

THE COMBINED FEDERAL CAMPAIGN

by
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The Combined Federal Campaign (the "CFC") is the U.S. Government's charitable-giving-in-the-workplace program. It grew out of intensifying study of the area from 1948 through 1956.² The rules adopted in 1956 were ratified by an executive order issued by President Eisenhower in 1957.³ The program, not then known as the CFC, was run twice each year. In 1961, supervision of the program was transferred from the White House to the Civil Service Commission by President Kennedy.⁴ In 1964, the campaign became a once-a-year program, and the name, "Combined Federal Campaign," was first used. The program is still governed by Executive Orders,⁵ implementing regulations,⁶ and a handbook -- the Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Agencies.⁷ Controversy about the CFC grew significantly in the early 1980's, as the result of litigation,⁸ various Congressional hearings, the appointment of Donald J. Devine as head of OPM, and the promulgation by President Reagan of two executive orders affecting the CFC.⁹

The controversy has produced eight fairly-recent major court decisions (including one by the Supreme Court of the United States), at least four sets of Congressional hearings, several law review articles, and a fair volume of other writings. Ferment continues in Congress and in the courts. Activities in both forums will be considered, separately, below.

The Congressional Hearings

The first of the relevant hearings was held on four days in October 1979, before the House Subcommittee on the Civil Service, chaired by Patricia Schroeder, Congresswoman from Colorado.¹⁰ Four years later, several hearings were held. The House Subcommittee on Civil Service held hearings on March 9 and 10, 1983. The House Subcommittee on Manpower and Housing held a hearing on March 24, 1983, under the chairmanship of Barney Frank, Congressman from Massachusetts.¹¹ It held further hearings on June 23 and July 19 of the same year. Under date of October 28, 1983, the House Subcommittee on Civil Service issued a staff report, prepared by Andrea Nelson, examining OPM actions from 1981 through 1983 to exclude Planned Parenthood Federation of America from CFC participation. On May 15, 1984, the House Subcommittee on Manpower and Housing had hearings on the CFC.

The Litigations¹²

The earliest of the cases is National Black United Fund v. Campbell, 494 F. Supp. 748 (D.D.C. 1980). NBUF, a national black voluntary welfare organization, brought a proceeding challenging the Civil Service Commission's rejection of its application to participate in the CFC. There were two ways NBUF could have been included: by establishing it was a "national voluntary agency" or by becoming a member of United Way.¹³ NBUF did not wish to become a United Way affiliate. The Commission then required any group

requesting treatment as a "national voluntary agency" to maintain chapters in all or nearly all states. NBUF was not able to meet this test.¹⁴ The District Court granted summary judgment for NBUF, holding that the rule was arbitrary, discriminatory, and in violation of NBUF's First Amendment rights.

On appeal, however,¹⁵ the D.C. Circuit Court reversed. It did not dismiss NBUF's claims.¹⁶ It merely found that summary judgment was not an appropriate remedy, and remanded for further fact-finding proceedings,¹⁷ stating:

"While we are not insensitive to the importance of associational freedom, NBUF provided little evidence, and no specific prediction, of how its activities would be affected by affiliation with the local United Ways." National Black United Fund v. Devine, 667 F.2d 173, 180 (D.C. Cir. 1981).

The third decision was NAACP Legal Defense & Educ. Fund v. Campbell, 504 F. Supp. 1365 (D.D.C. 1981).¹⁸ The plaintiffs were non-profit, tax-exempt, civil rights advocacy groups whose activities principally consisted of litigating for the rights of minority groups and others. They claimed that their exclusion from the CFC violated their First and Fifth Amendment rights. The exclusion was based on a portion of the Manual limiting participation to organizations "providing direct services to persons in the fields of health and welfare services" ¹⁹ The CFC did allow public defender and legal aid groups to participate, but had denied participation to the plaintiffs because of their selection of clients not solely on the basis of need but rather on the basis of how the client's case might influence public policy. The Court held the "direct services" language in the Manual to be too vague to be valid under First Amendment (freedom-of-speech) precedents. It ordered the Government to permit plaintiffs to participate in the next ensuing CFC.²⁰ The government did not appeal. Pursuant to this ruling, the plaintiffs participated in the 1981, 1982, and 1983 campaigns.

In NAACP Legal Defense & Educ. Fund v. Devine, 560 F. Supp. 667 (D.D.C. 1983), two of the same plaintiffs, claiming under the due process and equal protection clauses of the Fifth Amendment, as well as under the First Amendment, attacked the CFC method for distributing so-called "undesignated funds." The plaintiffs had been allowed to participate in the CFC, and had received funds to the extent that workplace donors had designed them as recipients. Some donors, however, gave to the CFC without designating any specific recipient. Those "undesignated funds" were allocated among various donees first under a complex formula, and then -- to the extent of any residual unallocated undesignated funds -- by local CFC coordinating groups.²¹ On March 31, 1983, the court

rejected all of the plaintiffs' claims. It found the First Amendment claims lacking in merit because, unlike the earlier NAACP Legal Defense & Educ. Fund v. Campbell case,²² the plaintiffs had been allowed to solicit designated funds, and thus had been permitted to circulate material describing their goals and operations. The plaintiffs did not appeal.

The fifth case, and the one which eventually reached the Supreme Court, was NAACP Legal Defense & Educ. Fund v. Devine, 567 F. Supp. 401 (D.D.C. 1983), decided on July 15, 1983. The plaintiffs challenged the newest Executive Order (E.O. 12,404)²³ on First and Fifth Amendment grounds, claiming it would operate to exclude them from the CFC. E.O. 12,404 was designed to reinstate the "direct services" requirement which had been found invalid in NAACP Legal Defense & Educ. Fund v. Campbell.²⁴ The court appraised these claims in light of recently-decided Supreme Court First Amendment doctrine. A brief detour is thus required.

In Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983), the Supreme Court, in a 5-4 decision, had refined its method of analysis of free speech claims.²⁵ Prior to that decision, the Court had recognized only two types of forums, public and private. The former -- including public streets and parks -- were open to broad First Amendment rights. Access could not be restricted except as "necessary to serve a compelling state interest" and then only if the restriction "is narrowly drawn to achieve that end."²⁶ Free speech in private forums, however, could be restricted as long as the restriction was reasonable and content neutral.²⁷ In Perry, a third type of forum -- the limited public forum -- was recognized. It was described as "public property which the State has opened for use by the public as a place for expressive activity."²⁸ Examples include university meeting facilities, school board meetings, and municipal theatres.²⁹ Access to a limited public forum is governed by the same standards as those which apply to public forums, but the state may convert such forums into private forums by prospectively treating them as no longer open for public "expressive activity."³⁰

Returning from the Perry detour -- the District Court in NAACP Legal Defense & Educ. Fund v. Devine found that the CFC was not a private forum, and distinguished it from the internal school mail system in Perry. Instead, it found that "the CFC is a limited public forum," access to which, under the First Amendment, could not be restricted except by showing "a compelling state interest" and that any restriction "is narrowly drawn to achieve that end."³¹ The court concluded that E.O. 12,404, by denying all advocacy groups access to the CFC, violated the First Amendment,³² and enjoined the OPM from preventing plaintiffs from participating in the CFC.³³

On appeal, the D.C. Circuit Court of Appeals, in NAACP Legal Defense & Educ. Fund v. Devine, 727 F.2d 1247 (D.C. Cir. 1984), affirmed, in a 2-1 decision. The author of the majority opinion did not find that the CFC was a limited public forum, holding instead that "it is unnecessary to decide this question."³⁴ Even in private forums, the Court said, First Amendment restrictions must be reasonable in light of the purpose which the forum serves. It held that the OPM restrictions did not meet that test, and thus were invalid. Of paramount significance was the fact that the OPM had permitted many other organizations, similar to plaintiffs, to participate in the campaign³⁵ -- a fact which raised:

"the serious possibility that a speaker . . . has been excluded from a forum, not in furtherance of a legitimate interest of the Government, but instead simply because the speaker has been viewed unfavorably by the Government."³⁶

The Supreme Court granted certiorari, and reversed. Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). It held, 4-3,³⁷ that the CFC is a nonpublic forum, rather than a limited public forum.³⁸ Unlike the D.C. Circuit Court, the Supreme Court found the restrictions in question to be reasonable.³⁹ It specifically found that "avoidance of controversy," while not a ground for restricting access to a public forum, is a relevant reason for regulating access to a nonpublic forum.⁴⁰ It remanded, however, for further proceedings to determine whether the OPM rules were in reality not content neutral.⁴¹

On remand, the most recent of the decisions was issued by the District Court for the District of Columbia. In NAACP Legal Defense & Educ. Fund v. Horner, 636 F. Supp. 762 (D.D.C. 1986), Judge Green issued a preliminary injunction preventing the OPM from excluding the plaintiffs from the CFC, pending discovery proceedings concerning OPM's underlying motives for adopting the contested eligibility criteria.

The Government appealed, and the appeal was granted expedited treatment. Prior to the date of argument, however, Congress acted, passing the so-called "Hoyer Amendment,"⁴² which required OPM to use the 1984 version of the regulations for the 1986 CFC.⁴³ A second "Hoyer Amendment"⁴⁴ extended the use of the 1984 regulations through 1987.⁴⁵ The D.C. Circuit Court of Appeals accordingly found the case moot for the "Hoyer Amendment" years, but remanded for further proceedings as to later years.⁴⁶

Current Status

Activity continues on both legislative and litigation fronts. In the main litigation, discovery is continuing, and a motion to compel production of various papers, as to which the Government claims executive privilege, is pending. However, the litigation is not being actively pressed at the date of this writing.⁴⁷ There is some hope that OPM will promulgate regulations, for post-'87 years, which will be acceptable to the parties. Discussions are going forward in hopes of reaching such an agreement.

The staff of the relevant legislative subcommittee⁴⁸ has the CFC under continuing study. Hearings may be needed, but none had been scheduled at the date of this writing.

FOOTNOTES

1. Copyright © 1987 Harvey P. Dale. All Rights Reserved. It is not possible, in the allotted space, to do justice to the many issues involved. A brief (and thus over-simplified) description of some of the main developments will be provided, together with citations to other sources where further details may be found by persons interested in pursuing the issues. This account, then, is not intended to be analytical, but merely descriptive. For another recent survey of the issues, see Green, No End in Sight, FOUNDATION NEWS, May/June 1986, at 23.

2. The historical facts in this paragraph are taken from Executive Orders 12353 and 12404 as they Regulate the Combined Federal Campaign (Part I): Hearing Before the Subcommittee on Manpower and Housing of the House Committee on Government Operations, 98th Cong., 1st Sess. (1983) (hereinafter 3/24/83 Hearing), and particularly from the statement of Rep. Patricia Schroeder, id. at 8-13.

3. E.O. 10,728 (Sept. 6, 1957).

4. E.O. 10,927 (March 18, 1961). The Civil Service Commission was succeeded by the Office of Personnel Management ("OPM") in 1978.

5. The most significant relevant orders, in chronological order, are cited in notes 3 and 4, supra, and note 9, infra.

6. The most recent regulations, as of this writing (January 20, 1987), were promulgated on April 4, 1986, and published at 51 Fed. Reg. 11668. They are codified at 5 C.F.R. Part 950.

7. Hereinafter the Manual.

8. The major litigations, brought by various advocacy groups and challenging restrictions on access to the CFC by potential donee organizations, are discussed below. Other court actions, however, involved charges of duress by supervisors in forcing subordinates to participate in and give to the CFC. A consent decree in Riddles v. Dep't of the Army, Civ. 78-1037 (D.D.C. March 19, 1979), settled a lawsuit by a member of the U.S. Army Band alleging such duress. The decree is reproduced in Combined Federal Campaign: Hearings Before the Subcommittee on the Civil Service of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess. 736-38 (1979) (hereinafter 10/11-19/79 Hearings). See also testimony of David O. Cooke, Deputy Assistant Secretary of Defense for Administration, id. at 236-43, and the statement and testimony of Benjamin T. Riddles, the plaintiff, id. at 244-52. Other relevant

decisions, not discussed below, challenge restrictions on eligibility to participate in state or city workplace charitable drives. See, e.g., Black United Fund of New Jersey v. Kean, 593 F. Supp. 1567 (D.N.J. 1984) (restrictions on access to state fund held unconstitutional), and United Black Community Fund v. City of St. Louis, 613 F. Supp. 739 (E.D. Mo. 1985) (restrictions on access to city fund held constitutional).

9. E.O. 12,353 (Mar. 23, 1982), published in 47 Fed. Reg. 12785-86 (Mar. 25, 1982), and E.O. 12,404 (Feb. 10, 1983), published in 48 Fed. Reg. 6685-86 (Feb. 15, 1983).

10. The 10/11-19/79 Hearings, cited at note 8, supra.

11. The 3/24/83 Hearing, cited at note 2, supra.

12. Further analysis is provided in some of articles cited in the notes that follow. The selected decisions all involve the CFC and all were handed down in the 1980's.

13. Section 5.4 of the Manual then provided that groups which were "members in good standing of, or . . . recognized by, the United Way of America" were exempt from the normal requirements for participation. Quoted in the appellate decision, 667 F.2d at 176.

14. NBUF also failed to meet certain administrative-cost-ratio standards. In his letter rejecting NBUF's application to participate in the campaign, "the Chairman of the Commission suggested that NBUF make arrangements to participate through local United Ways." 667 F.2d at 177.

15. The government did not appeal. United Way, as intervenor in the lower-court case, did.

16. Indeed, relying on Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), it explicitly found that "charitable solicitation undoubtedly furthers interests protected by the First Amendment," and that "the written message in the CFC pamphlets . . . advances protected speech and associational interests." 667 F.2d at 178.

17. It appears that the parties did not proceed with the litigation after the Circuit Court's remand. NBUF was allowed to participate in the campaign after the 1980 decision, and has referred to the proceedings as "our Federal court victory," notwithstanding the appellate reversal and remand. Statement of Garland Jagers, President, NBUF, 3/24/83 Hearing at 184.

18. It was actually decided prior to the appellate decision in National Black United Fund v. Devine, 667 F.2d 173 (D.C. Cir. 1981), reversing National Black United Fund v. Campbell, 494 F. Supp. 748 (D.D.C. 1980), discussed immediately above, and was in fact referred to in the D.C. Circuit's opinion.
19. Section 5.21 of the Manual, quoted at 504 F. Supp. 1366.
20. The court did not consider the plaintiffs' alternative Fifth Amendment claims. 504 F. Supp. at 1368, note 4. It also refused to award damages for the wrongful exclusion of the plaintiffs from the preceding (1980) campaign. 504 F. Supp. at 1369.
21. The formula then was, and continues to be, hotly contested. See 560 F. Supp. at 670-74.
22. 504 F. Supp. 1365 (D.D.C. 1981), discussed supra.
23. Cited at note 9, supra.
24. 504 F. Supp. 1365 (D.D.C. 1981), discussed supra.
25. Perry involved the claims of a rival union, seeking to organize teachers, which was denied access to teachers' school mailboxes and to the interschool mail system pursuant to a collective bargaining agreement giving the existing union exclusive access to them.
26. 460 U.S. at 45.
27. Content neutrality is shorthand for the notion that the regulation is "not an effort to suppress expression merely because the public officials oppose the speaker's view." 460 U.S. at 46. As the dissent described it, "the concept of content neutrality prohibits the government from choosing the subjects that are appropriate for public discussion." 460 U.S. at 59.
28. 460 U.S. at 45.
29. Id.
30. In Perry, the school mail facilities were held to be private forums, rather than public or limited public forums. The Supreme Court upheld the collective bargaining agreement, and denied the rival union access to those facilities. Justices Brennan, Marshall, Powell, and Stevens dissented.
31. 567 F. Supp. at 407.

32. It said that the First Amendment's requirement of content neutrality "extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." 567 F. Supp. at 407, quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980).

33. The plaintiffs were allowed to seek "designated contributions," but their claim to a portion of "undesignated contributions" was dismissed. 567 F. Supp. at 410.

34. 727 F.2d at 1257. The concurring judge would have found that the CFC was a limited public forum. 727 F.2d at 1268.

35. Thus, legal aid societies and public defender organizations were allowed to participate.

36. 727 F.2d at 1259.

37. Justices Marshall and Powell did not participate. Justices Blackmun, Brennan, and Stevens dissented. (The dissenters in Perry had been Justices Brennan, Marshall, Powell, and Stevens. See note 30, supra.)

38. 105 S. Ct. at 3451.

39. The Court said:

"The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation. . . . Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling." 105 S. Ct. at 3453.

40. "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." 105 S. Ct. at 3454.

41. It said that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination." 105 S. Ct. at 3454. For analyses of the Supreme Court's opinion see Comment, The Supreme Court, 1984 Term: Leading Cases, 99 HARV. L. REV. 120, at 202-12 (1985); Comment, Constitutional Law: The End of the Limited Public Forum?, 25 WASHBURN L.J. 375 (1986); and Note, Forum Over Substance: Cornelius v. NAACP Legal Defense & Education Fund, 35 CATHOLIC U.L. REV. 307 (1985).

42. Proposed by Representative Steny Hoyer, D-Md., and passed as section 204 of the Urgent Supplemental Appropriations Act of 1986, Pub. L. No. 99-349, 100 Stat. 748-49 (July 2, 1986).

43. Actually, new regulations may be promulgated if they are not more restrictive than the '84 regulations. The text of section 204 reads:

"None of the funds appropriated by this Act or any other Act shall be used for preparing, promulgating or implementing new regulations dealing with organization participation in the 1986 Combined Federal Campaign other than repromulgating and implementing the 1984 and 1985 Combined Federal Campaign regulations, unless such regulations provide that any charitable organization which participated in any prior campaign shall be allowed to participate in the 1986 campaign."

44. Section 619 of Pub. L. No. 99-591, 100 Stat. ___ (Oct. 30, 1986).

45. The text of section 619 is identical to the text of section 204 of the Urgent Supplemental Appropriations Act of 1986, quoted in note 43, supra, with two changes. First, the 1987 year of the CFC is also included in the prohibition. Second, additional language is added, reading as follows:

"Provided further, That none of the funds appropriated by this Act or any other Act shall be used for preparing, promulgating or implementing new regulations dealing with the Combined Federal Campaign ("CFC") which require or allow the Office of Personnel Management to directly or indirectly determine [sic] the eligibility of any agency to participate in the CFC (other than the local service of those agencies which perform a substantial preponderance of their services in the United States) if that agency is a member of a qualified federated group."

46. At first, the Circuit Court remanded with instructions to dismiss on grounds of mootness. On motion for reconsideration, however, the Court eliminated the dismissal order, recognizing that the legislation did not moot the issue for post-'87 years.

47. I.e., January 20, 1987.

48. The Subcommittee on Employment and Housing, Committee on Government Operations, House of Representatives. This was previously called the Subcommittee on Manpower and Housing. The name was changed in 1985.