction for such expenses.[13] Likewise, charitable organizations that get tax exemptions for their income and tax deductibility for contributions to them can be told that they may not substantially engage in lobbying if they want to keep the tax advantages. In a case involving a tax protest group, the Court said that such a condition does not violate the First Amendment since government has no obligation to underwrite or subsidize lobbying through tax preferences or subsidies. "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for . . . lobbying. We again reject the notion that 'First Amendment rights are somehow not fully realized unless they are subsidized by the State.' "[14] Some justices saw more of a problem because the group literally was losing a benefit—tax-exemption—because it exercised a First Amendment right—lobbying. But since the group could solve the problem easily—by setting up a separate fund for its lobbying work—without jeopardizing its charitable status, the problem was eased. The Court also ruled that the tax law was not discriminatory even though it exempted veterans' organizations and allowed them to keep their charitable status and also engage in lobbying.

Can government discriminate among the kinds of advocacy or protest groups or viewpoints that can receive preferential tax treatment?

Probably not. Although it upheld a special lobbying exemption for veterans' organizations, the Court clearly stated that tax breaks or other government subsidies could not be allocated "in such a way as to aim at the suppression of dangerous ideas." Similarly, the Court has adamantly resisted the imposition of special sales or business taxes targeted on newspapers and has overturned tax advantages which discriminate among different members of the press based on the content of their medium. Thus, for example, an Arkansas sales tax that exempted newspapers and religious, professional, trade, and sports journals but taxed other periodicals including political journals was imper-

missible content discrimination.[15] And a law that taxed all periodicals except religious ones was likewise thrown out, although as an impermissible and focused support for religion.[16] Conversely, a general sales tax on the sale of all books, including religious books, is allowable.[17]

The point that the First Amendment does not allow government a free hand where tax advantages are concerned was made in a recent case involving preferential export license fees for films approved as "educational" by the United States Information Agency. The government claimed the power to deny the preferential treatment to films that contained "propaganda," or "misrepresentation" or "espoused a cause." An appellate court ruled: "The challenged regulations require that in order to be certified, a film must be balanced and truthful; must neither criticize nor advocate any political, religious, or economic views, and must not, by 'special pleading,' seek to influence opinion or policy. Each of these requirements draws content-based lines forbidden by the First Amendment."[18]

How much leeway does government have to decide which groups or activities qualify for "charitable" or "educational" status?

The answer is unclear. As indicated in the movie export license case, the First Amendment does impose considerable limits on the government's power to label certain groups or speech activities as not "charitable" or "educational." But the issues are difficult.

For example, the Court upheld the power of the federal government to exclude advocacy groups from the federal workplace charity drive, so long as the exclusion was not intended "solely to suppress the point of view" of the excluded groups.[19]

Two cases in the federal appeals court in Washington, D.C., illustrate the difficulties of determining when the government can properly deny favorable tax or other similar treatment to groups it claims are not "educational" or "charitable." In one case, the IRS claimed that a feminist organization that published a monthly magazine, *Big Mama Rag*, and promoted women's rights was not educational because of political and legislative commentary and because of "the articles, lectures, editorials, etc., promoting lesbianism." The IRS reasoned that although an organization could be educational even though it

advocates a position or viewpoint so long as it permits a "full and fair exposition" of the facts, the feminist group had "adopted a stance so doctrinaire" that it could not satisfy this requirement. The court disagreed, ruling that the tax laws could not be used to penalize dissenting speech and that the IRS guidelines were so vague that they invited impermissible government censorship through the administration of charitable and educational tax benefits.[20]

Three years later, however, under a revised set of IRS guidelines, the same court rejected ACLU arguments and upheld an IRS decision to deny "educational" status to a white supremacy, antisemitic organization. This time the court found the group was not educational: "In sum, National Alliance repetitively appeals for action, including violence, to put to disadvantage or to injure persons who are members of named racial, religious or ethnic groups. It both asserts and implies that members of these groups have common characteristics which make them sufficiently dangerous to others to justify violent expulsion and separation. Even under the most minimum requirement of a rational development of a point of view, National Alliance's material falls short. . . . The material may express the emotions felt by a number of people, but it cannot reasonably be considered intellectual exposition." Distinguishing the feminist case, the court reasoned that "in the present case we see no possibility that the National Alliance publications can be found educational within any reasonable interpretation of that term." And the court concluded: "We have no doubt that publication of the National Alliance material is protected by the First Amendment from abridgement by law. . . . But it does not follow that the First Amendment requires a construction of the term 'educational' which embraces every continuing dissemination of views."[21]

Can government deny tax advantages to people or groups because government disapproves of their political views or activities?

No. In a 1958 case the Court ruled that California could not withhold a property tax exemption for veterans who were otherwise qualified taxpayers but who refused to sign a loyalty oath or prove their loyalty. Even though government did not have to provide a tax exemption in the first place, once it did so, it could not withhold the benefit because of people's political

views. That would be using the tax laws to impose a penalty for things and speech unrelated to taxation and would permit government to achieve indirectly a result it could not command directly.[22] That is still the law; the exercise of free speech cannot cause the loss of an otherwise available benefit unrelated to that free speech activity. Whether or not a person has a "right" to a government benefit, it cannot be taken away because that person exercises free speech rights; that would be an improper penalty on the exercise of such rights.

When government makes subsidies and benefits available to facilitate political activities, can it withhold those benefits from certain groups on a political basis?

It depends. On one hand, the Court upheld public funding of presidential campaigns even though small and minor parties were ineligible for the funds because of poor past showing at the polls.[23] But postal rate subsidies cannot be given to major political parties, but withheld from minor or independent parties.[24] Similarly, where a state that generally banned lotteries allowed political committees to hold lotteries for fundraising, it could not exclude dissident or minor party groups from that benefit; nor could an ACLU affiliate be barred from the right, given to other charities, to hold a raffle on the basis of an official's claim that the event would be held at the home of "a communist or something."[25]

Finally, militant 1960s student groups, such as the SDS, cannot be denied the campus benefits of official recognition because of their beliefs and protest activities.[26] The same principle was applied in an important recent case establishing that a recognized campus university gay rights organization could not be denied campus activity funds available to all student groups: "a public body that chooses to fund speech or expression must do so evenhandedly, without discrimination among recipients. . . . The University need not supply funds to student organizations; but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed."[27]

Can the government stipulate that recipients of public funds refrain from engaging in First Amendment activity unrelated to the purpose of the grant and paid for by the recipient's own resources?

No. The government cannot grant funds to otherwise eligible recipients on the condition that they refrain from engaging in otherwise protected speech or protest where that expression is not paid for out of public funds and is otherwise unrelated to the grant. The Court would characterize that as a penalty exacted as a condition of obtaining the subsidy. Just as the government cannot withhold a tax deduction to those who will not sign a loyalty oath, neither can the receipt of direct financial grants be conditioned on refraining from unrelated or privately subsidized speech. For example, a Congressional statute prohibited "editorializing" by any public television station that received grants from the federal Corporation for Public Broadcasting, even though the grants made up only a small portion of the station's budget and the "editorializing" was basically paid for out of privately contributed funds. The Supreme Court held this an unacceptable regulation of the content of the speech of a recipient of public funds.[28] The same rule has been used to strike down as penalties requirements that recipients of family planning grants not use even their own privately raised funds to counsel or advocate abortion.[29] For the same reason, a federal statute that denied employment training funds to any person "who publicly advocates the violent overthrow of the Federal Government" was held an unconstitutional penalty on protected speech.[30] And an environmental group could not be denied grants to assist energy consumers because that group also lobbied the legislature on environmental issues.[31]

Can the government condition a grant of benefits on giving up protected protest where there is some relationship between the two?

Arguably yes. In 1981 Congress limited eligibility for food stamps where a family's need resulted from the fact that a member of the household had gone on strike. In other words Congress did not want food stamps to help subsidize striking workers. The Court held that this condition did not violate a union member's rights of speech or association. "[Strikers] and their union would be much better off if food stamps were available, but the strikers' right of association does not require the government to furnish funds to maximize the exercise of that right."[32] The restriction was viewed as the withholding of a subsidy for protest, not the imposition of a penalty on protest.

Can government withhold or withdraw funding from specific speech or protest activities that the government does not want to subsidize?

This is the most troublesome issue and the answer is unclear. It is plain that government can decline to fund or subsidize an entire category of protected speech, e.g., denying tax breaks for lobbying. Does that mean government can decline to subsidize specific kinds and contents of speech? Government can also refuse to fund other constitutionally protected activities, such as the choice of an abortion, by withholding public funds for indigent women who wish to have an abortion.[33] Does this mean the same is true of advocacy or counseling of abortion, i.e., can family planning groups be given government funds, but only on the condition that they not use *those funds* to advocate abortion, whatever they do with privately raised funds?[34] The same problem has been raised with respect to government funding of controversial works of art.

In the few cases involving art, the courts have tended to treat government much like any other art patron, largely free to pick and choose what art and artists to fund, without serious First Amendment scrutiny. In one case, a governor was permitted to withdraw a small arts grant made to a magazine because he thought a poem it published was obscene.[35] In another case, a court ruled that the government could remove a sculpture entitled *Tilted Arc* from in front of the federal building in Manhattan. Since the government had bought the sculpture when it commissioned the work, the government could remove it over the artist's objection, so long as the decision was based on aesthetic considerations and not on political censorship grounds. "Government can be a significant patron of the arts. Its incentive to fulfill that role must not be dampened by an unwarranted restriction on its freedom to decide what to do with art it has purchased."[36]

In a related context, another court held that a university could cease funding all litigation by a student legal services office on behalf of students; this was not preventing the students from filing lawsuits, but only refusing to fund such suits. The case probably would have been different if the university had stopped funding only lawsuits advocating liberal (or conservative) causes.[37] But other courts have taken a different position, holding that government may not decline to make otherwise

appropriate grants simply because they would be used for artistic expression or other kinds of protected advocacy that government disfavors or disapproves.[38] Indeed, one court even held that it was unconstitutional for the Library of Congress, yielding to pressure, to withdraw its collection of Braille versions of Playboy magazine. "Although individuals have no right to a government subsidy or benefit, once one is conferred, as it is here through the allocation of funds for the program, the government cannot deny it on a basis that impinges on freedom of speech."[39]

Finally, courts have divided with respect to conditioning family planning grants on not using any of the funds to counsel or advocate abortion. One appeals court held that federal regulations prohibiting use of such funds to counsel or advocate abortion are unconstitutional as imposing undue burdens on a woman's right to choose and impermissible, viewpoint-based restrictions on the First Amendment right to publicly advocate abortion, even with the aid of public funds.[40] But another federal appeals court upheld the limitations.[41] The Supreme Court has agreed to rule on these questions.[42]

NOTES

1. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).
2. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Meyer v. Grant*, 486 U.S. 414 (1988).
3. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963).
4. *Buckley v. Valeo*, 519 F.2d 821, 869–78 (D.C. Cir. 1975); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980).
5. *Compare Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961) *with Gibson v. Florida Legislative Investigating Committee*, *supra* note 3.
6. *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).
7. *Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984).
8. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988).

9. *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610 (1976); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *cf. Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).
10. 376 U.S. 254 (1964).
11. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
12. *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).
13. *Cammarano v. United States*, 358 U.S. 498 (1959).
14. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983).
15. *Arkansas Writers Project, Inc.. v. Ragland*, 481 U.S. 221 (1987); *see also Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co., Inc..*, 297 U.S. 233 (1936).
16. *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989).
17. *Jimmy Swaggert Ministries v. Board of Equalization of California*, 110 S. Ct. 688 (1990).
18. *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 510 (9th Cir. 1988); *but cf. Meese v. Keene*, 481 U.S. 465 (1987) (upholding the requirement of a "political propaganda" label on films and books imported from abroad, based on their content).
19. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 806 (1985).
20. *Big Mama Rag, Inc., v. United States*, 631 F.2d 1030, 1037 (D.C. Cir. 1980).
21. *National Alliance v. United States*, 710 F.2d 868, 873, 875 (D.C. Cir. 1983).
22. *Speiser v. Randall*, 357 U.S. 513 (1958).
23. *Buckley v. Valeo*, 424 U.S. 1, 93–108 (1976); *cf. Regan v. Taxation with Representation of Washington, supra* note 14.
24. *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980); *Spencer v. Hardesty*, 571 F. Supp. 444 (S.D. Ohio, 1983); *but see Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982) (upholding the use of the frank by members of Congress to send free mail to their constituents).
25. *Rhode Island Chapter of the National Women's Political Caucus v. Rhode Island Lottery Commission*, 609 F. Supp. 1403 (D.R.I. 1985); *Rhode Island ACLU v. Rhode Island Lottery Commission*, 553 F. Supp. 752 (D.R.I. 1982).
26. *Healy v. James*, 408 U.S. 169 (1972).
27. *Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988). *Cf. Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982) (overturns funding ban on college facilities used by gay rights groups).
28. *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984).
29. *E.g., Planned Parenthood v. Arizona*, 789 F.2d 1348 (9th Cir. 1986), *aff'd*, 479 U.S. 925 (1986). *But see DKT Memorial Fund, Ltd. v. Agency for International Development*, 887 F.2d 275 (D.C. Cir. 1989).
30. *Blitz v. Donovan*, 538 F. Supp. 1119 (D.D.C. 1982), *vacated as moot*, 459 U.S. 1095 (1983).
31. *Citizens Energy Coalition of Indiana v. Sendak*, 459 F. Supp. 248 (S.D. Ind. 1978), *aff'd*, 594 F. 2d 1158 (7th Cir. 1979); *but cf. Regan v. Taxation with Representation of Washington, supra* note 14.
32. *Lyng v. International Union, UAW*, 485 U.S. 360, 368 (1988).
33. *Harris v. McRae*, 448 U.S. 297 (1980).
34. *Cf. Planned Parenthood Federation of America, Inc., v. Agency for International Development*, 838 F.2d 649 (2d Cir. 1988); *Alan Guttmacher Institute v. McPherson*, 616 F. Supp. 195, 205 (S.D.N.Y. 1985), *modified*, 805 F.2d 1088 (2d Cir. 1986).
35. *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir. 1976).
36. *Serra v. General Services Administration*, 847 F.2d 1045, 1051 (2d Cir. 1988); see also *Piarowski v. Illinois Community College District 515*, 759 F.2d 625 (7th Cir. 1985). *But see Sefick v. City of Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979).
37. *Student Government Association v. Board of Trustees of University of Massachusetts*, 868 F. 2d 473 (1st Cir. 1989); *but see Westchester Legal Services, Inc. v. County of Westchester*, 607 F. Supp. 1379 (S.D.N.Y. 1985) (government may not refuse to renew legal services contracts with private organization solely because those organizations file lawsuits against government).
38. *E.g., Gay and Lesbian Students Association v. Gohn*, 850 F.2d 321 (8th Cir. 1988); *Mission Trace Investments, Ltd. v. Small Business Administration*, 622 F. Supp. 687 (D. Colo. 1985) (invalidating an SBA rule barring financial assistance to all applicants engaging in the creation and dissemination of ideas and values); *see also Gay Men's Health Crisis v. Sullivan*, 733 F. Supp. 619 (S.D.N.Y. 1989) (pending challenge to ban on use of AIDS education funds "to promote or encourage, directly, homosexual sexual activities"); *New School for Social Research v. Frohnmeyer*, No. 90 Civ. 3510 (S.D.N.Y., filed May 23, 1990) (challenge to new nonobscenity certification procedures imposed on NEA grant recipients); *Bela Levitsky Dance Foundation v. Frohnmeyer*, 90 Civ. 3616 (C.D. Cal., filed July 12, 1990) (same).

39. *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 815 (D.D.C. 1986).
40. *See Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (en banc).
41. *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989); *cert. granted, sub nom. Rust v. Sullivan*, 110 S. Ct. 2559 (1990).
42. *See Rust v. Sullivan, supra* note 41; *see also DKT Memorial Fund, Ltd. v. Agency for International Development*, 887 F.2d 275 (D.C. Cir. 1989); *Planned Parenthood v. Agency for International Development*, 915 F.2d 59 (2d Cir. 1990).

VII

Protesting by Public Employees

Nearly a century ago, in totally rejecting a public employee's free speech claim, the great Judge (later Justice) Oliver Wendell Holmes wrote, "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[1] On this issue, Justice Holmes was not prophetic, for the law now holds that whether or not public or governmental employees have a right to their jobs, they most assuredly have a right not to be dismissed, disciplined, or demoted for reasons that violate the First Amendment. Today government may not condition public employment on any basis that infringes an employee's constitutionally protected interest in freedom of expression; the employee's rights of free speech and protest as a citizen cannot be defeated unless, on balance, the speech unacceptably damages the government's interest as an employer.[2]

This chapter will focus on these First Amendment rights of public employees. But it is important to remember that employees today—in the public and private sectors—have a wide range of protections available to them in addition to the First Amendment to protect their right to protest and to safeguard their employee status. At the federal level, civil service employees have elaborate protections against arbitrary and wrongful actions under a number of statutes, especially the Civil Service Reform Act of 1978, that established the Merit Systems Protection Board and also provided new protection for "whistleblowers."[3] Judicial review in the courts is available as well. Many state and local governments provide similar civil service systems and protections for most employees of those governmental entities. There are also statutory protections of membership in various federal employee unions.[4] Of course, comparable protections have long been available to union members and employees in most areas of private industry and commerce as well.

In addition, most governmental employees are guaranteed the constitutional rights of due process of law, meaning that public agencies and employers cannot deprive their employees

Goliath versus David

S.D. Union 4/19/97

The city of S.D. is giving serious thought to withdrawing its advertising from *La Prensa San Diego* because of "a pattern of defamatory and racist comments" made over the past several months. City Manager Jack McGrory hasn't notified the weekly newspaper of his discontent but is giving the ad cutback strong consideration.

"We're getting pretty tired of it," McGrory says. "Why pay money in advertising to a newspaper that's violating the values of this organization?" A case in point was an anti-Semitic reference to *"La Reina Judia"* (The Jewish Queen) in a March 14 column critical of Mayor Susan Golding and the stadium expansion.

Dan Muñoz Sr., publisher of the weekly newspaper and column author, says: "They don't like to have their peccadilloes exposed. It just kills them that someone dares to challenge the power structure." Economic coercion, he says, is not going to make him back off. Muñoz adds that losing the city's advertising (less than $10,000 a year) wouldn't have much impact.

S.D. Union
4/19/97

Goliath vs. Daniel, Part II

S.D. Union 5/8/97

The S.D. city manager is making good on his threat to cut city advertising from *La Prensa*, citing defamatory content. *La Prensa* publisher Dan Muñoz compares the move to blackmail and vows not to tone down his editorial remarks: "What they want is a passive propaganda press. If they don't get it, they're going to punish you."

Jack McGrory counters: "They have a First Amendment right to unlimited discretion and freedom in what they print. I don't want to infringe on that. But we don't have to give business to them . . . when they violate our values." Councilman Juan Vargas concurs, saying he, too, finds some of the language in *La Prensa* offensive, in particular, a recent reference to Mayor Susan Golding as "La Reina Judia" (Jewish Queen).

McGrory says advertising will be increased in other publications aimed at Latinos, such as *El Sol de San Diego, El Latino* and *Ahora-Now*. Together those three ran $22,000 in city advertising last year, while *La Prensa* got $29,000.

Muñoz notes that just last Friday the Latin Business Association of S.D. gave him a civic leadership award.

S.D. Union
5/8/97