LEADERSHIP COUNCIL
of
AGING ORGANIZATIONS

Barbara B. Kennelly, Chair

LCAO Principles on Citizen Enforcement of Federal Constitutional and Statutory Rights

Introduction

Over the last 2/3 of the 20th century, Congress enacted a network of laws aimed at ensuring older Americans health and economic security as well as equal opportunity in employment and other dimensions of social life. These include the Americans with Disabilities Act, the Age Discrimination in Employment Act, Medicaid, Medicare, the Rehabilitation Act of 1974, the Nursing Home Reform Act, the Family and Medical Leave Act, the Violence Against Women Act, the Older Americans Act, and Title VI of the Civil Rights Act of 1964. In the last decade, decisions by a bare 5-4 majority of the Supreme Court and by certain lower federal courts have struck down important provisions of and, in particular, they have restricted court enforcement of many of these measures. In addition, legislative initiatives are under consideration that could adversely affect the ability of private citizens and organizations to enforce their rights under these programs.

No group has more at stake in this narrowing of federal rights enforcement than the senior population. Older Americans are disproportionately affected by governmental programs, and they are disproportionately dependent upon meaningful administrative and judicial remedies to ensure effective, conscientious implementation of programs for their benefit. If continued, this trend could severely undermine benefit programs and civil rights protections on which senior citizens and many other Americans crucially depend.

Congress must retain constitutional authority to define the economic and social needs of all Americans, including older Americans.

American law, and the American electorate, have long embraced the principle that the people of the United States, through their elected representatives in Congress and the White House, have sovereign authority to define national needs and shape policies to meet those needs. During the New Deal era, the Supreme Court implemented this principle. The Court upheld major new initiatives such as Social Security, through broad interpretations of the "interstate commerce clause" in the Constitution – which authorizes Congress to "regulate commerce among the states – and the "spending clause" – which authorizes Congress to raise and spend money for "the general welfare." During the 1960s the Court invigorated a third source of Congressional power – the fourteenth amendment provision which empowers Congress to "enforce" with "appropriate legislation" the requirement in that amendment that states provide "equal protection of the laws" to all persons.

These doctrines have made the modern Constitution a platform to facilitate, not – as it was during the first third of the 20th century – a barrier to subvert democratically determined

solutions to social, economic, and civil rights problems. It must so remain. Specifically, the Constitution must continue to be construed to fully vest Congress with authority to: guarantee all Americans economic security, access to health care, and equal treatment, including freedom from discrimination based on age; and to guarantee freedom from fraud, deception, unfair trade and financial practices; and remedy these and other threats to the well-being of all citizens.

Congress must retain the flexibility to shape the optimal means of meeting national needs, without excessive second-guessing or micro-management by the courts.

Ever since the early 19th century it has been a basic ground rule of American government that, when Congress decides to tackle a problem it has the constitutional authority to address, it is up to Congress, not the courts, to determine the proper approaches and mechanics to solve it. As Chief Justice John Marshall explained in 1819: "Let the end be legitimate, let it be within the scope of the constitution, . . . all means which are appropriate, which are plainly adapted to that end, which are not prohibited . . . are constitutional." But in the last several years, courts have taken ever more aggressive steps to eliminate congressional flexibility on social, economic, and civil rights matters. In January 2000, a 5-4 Supreme Court majority held that state employees have no right to recover damages from state government employers for violations of the Age Discrimination in Employment Act of 1967 (ADEA) and Congress lacks the authority to give it to them. A year later, the same 5-4 majority struck down similar provisions of the Americans with Disabilities Act – a protection important to many older Americans.

These and similar decisions demean the legislative process. If the courts make a frequent practice of thus retroactively erecting evidentiary and procedural barriers that Congress had no reason to anticipate decades ago when the laws were passed, wholesale dismantling of long-standing programs could be in prospect.

Doctrines and attitudes treating seniors as second-class citizens have no place in the law or on the courts.

Regrettably, the courts' new hostility to some social legislation has sometimes perpetuated the same inaccurate stereotypes and prejudices that LCAO and its members have long worked with Congress to counter. The Supreme Court majority has relegated age discrimination to a kind of second-class status, on the asserted notion that, unlike victims of race and gender discrimination, "Older persons have not been subjected to a history of purposeful unequal treatment." Such misinformed and insensitive expressions underscore why unelected judges should not second-guess democratic measures to assist particular minorities, such as older Americans.

Citizen access to independent tribunals and courts is an essential means of securing individual rights and ensuring effective implementation of program requirements.

The long record of success of twentieth century federal social programs in delivering benefits and protections to seniors, and other Americans, could not have been achieved without robust mechanisms for adjudicating individual claims and enforcing federal law. Budgetary, policy, and political pressures inevitably influence administrative agencies' approaches to individual cases. Agency oversight must focus on only the most egregious

individual cases with the broadest policy implications. Opportunity for a due process hearing before a truly independent hearing officer, with the ultimate right of judicial review, is the only reliable way to ensure individual justice. Independent judicial review is a complementary, essential guarantor that statutory promises will be kept, especially with respect to politically vulnerable minorities and individuals.

Citizen-initiated court enforcement is especially crucial for state-administered federal programs.

Citizen access to the courts is especially significant for beneficiaries of "cooperative federalism" programs in which federal officials set standards and provide oversight, while state agency administrators execute federal requirements on the ground. For example, since Medicaid was established as a cooperative federalist program in 1965, state administrators have been obliged to respond to literally thousands of beneficiary lawsuits alleging violations of federal requirements. The compliance pressure generated by this litigation has been especially critical to the aging community. Nearly one third of all Medicaid spending currently goes to the elderly; Medicaid accounts for nearly half of all nursing home spending and over one third of all home health care spending. Federal standards guarantee quality of care for all recipients of such services, including those whose payments are not covered by Medicaid.
A recent concurring opinion by one member of the Supreme Court suggested that the sole remedy for a state's failure to comply with its obligations under Medicaid should be "termination of funding by the Secretary of the Department of Health & Human Services," and that an aggrieved citizen "may seek and obtain relief in the courts only when the denial of enforcement [by the secretary] is arbitrary, capricious, [or] an abuse of discretion . . . ." As a practical matter, for real-world beneficiaries, this approach would mean no remedy at all.

Such regressive views have not yet, and should not become the law. Without having to answer to beneficiaries in federal court, state administrative systems would inevitably stray far from Congressional purposes and federal standards. State governments have substantial political clout in Congress to secure accommodation with their legitimate interests, and do not need special protection from the federal judiciary. Most cooperative federalist programs, including Medicaid, involve federal funding; it is especially important that national taxpayer contributions are spent in accordance with Congressional intentions. Finally, it is patently unfair to expect aggrieved individuals to restart the political process of securing high-level administrative action in Washington, every time a dispute arises about application of national and state standards to a particular case.

If beneficiaries lose their ability to enforce federal rights in court, programs like Medicaid would be questionable to classify as entitlements in any practical sense. Similarly, it could be questionable to count the approximately 50 million persons enrolled in Medicaid in the ranks of Americans covered by health insurance.

Meaningful court access to enforce protections for older Americans requires reasonable arrangements for covering litigation costs.

To make federal rights lawsuits effective as a tactic, or credible as a threat, ways must be available to cover necessary litigation costs. On a number of fronts, overbroad restrictions

currently threaten to eliminate financing for citizen enforcement suits. For example, in 2001 the Supreme Court, in a case involving lax state enforcement of standards for assisted living residences, narrowly construed a federal statute awarding attorneys fees to prevailing parties in civil rights cases. Legislation is pending to cap damage recovery and otherwise restrict court access, particularly regarding malpractice and other suits against health providers. In 2002 the Supreme Court upheld – but only by a 5-4 margin – a common and important technique for financing indigent legal services, namely, the use of interest earned on pooled de minimus funds held in trust for clients by lawyers. Unless effectively countered with sensitively balanced measures, the continued build-up of pressure to eliminate these and other sources of financial support could devastate private enforcement mechanisms essential to guarantee the integrity of senior-oriented government programs.

Preserving federal rights enforcement authority and related Congressional prerogatives must be a priority for senior advocates and their representatives in Congress.

LCAO calls attention to the principles outlined here, to underscore the importance its members attach to countering the current erosion of federal rights enforcement, and alert concerned members of Congress to reinvigorate essential guarantees and their own institutional prerogatives.

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The Leadership Council of Aging Organizations is a coalition of over 50 national non-profit organizations concerned with the well-being of America's older population and committed to representing their interests in the policy-making arena.