RUST v. SULLIVAN (1991)

SUMMARY

By a 5-4 vote, the Supreme Court has ruled that regulations barring advice on abortion in federally-funded family planning clinics are valid. The ruling was issued on May 23, 1991 in the case of *Rust v. Sullivan.*

BACKGROUND

Congress enacted legislation providing partial funding for family planning clinics. Included in that legislation was a statement that "none of the finds appropriated under this chapter shall be used in programs where abortion is a method of family planning." There were some disputes about the meaning of this language and, in 1988, the Secretary of Health and Human Services issued regulations which were designed to give clearer meaning to the prohibition.

The regulations restrict activities at family planning clinics in three significant ways. First, they bar counseling about abortion or referral for abortion as a means of family planning, even when requested to do so by the client. Second, the clinics may not advocate abortion as a method of family planning in any way, such as contributing to abortion rights organizations or lobbying. Third, the family planning clinics supported under these funds must be physically separate from and financially independent of any facility that provides abortions.

Doctors and clinics involved in family planning brought suit seeking to overturn these regulations. The suits were based primarily on First Amendment questions (though statutory issues are involved as well). The suits proceeded in three different federal courts. Two of them found that the regulations were unconstitutional and a third found that they were constitutionally permissible.

Appeals were taken to the Supreme Court and this opinion, which was announced on the front pages of the nations major newspapers, followed.

ANALYSIS:

This case presents very complex issues and the complexity makes the divisions within the Court seem particularly great. The fundamental questions the case raises have nothing to do with abortion. Those questions are: (1) Do restrictions on abortions as family planning counseling constitute restrictions on free speech? And, if so, (2) Can the federal government limit the freedom of speech of those organizations that voluntarily accept funding from it?

These questions could obviously arise in a whole host of areas from high school to libraries to sewage treatment plants to subsidized housing to medical care, all of which receive some level of federal funding.

The majority and the dissenters focus on two entirely different parts of the problem. The majority sees this as a case involving reasonable regulations carrying out a choice Congress was entitled to make. It starts with the assumption that Congress is free to fund some forms of family planning and not fund others, a statement with which few would disagree. Congress chose to fund preconception family planning and not to fund abortion as a means of family planning. The majority refers to this decision as "a value judgement" and states that Congress may make value judgments in this area as in others. In doing so, Congress does not impose a viewpoint on others (which clearly would be forbidden by the First Amendment) but, instead, simply selects a viewpoint of its own to foster. Therefore, the majority argues, the regulations are acceptable if they carry out that lawful intent. Moreover, clinics must voluntarily seek funding from the federal government before the regulations apply to them. Those clinics that wish to provide abortion information can simply refuse federal funding.

The dissenters see this case in an entirely different fashion. In their view, the regulations adopt a viewpoint (abortions as family planning is wrong) and seek to impose it on those who disagree with it. They argue that, while the federal government is free to choose to spend its tax dollars on family planning or not, once it proceeds with funding it cannot bar expressions of opinion that people not receiving federal funding are clearly entitled to make. Imposing such opinion restrictions on those who accept funding necessarily, they say, imposes an "official" viewpoint in violation of the First Amendment.

This is a major decision, perhaps one of the most significant cases in some time. The immediate effects, however, may be relatively slight. Some family planning clinics will feel forced to seek alterative forms of funding or to close, though Congressional action invalidating the regulations is a significant possibility. Yet the real issues here are longer range and somewhat symbolic in nature.

Does the decision signal a change in the Court's position on abortion? Not necessarily. This opinion rests on statutory and First Amendment grounds and assumes that the right to abortion is constitutionally protected. On the other hand, it is fair, but speculative, to argue that the Court is sending a signal of hostility towards the right to abortion.

Does the decision signal a change in First Amendment protections? Possibly so. While the majority tests its decision on principles drawn from earlier cases, few would have predicted this outcome simply from reading those cases. The scope of the decision appears to have been a genuine surprise to some First Amendment scholars and its applicability in other areas is about to be tested over the years to come.

EXCERPTS FROM THE MAJORITY OPINION (By Chief Justice Rehnquist):

"The government may 'make a value judgment favoring childbirth over abortion and...implement that judgment by the allocation of public funds.' ...here the Government is exercising the authority it possesses ....to subsidize family planning services which will lead to conception and childbirth and declining to promote or encourage abortion. 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 alternate 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 another."

EXCERPTS FROM THE DISSENTING OPINION (By Justice Blackmun):

"Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content of viewpoint of the speech....It cannot seriously be disputed that the counseling and referral provisions at issue in the present cases constitute content-based regulation of speech. (Family planning clinics) may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion. (See our decision in *Consolidated Edison Co.*, 447 U.S., at 537 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also prohibition of public discussion of an entire topic.")).

The abortion counseling decision may apply on other areas. Assume that regulations like the following were put into effect (some of them are obviously not likely to be put into effect). How would you feel about the constitutionality (not the wisdom) of each? Can you come up with a theory that explains your answers?

1. Regulations barring church schools that accept federal funds from mentioning their religion's beliefs in a favorable way in the school and requiring that the school be physically and financially separated from the church.
2. Regulations forbidding a Legal Aid lawyer from giving advice as to affirmative action rights.
3. Regulations holding that a library that accepts federal funds may not carry on its shelves books or literature describing Saddam Hussein favorably.