

another building occupied: Should the police be called? Should classes be held under this or that circumstance?—which made the theater of the absurd appear like an exercise in normalcy.

There is no general rule for coping with crises other than (a) an intensification of the methods of good leadership that help in more ordinary situations, like keeping in touch, and (b) viewing yourself as a resource person who will better serve the

departmental interest if you are rested, cheerful, and retain the energy to correct the errors you are bound to make.

### Notes

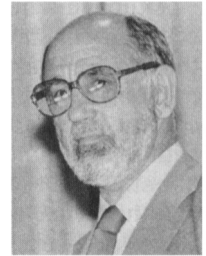
1. Martin Trow, "Leadership and Organization; The Case of Biology at Berkeley," Chapter 7 in Rune Premfors, ed., *Higher Education Organizations: Conditions for Policy Implementation* (Stockholm: Almqvist and Wiksell, 1984).
2. See Aaron Wildavsky, "Appendix" to

*Speaking Truth to Power* (Little, Brown, 1979).

### About the Author

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## On the Potential Impact of *Rust v. Sullivan* as a Model for Content-Based Restrictions on Federal Arts and Humanities Funding

John Hammer, *National Humanities Alliance*

On May 23, the Supreme Court in a 5-4 decision upheld regulations prohibiting Public Health Service Act, Title X family planning funds from counselling patients regarding abortion. The bare majority of the Court held constitutional regulations which conditioned a clinic's receipt of federal planning funds upon its doctors' silence about an abortion option, essentially no matter what the medical circumstances. Broadly, the court found that the contested regulations violated neither freedom of speech nor the woman's right to choose abortion.

The ruling upheld regulations promulgated in 1988 for the 4,000 family planning clinics which serve an estimated 5 million low-income women nationwide. Between the 1970 enactment of legislation establishing the program and 1988, the clinics were not allowed to perform abortions using federal funds but the regular provision of abortion counselling was sanctioned. The 1988 regulations which the court has now upheld, forbid the provision of information about abortion. Although there is some ambiguity as to congressional intent, the record seems to indicate that Congress declined to include in the statute the restrictions later promulgated by the Secretary of Health and Human Resources that are at issue in this case.

In the majority opinion of Chief Justice William H. Rehnquist that

"The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. . . . 'There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.' . . . This is not a case of the Government 'suppressing a dangerous idea' but of a prohibition on a project grantee or its employees from engaging in activities outside of its scope. . . . To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect . . . when the government appropriates public funds to establish a program it is entitled to define the limits of that program."

Mr. Rehnquist continues, however, "This is not to suggest that funding by the Government, even when coupled with the freedom of the

fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression. For example, this Court has recognized that the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' . . . or have been 'expressly dedicated to speech activity.' Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."

Not surprisingly, the decision was greeted with dismay by the large group of "pro choice" individuals and organizations and the overlapping and even larger group concerned with freedom of expression and the First Amendment. Within days of the decision, a major effort was launched to roll back the impact on the Title X family planning clinics, many of which indicated that it would not be possible to continue using federal funds under the court-approved regulations. If the Emergency Campaign to Overturn the Gag

Rule prevails, however, there remains a concern that the framework formulated for *Rust v. Sullivan* would still provide a vehicle for similar rulings in other cases.

Although a number of leading constitutional lawyers indicated that the decision was narrowly drawn and probably not applicable to other content-based activities supported with federal funds, some key officials in both the Department of Justice and the Office of Management and Budget are believed to view the ruling as an opportunity to assert government prerogative for content-based restrictions in many or all cases when the government is funding activities of organizations and individuals outside of the government.

Constitutional lawyer James F. Fitzpatrick and his colleagues L. Hope O'Keefe, and Steven M. Marks of the Washington firm of Arnold & Porter produced "Constitutionality of Content-Based Restrictions on Federal Funding of the Arts After *Rust v. Sullivan*" which was released as an extended memorandum on June 8. Quoting from Mr. Rehnquist, "This is not to suggest that funding by the Government . . . is invariably sufficient to justify government control over the content of expression," Mr. Fitzpatrick and his colleagues state: "Nothing in *Rust* justifies government control over the

content of federally funded arts and humanities. *Rust* leaves intact the fundamental constitutional principle that the Government may not condition a subsidy on the waiver of the First Amendment right to freedom of expression and may not use the carrot of government benefits as a stick to suppress 'dangerous ideas' " and go on to offer the following four arguments for their position:

"*First*, the Supreme Court considered that *Rust* was essentially an abortion case. The Court concluded that restrictions on funding of abortion counselling were simply a logical outgrowth of restrictions on abortion funding which have long been held constitutional. In contrast, arts content restrictions are not mere ancillary to a government refusal to fund a non-speech activity. Rather, they are a direct restriction of constitutionally protected speech. Court after court has held that speech in the areas sought to be regulated—non-obscene 'indecent' speech, 'blasphemy,' and 'denigration'—is constitutionally protected.

"*Second*, and most critically, *Rust* reaffirmed the long line of Supreme Court precedents that forbid the Government to condition subsidies on adherence to unconstitutionally vague and overbroad content restrictions.

"*Third*, the counselling restrictions in *Rust* were an integrated and con-

sidered part of a congressionally designed program. Far from being consistent with the federal arts funding program, content restrictions on art are antithetical to Congress' established mandate to the NEA to further creative artistic activity.

"*Finally*, arts funding content restrictions, unlike Title X regulations, impose speech restrictions upon individual and institutional recipients, not solely upon a 'project' and accordingly are *not* 'coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project.'

"*Thus*, the Court's validation of restrictions on abortion in *Rust* simply cannot be exported wholesale to rationalize and justify the imposition of content restrictions on arts funding."

*Editor's Note: APSA is a member of the National Humanities Alliance and Executive Director Catherine Rudder sits on its board. Relying on the Arnold & Porter memorandum quoted in part in the last six paragraphs of this report, the NHA has decided to take no action and to make no public statements on Rust v. Sullivan. If you have thoughts on this matter that you would like to have communicated to NHA, please contact Catherine Rudder, APSA, 1527 New Hampshire Ave., NW, Washington, DC 20036, or Fax (202) 483-2657.*

## Women Make Better Grades Than Men

Although their educational aspirations tended to be lower than those of men, women in the 1972 high school graduating class pursued post-secondary education at the same rate as and finished college faster than their male counterparts, a study from the Education Department shows.

Women also received more post-secondary scholarships, earned higher grade point averages regardless of their field of study, and achieved higher grades in both statistics and calculus courses, the report says.

The report, *Women at Thirtysomething: Paradoxes of Attainment*, traces the educational and career paths of women who graduated from high school in 1972 through their 32nd year. The study found that, despite the women's superior educational performance, they were more often unemployed between the ages of 25 and 32, and achieved income levels equal to men in only seven of 33 occupations.

Nevertheless, the study says, the women more frequently worked in

fields that were relevant to their courses of study and tended to take a more positive attitude toward job conditions and learning new skills.

The report is available for \$4.25 from the Government Printing Office, North Capitol and H Sts., N.W., Washington, DC 20401; (202) 783-3238. The stock number is 065-000-00-451-8.

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