Why I'm Suing the Federal Government

We need the court to decide whether the government can continue to curb private philanthropy that does not agree with its views.

BY MADELINE LEE

For nearly 25 years in philanthropy, I have gone along believing that if we are careful about observing the regulations of the IRS, conscientious about investigating grantees, and scrupulous about avoiding prohibited activities, we are a private foundation that can grant our money as we deem best.

Recently, we decided we had to go to court to keep it that way.

We weren't looking for a fight. We've been peaceably making grants longer than all but seven foundations in the United States. (The New York Foundation was established in 1909.) Our grants support work that

- Involves New York City or a particular neighborhood of the city
- Emphasizes advocacy and community organizing
- Addresses a critical need of a disadvantaged population, particularly youth or the elderly, under the terms of a restricted endowment
- Is strongly identified with a particular community.

Although our grants cover a great diversity of issues crucial to New York City's neighborhoods, there is a particular kind of grant which can be said to be our hallmark: start-up grants to new, untested programs, frequently involving a high element of risk. Funding from us is often their first major grant, enabling them to hire their first full-time staff.

Throughout the foundation's history, we have been strong supporters of civil legal aid programs. As their budgets and influence grew, they weren't always good candidates for the size of the grants we make, but starting in the late 90s, their importance in our grants portfolio increased. As we made grants related to changes in welfare policy in New York City, we began to recognize that organizing and advocacy weren't going to be enough to protect the rights of New York's most disenfranchised people. We made a cluster of project grants to legal organizations that offered representation, class action suits, and challenges to welfare policies. So important have these grants become that, starting in June 2002, we're mentioning support for this work in our funding guidelines.

One of the grants that prompted this change was made to the Brennan Center for Justice. Housed at New York University's School of Law, the Brennan Center was founded by former clerks of the late Supreme Court Justice William J. Brennan, Jr., as a memorial to his lifelong concern with the least powerful. The Brennan Center combines scholarship, public education, and legal action that promote equality and human dignity, while safeguarding fundamental freedoms. (You can learn more at www.brennancenter.org.)

In 2001, the city administration was refusing to allow welfare advocates to enter welfare centers. We made a grant to the Brennan Center for a civil lawsuit attempting to gain access to the city's welfare offices for advocates.

That spring, the staff of the Brennan Center sought us out to talk about a case that appeared at first to be a complex development in this question of the rights of welfare clients. Little did we realize it was really going to turn out to be about our own rights as a foundation.

The Wake-Up Call

Since 1996, the federal Legal Services Corporation (LSC), which funds legal services for the poor, has placed severe restrictions how its funds can be used. Briefly, if a law office serving the poor accepts any LSC funds, it cannot initiate advocacy on any issue, it cannot advertise its services, it cannot bring class action suits, it cannot represent many categories of immigrants, it cannot represent incarcerated people (regardless of whether they have been convicted), and it cannot recover attorney's fee awards.

We were presented with a stark example of the effects of these restrictions when we made a grant to South Brooklyn Legal Services. In many low-income neighborhoods in the city, women take in children while their mothers work. This is known as "family daycare," and it provides a critical service in a city where there are tens of thousands more children than there are daycare slots. They are even more important now that welfare recipients are expected to work to qualify for their benefits—even when they have children younger than school age. Under the city's work requirements, a woman receiving welfare can be faced with losing her welfare check if she cannot find childcare that allows her to report for work.

Family daycare providers can join networks with other providers, allowing them to qualify for savings on food, training, and help in filing many of the required licensing forms. It was to support these networks that we made a grant to South Brooklyn.

During the first year of our grant, the talented staff member hired with our grant funds discovered a startling problem: the city's Human Resources Administration was routinely underpay-

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ing the providers by calculating their payments on a monthly basis rather than a daily basis. With the help of the project, one woman recovered a staggering $12,000 in underpayments from the city.

But South Brooklyn receives Legal Services funding. This meant that they could not file a class action suit on behalf of all women thus underpaid. And although the city agreed to change its reimbursement calculations going forward, it did not make any effort to identify women underpaid by the previous method. Each claim would have to be separately filed.

Making matters worse, Legal Services restrictions prohibit South Brooklyn from claiming attorneys fee awards, so the individual claims that a lawyer might bring on behalf of other women could result, at most, in recovery of the money owed, and would never generate fee awards of the sort that might encourage the government to make whole the other women denied full payment.

This was a wake-up call for the New York Foundation. Clearly there was systemic injustice here. Why couldn't our grant address it expeditiously? The answer is because the government applies its restrictions even to private funds.

Congress has mandated that as long as any Legal Services Corporation funds support a civil legal aid program, that program must not engage in the prohibited activities even using private money. Apparently aware that this might be a highly questionable interference with free speech, the Legal Services Corporation did set up conditions under which private funds could theoretically be used. The legal services organization must set up a separate program, with separate physical facilities, separate executive directors, separate staff, and a separate budget (only the boards of directors may overlap).

In practice, this wasteful and duplicative alternative is impossible. Of the approximately 200 legal services programs nationwide, only a handful have even attempted to set up such facilities, and those few that have done so have struggled.

After long and careful thought, the board of the New York Foundation agreed to become a plaintiff in *Dobbins v. Legal Services Corporation*, alongside several individual donors to legal aid programs, several actual legal aid programs, and David Dobbins, an attorney in private practice who wishes to volunteer his services *pro bono* to a legal aid program in bringing a class action, but is prevented from doing so because the program's receipt of Legal Services Corporation funds means it is barred from collaborating with him. (See also Legal Brief, "The *Dobbins* Case," page 46 of this issue.)

The lawsuit challenges the restrictions on the ground that they interfere with our right—and the same right of the larger philanthropic community—to allocate our money as we see fit. This is not just about legal services or even about everyone's access to the courts. This is also about curbing private philanthropy that does not agree with the views of the government.

There's more. Beyond the world of nonprofit advocacy, the *Dobbins* case seeks to protect the broad array of public-private partnerships that are important in our society, including those in the academy, in the arts and in the sciences.

When government helps finance free expression—here it happens to be legal representation for the poor, but as easily it could be art exhibits or university courses—government often claims control over the content of what it finances. Whether government can do this even with its own funding is an important question, but whether government can rely on governmental funding as a lever through which to control how the philanthropic community chooses to spend its own money in these public-private partnerships is the core question the court will decide.

It's a question that, I believe, the philanthropic community will want to be heard on.

Calling All Friends

We want to alert the philanthropic community to this issue, and to urge it to educate itself about the matter and to protest, in the most vigorous possible public way, the intrusion on our First Amendment freedoms embodied in the legal services restrictions.

We'd also like some friends. What can you do? Join the suit as a plaintiff, or with an *amicus* brief. Sponsor a panel or a briefing on the case for your regional association or affinity group. Support the suit with funding.

The Brennan Center is coordinating the information and responses to the case: inquiries should be directed to David Udell, Director of the Poverty Program at the Brennan Center, New York University School of Law, 161 Avenue of the Americas, 12th floor, New York, New York 10013. david.udell@nyu.edu. FN&C

Madeline Lee is executive director of the New York Foundation.