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CIVIL ACCESS TO JUSTICE ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

ON

H.R. 3764

APRIL 27, 2010

Serial No. 111–87

Printed for the use of the Committee on the Judiciary

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CIVIL ACCESS TO JUSTICE ACT OF 2009

TUESDAY, APRIL 27, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:08 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Conyers, Watt, Johnson, Scott, Chu, Franks, and King.

Staff present: (Majority) Norberto Salinas, Counsel; Adam Russell, Professional Staff Member; and Justin Long, Minority Counsel.

Mr. COHEN. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing. I now recognize myself for a brief statement.

During the last session, October 2009, this Subcommittee held a hearing on Legal Services Corporation. Witnesses testified about Legal Services Corporation implementing recommendations made by the Government Accounting Office to improve corporate governance and internal controls within the Legal Services Corporation and the need for increased funding for Legal Services to help it fulfill its mission.

Witnesses also briefly discussed H.R. 3764, the "Civil Access to Justice Act," which will reauthorize the Legal Services Corporation.

This morning we meet to discuss and have more detailed conversations about H.R. 3764 in particular, legislation which a majority of the Subcommittee and myself are co-sponsors.

First, as we learned at the October 2009 hearing, during this economic downturn grantee programs have increased significantly in the requests that they have received for legal services. They have seen more families and individuals hard hit in this economy ask for legal assistance to obtain public benefits and to fend off home foreclosures.

Members of the Subcommittee are well aware of the impact that foreclosures have on our communities and the national economy. Unfortunately, many of legal services' programs have not been able to meet the growing urgency.

According to the 2009 report in support of the anecdotal evidence of our witnesses at the October hearing, not all eligible potential clients of LSC-funded programs are receiving the legal assistance they so desperately need.

In fact, the former president of LSC, Helaine Barnett, testified that for every three people requesting help, LSC only funded one, turning two out of three people away. Lack of sufficient funding is the reason.

The Civil Access to Justice Act of 2009 attempts to fill that void for these families and for others who need legal assistance. It would authorize LSC, which was last authorized—reauthorize it—over 30 years ago.

It would authorize a much needed increase in funding to $750 million, which would help LSC support more legal service attorneys, providing assistance to the growing poor in our country, a fact that we see every day as the—and the disparate amount of wealth between the rich and the poor grows and grows and grows with the awful end of the 110th Congress—President's economy.

The bill makes an additional change, one which may have a substantial impact. It would allow LSC-funded programs to utilize non-Federal funds more efficiently by removing some of the current restrictions limiting legal aid programs. This change by itself would infuse legal aid programs with millions of additional dollars.

For example, the Oregon Legal Center has calculated that eliminating the restriction on the use of non-Federal funds would result in $300,000 of savings, money currently spent on unnecessary administrative overhead for separate programs.

The Civil Access to Justice Act does more than just provide legal assistance to our neighbors in need. At the end of the October 2009 hearing we were assured that implementing these recommendations made by the GAO will prevent the misuse of taxpayer funds.

These recommendations attempt to strengthen Legal Services' governance practices, improve oversight within LSC and improve management practices. I applaud Legal Services Corporation in implementing the recommendations, and to guarantee that these recommendations are implemented—the Civil Access to Justice Act codifies them.

Perhaps we can do even more to protect taxpayer funds. In his written testimony for today's hearing, the inspector general suggests we make several changes. These changes prevent and detect waste, fraud, abuse, and improve effectiveness, efficiency and economy of Legal Services' programs.

I look forward to hearing the inspector general's testimony and that of the other witnesses to determine what changes they believe may be appropriate to the legislation. I thank the witnesses for appearing today and I look forward to their testimony.

I now recognize my colleague Mr. Franks, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

[The bill, H.R. 3764, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 3764

To amend the Legal Services Corporation Act to meet special needs of eligible clients, provide for technology grants, improve corporate practices of the Legal Services Corporation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 8, 2009

Mr. SCOTT of Virginia (for himself, Mr. CONYERS, Mr. COHEN, Mr. WATT, Mr. DELAHUNT, Ms. LINDA T. SÁNCHEZ of California, and Mr. JOHNSON of Georgia) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the Legal Services Corporation Act to meet special needs of eligible clients, provide for technology grants, improve corporate practices of the Legal Services Corporation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Access to Justice Act of 2009".

SEC. 2. FINDINGS.

Congress finds the following:

1 (1) It is crucial to provide equal access to the
2 system of justice in the United States for all individ-
3 uals, regardless of economic status.
4 (2) The Legal Services Corporation provides
5 high quality civil legal assistance for persons who
6 would otherwise be unable to afford legal assistance,
7 and there is a need to continue the present vital
8 legal services program.
9 (3) The amount of Federal resources made
10 available to the Legal Services Corporation has been
11 inadequate to provide individuals with the legal as-
12 sistance that they need. Over half of all people who
13 have applied for assistance from local programs
14 funded through the Legal Services Corporation have
15 been turned away in recent years. In many States,
16 over 80 percent of individuals who need legal assist-
17 ance do not receive the help they need.
18 (4) Congress must adequately fund Legal Serv-
19 ices Corporation programs to preserve the strength
20 of the programs.
21 (5) Providing legal assistance to those who face
22 an economic barrier to adequate legal counsel serves
23 justice and assists in improving opportunities for
24 low-income persons.

(6) The availability of legal services has reaffirmed the faith of many people of the United States in a government of laws.

(7) To preserve its strength, the legal services program must be kept free from the influence of political pressures.

(8) Attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the applicable rules of professional responsibility and the high standards of the legal profession.

SEC. 3. AMENDMENTS TO STATEMENT OF FINDINGS AND DECLARATION OF PURPOSE.

Section 1001 of the Legal Services Corporation Act (42 U.S.C. 2996) is amended—

(1) by striking "1001." and inserting "1001.(a)";

(2) in paragraph (3), by striking "Act" and inserting "title";

(3) in paragraph (6), by striking "Code of Professional Responsibility, the Canons of Ethics," and inserting "applicable rules of professional responsibility"; and

(4) by inserting at the end the following:

"(b) Congress finds the following:

"(1) Participation of private lawyers in providing legal assistance to those unable to afford such assistance significantly enhances the overall system for providing legal services to the poor, and the Legal Services Corporation should continue to promote and support pro bono services and other forms of private bar involvement through its policies and regulations.".

"(2) The highest court of each State should encourage pro bono service by lawyers by adopting aspirational guidelines, such as the American Bar Association Model Rule of Professional Conduct 6.1, 'Voluntary Pro Bono Publico Services', and by adopting mandatory reporting of voluntary pro bono service.".

SEC. 4. DEFINITIONS.

Section 1002 of the Legal Services Corporation Act (42 U.S.C. 2996a) is amended—

(1) by striking paragraph (7) and inserting the following:

"(7) 'staff attorney' means an attorney who—

"(A) is employed by a recipient organized in whole or in part for the provision of legal assistance to eligible clients under this title; or

"(B) receives more than one-half of the attorney's annual professional salary from the proceeds of a grant, contract, or other financial assistance from the Corporation to such recipient;";

(2) in paragraph (8), by striking "the Trust Territory of the Pacific Islands, and any other territory or possession of the United States" and inserting "the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau;"; and

(3) by adding at the end the following:

"(9) 'individual in poverty' means an individual who is a member of a family (of 1 or more members) with an income at or below the poverty line; and

"(10) 'poverty line' means the poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)), applicable to a family of the size involved.".

SEC. 5. GOVERNING BODY.

Section 1004 of the Legal Services Corporation Act (42 U.S.C. 2996c) is amended—

(1) in subsection (a), in the third sentence—

(A) by striking "Effective with respect to appointments made after the date of enactment of the Legal Services Corporation Act Amendments of 1977 but not later than July 31, 1978, the" and inserting "The";

(B) by striking "and" after "shall be appointed so as to include eligible clients,"; and

(C) by inserting ", and to include at least 1 individual with financial or audit experience" before the period; and

(2) in subsection (b)—

(A) by striking ", except that five of the members first appointed, as designated by the President at the time of appointment, shall serve for a term of two years"; and

(B) by striking the third and fourth sentences;

(3) in subsection (d), by striking "President shall select from among the voting members of the board a chairman, who shall serve for a term of three years. Thereafter the";

(4) by striking subsection (f);

(5) by redesignating subsections (g) and (h) as (f) and (g), respectively; and

(6) in subsection (f), as redesignated by this section, by striking ", of any executive committee of the Board, and of any advisory council established in connection with this title" and inserting "or of any committee of the Board".

SEC. 6. OFFICERS AND EMPLOYEES.

(a) ELIMINATION OF PERSONAL PRONOUN.—Section 1005(b)(1) of the Legal Services Corporation Act (42 U.S.C. 2996d(b)(1)) is amended by striking "as he" and inserting "as the president of the Corporation".

(b) MAXIMUM PAY.—Section 1005(d) of the Legal Services Corporation Act (42 U.S.C. 2996d(d)) is amended—

(1) by striking "level V" and inserting "level III"; and

(2) by striking "5316" and inserting "5314".

SEC. 7. IMPROVEMENTS OF LEGAL SERVICES CORPORATION CORPORATE GOVERNANCE AND INTERNAL PRACTICES.

Section 1006 of the Legal Services Corporation Act (42 U.S.C. 2996e) is amended—

(1) in subsection (a)—

(A) in paragraph (2), by inserting ", subject to subsection (g)" before the semicolon; and

(B) in paragraph (3)(A), by striking "except that broad general legal or policy research unrelated to representation of eligible clients may not be undertaken by grant or contract,";

(2) in subsection (b)—

(A) in paragraph (3), by striking "as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association" and inserting "as established in the applicable rules of professional responsibility or other laws of the State or other jurisdiction where the attorney practices law"; and

(B) in paragraph (5), by striking the last sentence; and

(3) by adding at the end the following:

"(g)(1) The Corporation shall establish a protocol for the receipt of donations under subsection (a)(2).

"(2) In order for the Corporation to use any Federal funds for representational activities of the Corporation, not including non-representational activities that primarily involve Corporation staff, the appropriations Act through which the funds are made available shall specifically per-

1 mit the use of the funds for such activities. Any solicita-
2 tion of a donation of funds for expenses for which Federal
3 funds may not be used under this title shall be approved
4 in advance by the Board. In addition, a budget for the
5 use of such donated funds shall be approved by the Board,
6 before the Corporation incurs such an expense.

7 "(3) The Corporation may not advance Federal
8 funds, in anticipation of receiving a donation under sub-
9 section (a)(2), to pay for an expense.

10 "(h)(1) The Board shall establish and maintain an
11 audit committee, a finance committee, and a governance
12 and performance review committee.

13 "(2) The Corporation shall establish and implement
14 a continuity of operations plan, to prepare for disasters
15 and emergencies.

16 "(3) The Corporation shall—

17 "(A) establish an adequate internal control
18 structure and procedures for financial reporting; and

19 "(B) not later than 1 year after the date of en-
20 actment of the Civil Access to Justice Act of 2009,
21 and annually thereafter, conduct an assessment of
22 the effectiveness of the internal control structure
23 and procedures.

24 "(i)(1) The Corporation shall adopt comprehensive
25 training standards and develop appropriate training mate-

1 rials to ensure that recipients are able to provide com-
2 prehensive and appropriate training for executive direc-
3 tors, supervisors, and attorneys employed by recipients
4 and board members of recipients. Such training standards
5 and materials shall address training concerning—

6 "(A) restrictions applicable to the activities of
7 attorneys employed by the recipient involved; and

8 "(B) appropriate use of Federal funds.

9 "(2) In developing training standards and materials
10 for the training described in paragraph (1), the Corpora-
11 tion—

12 "(A) is encouraged to address training con-
13 cerning the representation of victims of domestic vio-
14 lence; and

15 "(B) may coordinate activities with the Amer-
16 ican Bar Association Commission on Domestic Vio-
17 lence.

18 "(3) The Corporation shall provide financial assist-
19 ance, in such amounts as the Corporation may determine
20 to be appropriate, to recipients, to enable the recipients
21 to provide the training described in paragraph (1).".

22 **SEC. 8. PILOT LOAN REPAYMENT ASSISTANCE PROGRAM.**

23 Section 1006 of the Legal Services Corporation Act,
24 as amended by section 7, is further amended by adding
25 at the end the following:

1 "(j)(1) The Corporation shall promote recruitment
2 and retention of highly qualified staff members for all re-
3 cipients, through the Pilot Loan Repayment Assistance
4 Program established by the Corporation in 2005 or other
5 programs, as the Corporation determines to be appro-
6 priate.

7 "(2) If funds are appropriated for any such staff re-
8 cruitment and retention program for each of the 5 full
9 fiscal years following the date of enactment of the Civil
10 Access to Justice Act of 2009, in the fifth year, the Cor-
11 poration shall submit to Congress a report on the impact
12 of such program on the recruitment and retention of high-
13 ly qualified staff for recipients.

14 "(3) Nothing in paragraph (2) prevents the Corpora-
15 tion from continuing such recruitment and retention pro-
16 grams for longer than 5 years, if such program is effective
17 in the recruitment and retention of highly qualified staff
18 and funds are appropriated for such program.".

19 **SEC. 9. PROHIBITED USE OF FUNDS.**

20 Section 1006 of the Legal Services Corporation Act,
21 as amended by section 8, is further amended by adding
22 at the end the following:

23 "(k)(1)(A) No prohibited purposes provision shall be
24 considered to cover recipient funds from any source other
25 than the Corporation, except as provided in paragraph (3).

"(B) No prohibited purposes provision shall be considered to cover Federal funds awarded under this title, except as provided in this title.

"(2)(A) In this subsection, the term 'prohibited purposes provision' means a provision of this title, or any other Federal law, that contains text stating that funds of a recipient may not be expended for a purpose prohibited by this title or another Federal law.

"(B) The term includes any Federal law that incorporates by reference a provision that contains text described in subparagraph (A) and is a provision of—

"(i) the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998;

"(ii) the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996; or

"(iii) another Federal law.

"(3) No non-Federal funds may be used by a recipient to participate in any litigation with respect to abortion.".

SEC. 10. CONSTRUCTION.

Section 1006 of the Legal Services Corporation Act, as amended by section 9, is further amended by adding at the end the following:

"(l) No provision of law, other than an amendment to this title, shall be considered to supersede or modify this title unless the provision refers specifically to this subsection.".

SEC. 11. GRANTS AND CONTRACTS.

Section 1007 of the Legal Services Corporation Act (42 U.S.C. 2996f) is amended—

(1) in subsection (a)—

(A) in paragraph (2)—

(i) in subparagraph (A), by striking "and with the Governors of the several States";

(ii) in subparagraph (B)—

(I) in clause (i), by striking "liquid"; and

(II) in clause (iv), by striking ", which may include evidence of a prior determination that such individual's lack of income results from refusal or unwillingness, without good cause, to seek or accept an employment situation; and" and inserting a semicolon;

(B) by striking paragraphs (8) and (9);

(C) by redesignating paragraphs (10) and (11) as (9) and (10), respectively;

1 (D) by inserting after paragraph (7) the
2 following:
3 "(8) ensure that funds appropriated under this
4 title for basic field programs shall be distributed on
5 the basis of a system of competitive bidding, in ac-
6 cordance with Legal Services Corporation regula-
7 tions, and shall be allocated so as to provide—
8 "(A) except as provided in subparagraphs
9 (B) and (C), an equal figure per individual in
10 poverty for all geographic areas, as determined
11 on the basis of the most recent decennial census
12 of population conducted pursuant to section
13 141 of title 13, United States Code (or, in the
14 case of the Republic of Palau, the Federated
15 States of Micronesia, the Republic of the Mar-
16 shall Islands, the Commonwealth of the North-
17 ern Mariana Islands, Alaska, Hawaii, and the
18 United States Virgin Islands, on the basis of
19 the adjusted population counts historically used
20 as the basis for such determinations);
21 "(B) an additional amount for Native
22 American communities that received assistance
23 under the Legal Services Corporation Act for
24 fiscal year 2009, so that the proportion of the
25 funds appropriated to the Legal Services Cor-

1 poration for basic field programs for fiscal year
2 2010 that is received by the Native American
3 communities shall be not less than the propor-
4 tion of such funds appropriated for fiscal year
5 2009 that was received by the Native American
6 communities; and
7 "(C) an amount for representation of mi-
8 grant and seasonal farm workers."; and
9 (E) in paragraph (9), as redesignated by
10 this subsection, by striking "the Canons of Eth-
11 ics and Code of Professional Responsibility of
12 the American Bar Association" and inserting
13 "applicable rules of professional responsibility";
14 (2) in subsection (b)—
15 (A) by striking paragraph (8) and insert-
16 ing the following:
17 "(8) to participate in any litigation with respect
18 to abortion;";
19 (B) in paragraph (10), by striking "or"
20 after the semicolon;
21 (C) in paragraph (11), by striking the pe-
22 riod at the end and inserting a semicolon; and
23 (D) by adding at the end the following:
24 "(12) to provide legal assistance with respect to
25 litigation relating to prison conditions on behalf of

1 any individual who is incarcerated in a Federal,
2 State, or local prison, except that nothing in this
3 paragraph prohibits the use of funds made available
4 by the Corporation for litigation related to an incar-
5 cerated individual's ability to reenter society success-
6 fully;
7 "(13) to provide legal assistance with respect to
8 the defense of an individual in a proceeding to evict
9 such individual from a public housing project if—
10 "(A) the individual has been convicted in a
11 criminal proceeding with the illegal sale or dis-
12 tribution of a controlled substance; and
13 "(B) the eviction proceeding is brought by
14 a public housing agency because the illegal drug
15 activity of the individual threatens the health
16 and safety of another tenant residing in the
17 public housing project or an employee of the
18 public housing agency; or
19 "(14) to provide legal assistance for, or on be-
20 half of an alien, unless the alien—
21 "(A) is present in the United States and
22 the alien—
23 "(i) is described in subparagraph (A),
24 (B), (C), (D), (E), or (F) of section
25 504(a)(11) of the Departments of Com-

1 merce, Justice, and State, the Judiciary,
2 and Related Agencies Appropriations Act,
3 1996, as enacted by section 101 of the
4 Omnibus Consolidated Rescissions and Ap-
5 propriations Act of 1996 (Public Law 104–
6 134; 110 Stat. 1321–54);
7 "(ii) is lawfully present as a result of
8 withholding of deportation pursuant to
9 former section 243(h) of the Immigration
10 and Nationality Act, withholding or restric-
11 tion of removal pursuant to section
12 241(b)(3) of the Immigration and Nation-
13 ality Act (8 U.S.C. 1231(b)(3)), or with-
14 holding of removal under the Convention
15 Against Torture pursuant to the regulation
16 of the Secretary of Homeland Security
17 codified on the date of the enactment of
18 the Civil Access to Justice Act of 2009 at
19 8 C.F.R. 208.16(c) and the regulation of
20 the Attorney General codified on such date
21 at 8 C.F.R. 1208.16(c);
22 "(iii)(I) has been battered or sub-
23 jected to extreme cruelty or was a victim
24 of sexual assault or trafficking in the
25 United States; or

1 "(II) qualifies for nonimmigrant sta-
2 tus described in section 101(a)(15)(U) of
3 the Immigration and Nationality Act (8
4 U.S.C. 1101(a)(15)(U));
5 "(iv) has a child present in the United
6 States who, without the active participa-
7 tion of the alien—
8 "(I) has been battered or sub-
9 jected to extreme cruelty or was a vic-
10 tim of sexual assault or trafficking in
11 the United States; or
12 "(II) qualifies for nonimmigrant
13 status described in section
14 101(a)(15)(U) of the Immigration and
15 Nationality Act;
16 "(v) has been a victim of trafficking
17 or is a family member of such a victim and
18 is eligible for protection and assistance
19 under section 107 of the Trafficking Vic-
20 tims Protection Act of 2000 (22 U.S.C.
21 7105);
22 "(vi) is an evacuee from, or victim of,
23 a major disaster or an emergency des-
24 ignated by the President pursuant to the
25 Robert T. Stafford Disaster Relief and

1 Emergency Assistance Act (42 U.S.C.
2 5121 et seq.) or by an appropriate State or
3 local official, and the alien's need for legal
4 assistance from the Corporation is related
5 to the alien's status as such an evacuee or
6 victim;
7 "(vii)(I) has been declared dependent
8 on a juvenile court located in a State or
9 has been legally committed to, or placed
10 under the custody of, an agency or depart-
11 ment of a State by such a court; and
12 "(II) has been deemed eligible by such
13 a court for long-term foster care due to
14 abuse, neglect, or abandonment;
15 "(viii) is under 18 years of age, is un-
16 accompanied by a parent or legal guardian,
17 and is in the custody of the Secretary of
18 Homeland Security or Health and Human
19 Services; or
20 "(ix) is authorized to work in the
21 United States or is otherwise lawfully
22 present in the United States;
23 "(B) is a member of a cross-border Indian
24 Tribe who is—

"(i) an American Indian born in Canada referred to in section 289 of the Immigration and Nationality Act (8 U.S.C. 1359); or

"(ii) a member of the Texas Band of Kickapoo Indians referred to in the Texas Band of Kickapoo Act (25 U.S.C. 1300b–11 et seq.);

"(C) is—

"(i) indigent; and

"(ii) seeking relief under the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, pursuant to the International Child Abduction Remedies Act (42 U.S.C. 11601 et seq.); or

"(D) is a citizen of—

"(i) the Commonwealth of the Northern Mariana Islands;

"(ii) the Federated States of Micronesia;

"(iii) the Republic of the Marshall Islands; or

"(iv) the Republic of Palau.";

(3) by striking subsection (c) and inserting the following:

"(c) In making grants or entering into contracts for legal assistance, the Corporation—

"(1) shall ensure that any recipient organized solely for the purpose of providing legal assistance to eligible clients is governed by a body (referred to in this subsection as a 'board') at least 50 percent of which consists of attorneys who are members of the bar of a State in which the legal assistance is to be provided (except that the Corporation may grant, pursuant to regulations issued by the Corporation, a waiver of such requirement for recipients which, because of the population the recipients serve, are unable to comply with such requirement);

"(2) shall ensure that any attorney, while serving on such board, shall not receive compensation from a recipient for such service;

"(3) shall ensure that at least one-third of a recipient's governing body consists of individuals who are, when selected, eligible clients who also may be representatives of associations or organizations of eligible clients; and

"(4) shall ensure that at least 1 board member is designated as a liaison to the bar association of

1 the State described in paragraph (1) for pro bono
2 promotion and coordination.";
3 (4) in subsection (d), by adding at the end the
4 following: "The Corporation shall ensure that the
5 monitoring and evaluation activities described in this
6 subsection are carried out in a manner that is con-
7 sistent with the applicable rules of professional re-
8 sponsibility for the jurisdiction in which the recipient
9 is being monitored, and shall take reasonable steps
10 to avoid imposing undue burden or expense on the
11 recipient.";
12 (5) by striking subsections (g) and (h); and
13 (6) by adding at the end the following:
14 "(h) The Corporation shall require all attorneys and
15 paralegals employed by a recipient to maintain records of
16 time spent on each case or matter supported in whole or
17 in part with funds provided under this title.".
18 **SEC. 12. TECHNOLOGY GRANTS.**
19 Section 1007 of the Legal Services Corporation Act
20 (42 U.S.C. 2996f), as amended by section 12, is further
21 amended—
22 (1) by redesignating subsections (c) through (f)
23 as subsections (d) through (g), respectively; and
24 (2) by inserting after subsection (b) the fol-
25 lowing:

"(c) In making a grant or entering into a contract under this section, the Corporation may provide that a portion of the funds provided under the grant or contract may be used to acquire and develop information technology to promote full access to high-quality, efficient legal representation and materials for self-representation.".

SEC. 13. AUDITS.

Section 1009 of the Legal Services Corporation Act (42 U.S.C. 2996h) is amended—

(1) by striking subsection (c) and inserting the following:

"(c) The Corporation shall require an audit of each recipient in accordance with generally accepted auditing standards and shall require that the recipient prepare a report that includes—

"(1) the financial statements of the recipient, including an unbiased presentation of the recipient's financial position and the results of the recipient's financial operations, in accordance with generally accepted accounting principles; and

"(2) a description of internal control systems of the recipient that provide reasonable assurance that the recipient is managing funds, from all sources, in compliance with Federal law."; and

(2) in subsection (d), by striking all that follows the comma and adding "the Corporation, the Comptroller General of the United States, and the Corporation's Inspector General shall not have access to any information in documents, reports, or records that is confidential under the applicable rules of professional responsibility or that is subject to the attorney-client privilege.".

SEC. 14. FINANCING.

Section 1010 of the Legal Services Corporation Act (42 U.S.C. 2996i) is amended—

(1) in subsection (a), by striking the first 3 sentences and inserting the following: "There are authorized to be appropriated for the purpose of carrying out the activities of the Corporation $750,000,000 for each of fiscal years 2010 through 2015.";

(2) in subsection (c)—

(A) by striking the semicolon after "distinct from Federal funds" and inserting a period;

(B) by striking "but any funds so received for the provision of legal assistance shall not be expended by recipients for any purpose prohib-

1 ited by this title, except that this" and inserting
2 "This";
3 (C) by striking "or" after "to prevent re-
4 cipients from receiving other public funds" and
5 inserting ", private funds,"; and
6 (D) by inserting after "(including founda-
7 tion funds benefitting Indians or Indian
8 tribes)" the following: ", or any other funds re-
9 ceived from a source other than the Corpora-
10 tion"; and
11 (3) by adding at the end the following:
12 "(e) For purposes of other programs that have Fed-
13 eral funds matching requirements, funds received by a re-
14 cipient from the Corporation shall not be considered to
15 be Federal funds for the purpose of determining whether
16 those funds may be used as non-Federal matching funds."

○

Mr. FRANKS. Well, thank you, Mr. Chairman.

Thank you, gentlemen, for being here.

Mr. Chairman, I thank you for calling this hearing. I welcome the opportunity to look closely at H.R. 3764, the Civil Rights—Civil Access to Justice Act of 2009.

And I say this because we know that LSC has a deeply troubling history of mishandling Federal funds. This has been revealed in news articles, reports from the LSC inspector general and reports from the General Accounting Office.

It is clear, too, that this historical pattern hasn't stopped. To the contrary, troubles continue. Last year the Washington Times and CBS News reported numerous instances of wasted funds, including unnecessary travel expenses and a decorative wall costing more than $180,000.

Also, LSC's inspector general reported problems with the organization's consultant contracts last year. And as we speak, the GAO is preparing its third report on LSC since 2007. And so I am concerned about H.R. 3764 because it would greatly expand LSC's funding, at the same time loosen or lift a number of restrictions on how LSC uses those funds.

Additionally, depending on how the bill is interpreted, H.R. 3764 might strip LSC's Office of Inspector General of so much authority as to prevent that office from fulfilling its statutory duty to identify waste, fraud and abuse.

Before rewarding LSC with more funds and looser uses of those funds, we should first have proof that LSC has stopped mishandling funds. Some witnesses today may point out that LSC has implemented 11 of the 17 recommendations provided by the GAO in 2007 studies. But there are still six more of those recommendations left, and there are still—there is still a third GAO study coming in the near future.

And despite LSC's efforts to reform itself in 2008 and 2009, multiple news stories emerged in 2009 with new instances of mishandled funds.

So how, Mr. Chairman, can we trust that the most recent fixes at LSC will really work unless it is proved through a track record of responsible fund management over the course of at least a few years? Should we not first wait and see if LSC and its grantees improve their performance before rewarding LSC with this bill?

The 1996 restrictions on funds' use were enacted by Congress in response to evidence that Legal Services lawyers were systematically using taxpayer money to further ideologically motivated lawsuits. The restrictions banned represented—the restrictions banned representation of undocumented aliens, persons evicted for drug use, suits in which attorneys' fees are collected, class action lawsuits, prisoner advocacy, and challenges to welfare reform.

Not only do these—not only do they keep LSC out of the partisan area, these restrictions also focus LSC on its true mission, ostensibly to provide legal aid to the poor.

Even with the restrictions, however, Legal Services lawyers funded by LSC have apparently attempted to use Federal funds to engage in prohibited—in prohibited activism.

As recently as 2008, for example, LSC's inspector general subpoenaed California Rural Legal Assistance to see if it violated the re-

striction on representing undocumented aliens. The National Legal and Policy Center reported in 2009 that a former CRLA lawyer said the organization had a policy of providing aid to illegal aliens.

Evidence like this misuse of Federal funds should stop before we reward LSC with increased funds, Mr. Chairman. Congress should not consider giving LSC more money and more ways to misuse its money at this point in time.

Oversight, not increased funding and loosened restrictions, is what we need today and in the foreseeable future. Until LSC has proven over a sustained period of time that its funds are no longer being used for partisan activism and wasted on decorative Italian walls, unused casino rooms and lavish travel expenses, we should not even consider rewarding LSC with increased funds and loosened restrictions.

With that, Mr. Chairman, I would yield back.

Mr. COHEN. Thank you, Mr. Franks.

I am going to recognize Mr. Conyers, the distinguished Member of the Subcommittee and Chairman of the Committee. He has never failed me when I have recognized him before. But before he makes his opening statement, I do want to give notice that this young man has a little bit more experience than me, so I need to ask him a question that I hope he will respond to.

I just wonder when the Department of Defense was exposed for buying $200 hammers and toilets that cost $18,000 and things like that, did we shut down the Department of Defense?

Mr. Conyers, you are recognized for your statement.

Mr. CONYERS. I reserve the right to answer that question. [Laughter.]

But I want to thank the Chairman and the Ranking Member, Mr. Franks of Arizona, who looks at these matters with great care and with great scrutiny. And I am glad that we are holding the hearing.

And to have our former colleague Senator Harkin here with us and the Chairman of the Subcommittee on Crime in Judiciary, Bobby Scott, I think signals that this is an important issue that we are charged under our jurisdiction to deal with.

Now, there is a constitutional basis for everyone being able to receive equal justice. As a matter of fact, it is on the front of the Supreme Court itself. And as the late Justice Powell said, equal justice should be accessible to all, without regard to economic means.

Now, one of our very distinguished witnesses, the chairman of the National Legal and Policy Center, suggests that we use mediation and more mediation, and to—that premise I agree with. But mediation without representation and legal counsel to get you to mediation I think would be self-defeating.

And so I see three issues, and I am going to yield to our distinguished senior Member from North Carolina for just a moment. But the three things that we want to concern ourselves with is what are the resources that are needed to have equal justice for those who cannot afford legal counsel.

The second thing I think we need to do is reexamine the restrictions that have been placed on these agencies.

And third, I think that we ought to make sure, through our auditing and oversight and the way we look at the way all Federal

money is spent out of the Treasury, that we are doing absolutely everything that we can to make sure that this meets the scrupulous inquiry of the gentleman, the Ranking Member from Arizona. I join him in that. We want to be as careful as we can about how we use this money.

And I now yield to Mr. Watt of North Carolina the remainder of my time.

Mr. WATT. Thank you, Mr. Chairman. I don't want to prolong this because I am so anxious to hear my colleague Mr. Scott testify on the other side of the desk.

And I am anxious to hear Senator Harkin, too. Although you reminded us that he was a former colleague, that must have been long before my time, because ever since I have known him he has been on the Senate side.

I did want to correct one error that my colleague Mr. Franks made in his—in his opening statement. I think we often miss the distinction, at least on the House side—I don't know how it works on the Senate side—the distinction that we make over here between authorizing Committees and appropriating Committees.

There is nothing in this bill that is going to provide any money to anybody, because we don't have the authority to do that. Only the appropriators, as I understand it, have that authority.

And we make that mistake quite often and miss the point that the role of the authorizing Committee is to—is to set the rules under which, if money is available and if the appropriators find it in the public interest to fund, they will—they will do so.

Most of these restrictions that have been placed on the Legal Services Corporation have never been acted on by any authorizing Committee. And this notion that there were extensive hearings held by the folks who put these restrictions on—on the bill is just not—that is not the case.

We need to be aware of whatever abuses have been—have taken place, if abuses have taken place, and we need to set up a structure in the authorizing Committee to try to prevent those abuses from taking place in the future.

But we shouldn't abdicate our responsibility to authorize a Legal Services Corporation to do what it needs to do to provide justice to the American people, and we should do that not—without regard to what it costs, really, and let the appropriators play their role in this process and try to figure out how much money we can afford to devote to it.

Our responsibility should be to authorize Legal Services at a—at a level and with—without the baggage that they have been given by the appropriators to do what the Legal Services Corporation was set up to do.

So with that, I appreciate the Chairman yielding, and I am looking forward to the testimony of these witnesses and the witnesses of the next panel.

Mr. COHEN. Thank you, Mr. Conyers, Mr. Watt. I thank each of you for your statement.

Without objection, other Members' opening statements will be included in the record.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Congressman Henry C. "Hank" Johnson, Jr.
Statement for the Hearing on H.R. 3764, the Civil Access to Justice Act of 2009
April 27, 2010

Thank you, Mr. Chairman, for holding this very important hearing on the Civil Access to Justice Act of 2009 and the Legal Services Corporation.

The LSC is a private, non-profit, federally funded corporation which promotes equal access to justice by providing grants for civil legal assistance for low-income individuals. It is imperative that we examine the role that the LSC plays in ensuring that all Americans have access to justice.

In my hometown of Georgia, the LSC plays a vital role. The LSC funds the Atlanta Legal Aid Society, and the Georgia Legal Services Program. These LSC funded programs help my constituents in public benefits, child custody, employment, and foreclosure cases.

In this economic climate, the programs that LSC funds plays a necessary and significant role. It is vitally important to make sure that the LSC receives adequate funding to fulfill its mission.

According to a 2009 LSC study, there is one legal services attorney for every six thousand four hundred and fifteen poor persons. This means that an overwhelmingly large percentage of the legal needs of low income Americans are being unmet.

Adequate legal representation can be costly, often forcing individuals to represent themselves, pro se. Thus, it is imperative that we consider not only the costs of increasing the LSC's funding, but more importantly what costs we will face if we do not support them. Not adequately funding the LSC will clog the judicial system with pro se litigants and, ultimately, lead lower-income Americans to lose faith in the legal system.

I applaud my colleague, Mr. Scott, Chairman of the Subcommittee on Crime, for introducing the Civil Access to Justice Act of 2009. I am a proud cosponsor of this legislation which will authorize an increase of funding for the LSC.

Thank you, Mr. Chairman, for scheduling this hearing. I look forward to hearing from our witnesses today, and yield back the balance of my time.

I am now pleased to introduce our first panel of witnesses and hear their testimony. Thank you for participating in today's hearing. Without objection, your written statements will be placed in the record. We ask you limit your oral remarks to 5 minutes and note we have a lighting system. You are all familiar with that.

Our first witness is Congressman Robert C. "Bobby" Scott, again, serving his ninth term as a Member of Congress in 2009. Prior to serving in the House he served in the Virginia house of delegates and in the senate in Virginia.

In November 1992 he was elected to the U.S. House, currently serves on the Committee on the Judiciary, where he is the Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security, distinguishing—distinguished Member of this Subcommittee, and also serves on Education and Labor and the Committee on the Budget.

During his 16 years he has become known as a champion of the U.S. Constitution and the Bill of Rights in particular, fighting to protect the rights and civil liberties of all Americans.

Pleased to have worked with him on this—Legal Services Corporation matters, which he anteceded me on. He is a driving force and a recognized champion as the author of the H.R. 3764, the "Civil Access to Justice Act."

Thank you, Congressman Scott, and if you would begin your testimony.

TESTIMONY OF THE HONORABLE ROBERT C. "BOBBY" SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. SCOTT. Thank you. Thank you, Chairman Cohen, Ranking Member Franks, Chairman Conyers. Thank you, Chairman Cohen, Ranking Member Franks, Chairman Conyers and other Members of the Committee.

I thank you for holding the hearing today on H.R. 3764, the Civil Access to Justice Act. I am honored to be here to testify on behalf of the legislation to reauthorize the Legal Services Corporation.

Also pleased that Senator Harkin could join us to testify on behalf of the efforts being made in the Senate to pass similar legislation. I look forward to his testimony and the testimony of those on the second panel.

Supreme Court Justice Hugo Black once said in an opinion that there can be no equal justice where the kind of trial a man gets depends on the amount of money he has. So the Legal Services Corporation was established by Congress in 1974 to provide legal assistance to people in civil matters who otherwise could not afford a lawyer.

The LSC directs and supervises Federal grants to local legal services programs which provide such assistance, and the importance of this program has not diminished over time. As President Richard Nixon, who was President when the program was established, once said, legal assistance to—legal assistance to the poor, when properly provided, is one of the most constructive ways to help them help themselves.

I have a special connection, Mr. Chairman, to the LSC. I was the original board chairman of the Peninsula Legal Aid Center, which

is located in Newport News-Hampton, Virginia area. And given this experience, I know firsthand the benefit and needs of legal aid programs around the country as well as the benefit they provide to those they serve.

H.R. 3764 accomplishes several goals. It increases the authorized level of—for LSC to $750 million. This is approximately the same amount appropriated in 1981, adjusted for inflation. LSC currently is funded at $420 million, which is well below the amount needed to meet the recognized need for legal services.

Currently more than 80 percent of individuals who need civil legal representation do not have the means to obtain it, and nationally 50 percent of the eligible applicants for legal assistance from federally funded programs are turned away because these programs lack ample funding.

Moreover, given the state of the economy the number of individuals who will qualify for legal representation will likely increase. We need to ensure that resources are available to provide legal services to those who cannot afford adequate legal representation.

The $750 million authorized in the bill will enable each LSC program to begin to address the legal needs of low-income residents in their communities.

The bill also lifts most of restrictions placed on the program through appropriations bills over the years, including the restriction on collecting attorneys' fees, the prohibition on legal aid attorneys bringing class action suits, and the—and the prohibition on what programs can do with non-Federal funds.

The bill does maintain the prohibition on abortion-related litigation and incorporates some of the limits on whom LSC-funded programs can represent, including prisoners challenging prison conditions and people convicted of illegal drug possession in public housing eviction proceedings.

Additionally, the legislation provides for more effective administration of LSC. Government Accountability Office reports do emphasize the need for better corporate oversight and management, so this bill seeks to improve corporate practices of LSC.

I am pleased that we have a companion bill in the Senate. Overall, the bills are similar but do have some differences. One example is the issue of class action lawsuits. The House bill allows class action suits with the approval of the project director, which is what the original Legal Services Act allowed. The Senate bill permits class actions if the suit arises "under established state or Federal statutory or judicial case law."

Even with these differences, however, it is my hope that both bills can be passed by this Congress, reconciled and sent to the President for his signature. And I am not the only one. As of this morning, the House bill has 44 co-sponsors, including a majority of the Members of the House Judiciary Committee.

The bill also has the support of over 150 national, state and local organizations, including the—including the American Bar Association, the Brennan Center for Justice New York University Law—School of Law, the National Legal Aid and Defender Association, and the Virginia State Bar.

Mr. Chairman, I would like to submit for the record a letter signed by all of the groups supporting the bill.

[The information referred to follows:]

LETTER IN SUPPORT OF
THE CIVIL ACCESS TO JUSTICE ACT (S.718, H.R. 3764)

February 12, 2010

Dear Senators and Members of Congress:

We write to urge your support for the *Civil Access to Justice Act of 2009* (S.718, H.R. 3764), an Act that would reauthorize and revitalize the Legal Services Corporation (LSC), the backbone of our nation's civil legal aid system. LSC is a non-profit corporation created by Congress in 1974. Funded by the federal government, LSC grants money to local legal services programs in every state, which, in turn, assist low-income families with the civil legal issues they may face – protecting spouses and children from domestic violence, fighting predatory lenders, saving homes from foreclosure, ensuring child support payments, and helping seniors and the disabled obtain necessary benefits.

LSC is in need of revitalization. Severely underfunded, LSC reports that more than half of all eligible clients who seek legal help from LSC-funded programs are turned away due to insufficient resources. Additionally, LSC-funded programs' ability to help their clients is hampered by outdated restrictions, imposed in the mid-1990s.

The *Civil Access to Justice Act* would reauthorize LSC for the first time in over 30 years and would expand access to justice for the poor during this time of extraordinary need. The bill would: 1) expand access to justice by authorizing $750 million in annual funding for LSC, the level necessary to return to the high water mark for funding reached in 1981, the last time a minimum level of access to LSC services was achieved; 2) lift a number of overreaching restrictions that prevent LSC grantees from most efficiently and effectively serving their clients; and 3) improve oversight and governance of LSC.

As the nation continues to reel from the economic crisis, civil legal aid has never been more important. More and more of our nation's families are turning to the courts with pressing civil legal needs, and both individuals and society suffer when these issues are left unresolved, or resolved unfavorably. With the courts and legal aid programs now overwhelmed, Congress must act to help low-income individuals access and navigate the courts, which oftentimes is only possible with the help of a legal aid lawyer.

The *Civil Access to Justice Act* goes a long way toward renewing our promise to "equal justice for all" and ensuring that our neighbors are able to obtain the services they need to meaningfully access the courts. Please support this legislation to reauthorize and revitalize LSC.[1]

Sincerely,

National Organizations

AARP

Alliance for Justice

American Civil Liberties Union

American Judicature Society

Asian American Legal Defense and Education Fund

Boat People SOS

Brennan Center for Justice at NYU School of Law

Campaign for Community Change (CCC)

Center for Law and Social Policy

Center for Lobbying in the Public Interest

Center for Medicare Advocacy, Inc.

Consumers for Auto Reliability and Safety

Disability Rights Education and Defense Fund

Ella Fitzgerald Charitable Foundation

Equal Justice Society

Equal Justice Works

Evangelicals for Social Action

Garvey Schubert Barer

Independent Sector

Insight Center for Community Economic Development

International Center for Civil Society Law

The Leadership Conference on Civil and Human Rights

Lowenstein Center for the Public Interest

Lowenstein Sandler PC

Medicare Rights Center

Mexican American Legal Defense and Educational Fund

National Association of Counsel for Children

National Association of IOLTA Programs

National Center for Law and Economic Justice

National Center for Lesbian Rights

National Committee for Responsive Philanthropy

National Consumer Law Center

National Employment Law Project

National Housing Law Project

National Immigration Law Center

National Legal Aid & Defender Association

National Organization of Social Security Claimants' Representatives

National Senior Citizens Law Center

National Women's Law Center

OMB Watch

Orrick, Herrington & Sutcliffe LLP

Sargent Shriver National Center on Poverty Law

Schulte Roth & Zabel LLP

Service Employees International Union

Skadden, Arps, Slate, Meagher & Flom LLP

UAW International and Local 2320, the National Organization of Legal Services Workers

Workplace Fairness

Youth Law Center

State & Local Organizations

Access Now, Inc. ®, Florida

Advocates for Basic Legal Equality, Inc. (ABLE), Ohio

AIDS Legal Referral Panel, California

Alabama Civil Justice Foundation

Alameda County Bar Association, California

Alameda County Bar Association, Volunteer Legal Services Corporation, California

Arizona Foundation for Legal Services & Education

Asian Law Alliance, California

Asian Law Caucus, California

Asian Pacific American Legal Resource Center, Washington D.C.

The Association of the Bar of the City of New York

Bet Tzedek Legal Services, California

The Bronx Defenders, New York

California Advocates for Nursing Home Reform

California Reinvestment Coalition

California Women's Law Center

Californians for Disability Rights, Inc.

Californians for Legal Aid

Center for Civic Values IOLTA Program, New Mexico

Center for Civil Justice, Michigan

Centro Legal de la Raza, California

Children's Law Center, Washington D.C.

Civil Justice Clinic, University of California Hastings College of the Law

Coalition of California Welfare Rights Organizations, Inc.

Community Foundation of St. Joseph County, Indiana

Community Legal Services in East Palo Alto, California

Community Legal Services, Inc., Pennsylvania

DC Consortium of Legal Services Providers[2]

Democratic Processes Center, Arizona

Disability Rights California

Disability Rights Legal Center, California

Disability Rights Network of Pennsylvania

Don't Waste Arizona

East Bay Community Law Center, California

Education Law Center of Pennsylvania

Empire Justice Center, New York

Family Violence Law Center, California

The Fund for Modern Courts, New York

Harriett Buhai Center for Family Law, California

Hawaii Justice Foundation

HIV & AIDS Legal Services Alliance, California

Homeless Persons Representation Project, Inc., Maryland

Housing and Economic Rights Advocates, California

The Impact Fund, California

Indiana Lawyers Committee

Inland Empire Latino Lawyers Association, California

King County Coalition Against Domestic Violence, Washington

La Raza Centro Legal, California

Law Foundation of Silicon Valley, California

Lawyers Trust Fund of Illinois

Legal Aid Association of California

Legal Aid Justice Center, Virginia

Legal Aid Society of San Mateo County, California

Legal Aid Society of the District of Columbia

Legal Assistance of Washington County, Minnesota

Legal Foundation of Washington

Legal Information for Families Today (LIFT), New York

Legal Services Corporation of Virginia

Legal Services for Children, California

Legal Services of Southern Piedmont, North Carolina

Legal Voice, Washington

Los Angeles Center for Law and Justice, California

Lutheran Office of Governmental Ministry in New Jersey

Maine Bar Foundation

Maine Justice Action Group

Massachusetts Access to Justice Commission

Massachusetts Law Reform Institute

Michigan Designated State Planning Body for Legal Services

Michigan Disability Rights Coalition

Mid-Minnesota Legal Assistance

Minnesota Legal Services Planning Committee

Minnesota State Bar Association

Montana Access to Justice Committee

Montana Equal Justice Task Force

Montana Justice Foundation

New Jersey Association on Correction

New York State Bar Association

North Carolina Justice Center

Ohio Legal Assistance Foundation

Oregon Law Center

Oregon Law Foundation

Oregon State Bar

Pennsylvania Council of Churches

Peter Edelman, Chair, District of Columbia Access to Justice Commission

Philadelphia Unemployment Project, Pennsylvania

Public Advocates, Inc., California

Public Counsel, California

Public Interest Clearinghouse, California

The Public Interest Law Project/ California Affordable Housing Law Project

Public Justice Center, Maryland

Quality Trust for Individuals with Disabilities, Washington D.C.

San Diego Volunteer Lawyer Program, Inc., California

Senior Citizens Legal Services of Santa Cruz & San Benito Counties, California

Social Justice Initiatives, Columbia Law School, New York

Student Advocacy, New York

Texas Access to Justice Foundation

University of the District of Columbia David A. Clarke School of Law

The Utility Reform Network, California

Vermont Legal Aid

Virginia State Bar

Washington Lawyers' Committee for Civil Rights and Urban Affairs, Washington D.C.

Washington Legal Clinic for the Homeless, Washington D.C.

Washington State Access to Justice Board

The Watsonville Law Center, California

Western Center on Law and Poverty, California

Wisconsin Trust Account Foundation, Inc.

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[1] For more information about this letter, contact Rebekah Diller, Justice Program Deputy Director, at the Brennan Center for Justice (rebekah.diller@nyu.edu, 212.992.8635).

[2] The following members of the DC Consortium of Legal Services Providers join this letter: The American Civil Liberties Union of the National Capitol Area; Advocates for Justice and Education; The Archdiocesan Legal Network, Catholic Charities; The Asian Pacific American Legal Resource Center; Ayuda, Inc.; Bread for the City; Capital Area Immigrants Rights (CAIR) Coalition; Central American Resource Center (CARECEN); The Children's Law Center; The Employment Justice Center; DC Crime Victims Resource Center; DC Law Students in Court; DC Volunteer Lawyers Project; Domestic Violence Legal Empowerment and Appeals Project (DV LEAP); The Legal Aid Society; Legal Counsel for the Elderly; Our Place, DC; The Public Defender Service of DC; The Quality Trust for Individuals with Disabilities; University of the District of Columbia David A. Clarke School of Law; University Legal Services; The Washington Lawyers' Committee for Civil Rights and Urban Affairs; The Washington Legal Clinic for the Homeless; Whitman-Walker Clinic Legal Services Program; Women Empowered Against Violence (WEAVE). Due to funding restrictions on advocacy, two members of the Consortium have not joined this letter: Neighborhood Legal Services Program (NLSP) and the DC Bar Pro Bono program abstained from signing this letter.

Mr. SCOTT. And the end of the—I would like to end with a quote from Justice Lewis Powell during his—who, during his tenure as president of the American Bar Association, said, "Equal justice under the law is not merely a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. It is

fundamental that justice should be the same in substance and availability without regard to economic status." This is the goal that H.R. 3764 seeks to achieve.

So thank you, Mr. Chairman, for holding the—this hearing and giving me the opportunity to speak on behalf of the Civil Access to Justice Act. I hope we can mark it up in the near future.

[The prepared statement of Mr. Scott follows:]

PREPARED STATEMENT OF THE THE HONORABLE ROBERT C. "BOBBY" SCOTT,
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Remarks for Congressman Robert C. "Bobby" Scott
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 3764, the "Civil Access to Justice Act of 2009"
Tuesday, April 27, 2010

Thank you, Chairman Cohen, for holding this hearing today on H.R. 3764, the Civil Access to Justice Act. As the chief sponsor of this legislation, I am honored to be here today to testify on behalf of legislation to reauthorize the Legal Services Corporation. I am also pleased that Chairman Harkin could join us today to testify on behalf of the effort in the Senate to pass similar legislation. I look forward to his testimony and the testimony of those on the second panel.

The Legal Services Corporation was established by Congress in 1974 to provide legal assistance to people in civil matters who otherwise could not afford a lawyer. LSC directs and supervises federal grants to local legal service programs which provide such assistance. The importance of this program has not diminished with time. As President Richard Nixon, who was President when

this program was established, said "...legal assistance for the poor, when properly provided, is one of the most constructive ways to help them help themselves."

I have a special connection to LSC; I was the original board Chairman of the Peninsula Legal Aid Center located in the Newport News – Hampton, Virginia area. Given this experience, I know firsthand the benefit and needs of legal aid programs around the country as well as the benefit they provide to those they serve.

H.R. 3764 accomplishes several goals. It increases the authorized funding level for LSC to $750 million. This is approximately the amount appropriated in 1981, adjusted for inflation. LSC is currently funded at $420 million which is well below the amount needed to meet the recognized need for legal services. Currently, more than 80 percent of individuals who need civil legal representation do not have the means to obtain it. Families who need this assistance the most make less than 125

percent of the poverty line or approximately $27,500 per year for a family of four. Nationally, 50 percent of the eligible applicants for legal assistance from federally funded programs are turned away because these programs lack ample funding. Moreover, given the state of the economy, the number of individuals who qualify for legal representation is likely to increase. We need to ensure that resources are available to provide legal services to those who cannot afford adequate legal representation. The $750 million authorized in the bill will enable each LSC program to begin to address the legal need of those in low income residents in their community.

The bill also lifts most of the restrictions placed on the program through appropriations bills over the years, including the restriction on collecting attorneys' fees, the prohibition on legal aid attorneys bringing class action suits and prohibitions on what programs can do with non-federal funds. The bill does maintain the prohibition on abortion related litigation and incorporates some

limits on whom LSC-funded programs can represent, including prisoners challenging prison conditions and people convicted of illegal drug possession in public housing eviction proceedings.

Additionally, the legislation provides for more effective administration of LSC. Government Accountability Office reports emphasize the need for better corporate oversight and management, so this bill seeks to improve the corporate practices of LSC.

I am pleased that we have a companion bill in the Senate. Overall, the bills are similar, but they do have some differences. One example is the issue of class actions lawsuits. The House bill allows class action suits with the approval of the project director, which is what the original Legal Services Act allowed. The Senate bill permits class actions if suit arises "under established State or Federal statutory law or judicial case law."

Even with the differences, it is my hope that both bills can be passed this Congress, reconciled and sent to the President for his signature. And I am not the only one. Currently, the House bill has 42 co-sponsors. The bill also has the support of over 150 national, state and local organizations including the American Bar Association, the Brennan Center for Justice at New York University School of Law, the National Legal Aid & Defender Association and the Virginia State Bar. Mr. Chairman, I would like to submit for the record a letter signed by all of the groups supporting the bill.

I'd like to end with a quote by former Supreme Court Justice Lewis Powell, Jr. during his tenure as President of American Bar Association who said "Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice

should be the same, in substance and availability, without regard to economic status." This is the goal that H.R. 3764 seeks to achieve.

Thank you, Mr. Chairman, for the opportunity to speak on behalf of the Civil Access to Justice Act. I hope that we can mark up this bill in the near future.

Mr. COHEN. Thank you, Chairman Scott, and appreciate your testimony.

Was Justice Powell from Richmond?

Mr. SCOTT. Yes, he was.

Mr. COHEN. So I think I visited his grave when I was there. Yes.

Our second witness is Senator Tom Harkin. Senator Harkin has represented Iowa in the United States Congress for 35 years and is the first Iowa Democrat to win a fifth term in the United States Senate. First winning election to the House in 1974, he served 10 years representing the Fifth District, and then he challenged an incumbent senator and won.

He currently Chairs the Senate Health, Education, Labor and Pensions Committee and as a senior Member of the Senate Appropriations, Agriculture and Small Business Committees. Since arriving in Congress he has been a champion of the issues that I think touch every American's life in a special way—health care, education, and equal rights.

He has worked to transform America into a wellness society focused on disease prevention and improving public health and is a staunch defender of America's working families. He has made Iowa proud and is a great representative of Iowa in the great tradition of Henry Wallace and Governor Hughes and other great Iowans. He did run for President and would have made a great President.

Senator Harkin is the author of S. 718, the "Civil Access to Justice Act of 2009," which is the companion to Representative Scott's bill.

We thank you for taking time out of your schedule and coming back to visit us and share your testimony, Senator.

TESTIMONY OF THE HONORABLE TOM HARKIN, A UNITED STATES SENATOR FROM THE STATE OF IOWA

Senator HARKIN. Well, Chairman Cohen, thank you for the honor of coming back to my—to the bosom of the start of my political career here in the House of Representatives. It is always wonderful to be back here.

I thank you for your leadership on this issue. I would be remiss if I didn't thank my hero, and I say that with all that it means, my hero John Conyers.

When I first got here that many years ago—Mr. Watts, I want to say—reminded me a couple years ago I had—school kids were out on the Senate steps, and I was telling them about being a senator, and I said, "But before I was a senator I served over there in the House of Representatives in the Congress." But I said, "That was some time ago." I said, "That was the last century." This little kid looked up with these big eyes and said, "How old are you?" I had to explain what—10 years ago.

But anyway, but John Conyers to me has always embodied what I think is the epitome of the great public servant. For his entire lifetime he has fought to make our society a more fair, a more just, a more caring and compassionate society. And it is always an honor to be here in front of Congressman Conyers.

And, Representative Franks, thank you also for your interest in this. I just have a couple things I will say about a couple of the

comments you made about that, about governance, which—you are right on track, by the way. A lot of that has disturbed a lot of us.

And to be here with Representative Scott—an honor. He has been a constant champion again for equal rights and justice. I couldn't ask for a better partner in this effort to try to get this legislation through.

Mr. Chairman, when I first came to Washington, D.C., I came to law school. I went to Catholic University Law School just up the street here. And we had a dean, Dean Clinton Bamberger, who decided to start a neighborhood legal service clinic with law school students.

And he got some money, I guess, from some friends and stuff, and we opened a clinic up on North Capitol Street. It was the first neighborhood legal services based out of—out of a law school in the District of Columbia.

And I can remember going over there to staff that after class hours, in the evenings, on Saturdays. It was all volunteer. And having people come in—I can remember—this was not too long after the Walker-Thomas case here in the district, a Supreme Court case.

A person came in and—and wife—he and his wife, couple of kids—I think—I forget, maybe two or three, four kids, and all their possessions had been taken out of their apartment and just put out because of an illness that he had had and he had missed one payment on his rent. And the landlord decided to just take everything out and put it outside.

I said, "Well, that can't happen in our society." But it was happening. And so how do you handle a case like that? I wasn't a lawyer. We were just law students. Our legal clinic then had to go to law firms in the District of Columbia to try to find some lawyer that had some free time to help us out. And that is the way we operated. It was sort of hit or miss. Now, that was before 1974, obviously.

After I graduated from law school, I went to Iowa, went back to my home state, and I joined the Polk County Legal Services—Polk County Legal Services and became a lawyer there for Polk County Legal Services. I will never forget the first person that walked into my little cubbyhole where I had my desk.

She came in. She had a little girl with her, her daughter. And she came in and she was assigned to me. She came in. She had these welts on her face and on her—and she showed me her back and her arms. She had a couple of teeth missing, and her little kid just so frightened.

I thought, "Well, surely this is a criminal case. We don't handle criminal cases. We handle civil cases." What it was was that her husband had been beating her up, and she wanted to come in to get some protection.

She wanted to know if there was a safe place where she could go with her daughter. She wanted to know if we could handle a divorce so she could get away from this abusive relationship. I will never forget that and how we were able to help in those cases.

And then through my tenure there, the landlord-tenant cases, the workers' comp cases, the disability cases that came through the

door, left a lasting impression on me of how important it is for poor people to have legal—access to legal services.

Well, then after that, Legal Services Corporation was started, as Congressman Scott said, in 1974, I might add under a Republican president, Richard Nixon. And then by the time I got here to the Congress in 1975, Legal Services was just starting to get off the ground and make its way across the country.

So I was able to see it grow until about 1981 when I think the high point was reached in terms of funding, and then during the 1980's, during the Reagan years, it just kept getting cut more and more and more and more, and we reached a low point I think some time in the 1990's in terms of funding.

But nonetheless, the Legal Services that—Corporation and those lawyers out there kept at it, kept doing more with less, until finally it reached a crisis, till what—people just couldn't handle it any longer. And so we finally started, then, in the 1990's getting the funding back up for the Legal Services Corporation.

Even where the funding is now—and right now—it got down quite a bit. I can get the numbers. But we are now back up to just about where we were in the mid 1990's, not counting for inflation. If you count inflation, we are way back. We are way back.

One of the things that our bill does is it sets an authorization level that is basically where it was in 1981. That is the authorization level we have, adjusted for inflation, so it is around $750 million.

And I think right now we are at about $420 million. So it sets that as an authorization level, because right now, even where we are, 50 percent—50 percent—of the people who walk in the door of a Legal Services office anywhere in America—half of them—are not helped, not because their cases aren't good or they don't need help.

Legal Services simply do not have—does not have the money or the resources to help these people. One out of every two are turned away because they don't have the wherewithal to help them. And it is probably getting worse.

I checked with Iowa legal aid. Our Iowa legal aid—just in the last few years, their housing cases have gone up 300 percent. No surprise, with the housing crisis. That has gone up 300 percent. The chief justice of the Texas supreme court said this is a crisis of epic proportions. A crisis of epic proportions. Chief justice of the Texas supreme court.

And it has real consequences for people. Our bill, I think, would bring this into the 21st century. As I think was pointed out, this bill has not been authorized since 1981. So if there is problems out—it is because we haven't brought it into this century.

The Federal funds, I said, have been cut. When you consider the inflation, it is way down. So we do need to reauthorize it, and I think Congressman Scott went through some of the things. But I mentioned we increase the authorizing level basically where it would be at 1981.

It lifts some of the restrictions, like collecting attorneys' fees and things like that, but it also does better governance, Congressman Franks. One of the things we put in this bill is we incorporated all of the GAO recommendations.

And believe me, I have watched this with some anger and frustration as I have seen some of the governance of Legal Services in the last few years. But we are getting it back. We have got a new chairman of the board who is excellent, and you are going to hear from Mr. Levi.

So I think we are now moving in—but we incorporate all those GAO recommendations and codified them—codified them—in this bill.

And lastly, I might say one of the things I really wanted in this bill was it expands the law school clinics. Maybe that is personal to me, but we can—we can make our dollars go a lot further by expanding the use of law school clinics, for law school clinics like the one I started up on North Capitol Street, where we don't have to go shopping around all the time to one law firm or other to find who might have some free time, but where we can go to Legal Services with these cases from the law school clinics and get people the kind of representation they need. So we expand those—those clinics in this—in this bill.

Lastly, let me just say, again, I have never considered this a Republican or a Democratic issue. Many of the lawyers I served with in Legal Services in Polk County were Republicans and are still today. Many of the champions of this have been Republicans as well as Democrats.

You mentioned President Nixon. I mentioned somebody closer to home. I worked for years in the Senate with Pete Domenici, from your neighboring state, New Mexico, one of the great champions of this.

And here is what Pete said once. He said, "I do not know"—we were talking about funding for legal services. He said, "I do not know what is wrong with the United States of America saying to the needy people of this country that the judicial system is not only for the rich. What is wrong with that? That is what America is all about."

So I have never considered this a Republican or Democratic issue. I consider it an issue of just basic fairness and justice. That statue of Justice up there with the blindfold is holding those scales, but the scales get tipped if you put dollar bills on them. That not equal justice. That is not equal justice.

We have got to take away that influence of whether or not you have the money to get a lawyer or not to make sure you get equal representation in our society.

So I thank you, Mr. Chairman, for having this hearing. I hope we can move this bill as expeditiously as possible.

[The prepared statement of Senator Harkin follows:]

PREPARED STATEMENT OF THE HONORABLE TOM HARKIN,
A UNITED STATES SENATOR FROM THE STATE OF IOWA

TESTIMONY OF SENATOR TOM HARKIN
HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
HEARING ON THE CIVIL ACCESS TO JUSTICE ACT
TUESDAY, APRIL 27, 2010

Chairman Cohen, Ranking Member Franks, other members of the Subcommittee, thank you for the very kind invitation to testify on the importance of legal services. I am very appreciative that you are shining a spotlight on the need to expand and improve vital civil legal services to our most vulnerable citizens.

It is a particular honor to be here with Representative Scott, who has been a tireless champion for ensuring equal rights and justice for all Americans.

This issue is personal for me. Before I was elected to Congress, I practiced law with Polk County legal aid in Iowa. I can honestly say the work I did with legal aid is some of the most rewarding of my career. I know first-hand how crucial legal assistance is to struggling families who have no place else to turn when they have lost a job and are facing a foreclosure. I know the invaluable assistance that legal aid provides to battered women trying to leave abusive marriages while fearing for their safety and the safety of their children. I know that, without access to an attorney, the poor are often powerless in the face of injustice and wrongdoing.

Unfortunately, too many Americans today cannot afford legal representation. In many parts of this nation, more than 80 percent of those who need an attorney go without one. Nationally, over 50 percent of applicants for federally funded legal services who request legal aid are turned away because programs lack adequate funding.

And, the problem is only getting worse. Because of the economic downturn, demand for legal services is skyrocketing. As just one example, in Iowa, the number of housing related cases handled by Iowa Legal Aid increased by nearly 300%. At the same time, many states have

slashed their budgets for legal services, and federal funding continues to be inadequate. It is no surprise that the Chief Justice of the Texas Supreme Court recently noted that legal aid programs have reached what he calls a "crisis of epic proportions."

This has very real consequences for the freedom, security, and health of low-income Americans. Simply put, millions of our fellow citizens are unable to enforce their rights. The senior who is a victim of a financial scam cannot protect the retirement she has earned and is entitled to. The family that faces the loss of a home cannot take advantage of consumer protections in order to ensure their children have a place to sleep. The battered woman cannot get the protection she needs from an abusive husband. These citizens are denied justice not due to the facts of their case or the governing law, but solely because they cannot afford an attorney. This is not justice. And, to state the obvious, it makes a mockery of the principle of equal justice under the law.

As a legislator, I want to highlight another consequence of the inadequacy of legal services. All of us have worked to enact laws designed to improve the lives of the American people. One of my proudest achievements, for example, is the Americans with Disabilities Act. But, the ADA and countless other laws are merely pieces of paper with the President's signature in some dusty law library if individuals whom the law was meant to protect are unable to enforce their rights. When people who are wronged and have legal redress, but are unable to vindicate their rights solely because they cannot afford an attorney, it is the law itself that is eroded.

Finally, I want to emphasize that the problem goes beyond clients being turned away. Congress has imposed severe restrictions on the clients that LSC-funded attorneys are allowed to represent, as well as on the legal tools that attorneys are allowed to use in representing their clients.

The fact is, in many cases, these restrictions impede the ability of legal aid attorneys to provide the most meaningful and effective legal representation. They often have prevented lawyers from doing what attorneys are ethically bound to do: Provide zealous representation. Further, by limiting the range of tools that legal aid attorneys can employ compared to other members of the bar, the restrictions have created a system of second-class legal representation.

Last year, along with Congressman Scott and Chairman Cohen, I introduced the Civil Access to Justice Act. This bill would improve both the quantity and quality of legal assistance in the United States, and I am grateful for your hearing on this legislation today.

By the way, for the record, let me just say that nobody was more disturbed by recent GAO reports and IG findings regarding LSC than I was. As a former legal aid attorney and strong supporter of funding for legal services, any dollar wasted by poor oversight and poor corporate governance is a dollar that is unavailable to provide much needed assistance to our most vulnerable citizens who need legal help. That is why I personally told LSC management, in no uncertain terms, that corporate governance must improve. It is also why a central feature of the bill I introduced is improved corporate governance. And, it is why I am excited about the new corporate leadership at LSC, including the new Chair, John Levy, and Vice Chair, Martha Minow. Corporate governance needs to be improved at LSC, and I am confident these new leaders will make the necessary changes.

Finally, I want to emphasize, legal services is not a Democratic or Republican issue. It was President Nixon who created the Legal Services Corporation and who said, in 1962, "I would suggest there is no subject which is more important to the legal profession, that is more important to this nation, than . . . the realization of the ideal of equal justice for all." As my former Republican colleague Senator Domenici once declared: "I do not know what is wrong

with the United States of America saying to the needy people of this country that the judicial system is not only for the rich. What is wrong with that? . . . That is what America is all about.

After years of grossly underfunding this essential program – denying legal representation to millions of low-income citizens – and denying legal aid lawyers the full panoply of tools they need to represent their clients effectively, it is time we fulfill the promise of our Constitution. With passage of the Civil Access to Justice Act, "Equal Justice under Law" will be more than an ideal chiseled on a marble façade; it will be a concrete reality for millions of our citizens, who, today, are denied it.

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Mr. COHEN. Thank you for your testimony, Senator Harkin, heartfelt and personal, anecdotal, and publicly thank you for sponsoring the Senate apology for slavery and Jim Crow in the 111th.

We thank each of you for your statements, and we excuse you. We know you need to get back to the Senate for duties.

And, Congressman Scott, you have duties as well.

So we thank each of you and we will now empanel the second witnesses, group of witnesses.

Mr. WATT. Mr. Chairman, you mean I am not going to get a chance to question Mr. Scott? [Laughter.]

Mr. COHEN. Not here. [Laughter.]

Out of order. Thank you all for participating. The second panel will come forward.

I would like to thank everybody for participating in today's hearing, and the same instructions that went to the first panel go to your panel, except you have to answer questions.

Our first witness on this panel is Mr. John Levi. On April 7, 2010 he was elected chairman of Legal Services Corporation board of directors. Mr. Levi is a partner in Sidley's Chicago office. He represents major professional financial services firms and corporations in employment and labor matters before numerous Federal and state courts, government agencies and arbitration forums.

He regularly litigates claims regarding wrongful termination for employment issues, restrictive covenants, wage and hour and other employment-related matters in these various forums. In addition, Mr. Levi advises clients on their internal policies and governance.

He has counseled numerous clients regarding their employment policy handbooks and manuals, prepares and negotiates executive employment agreements and post-employment covenants, and has spoken at a number of employment law conferences as the author of "Legal Issues Regarding AIDS in the Workplace." That was published in the January 1988 issue of Commerce magazine.

Anecdotally, he related to me that historically his father, Mr. Edward Levi, was the United States attorney general under the Ford administration and served with distinction there.

We thank you for your service and appreciate your attendance, and you can begin your testimony and the 5-minute light will start.

I think I forgot to—I dismissed giving the warnings to the previous panel because they are so used to them. There is a light that goes on that is green. That means you have got your—you are in your okay zone. It goes on for 4 minutes. At the end of 4, it goes to yellow. At the end of that minute, which is a total of 5, it goes to red. And at red you should be concluding or have concluded. Thank you, sir.

TESTIMONY OF JOHN G. LEVI, CHAIRMAN, BOARD OF DIRECTORS, LEGAL SERVICES CORPORATION

Mr. LEVI. Thank you, Chairman Cohen. In our profession we are familiar with lights.

Chairman Cohen, Chairman Conyers, Congressman Franks, Members of the Subcommittee, thank you for holding this hearing and providing the Legal Services Corporation with the opportunity to testify on H.R. 3764, the Civil Access to Justice Act. I will keep my comments very brief.

My thanks to you, Congressman Scott, for your sponsorship of this bill and to you, Mr. Chairman, and all of the co-sponsors.

We wholeheartedly support the authorized funding level of $750 million because it will significantly strengthen our ability to provide legal aid to the poor. Higher annual funding for LSC will help

expand the capacity of local Legal Services programs to meet the needs of their communities.

Those needs are on the rise, especially given the risk that the economic downturn raises to jobs and homes, the jeopardy of physical violence and family conflict, and the special needs of veterans, and yet all these needs are increasing at precisely the same time that local resources are in decline.

A major source of legal aid funding, IOLTA, is in a downward spiral because of the drop in short-term interest rates. LSC programs were hit with a 24 percent reduction in IOLTA funding in 2009 compared to 2008, and that is a loss of $27 million.

The near term is just as troubling. Most programs project declines in their IOLTA funding this year and probably into 2011, so this is a moment when every dollar counts, and the board is encouraging local programs to think strategically about partnerships, collaborations with others, such as law firms, law schools, medical centers, local businesses and community agencies.

Our programs report that cases closed by private attorneys increased significantly, up 11 percent in 2009, from the previous year. And we want to do all we can to continue to foster commitments for pro bono work from lawyers in every community.

With the bill's sponsors, I share the goal of improving governance and accountability so that every dollar is well spent. With new membership and renewed dedication, the board is committed to serious improvement in the organization's accountability and transparency.

We also greatly appreciate the increase in the corporation's executive pay schedule from level five to level three. We are now about to launch a nationwide search for a new president of LSC, and more competitive pay will help us recruit an innovative and forceful leader.

Let me close with a couple of observations from my first few weeks on the job. We held our regular board meeting about 10 days ago in Arizona where we were briefed by the three LSC programs in that state.

Legal aid programs in Arizona, as in most parts of our Nation, are unable to provide assistance to a majority of those who need help and daily turn people away. While board members were being briefed at Southern Arizona Legal Aid offices, clients filled every intake desk and the waiting room, with a line out the door.

In my home town of Chicago, the Legal Assistance Foundation operates the Foreclosure Project, and its intake telephone lines usually have to shut down early Monday afternoon for the rest of the week because of the overwhelming need and limited staff resources.

Mr. Chairman and Subcommittee Members, the corporation supports reauthorization because it represents an expression of ongoing support for the mission of LSC. In particular, the proposed funding level in the legislation reaffirms that Congress recognizes the profound importance of the work performed by the 136 LSC programs across the Nation and located in every state.

With 54 million Americans—one-sixth of our population—qualifying for legal assistance, the magnitude of this issue cannot be overstated.

My father, as you recognized, served as attorney general of the United States in the Ford administration, in a different time of crisis. And in his farewell address to the Justice Department he reminded us that the values on which our country was founded "can never be won for all time. They must always be won anew."

Every day legal aid attorneys do their best to ensure the poor receive fair treatment in the resolution of their pressing legal problems. I thank the Subcommittee for taking up this legislation. It represents a giant step toward fulfilling our national promise of equal justice for all.

Thank you, Mr. Chairman. I am happy to respond to questions at an appropriate time.

[The prepared statement of Mr. Levi follows:]

PREPARED STATEMENT OF JOHN G. LEVI

Legal Services Corporation
America's Partner For Equal Justice

John G. Levi
Chairman, Board of Directors
Legal Services Corporation

Testimony Before the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

April 27, 2010

Good morning, Chairman Cohen, Congressman Franks and other members of the Subcommittee. I am John G. Levi of Chicago, Chairman of the Board of the Legal Services Corporation (LSC), and it is my pleasure to be with you today.

The LSC Board is bipartisan, and I was elected Chairman by my fellow Board members on April 7, 2010. In addition to myself, five other appointees recently joined the Board. We are experienced members of the bar and excited to have this opportunity to serve the nation and ensure equal access to civil legal assistance by low-income Americans. We held our first Board meeting April 16 and 17, in Tucson, where we were briefed by the three LSC programs that serve Arizona. They reported an overwhelming need for legal services.

On behalf of the Corporation, I thank you for holding this important hearing and for providing LSC with an opportunity to comment on H.R. 3764, the Civil Access to Justice Act of 2009.

The Corporation, which celebrated its 35th anniversary last year, has historically supported reauthorization because it represents an expression of ongoing support for the mission of LSC—promoting equal access to justice and ensuring the provision of high-quality legal assistance to low-income Americans. In particular, the proposed funding level in H.R. 3764 reaffirms the support of Congress for equal access to justice and the work of LSC programs. LSC was established by Congress as an independent 501(c)(3) nonprofit corporation and will benefit from the scrutiny that reauthorization brings. We thank you, Congressman Scott, for sponsoring this legislation, and we thank Chairman Cohen, Chairman Conyers and all other cosponsors.

H.R. 3764 would strengthen the LSC budget by authorizing $750 million as a new, annual funding level. That level is approximately the amount appropriated in 1981, when adjusted for inflation, and reflects a time when LSC programs were recognized as being as close as they ever have been to meeting the demand for civil legal services by the poor.

Over the years, the LSC Board has called for measured strides to expand the capacity of legal services programs to meet the needs of their communities, and H.R. 3764 would accelerate the Board's efforts to ensure equal justice for all. The Board recognizes and applauds the hard work of the sponsors in drafting this legislation to strengthen funding for the delivery of civil legal assistance to low-income Americans.

Congressional appropriations for civil legal assistance are more critical than ever before. The recession that began in 2008 and continuing high unemployment rates have led to increases in requests for help with foreclosures, consumer issues and unemployment benefits. The success of this legislative initiative to increase LSC funding could well mark the difference between a bleak future for many Americans and a bright one.

Currently, at least 54 million Americans are eligible for civil legal assistance under LSC's income guidelines, which establish maximum income eligibility for legal assistance at $13,538 for individuals and $27,563 for a family of four. Our legal aid programs offer help to the most vulnerable among us—mothers and children, the elderly, the disabled, veterans and military families.

But legal aid programs also turn away many seeking help. In Arizona, when Board members were being briefed by program officials, we noted that every intake desk was busy and that the waiting room was full, with people standing in a hallway. A 2007 study in the state found that nearly 75 percent of the survey respondents reported being unable to get direct legal assistance.

The number of Medicaid recipients in Arizona has increased by 14 percent from 2009 to 2010 and the number of food-stamp recipients is up 31 percent during that period, according to our local program officials. They also told us that foreclosure actions are on the rise.

In my hometown, the Legal Assistance Foundation of Metropolitan Chicago operates a Home Ownership Preservation Project to handle foreclosure actions, and its intake telephone lines usually shut down in early afternoon on Mondays—for the week. Because of limited staff resources and the complexity of the cases, the foreclosure project staff can only handle 50 such cases per week. With the continuing foreclosure crisis, our challenge is large.

I understand that Harrison D. McIver III, executive director of Memphis Area Legal Services, appeared before the Subcommittee last October and clearly laid out the need in Tennessee. Mr. McIver reported that he has seen an increase in the poverty population served by his program and that requests for legal services are on the increase.

The challenges facing Arizona, Illinois and Tennessee are not unique. Legal services programs across the country, including those in Alabama, California, Florida, Maryland, Michigan, North Carolina, Ohio, Pennsylvania, and Rhode Island, have reported increased requests for help. Legal aid programs need more resources to meet the demand for legal services.

Nationwide in 2009, LSC programs closed more than 920,000 cases, an increase of 3.5 percent from 2008. About 35 percent of those cases involved family law matters, including domestic violence; 25 percent involved housing issues, such as landlord-tenant disputes, and 12.5 percent

were consumer cases, ranging from deceptive sales and loans to bankruptcies. Foreclosure cases doubled from 2008 to 2009 and unemployment-related cases more than doubled.

But numbers alone do not capture the spirit and mission of LSC programs. Each of these numbers represents the life of a family or an individual under stress. Take the case of a child that came to our Cleveland program. She began suffering from a seizure disorder at age 3 and developmental speech delays. In elementary school, the child became despondent because she could not understand what was happening in her classroom and no one could understand her. She would come home from school and cry, saying she did not want to live anymore, her mother said. Although the school provided an hour of special education class each day, her mother hoped to find more comprehensive services. The child was referred to the Community Advocacy Program, a partnership between the Legal Aid Society of Cleveland and the Metro Health System, which serves Cleveland's neediest neighborhoods. After a legal aid attorney participated in lengthy talks with school officials, the child was enrolled in additional special education classes and was provided with transportation to school. The student's grades improved and she began making friends. She is thriving today—a great example of how having a legal aid lawyer to press your concerns can save a life.

The people who come to our programs are in search of fair treatment and solutions to pressing legal problems. Legal aid lawyers not only open the doors to justice, they provide assistance at a crucial moment in the lives of the poor, helping them get back on their feet and helping prevent a downward spiral into costly public support.

Even as the need for LSC program services increases, the funding resources necessary to provide services are dwindling. One major source of funding, Interest on Lawyers' Trust Accounts (IOLTA), is eroding because of the drop in short-term interest rates and the decline in real estate transactions.

LSC programs received $84.9 million in IOLTA funds last year, which was $27 million less than in 2008, for a 24 percent reduction. IOLTA funding varies by state and grant cycle, making it difficult to forecast how much support LSC programs will receive, but the outlook is not encouraging. Most programs project declines in 2010 and probably into 2011, in part because IOLTA funders will likely deplete their reserves.

Currently, there are 136 independent nonprofit legal aid programs, which have 918 offices across the nation, that receive funding from LSC. With so much work to be done to meet requests for assistance, the LSC Board encourages these programs to leverage their federal funding.

In an era where every dollar counts, partnerships are vital to leveraging our federal funding in every community. LSC encourages programs to think strategically about partnerships and collaborations with others—such as hospitals, law firms, law schools and community agencies—that hold the promise of stretching limited resources and making our programs more effective and efficient. For example, LSC has almost 40 programs that participate in 43 medical-legal partnerships in more than 25 states, focusing on improving the health outcomes for children, families, the disabled and the elderly.

LSC programs serve as a cornerstone of our nation's *pro bono* efforts, and the Board will continue to encourage and grow the involvement of the private bar. The involvement of private attorneys in LSC work increased significantly—11.4 percent from 2008 to 2009.

From young lawyers seeking experience as they enter the profession, to mid-career lawyers wanting to give back, to retiring lawyers that want to remain active, we need to figure out how to engage and deploy these attorneys, for there is no shortage of work in legal aid offices.

The funding provided by Congress to LSC is more vital than ever and an essential part of our country's effort to provide civil legal aid for the poor. LSC distributes more than 95 percent of its annual appropriation, currently $420 million, directly to the programs that deliver legal assistance. The proposed $750 million in annual funding authorized by this legislation would represent a giant step toward fulfilling our nation's pledge of equal justice for all.

In addition to higher funding authorization for LSC, I would like to offer some observations on other sections of the reauthorization legislation.

Governance

As to the sections of the bill that codify the improvements in governance and accountability that were recommended to LSC by the Government Accountability Office (GAO) in 2007, the Corporation supports the intent of these changes. The improvements have already been implemented by LSC and in testimony before this Subcommittee in October 2009, Susan Ragland of GAO acknowledged the good progress that had been made by the Corporation.

Specifically, GAO made a total of 17 recommendations in its two reports issued on LSC in 2007 (*Legal Services Corporation, Governance and Accountability Practices Need to be Modernized and Strengthened* (August 2007) and *Legal Services Corporation, Improved Internal Controls Needed in Grants Management and Oversight* (December 2007). LSC accepted all the recommendations and continues to work with the GAO to ensure that all the recommendations are completed to their satisfaction.

According to the GAO, LSC has fully implemented 11 recommendations and partially implemented the remaining six. Additional documentation on all six items has been provided to the GAO, where they are under review. These include a comprehensive orientation program for new Board members; risk-based criteria for selecting grantees for internal control and compliance program visits; guidance for performing follow-up on responses from grantee interviews; policies that clearly delineate organizational roles and responsibilities for grantee oversight and monitoring including grantee internal controls and compliance; a periodic self-assessment of the Board's committees, and evaluation of key management processes by the Board's Audit Committee. LSC expects that all the recommendations will be fully implemented and closed out by the GAO by the end of this year.

The only question that my Board would ask is whether it is a best practice to actually name the committee structure in an authorization bill, or could a more general statement suffice that requires the Board to pursue best governance practices. We do not know how long this bill will

be in place and, even if it is only five years, best practices and labels could change in that time period, and it would not seem to be prudent to have to change the law to address these changes. We would be happy to work with the Subcommittee either as part of your markup or in a future conference to address this issue.

Grantee Board Composition

LSC grantees have expressed a desire for greater flexibility in their board composition. At LSC's Executive Directors' conference in 2008, executive directors in a feedback session commented on the advantages of relaxing the current requirement that requires 60 percent of grantee board members to be lawyers. Changing this requirement to a smaller percentage of lawyers, such as 50 percent, would enable grantees to recruit other members of the community with expertise in fundraising, social services and financial issues.

Because of the overwhelming interest by program executive directors in this subject, LSC invited a panel of current and former grantee board chairs to speak on this topic at the LSC Board meeting in January 2009. The panel members discussed the makeup of their respective boards and how they generally operate. The former board chair of Iowa Legal Aid reiterated the importance of having more flexibility to recruit members with non-legal backgrounds, such as persons with audit and financial expertise.

Currently, the LSC Act requires that the grantees are governed by a board that is at least 60 percent attorneys who belong to the state bar and at least one-third members who are "client eligible." H.R. 3764 would alter the board's composition so that half are attorneys and a third are client eligible. The legislation also adds a requirement for a *pro bono* liaison with state bar associations and eliminates the McCollum Amendment requirement that state and local bar associations select members for grantee boards.

LSC supports these revised requirements and believes they will provide greater flexibility to recruit non-legal expertise that is beneficial to grantees.

Funding Restrictions

Since Fiscal Year 1996, Congress has included a number of funding restrictions in our appropriations. Last year, Congress removed the statutory restriction on funding programs that claimed, collected and retained attorneys' fees.

The Board, at its April 16-17 meeting, approved a Final Rule in the Federal Register that confirmed prior action by the Board to repeal LSC's regulatory restriction on claiming, collecting and retaining attorneys' fees. Grant recipients can make claims for attorneys' fees in any case in which the award of fees is permitted by law. LSC grant recipients also will be permitted to collect and retain attorneys' fees whenever such fees are awarded to them. LSC will collect information on this revenue and report it, as we do with other sources of income.

LSC is committed to enforcing the will of Congress and takes actions to ensure that our programs are in compliance. We are currently defending certain 1996 restrictions and the 45

CFR Part 1610 Program Integrity Rule in court. The U.S. Court of Appeals for the Ninth Circuit has ruled in LSC's favor in *Legal Aid Services of Oregon v. LSC* and plaintiffs have asked for a rehearing. The combined cases *Velazquez v. LSC* and *Dobbins v. LSC* are on hold in the Eastern District of New York because of the uncertainty regarding possible Congressional changes to funding restrictions.

The LSC Board and the Corporation are not taking a position on the restrictions because LSC administers and enforces all laws regarding the use of LSC funds.

Student Loan Repayment Assistance

LSC supports efforts to authorize the Corporation's Herbert S. Garten Loan Repayment Assistance Program (LRAP), which has proven successful in helping LSC grantees recruit and retain highly qualified attorneys.

LSC launched the program in Fiscal Year 2006 with Congressional support, and since then 154 legal aid staff attorneys have received loan repayment assistance. LSC expects to award loans to 94 attorneys this year. LRAP recipients are awarded $5,600 per year for up to three years, provided that the attorneys remain in good standing with their programs.

Surveys conducted by LSC in 2007 and 2008 found that financial pressure was cited by a majority of LRAP participants as a significant or very significant reason for why they would leave their jobs as legal aid lawyers, and that receiving loan repayment assistance increased their willingness to remain with their organizations. The surveys also found that the majority of executive directors of LSC-funded organizations reported that offering loan repayment assistance significantly enhanced their ability to recruit and retain staff.

Ongoing research conducted by the National Association for Law Placement shows that civil legal aid attorneys are consistently the lowest-paid members of the legal profession, earning less than public defenders and state and local prosecutors, and far less than their counterparts in the private sector. According to the surveys, the average law student graduates with more than $80,000 of debt.

The continuation of LSC's LRAP, in combination with other loan repayment programs, including those created by the Congress, is vital to addressing this need and ensuring the existence of a robust pool of lawyers dedicated to providing help to those who could not otherwise afford it.

Executive Compensation

I am pleased to endorse the compensation change in H.R. 3764, which would permit the LSC President to be paid at Level III of the Executive Schedule.

The LSC Board, at its April 16-17 meeting, took steps to begin a nationwide search for a distinguished new president to lead the Corporation. This is an urgent matter, clearly, and one of the Board's top priorities this year.

One of the hurdles that we will encounter in recruitment is the salary authorized for this position, currently Level V of the Executive Schedule. The rate of pay for this position, which is $145,700, is less than the pay for most members of the Senior Executive Service (average rate of basic pay before bonuses was $157,937 in Fiscal Year 2008) in the federal government.

In comparison with other similar organizations, the salary of the president of LSC is set far too low. The Corporation for Public Broadcasting, for instance, has their president's salary set at Executive Level I. The Federal Communications Commission, the International Trade Commission and the Small Business Administration have their chief executives' salaries set at Executive Level III, also higher than the president of LSC. We believe that H.R. 3764, by setting the LSC president's salary at Executive Level III, corrects a glaring inequity in the salary scale.

My predecessor as Board Chairman informed me that the salary schedule for LSC's senior staff had presented issues during searches for talented and experienced corporate officers. As you know, pay that is not competitive in Washington makes it difficult to recruit from outside this region, especially since housing and living costs are typically higher here than in some other parts of the nation. The salary for the LSC president was set 35 years ago—long before chief executives were expected to be leaders in such areas as technology, contingency planning and security systems, organizational performance, performance-based budget decisions, collaborative partnerships and "green" initiatives to reduce energy costs. Our next president must be an innovator who can take the steps to ensure LSC continues to be the leading national voice on legal aid for the poor.

I also ask that you provide for the continuation of the Corporation's locality pay program, which is modeled after the federal government and has been specifically provided for in the annual appropriations act that funds LSC.

Audits of LSC-Funded Programs

The LSC Board of Directors is strongly committed to efficiency, effectiveness and accountability. I have been told that the LSC Inspector General has reservations about some parts of H.R. 3764, and I believe any concerns that he raises deserve study by the Board.

In 1996, Congress gave the LSC Office of Inspector General (OIG) primary responsibility for annual independent public accountant (IPA) audits of grantees and audit oversight. Both the Office of Compliance and Enforcement (OCE), which conducts regular compliance reviews and investigations, and the OIG have direct compliance functions. The OIG refers certain findings and recommendations to OCE for follow-up, and OCE refers fraud and other matters to the OIG. When the GAO reviewed this situation in 2007 they concluded that a lack of clear definition of authority and responsibilities existed between OCE and OIG. LSC has implemented policies and procedures to address this concern and is continuing to take steps in that direction.

The reauthorization bill would eliminate the 1996 provisions regarding the OIG's role and revert to the provisions of the LSC Act and the IG Act. I am very interested in learning how the IG and OCE operate and what is the normal practice for IGs and federal agencies. LSC is committed to

ensuring that management and the OIG will coordinate to maximize the effectiveness of LSC compliance oversight.

The reauthorization bill would also address language in the LSC Act protecting client secrets protected under mandatory state and local attorney rules of professional responsibility. Attorneys are required to zealously guard their clients' secrets, and poor clients are entitled to the same protections. These revisions would clarify some questions as to whether grantees would rely on the American Bar Association's non-mandatory rules or the governing state and local rules. In 1996 Congress allowed LSC to collect non-privileged information such as client names and financial records even if they were otherwise protected secrets. The reauthorization bill would eliminate that provision. The Board expects to learn much more in the coming months about how the current language has worked over the past 14 years. LSC is committed to finding the best balance of respecting the local rules while ensuring that it can continue to maintain effective oversight of recipients and enforcement of restrictions.

The IG has also raised a number of points regarding specific provisions of the 1996 appropriation that would not be continued in this bill. Many of them involve statutory requirements that LSC has implemented by regulation and practice. I believe that the LSC Board and management, with the help of the IG, can ensure that they use their broad oversight discretion to maintain, and improve, existing grant management and competition practices. Other issues involve more technical matters such as the correct accounting standards and the applicable federal laws.

My goal is a fresh and determined review regarding these issues. I look forward to working with the Subcommittee and its highly capable staff on the 1996 provisions.

Conclusion

The programs that LSC funds serve clients as diverse as the nation itself—all races, ethnic groups and ages. Their clients include the working poor, veterans, homeowners and renters, families with children, farmers, and people with disabilities. Three out of four people served by our programs are women, many struggling to keep their children safe and their families together.

The ranks of the poor are growing. Economic data indicate that the number of working poor eligible for civil legal assistance is increasing and will likely continue to do so as the recession recedes. Although the unemployment rate was stable in February and March, the record number of long-term unemployed individuals continued to rise.

LSC programs are doing all that they can to help low-income Americans. Programs in West Tennessee and in Ohio hold open houses to help homeowners who may be nearing, or are in trouble, paying their mortgages. Programs in West Virginia and Arizona are part of community efforts to help victims of domestic violence. LSC programs partner with the American Red Cross and the Young Lawyers Division of the American Bar Association to provide legal aid to victims of hurricanes and other disasters, including the April 4 earthquake in California's Imperial Valley. Programs in Georgia and California have helped create medical-legal partnerships that

transform how legal services are delivered to families and children. These are just a few examples of the critical work undertaken by LSC programs.

We need to expand the use of technology, for internal and external purposes, by building on LSC's existing online services to better serve clients, by assisting and training LSC lawyers through online media, and by better coordinating our own efforts across the country.

We must continue to look toward the community of grant-making organizations and apply the best practices they have developed, to ensure that our funds are accounted for and efficiently spent on those programs that consistently prove their high-quality effectiveness.

Although an increasing number of our cases are handled on a *pro bono* basis, we can do more to reach out to the private bar, law schools and others for volunteers to help families with legal problems.

The Constitution of the United States begins with a call for government to "establish justice." Thirty-three years ago, my father, Edward H. Levi, in his farewell address as Attorney General to the Department of Justice, reminded us that the values on which our country was founded "can never be won for all time—they always must be won anew."

Every day, legal aid attorneys across our nation can be counted on to ensure the poor are treated with fairness and dignity in the resolution of their civil legal problems. LSC thanks the Subcommittee for taking up H.R. 3764. It represents a giant step toward fulfilling the national promise of equal justice for all.

Thank you. Mr. Chairman, it is an honor to testify today. I am happy to respond to your questions.

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Mr. COHEN. Thank you, Mr. Levi, for your service and that of your family and for your testimony.

Our second witness is Mr. Jeffrey Schanz, who was appointed Legal Services inspector general effective March 3 of 2008. He has had a long and distinguished career with the Federal Government, 34 years, the last 32 in DOJ, served 17 years as director of the Office of Planning and Development, Audit Division, in the inspector general's office.

Thirty-two years at DOJ have included auditing, program analysis, investigation, legal analysis of top management positions. After leaving the Department of Health, Education and Welfare he served with the Law Enforcement Assistance Administration, Justice Management Division, and the Office of the Inspector General, and a recipient of several attorney general awards.

Thank you, Mr. Schanz, and you can begin your testimony.

TESTIMONY OF JEFFREY E. SCHANZ, INSPECTOR GENERAL, LEGAL SERVICES CORPORATION

Mr. SCHANZ. Thank you very much, Mr. Chairman. Mr. Chairman, Congressman Franks and other distinguished Members, as you just heard, my name is Jeff Schanz. I have been the inspector general for Legal Services since March of 2008. Sorry.

I believe strongly, being in the I.G. community for so many years—actually, decades; three decades—I strongly believe in the values of accountability, transparency, effectiveness and efficiency that are mandated by Inspector General Act.

I fully endorse Chairman Levi's statement underscoring the critical importance of the LSC mission, and I look forward to working with Mr. Levi and the new board in fulfilling the corporate mission by ensuring that Federal funds are appropriately used to help the indigent, the people that it is designed to help.

One of my duties as the inspector general is to keep the Congress fully and currently informed of my findings and activities and comment on existing and proposed legislation, that latter function which brings me here today to comment on H.R. 3764.

At this Subcommittee's hearing last year, Chairman Cohen asked what steps the corporation had taken to "protect against the misuse of Federal funds." I will briefly talk about some of the activities that my office has done in the last 18 months, recognizing I have been here 2 years. A more robust list of my activities are in the formal statement that I prepared for today that will be, hopefully, entered into the—into the record.

We did complete a series of audits of grant management and oversight, reporting on issues that affected almost $1.5 million in LSC or LSC derivative funds and referred over $400,000 to the corporation as questioned costs to be recouped.

We launched a number of initiatives to help and detect—prevent and detect fraud and abuse. We have issued fraud alerts, an initiative that was undertaken to all of the executive directors of the programs, the 136 programs, to highlight vulnerabilities identified in the course of OIG audits and investigations.

We also took numerous steps to improve the government practice—governance practices and accountability at LSC by independently and objectively conducting an audit of the LSC contracting with respect to consultants.

We also have taken a more robust look at all the IPA reports, the independent public accountant reports, that come in to the OIG, and we have also overseen and continue to oversee the annual corporate audit.

While H.R. 3764 proposes some useful reforms in the areas of governance, it also contains that—we believe, a number of provisions that threaten to undermine the I.G.'s work.

If a provision comparable to Section 509 of the 1996 LSC Appropriation Act is not included, the reauthorization bill would take the corporation backwards to a time where the respective roles of management, LSC management, the OIG and the aforementioned IPAs, the independent public accountants who audit grantees, were unclear.

The GAO in their first audit has specifically identified such lack of demarcation as a major factor in LSC's heretofore weak governance and accountability practices.

Without Section 509 or an equivalent, oversight of grantee audits would no longer be held to the same standards that the OMB Circular A-133 makes applicable to audits of states, local governments and nonprofit organizations receiving Federal grants.

In addition, the bill as constituted would restrict the OIG's access to grantee records as it contains no provision comparable to Section 509(h) of the 1996 act, which provides the OIG access to the records it needs to perform our statutory oversight duties.

Moreover, under the proposed LSC bill, grant money would no longer be considered Federal funds for purposes of Federal statutes relating to fraud and embezzlement—unfortunately, issues that we have uncovered.

The bill would also make it difficult for the OIG to ascertain the source of funding for grantee activities by repealing current provisions that require recipients to account separately for LSC and non-LSC funds.

In addition, the bill would repeal the current statutory requirements that grantees make their timekeeping records available to oversight entities, OIG, GAO and the corporation included, and eliminates statutory provisions designed to foster competition in the grant award process.

I stand ready to work with the Committee and the new board of directors to ensure that the LSC OIG can function with the independence and authority it needs to ensure the—that Federal funds entrusted to LSC are spent with the appropriate level of transparency and accountability.

I am pleased to answer any questions that the Committee may have. Thank you for this opportunity.

[The prepared statement of Mr. Schanz follows:]

PREPARED STATEMENT OF JEFFREY E. SCHANZ

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Jeffrey E. Schanz
Inspector General
Legal Services Corporation

Testimony Before the
Subcommittee on Commercial and Administrative Law
House Committee on the Judiciary

April 27, 2010

Introduction

Mr. Chairman, Congressman Franks, and other distinguished members, thank you for this opportunity to comment on H.R. 3764, the Civil Access to Justice Act of 2009. My name is Jeffrey Schanz. Since 2008, I have been Inspector General for the Legal Services Corporation. I was a founding member of the United States Department of Justice Office of Inspector General at its inception in 1989, and remained there until retiring as Director of the Office of Policy and Planning in 2008. All told, I have now spent more than 36 years performing audits and other types of IG work. Needless to say, I believe strongly in the values of accountability, effectiveness and efficiency that are mandated by the Inspector General Act of 1978, 5 U.S.C. app. 3.

Like all federal Inspectors General, it is my statutory duty to prevent and detect fraud, waste, and abuse and to make recommendations to the head of the agency to improve the efficiency and effectiveness of its programs and operations. The Inspector General also has a duty to keep the Congress fully and currently informed of his findings and activities, and to comment on existing and proposed legislation, regulations, and agency policies. Thus the Inspector General serves both Congress and the head of his or her agency with equal thoroughness and zeal.

The LSC OIG is charged with oversight not only of its parent agency but also of 136 separate legal aid grantees, which receive a substantial portion of their operating funds in the form of LSC grants. As Inspector general, I am obligated by statute to report serious problems to the LSC Board of Directors, and to notify appropriate law enforcement authorities when my office has found that there are reasonable grounds to believe that a crime has occurred. In addition, the LSC OIG provides periodic reports to the Board and management of LSC and to the Boards of Directors and management of LSC grantees. In order to carry out these responsibilities effectively, it is important that my office have unimpeded access to records and information, from both the Corporation and its grantees. See Section 6(a)(1) of the Inspector General Act of 1978, as amended, 5 U.S.C. app. 3, § 6(a)(1) (authorizing each Inspector General "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act").

Provided the "agency head is committed to running the agency effectively and to rooting out fraud, abuse and waste at all levels," the Inspector General "can be his strong right arm in doing so, while maintaining the independence needed to honor his reporting obligations to Congress." Inspector General Act of 1978, S. Rep. 95-1071, 95th Cong., 2nd Sess, p. 9. To ensure the objectivity of the IG, the IG Act grants the LSC IG the independence to determine what reviews are performed; gain access to all documents needed for OIG reviews; publish findings and recommendations based on OIG reviews; and report OIG findings and recommendations to the LSC Board of Directors and to Congress.

Although the OIG is not a part of LSC management, we serve as an objective and independent accountability expert for the LSC Board of Directors and LSC management. To

be effective, the OIG works cooperatively with the Board and management, seeks their input prior to choosing topics for OIG review, and keeps them informed of OIG activities. Within their different statutory roles, the OIG and management of LSC share a common commitment to improving the federal legal services program and increasing the availability of quality legal services to the poor.

Recent Activities

At this subcommittee's last hearing on the Legal Services Corporation, Chairman Cohen noted that LSC and some of its grantees had been criticized for inappropriate use of federal funds, noting that "there are special places held for people who steal from the poor." Chairman Cohen wanted to know what steps LSC had taken to "protect against misuse of federal funds and protect those funds entrusted to them for the benefit of people who need that help."

The LSC OIG has recently undertaken a number of steps to address such concerns. During the past 18 months, the LSC OIG has:

• Completed a series of audits following up on GAO review of LSC controls over grants management and oversight, and provided LSC management with "roll-up" memoranda summarizing audit findings and identifying matters requiring further management attention. Overall, we reported on issues affecting over $1.47 million in LSC or LSC-derivative funds, of which $435,000 was referred to management as questioned costs;

• Directed continuing audit efforts to review adequacy and effectiveness of internal controls at grantees; these audits have resulted in questioned costs of over $229,000.

• Investigated a former grantee employee who was subsequently indicted on 73 counts of mail fraud and thereafter pleaded guilty to defrauding the grantee and scores of its clients of thousands of dollars.

• Undertaken an investigation involving a grantee that was ordered to divest over $2 million in attorneys' fees and agreed not to seek LSC funding for five years.

• Conducted a joint investigation with the Department of Justice OIG of an acting executive director of a grantee for stealing tens of thousands of dollars in grant funds; the acting executive director was removed from his position and subsequently pleaded guilty to theft of federal grant monies under programs funded by LSC and the Department of Justice's Office of Violence Against Women.

• Launched a variety of initiatives to help prevent and deter fraud and abuse, including: fraud alerts issued to all executive directors to highlight issues and vulnerabilities identified in the course of OIG investigations or audits (e.g., control breakdowns that permitted a $200,000 embezzlement at one grantee); onsite fraud awareness briefings; onsite fraud vulnerability assessments; a guide on how to help prevent computer thefts; and significant improvements in Hotline awareness and operations.

In order to improve governance practices and improve accountability for federal funds, the LSC OIG has, during the same period:

• Conducted an audit of LSC controls and practices with respect to consultant contracting. The audit identified a number of issues requiring corrective action (e.g., potentially improper classification of consultants for tax purposes; inadequate adherence to internal controls; and multiple procedural weaknesses).

• Initiated an audit of LSC's Technology Initiative Grant Program.

• Conducted on-going oversight of the grantee audit process, including desk reviews of 100% of grantees' audit reports and more in-depth and onsite reviews of selected IPAs' audit work (Audit Service Reviews).

By continuing to press forward with these and similar activities, the LSC OIG is helping to root out fraud, waste, and abuse in LSC and its grantees, and to improve the efficiency and economy of the federal legal services program. Serving as an agent for positive change, the OIG continues to work with the LSC Board and LSC management to maximize the use of available funding by ensuring it is used to assist eligible indigent clients in resolving their legal problems.

H.R. 3764

Although H.R. 3764 contains positive measures to improve corporate governance and accountability, if enacted in its current form it could hamper my office's ability to carry out its statutory responsibilities to prevent and detect waste, fraud, and abuse in the Corporation and its grantees, to ensure compliance with applicable statutory and regulatory provisions, and to improve the effectiveness, efficiency and economy of the federal legal services program. I have outlined my concerns with the legislation below.

Audits

Certain provisions of H.R. 3764 could be read to undermine the LSC OIG's central oversight role in the grantee audit process, which is currently governed by Section 509 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 ("1996 Act"). To understand how the audit provisions of H.R. 3764 would affect the OIG requires some acquaintance with the historical background of LSC and the LSC OIG.

The LSC Act itself contains only a few provisions bearing directly on the audit function. Section 1009(c) of the LSC Act requires the Corporation to "conduct, or require each grantee, contractor, or person or entity receiving financial assistance under this subchapter to provide for, an annual financial audit." 42 U.S.C. § 2996h(c). In addition, Section 1009(c) sets forth certain administrative requirements; for example, the Corporation must retain audit reports for five years, and make copies of the reports available to GAO and members of the public. See id. at § 2996h(c)(1), (2). The audits

mandated by the LSC Act are required to be performed in accordance with Generally Accepted Auditing Standards ("GAAS").

LSC did not have an Inspector General at the time of the 1974 LSC Act or the 1977 LSC Reauthorization Act. Thus, the audit provisions in the LSC Act do not take into account the powers and responsibilities of the LSC Inspector General, which came into existence in 1989. In the Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101, Congress consolidated all non-programmatic audit operations under the Inspectors General. *See* 5 U.S.C. app. 3. § 8E(b) (requiring head of DFE to transfer "offices, units, or other components" with OIG-related functions to OIG); S. Rep. No. 150, 100th Cong., 1st Sess., at 3 (1987) ("defining "IG 'concept'" as involving "the consolidation of an agency's audit and investigative functions and resources under a single high-level official reporting directly to the agency head").

Moreover, Section 1005(e)(1) of the LSC Act specifies that the Corporation "shall not be considered a department, agency, or instrumentality, of the Federal Government." 42 U.S.C. § 2996d(e)(1). As a result, laws that apply generally to federal departments, agencies and instrumentalities do not apply to LSC absent a specific provision to the contrary. As a result, neither the myriad of federal financial management and governance laws that have been enacted over the past 33 years (such as the Single Audit Act of 1984 and the Single Audit Act Amendments of 1996) nor OMB Circulars such as A-133 (audits of state and local governments and nonprofits receiving federal grants) are applicable to LSC and its grantees.

Recognizing the statutorily-mandated role and duties of the LSC OIG and hoping to improve accountability for LSC funds, in 1996 Congress made a number of significant changes to the grantee audit process by enacting Section 509 of the 1996 Act. Section 509: (1) mandated routine on-site monitoring of grantee compliance by means of annual audits conducted by independent public accountants ("IPAs"); (2) provided that such audits be conducted in accordance with Generally Accepted Government Auditing Standards ("GAGAS") pursuant to guidance established by the LSC OIG; (3) established special requirements for interim reporting by recipients concerning noncompliance with laws and regulations identified by their IPAs during the course of audits; (4) gave the Corporation, upon the recommendation of the OIG, authority to impose sanctions on recipients failing to conduct audits in accordance with OIG guidance; and (5) provided for OIG removal, suspension, or debarment of IPAs upon a showing of good cause after notice and opportunity for a hearing. See 110 Stat. 1321, Sec. 509(a)-(d).

The legislative history underlying Section 509 makes clear that Congress intended to ensure the LSC OIG a central role in the conduct of grantee audits. In particular, the conference report notes that Section 509 includes:

> modifications to language proposed by the Senate to clarify that *only the Office of the Inspector General shall have oversight responsibility to ensure the quality and integrity of the financial and compliance audit process*. Language is also included, as proposed by the Senate, to

> clarify the Corporation management's duties and responsibilities to resolve deficiencies and non-compliance reported by the Office of the Inspector General. Further, language is included, as proposed by the Senate, authorizing the Office of the Inspector General to conduct additional on-site monitoring, audits, and inspections necessary for programmatic, financial and compliance oversight.

HOUSE RPT. 104—537 (emphasis supplied).

Moreover, the 1996 Act made clear that this new audit regime was to be "in lieu of the financial audits otherwise required by section 1009(c)" of the LSC Act. 1996 Act, § 509(h). Thus, Section 509 aligned, for the first time, LSC grantee audit requirements with the pre-existing statutory responsibility of Inspectors General to "take appropriate steps to ensure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General [for audits of federal establishments]". 5 U.S.C. app. 3, § 4(b)(1)(C). See generally S. Rep. 95-1071, "Inspector General Act of 1978," Sept. 22, 1978, p. 2687 (noting that standards established by the Comptroller General of the United States – i.e., GAGAS – are preferable to GAAS for audits involving federal funds).

The 1996 Act established a new grantee audit regime at LSC, both expanding the scope of recipient audits and clarifying the role of the LSC OIG in overseeing them. Moreover, by enacting Section 509, Congress attempted to bring oversight of LSC grantee audits more in line with the standards that had already been made applicable to audits of states, local governments, and nonprofit organizations receiving federal grants by the Single Audit Act of 1984, P.L. 98-502, the Single Audit Act Amendments of 1996, P.L. 104-156, and OMB Circular A-133.

H.R. 3764, however, would eliminate the audit-related requirements of Section 509. By doing so H.R. 3764 would take LSC backwards to a time when the respective roles of LSC management, the LSC OIG, and the IPAs were unclear, leading to unnecessary confusion and overlap in functions and activities between various LSC offices. In an August 2007 report, the GAO specifically identified such confusion and overlap as a contributing factor in LSC's weak governance and accountability practices. See Legal Services Corporation: Governance and Accountability Practices Need to Be Modernized and Strengthened, GAO-08-37.

Inexplicably, Section 15 of H.R. 3764 ignores the IG Act's explicit grant of authority to OIGs to oversee work performed by non-federal auditors. Nor does the bill mention the OIG's important role in promulgating standards and in providing oversight to "ensure the quality and integrity of the financial and compliance audit process." Instead, it merely provides that the "Corporation shall require an audit" of each recipient. Nor does the bill acknowledge the IG Act's requirement that work performed by non-federal auditors conform to Government Auditing Standards.

H.R. 3764 would relax IPA audit requirements in other ways as well. Under current law, IPAs are required to "report whether –

> (1) the financial statements of the recipient present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;
>
> (2) the recipient has internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations; and
>
> (3) the recipient has complied with Federal laws and regulations applicable to funds received, regardless of source.

Pub. L. 104-134, § 509(a)(1)-(3).

H.R. 3764 would weaken these standards in several subtle ways. First, unlike Section 509, it would not require IPAs to report whether the recipient's financial statements fairly present its financial position; whether the recipient has internal control systems meeting certain standards; and whether the recipient has complied with the applicable laws and regulations. Instead, H.R. 3764 would merely require each recipient to "prepare a report that includes . . . the financial statements of the recipient, including an unbiased presentation of the recipient's financial position and the results of the recipient's financial operations [and] . . . a description of internal control systems of the recipient that provide reasonable assurance that the recipient is managing funds, form all sources, in compliance with Federal law."

Additionally, H.R. 3764 incorporates none of the provisions of the 1996 Act setting forth special requirements for interim reporting by recipients concerning noncompliance with laws and regulations identified by their IPAs during the course of an audit, and allowing the Corporation to impose sanctions on IPAs who fail to conduct audits in accordance with OIG guidance.

By eliminating specific reference to the OIG's central oversight role in the grantee audit process, the audit provisions of H.R. 3764 appear to run counter to the intent of the Inspector General Act of 1978 to consolidate all non-programmatic audit operations under the Inspectors General, see 5 U.S.C. app. 3, § 8E(b), and vest the OIGs with the responsibility to "provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment." 5 U.S.C. app. 3, § 4(a)(1).

The changes H.R. 3764 would work in LSC's auditing regime are not just cosmetic. GAGAS audits are mandated for entities with statutory Inspectors General because they carry greater assurance of accuracy and accountability than do those conducted pursuant to GAAS. In comparison with GAAS, GAGAS requires the maintenance of higher standards with respect to auditor qualifications, the quality of the audit effort, and the

required contents of audit reports. By repealing the requirement that audits of LSC grantees be conducted in accordance with GAGAS, H.R. 3764 would return the Corporation to the confusing state of affairs that existed in 1992, when 38% of the grantee audits submitted to LSC were conducted in accordance with GAGAS and the remainder were conducted in accordance with GAAS. Like virtually every other non-profit entity that receives substantial federal grant funding, LSC recipients should be required to account for their use of federal dollars in accordance with rigorous government auditing standards.

In this regard, moreover, H.R. 3764 runs counter to the clear intent of the Inspector General Act of 1978, *i.e.*, to bolster the ability of Federal OIGs to "provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment." 5 U.S.C. app. 3, § 4(a)(1) (IG Act).

Unlike other nonprofits receiving federal grants, which are required by OMB Circular A-133 to be audited pursuant to Government Auditing Standards, under H.R. 3764 LSC grantees would no longer be required to be audited pursuant to these well-established standards.

Replacing Section 509 of the 1996 Act with reporting requirements that are less rigorous than those imposed on federal grantees by OMB Circular A-133 would substantially increase the risk that more funds will be lost as a result of unreasonable or unsupportable expenditures, as well as fraud, embezzlement, or simply poor bookkeeping.

In this respect, H.R. 3764 appears to conflict with the statutory mandates of the IG Act, which requires Inspectors General to ensure that non-federal auditors examining federal programs adhere to Government Auditing Standards. See 5 U.S.C. app. 3, § 4(b)(1)(C) ("[I]n carrying out the responsibilities specified in subsection (a)(1), each Inspector General shall . . . take appropriate steps to ensure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General [for audits of Federal establishments]").

To address these problems, I recommend that H.R. 3764's current provision relating to audits and audit requirements be deleted and replaced with a provision specifying that such audits should be conducted in accordance with the reporting requirements set forth in OMB Circular A-133, which sets forth the requirements applicable to audits of states, local governments, and nonprofits expending federal funds.

In addition, I recommend that Section 1009 of the LSC Act be amended to specify that the Inspector General shall oversee all grantee audits, and that such audits must be conducted in accordance with GAGAS. In addition, as the LSC Act has not been amended since LSC became subject to the IG Act in 1988, H.R. 3764 should be amended to include a general statement to the effect that nothing in the amended LSC Act should be construed to diminish or otherwise affect the authorities or responsibilities of the Inspector General pursuant to the Inspector General Act of 1978, as amended.

Access to Records

By restricting the OIG's access to information protected from disclosure to third parties by state and local bar rules, H.R. 3764 would substantially restrict the OIG's access to grantee information and seriously hamper its ability to carry out meaningful audits and investigations.

It is a long-established principle that the federal law of privilege generally applies in subpoena enforcement proceedings brought by federal entities. See Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1513 (D.C. Cir. 1993). The LSC Act, however, adds a slight complication to this principle in its application to the LSC OIG (which was not in existence at the time the LSC Act was last amended). Specifically, Section 1006(b)(3) of the Act, 42 U.S.C. § 2996e(b)(3), provides that LSC may not

> interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction.

Because an Inspector General's access to records is limited to those "available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities", 5. U.S.C. app. 3, § 6(a)(1), the LSC OIG initially had considerable difficulty obtaining client names and other case-related information (which is not, as a rule, protected by the attorney-client privilege) based in part on interpretations of state bar rules, which generally require lawyers to protect the confidentiality of virtually all information relating to clients. On a number of occasions recipients' denial of such information made it extremely difficult for the LSC OIG to carry out routine work, including case reporting audits; audits of client trust fund accounts; and client satisfaction surveys.

Congress attempted to address these access problems by crafting Section 509(h) of the 1996 Act, which expressly supersedes the restrictions of §1006(b)(3). Section 509(h) provides:

> Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the

> Corporation, except for reports or records subject to the attorney-client privilege.[1]

Despite the clear language of Section 509(h), LSC grant recipients have continued to invoke state rules of professional responsibility to resist the enforcement of OIG subpoenas. So far, these attempts have been unsuccessful. See U.S. v. Legal Services for New York City, 249 F.3d 1077, 1083 (D.C. Cir. 2001) ("LSNYC") (noting that "§ 509(h) is an explicit exception to § 2996e(b)(3)"); Bronx Legal Services v. Legal Services Corp., 2002 WL 1835597, at * 4 (S.D.N.Y. Aug. 8, 2002) ("[E]ven if the requested information does constitute a client secret, plaintiffs are relieved of any perceived ethical obligations to withhold client names and the nature of the representation because they are required by [§ 509(h)] to disclose the requested information").

Notwithstanding the foregoing precedents, one grantee which is currently engaged in resisting disclosure of records to the LSC OIG in a subpoena enforcement action has recently invoked Section 1006(b)(3) in support of its contention that state law ethical obligations prohibit it from disclosing client-related information to the OIG. See 9/14/07 Opposition to Petition for Subpoena Enforcement, at 37-40, United States of America v. California Rural Legal Assistance, Inc, 07-mc-123 (D.D.C.). (Making matters even more confusing, the grantee has contended that the state law of attorney-client privilege, in addition to the federal attorney-client privilege, may be applicable to the withheld records. See id. at 37-40.)

H.R. 3764 would worsen this situation considerably. First, Section 7 of the bill would delete LSC Act Section 1006(b)(3)'s reference to the "Canons of Ethics and the Code of Profession Responsibility of the American Bar Association," and replace it with a reference to the "applicable rules of professional responsibility or other laws of the State or other jurisdiction where the attorney practices law". Second, Section 11 of the bill would add a new provision to the LSC Act requiring that the Corporation's "monitoring and evaluation activities" be "carried out in a manner that is consistent with the applicable rules for the jurisdiction in which the recipient is being monitored, and . . . take reasonable steps to avoid imposing undue burden or expense on the recipient." Third, Section 13 of the bill would require that the OIG would not "have access to any information . . . that is confidential under the applicable rules of professional responsibility or that is subject to the attorney-client privilege." And fourth, the bill contains no provision comparable to Section 509(h) of the 1996 Appropriations Act, which provides the OIG access to "financial records, time records, retainer agreements, client trust fund and eligibility records, and client names", notwithstanding the provisions of § 1006(b)(3). In combination, these changes in the current statutory regime could erode the LSC OIG's ability to obtain records necessary to carrying out audits and investigations.

Thus, in its current form, H.R. 3764 would place the LSC OIG in a highly disadvantageous position by forcing it to reckon with not only the varying laws of

[1] The terms and conditions to which the 1996 Act subjected LSC funding, including those bearing on the authorities of the OIG, have been incorporated by reference into all subsequent appropriations acts.

privilege in each distinct state or territory, but also with the professional responsibility rules of each jurisdiction, each time it sought information from LSC grantees. Moreover, the bill's requirement that LSC take "reasonable steps to avoid imposing undue burden and expense" on a grantee when carrying out the "monitoring and evaluation activities" set forth in Section 1007 would undoubtedly spark unnecessary disputes over the questions of undue burden and expense, which the OIG is already required to consider in the context of subpoena enforcement actions. See Linder v. National Sec. Agency, 94 F.3d 693, 695 (D.C. Cir. 1996) (district court is authorized to quash or modify unduly burdensome subpoena).

In sum, by depriving the LSC OIG of the ability to obtain records from the grantees it is charged with overseeing, the statutory alterations proposed in H.R. 3764 would leave several hundred million dollars in federal funds to be spent with considerably less oversight and accountability than at present. In this respect H.R. 3764 runs directly counter to the intent of Congress, as expressed in the recently-enacted Inspector General Reform Act of 2008, to enhance the authority of federal Inspectors General to root out waste, fraud, and abuse in federally-funded programs. By complicating access by the OIG and other monitors to recipient files, subjecting auditors and investigators to the various provisions of state and territorial rules of professional responsibility, H.R. 3764 would guarantee endless litigation over the terms of access to recipient files, and thereby allow LSC grantees to evade all but the most superficial oversight over their expenditures of federal funds.

To address this problem in the current version of H.R. 3764, the LSC OIG proposes engrafting the access provision of Section 509(h) into the bill, with the additional clarification that only information subject to the federal attorney-client privilege may be withheld from auditors or monitors of the grant recipient. In addition, all references to the "applicable rules of professional responsibility" of the several states and territories should be deleted from the statutory text wherever they appear.

Federal Funds

Unlike current law, H.R. 3764 contains no provision stipulating that LSC grants are to be considered federal funds for purposes of certain statutes. Accordingly, the bill would deprive the LSC OIG of a useful tool for safeguarding taxpayer funds (a risky proposition, as recent OIG audits and investigations have highlighted).

Among the provision of the 1996 Act that govern the use of LSC funds is Section 504(a)(19), which provides:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . unless such person or entity enters into a contractual agreement to be subject to all provisions of Federal law relating to the proper use of Federal funds, the violation of which shall render any grant or contractual agreement to provide funding null and void, and,

> for such purposes, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be considered to be Federal funds provided by grant or contract.

To implement Section 504(a)(19), LSC has promulgated regulations identifying the following statutes as applicable to money dispensed by the Corporation:

- 18 U.S.C. § 201 (Bribery of Public Officials and Witnesses)
- 18 U.S.C. § 286 (Conspiracy to Defraud the Government With Respect to Claims)
- 18 U.S.C. § 287 (False, Fictitious, or Fraudulent Claims)
- 18 U.S.C. § 371 (Conspiracy to Commit Offense or Defraud the United States)
- 18 U.S.C. § 641 (Public Money, Property, or Records)
- 18 U.S.C. § 1001 (False Statements or Entries)
- 18 U.S.C. § 1002 (Possession of False Papers to Defraud the United States)
- 18 U.S.C. § 1516 (Obstruction of Federal Audit)
- 31 U.S.C. § 3729-33 (Civil False Claims) (except that *qui tam* actions authorized by § 3730(b) may not be brought against the Corporation or its grantees)

45 C.F.R. § 1640.2(a)(1).

As with the previously-discussed provision conditioning the LSC OIG's access to grantee records on state professional responsibility rules, H.R. 3764's omission of a provision applying laws concerning the proper expenditure of federal funds would leave several hundred million dollars in federal funds to be spent with considerably less accountability than at present.

Section 504(a)(19) is the product of a longstanding bipartisan consensus that LSC funds should be considered federal funds for purposes of statutes bearing upon the proper use of federal funds; a substantially similar provision was included in H.R. 2039, the Legal Services Reauthorization Act of 1991, which was the last LSC reauthorization bill to pass either House of Congress. (H.R. 2039, introduced by Rep. Barney Frank (D-Mass.), passed the House of Representatives by the bipartisan margin of 253-154 on May 12, 1992.)

Although H.R. 2039 stalled in the Senate, in 1993 Representative John Bryant (D-TX) used the unaltered text of H.R. 2039 as the starting-point for H.R. 2644, the LSC reauthorization bill he introduced in the following (103rd) Congress. (H.R. 2644 never made it out of the House Subcommittee on Administrative Law and Governmental Relations.)

Both H.R. 2039 and H.R. 2644 provided that the Corporation was to be considered a "department or agency of the United States Government" for purposes of 18 U.S.C. §§ 286, 287, 641, 1001 and 1002; "the term 'United States Government' [was to] include the Corporation" for purposes of 31 U.S.C. §§ 3729-33; LSC auditors were to be considered "Federal auditors" for purposes of 18 U.S.C. § 1516; funds provided by the Corporation

were to be "deemed Federal appropriations when used by a contractor, grantee, subcontractor, or subgrantee of the Corporation"; and LSC funds were to be deemed "benefits under a Federal program involving a grant or contract" for purposes of 18 U.S.C. § 666, which concerns theft or bribery involving federally-funded programs. See H.R. 2039, 102nd Cong., 2nd Sess., at § 4 (reported with an amendment, Mar. 31, 1992); H.R. 2644, 103rd Cong., 1st Sess., § 4 (introduced July 15, 1993).

In addition to receiving bipartisan support in the Congress, the "federal funds" provision in H.R. 2644 received the approval of the Clinton Administration. See Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, 103rd Cong., 1st Sess., on H.R. 2644 (Sept. 22, 1993) (Prepared Statement of Webster L. Hubbell, Associate Attorney General), at 89:

> The flip side of local control is the need for effective, yet nondisruptive monitoring by the Corporation to make sure the services being provided with federal funds are efficient and effective. H.R. 2644 adeptly balances these competing goals. The bill provides a variety of new protections to guard against the misuse or misappropriation of Corporation funds. For example, the theft or embezzlement of funds provided by the Corporation will be treated like theft or embezzlement of any other federal appropriation under our criminal statutes.

The LSC reauthorization bills introduced in the Republican-led 104th Congress were, in many ways, quite different from those introduced in the 102nd and 103rd Congresses. In at least one respect, however, they were identical to their predecessor bills: both the House and Senate bills contained language identical to that in the Frank and Bryant bills requiring LSC funds to be deemed federal funds for certain purposes. See H.R. 1806, 104th Cong., 1st Sess., § 5 (introduced June 8, 1995 by Rep. McCollum); S. 1221, 104th Cong., 1st Sess., § 5 (introduced Sept. 7, 1995 by Senator Kassebaum).

It should be noted that theft or embezzlement of LSC funds is not an unheard-of phenomenon among LSC recipients. In a recent Semiannual Report to Congress, for example, the LSC OIG reported that a grantee employee with the responsibility for preparing checks and reconciling bank statements had been making checks out to herself and depositing them into her personal account. See LSC OIG Semiannual Report, April 2009, at 12. The investigation revealed that the employee had embezzled roughly $200,000 of program funds to pay for personal expenses by writing checks from the program payable to herself; using the program's debit and credit cards for cash withdrawals and personal purchases; and using the program's general bank account to pay for her personal credit cards via electronic payment. See id. The LSC OIG recently referred this matter to the United States Department of Justice for prosecution under federal laws.

There is no reason why congressionally-appropriated LSC funds should lose their federal character for purposes of allowing federal prosecutions in cases of bribery, theft, fraud, or embezzlement. Moreover, in this respect H.R. 3764 runs directly counter to the intent of

Congress, as expressed in the recently-enacted Inspector General Reform Act of 2008, to enhance the authority of federal Inspectors General to root out waste, fraud, and abuse in federally-funded programs.

To rectify this deficiency in H.R. 3764, I recommend that the Committee adopt a provision similar to Section 504(a)(19) of the 1996 Act, but modified to correct certain deficiencies of Section 504(a)(19).

Although there is no indication in the legislative history of the 1996 Act why the specific statutory references were omitted from the appropriations rider that ultimately became Section 504(a)(19) (following the veto of two previous appropriations bills), it is clear that LSC took its cue from the cognate provisions in the pre-1996 reauthorization bills when it published its regulations implementing Section 504(a)(19). See 62 Fed. Reg. 19424, 19425 (noting that H.R. 1806 "expressly cites most of the laws included in this part").

Nevertheless, while Section 504(a)(19) requires that grantees agree to be bound by *all* federal statutes relating to the proper use of federal funds, LSC's implementing regulations, at 45 C.F.R. § 1640, do not identify all federal statutes relating to the proper use of federal funds.

In particular, the regulations contain no mention of 18 U.S.C. § 666, which is the primary federal statute to prosecute cases involving theft or bribery involving non-federal officials who have been entrusted to administer federal funds. It was enacted to "fill a gap caused by the difficulty of tracing federal monies" in prosecutions undertaken pursuant to 18 U.S.C. § 641, which covers theft or embezzlement of federal property. United States v. Westmoreland, 841 F.2d 572, 576 (5th Cir. 1988). As the Senate Report on Section 666 explained:

> [T]here is no statute of general applicability in this area, and thefts from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 U.S.C. § 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds. Indeed, a recurring problem in this area (as well as in the related area of bribery of the administrators of such funds) has been that State and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved.

S.Rep. No. 225, 98th Cong., 2d Sess. 369, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3510, as quoted in Westmoreland, 841 F.2d at 576-77.

Given the widely-recognized inadequacy of Section 641 for the prosecution of thefts of federal grant funds by non-federal officials, and the evident Congressional intent to include Section 666 among those federal laws which were to be made applicable to LSC funds by Section 504(a)(19) of the 1996 Act, see H.R. 2039, 102nd Cong., 2nd Sess., at § 4; H.R. 2644, 103rd Cong., 1st Sess., § 4; H.R. 1806, 104th Cong., 1st Sess., § 5; S. 1221, 104th Cong., 1st Sess., § 5 (making Section 666 applicable to LSC funds), I recommend that H.R. 3764 correct this oversight by making Section 666 applicable to LSC funds.

Timekeeping

Other provisions of H.R. 3764 are troubling as well. For example, the bill would make it more difficult for the LSC OIG and other monitors to ascertain the source of funding behind grantee activities by repealing current statutory provisions that require recipients to account separately for receipts and disbursements of LSC and non-LSC funds. In addition, the bill would repeal the current statutory requirement that grantees make their timekeeping records available to monitors. Pub. L. 104-134, § 504(a)(10)(A)-(C).

Prior to the 1996 Act, LSC grantees were required to account for and report receipts and disbursements of non-LSC funds as "separate and distinct" from LSC funds. In the absence of any timekeeping requirement for recipient staff, however, it was difficult for an outside monitor to assess whether LSC funds had been used for prohibited purposes.

Section 504(a)(10) of the 1996 Act went some way toward remedying this situation by requiring recipients to "maintain records of time spent on each case or matter"; account for funds received from sources other than LSC "as receipts and disbursements . . . separate and distinct from Corporation funds"; and make their timekeeping records available to auditors and other monitors (including the LSC OIG). See Pub. L. 104-134, Section 504(a)(10)(A)-(C).

H.R. 3764, however, would make it even more difficult than at present for monitors to ascertain the source of funding behind grantee activities. In place of Section 504(a)(10)'s somewhat detailed recordkeeping requirements, Section 11 of H.R. 3764 would merely require LSC to ensure that "all attorneys and paralegals employed by a recipient . . . maintain records of time spent on each case or matter supported in whole or in part with funds provided under this title."

Not only would H.R. 3764 fail to improve grantees' accountability for LSC funds; it would actually repeal the current statutory requirement that grantees make their timekeeping records available to monitors. Pub. L. 104-134, § 504(a)(10)(A)-(C).

What is more, H.R. 3764 would loosen these accountability requirements at the same time as it would repeal the 1996 Act's restrictions on grantees' use of non-LSC funds for restricted activities. In combination, these two innovations would make it nearly

impossible for the OIG or any other monitor to ensure that LSC funds are not being spent in furtherance of prohibited activities. The LSC OIG has surfaced a number of problems in recent years indicating more oversight is required, not less.

By seriously weakening the OIG's ability to monitor grantees' use of federal dollars, this provision of H.R. 3764 runs directly counter to the intent of Congress, as expressed in the Inspector General Reform Act of 2008, to enhance the authority of federal Inspectors General to root out waste, fraud, and abuse in federally-funded programs.

To remedy this deficiency in H.R. 3764, I recommend that, at the very least, the bill be amended to include the timekeeping requirements set forth in Section 504(a)(10) of the 1996 Act. In addition, given LSC's past disinclination to amend its Part 1635 regulations to require grantees to implement a timekeeping system that links employee time records to the relevant funding source, the OIG recommends that the bill be amended to include such a requirement in the LSC Act itself, a requirement that would greatly increase accountability for the use of funds throughout the LSC-funded legal services delivery system.

Competition

H.R. 3764 would eliminate a number of statutory provisions that Congress has put in place in an attempt to bring about competition in the LSC grant award process. These provisions, which Congress inserted in the 1996 and 1998 LSC Appropriations Acts, require that LSC mandate publicly announced grant competitions; consider a grantee's history of compliance (or noncompliance) with applicable statutes and regulations when making grant award decisions; avoid giving preferential treatment to previous grantees; and institute a new selection process upon a finding of noncompliance. They also allow LSC to debar a recipient for good cause.

In place of these pro-competition provisions, H.R. 3764 would require only that LSC ensure basic field grants are distributed "on the basis of a system of competitive bidding, in accordance with Legal Services Corporation regulations . . . ."

Prior to enactment of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. No. 104-134 (1996) ("1996 Act"), incumbent LSC grantees enjoyed presumptive refunding by virtue of two provisions of the LSC Act. First, Section 1007(a)(9) of the LSC Act requires the Corporation to ensure that each recipient applying for refunding "is provided interim funding necessary to maintain its current level of activities" until the refunding has been approved and the funds have been received by the grantee, or the application has been finally denied. See 42 U.S.C. § 2996f(a)(9). Second, Section 1011 of the Act prohibits LSC from terminating a grant or denying a refunding application unless the recipient "has been afforded reasonable notice and opportunity for a timely, full and fair hearing...." 42 U.S.C. § 2996j(2).

Section 503(b) of the 1996 Act abolished the presumptive refunding regime and required LSC to implement a competitive selection process in the awarding of grants.

Section 503(c) of the 1996 Act, in turn, required LSC to issue implementing regulations specifying certain selection criteria for grantees competing for LSC grants, including:

> (1) a demonstration of a full understanding of the basic legal needs of the eligible clients to be served and a demonstration of the capability of serving the needs; the quality, feasibility, and cost effectiveness of a plan submitted by an applicant for the delivery of legal assistance to the eligible clients to be served; and (2) the experience of the Legal Services Corporation with the applicant, if the applicant has previously received financial assistance from the Corporation, including the record of the applicant of past compliance with Corporation policies, practices, and restrictions.

Pursuant to Section 503(d), such regulations must

> ensure that timely notice regarding an opportunity to submit an application for such an award is published in periodicals of local and State bar associations and in at least 1 daily newspaper of general circulation in the area to be served by the person or entity receiving the award.

In addition, Section 503(e) provides: "No person or entity that was previously awarded a grant or contract by the Legal Services Corporation for the provision of legal assistance may be given any preference in the competitive selection process."

LSC issued the required regulations, establishing a competitive grant application process that implements the requirements of Section 503. See 45 C.F.R. § 1634 (requiring LSC to consider compliance history in grant award process; mandating public notice of grant availability; and forbidding preferences to incumbent grantees).

In LSC's 1998 appropriation Congress added additional requirements to the competitive selection process. Section 501(b) of the 1998 Commerce, State, and Justice Appropriations Act, Pub. L. 105-116 ("1998 Act"), bolstered LSC's ability to implement a competitive grant application process by rendering Sections 1007(a)(9) and 1011 of the LSC Act inapplicable to the competitive selection process.

In addition, Section 501(c) of the 1998 Act provides that the Corporation may institute a new competitive selection process for a recipient's service area during the grant term if it finds, after notice and an opportunity for the recipient to be heard, that the recipient has failed to comply with the LSC Act or any other applicable statute.

Finally, Section 504 of the 1998 Act gives the Corporation authority to debar recipients ("on a showing of good cause") from receiving additional LSC grants, provided the recipient has received notice and an opportunity to be heard.

H.R. 3764 would delete Section 1007(a)(9) and render inapplicable all provisions contained in the 1996 and 1998 Acts, while re-activating Section 1011 of the LSC Act, which requires that grantees be afforded notice and a hearing before funding is suspended or terminated, or an application for refunding denied. See 42 U.S.C. § 2996j.

Thus, although Section 11 of H.R. 3764 would require that LSC ensure basic field grants are distributed "on the basis of a system of competitive bidding, in accordance with Legal Services Corporation regulations," H.R. 3764 in fact *removes* all the statutory provisions that have been put in place to encourage and implement actual competition.

Moreover, under H.R. 3764, LSC would once again be required to comply with the time-consuming procedures of Section 1011 of the LSC Act before it could deny an application for refunding, or terminate or suspend a grantee's funding. This provision runs directly counter to the effort to promote competition for LSC grants, and would severely limit the Corporation's ability to deal with grantees engaging in fraudulent practices; non-performing grantees; and grantees failing to comply with the requirements of federal law. (Although these provisions do not directly affect matters within the OIG's jurisdiction, we have a duty to comment on them because of their tendency to increase the number of opportunities for fraud, waste and abuse within LSC programs and their effect on the efficiency and effectiveness of LSC programs and operations.)

In addition, while LSC regulations currently embody the requirements of Section 503 of the 1996 Act, there is nothing in H.R. 3764 requiring that *future* LSC regulations mandate publicly announced grant competitions; require consideration of a grantee's history of compliance (or noncompliance) with applicable statutes and regulations when making grant award decisions; avoid giving preferential treatment to previous grantees; or allow the Corporation to institute a new selection process upon a finding of noncompliance, or debar a recipient for good cause.

Although there is currently little competition for LSC grants despite Section 503's mandate, H.R. 3764 would unnecessarily diminish the likelihood of any future competition by removing entirely the competition standards put in place by the 1996 and 1998 Acts, and reinstating the cumbersome procedures mandated by Section 1011 of the LSC Act.

To remedy the foregoing deficiencies in H.R. 3764, the LSC OIG recommends that H.R. 3764 be amended to include a competition requirement that, at the very least, forbids preferential treatment for incumbent grantees; mandates public notice of grant availability; and requires the Corporation to consider a grantee's compliance history when making grant award decisions.

In addition, the LSC OIG recommends that the competition provisions of the 1996 and 1998 Acts be included so as to facilitate the competitive process and remove unnecessary barriers to recompetition in the event an incumbent grantee is failing to comply with the LSC Act or other applicable statutes.

Finally, the LSC OIG recommends that, in the interests of promoting competition for LSC grants, Section 1011 of the LSC Act be deleted.

Conclusion

By weakening the LSC OIG's oversight role in grantee audits, depriving LSC funds of their federal character, and limiting the LSC OIG's access to grantee records, many of the provisions of H.R. 3764 run directly counter to Congress' intent, as expressed in the recently-enacted Inspector General Reform Act of 2008, to enhance the authority of federal Inspectors General to root out waste, fraud, and abuse in federally-funded programs.

This is worrisome given that the appropriations authorized for LSC under H.R. 3764 would be roughly double the Corporation's current appropriation. It is also troubling in light of recent reports issued by the Government Accountability Office strongly indicating that LSC needs to implement improved governance and accountability practices, and to improve its grantee oversight practices. See August 2007 GAO Report, Legal Services Corporation: Governance and Accountability Practices Need to Be Modernized and Strengthened, GAO-07-993; December 2007 GAO Report, Legal Services Corporation: Improved Internal Controls Needed in Grants Management and Oversight, GAO-08-37. See also 7/7/09 Audit of Legal Services Corporation's Consultant Contracts (finding that LSC did not regularly follow its own written policies and procedures on consultant contracting process, and may have entered into independent contractor agreements with individuals who should have been classified as employees under IRS rules); 8/10/09 Report on Selected Internal Controls, Legal Aid of Northwest Texas (finding unsupported expenditure of $188,522 by Legal Aid of North West Texas for multi-story stone wall composed of imported Italian stone).

I appreciate the opportunity to offer my views on this proposed legislation, and I am hopeful that some consensus can be achieved on the issues I outlined above. Accountability, responsibility and transparency in the expenditure of taxpayer dollars should not be a controversial issue. I stand ready to assist the committee in incorporating the changes I have outlined above to ensure the LSC Office of Inspector General can truly function as the "strong right arm" of the Legal Services Corporation, helping to ensure the most efficient and effective use of limited federal funds for the Corporation's critical mission: "Equal Justice for All."

Mr. COHEN. Thank you, Mr. Schanz. I appreciate your service and your statements.

Our third witness is Mr. Kenneth Boehm. Mr. Boehm is the full-time chairman of the National Legal and Policy Center in Falls Church, Virginia since 1994. Previously he was in a senior position in Legal Services Corporation, from 1991 to 1994, assistant to the president of LSC and counsel to the board of directors.

He has received his J.D. and since then he has been a prosecutor in Chester County, Pennsylvania; treasurer of a top 10 political action committee; chief of staff to Representative Chris Smith, Republican of New Jersey; and chairman of Citizens for Reagan—awful young to have done that.

In addition to his legal career, Mr. Boehm spent 5 years as an award-winning radio talk show host on Philadelphia's WWDB. His broadcast experience—guest commentator at NPR and guest interviews on more than 500 radio and TV programs.

We appreciate your being here and look forward to your melodious voice. I believe you need to turn on the microphone.

TESTIMONY OF KENNETH F. BOEHM, CHAIRMAN, NATIONAL LEGAL AND POLICY CENTER

Mr. BOEHM. There we go. So much for my broadcasting background.

Mr. Chairman, Congressman Franks and distinguished Members of the Subcommittee, I want to thank you for this opportunity to testify this morning on the proposed reauthorization of the Legal Services Corporation.

If there is one thing that everybody familiar with the Legal Services program knows, it is that it has had a very troubled history. A lot of this has been commented on—the GAO studies, the other problems, et cetera.

One of the reasons that we are here today is because this program has not been—was last reauthorized in 1977, authorization that expired in 1980. There are few Federal programs out there that have been unauthorized for some 30 years.

The reason——

Mr. COHEN. We talk through that.

Mr. BOEHM. Oh, okay. The reason that it has been unauthorized for so long is because of these controversies. It reached a head in 1996 when there were deep cuts in the program. Actually, the House budget resolution called for phasing it out over 3 years.

The people who supported Legal Services said, "It is time for an historic compromise. The compromise is this. Let's do away with a lot of the more controversial programs—lobbying, congressional redistricting, the class actions, prisoner litigation—you name it—and in return for that, we will see how they do, see if these reforms stick, and let's press ahead."

That is, in fact, what happened. And most of these reforms have been repeating year after year since 1996. There has been a broad bipartisan coalition. There has been no real effort to gut them in any substantial way. And that brings us to today.

The problem I have with the proposed reauthorization is it basically would eliminate or weaken almost all of the 1996 reforms. We won't have to wonder what will happen if that occurs, because we

just have to look at what happened before the reforms were in place.

One of the problems were these series of legal actions that don't have to do with the day-to-day legal service of the poor that generated most of the problems. It is almost an 80-20 Pareto principle. Eighty percent of the problems came from 20 percent of the cases, but it was those 20 percent that got an awful lot of attention.

Prisoner lawsuits—now the current reauthorization would allow them with the exception of prisoner conditions. This was highly controversial.

You had a situation in a Pennsylvania prison where a triple murderer was released back to the general population through the good services of Legal Services and in a prison break attempt took 30-something hostages. The governor really was very, very upset with that. He later became attorney general of the United States. And it received a lot of bad publicity.

I would argue that in a time and date when we have so many unemployed and so much traditional legal services to be done, this is the last time to be wasting scarce resources on civil lawsuits on behalf of prisoners.

The real outrage is one—I think is congressional redistricting, or any legislative redistricting. Incredible as it seems, Legal Services has been involved in this area. When this reform was proposed, even Congressman Barney Frank said, "I don't know what Legal Services lawyers are doing in congressional redistricting cases." It is not like the poor people are wading into the offices saying we feel malapportioned, we think the 16th Congressional District should look like this, as opposed to this.

On top of that, one of the problems with these cases is they are very, very expensive, with computer models and the rest of it. It is hard to say it is not a politicized program if it is doing something as political as redistricting. It is hard to imagine anything less tinged with partisanship than that.

Another argument is drug-related evictions for public housing. This was another hot-button issue. Legal Services was more involved than any other single group of legal groups in thwarting drug-related evictions up to the 1996 reforms. And the rule was that—that came in 1996 you can't participate in these at all.

The new proposed reauthorization allows them to get back in but draws the line at convicted drug dealers. Well, convicted drug dealers aren't going to be in that public housing. They are generally going to be in other public housing. And usually, they are not even client eligible at all because they tend to have cash income that makes them uneligible.

I couldn't begin to understand why Legal Services would go back into this very controversial area and yet allowed under this legislation.

Then you have class action lawsuits. The reason they were restricted was because so many of them were very, very highly political. In many cases you could argue against the interests of the poor.

One of the more celebrated ones was a class action lawsuit in the case of Atlanta public housing in which case they were trying to

screen out violent criminals from becoming tenants in public housing.

Legal Services brought a very expensive class action lawsuit to try to stop that. I don't think if you polled the average public housing person they want violent criminals in their public housing unit, and yet Legal Services was involved.

And so class actions has been for the last—since 1996 restricted and, again, I think opening the door back to that is a backwards step.

Lobbying, the same argument. The bill would allow lobbying with non-Federal funds. The trick there is—or the real issue there is who picks what is lobbied on. It would be the Legal Services lawyers. And again, I think you could make a good argument when they were lobbying they were lobbying on a lot of things that an awful lot of poor people would not agree with.

The most important provision of all is the one that says that you cannot do with non-LSC funds—the restriction—you cannot do with non-LSC funds what you can't do with LSC funds.

And the reason that that was a problem up to 1996 was that so many of the individuals that were involved in Legal Services at the time, frankly, didn't—you couldn't tell whether it was Federal money or other money, and the tools weren't there. The oversight wasn't there. And so that was a major problem.

If you allowed it, essentially it would be anything goes, and they would be doing lots of restricted activities and it would be impossible to sort it out.

The final argument I would make is this, that we are going backward when we eliminate all these common-sense restrictions, and we should instead keep them.

And I think ultimately Legal Services would have a better chance of getting funding if it weren't engaged in these highly political and controversial subjects and instead was actually helping the traditional legal needs of the poor. Thank you.

[The prepared statement of Mr. Boehm follows:]

PREPARED STATEMENT OF KENNETH F. BOEHM

H.R. 3764 – Ending LSC Reforms, Transparency and Accountability

Kenneth F. Boehm
Chairman
National Legal and Policy Center

Testimony Before the
Subcommittee on Commercial and Administrative Law
U.S. House of Representatives Committee on the Judiciary

April 27, 2010

Mr. Chairman, Congressman Franks and distinguished members of the subcommittee, thank you for this opportunity to testify on the proposed reauthorization of the Legal Services Corporation and H.R. 3764, the "Civil Access to Justice Act of 2009."

My name is Ken Boehm and I am Chairman of the National Legal and Policy Center in Falls Church, Virginia. From 1989 to 1994, I served in senior management positions at the Legal Services Corporation. From 1991 to 1994, I was Counsel to the Legal Services Corporation Board of Directors.

If there's one thing everyone familiar with the history of the Legal Services Corporation (LSC) can agree on, it's that it has been one of the most controversial federal programs.

Just the fact that it was last reauthorized in 1977 – an authorization that expired in 1980 – speaks volumes as to LSC's contentious record.

Few federal programs have the dubious distinction of going some 30 years without reauthorization.

Over the past 30 years, Congress has made attempt after attempt to reform the Legal Services program. Oversight hearings on wasteful spending and questionable activities have frequently followed GAO audits or investigations showing serious problems.

By the mid-1990s more than 80 national organizations had asked Congress to take action against the controversial program. Among these groups were the National Federation of Independent Business, American Farm Bureau Federation, National Rifle Association, National Taxpayers Union, U.S. Chamber of Commerce and other organizations representing many millions of Americans.

After a rising tide of complaints about the problem-plagued program, the House of Representatives Fiscal Year 1996 budget resolution proposed a three-year phase out of funding. Appropriations of $276 million in FY1996, $141 million in FY 1997 and elimination in FY 1998 was recommended.

The report of the House Budget Committee stated:

> "Too often…lawyers funded through federal LSC grants have focused on political causes and class action lawsuits rather than helping the poor solve their legal problems… A phase out of federal funding for LSC will not eliminate free legal aid for the poor. State and local governments, bar associations, and other organizations already provide substantial legal aid to the poor."
> (H.Rept. 104-120)

Congress then proceeded to show it meant business by voting for deep funding cuts in the FY 1996 LSC appropriations.

A Congressional consensus quickly developed that LSC programs should continue to be funded but only if there were extensive reforms to eliminate the wide variety of political and abusive practices which had plagued the program.

This consensus for broad reform was incorporated into the Fiscal Year 1996 appropriations law for LSC, Public Law 104-134. LSC promulgated regulations to cover the many reforms.

With only several modifications, these reforms and restrictions were subsequently incorporated into all subsequent LSC appropriations and have had broad, bipartisan support.

Under appropriations law, Legal Services programs funded by LSC may not:

- engage in legislative redistricting activities or litigation
- attempt to influence regulatory, legislative or adjudicative action at the federal, state or local level
- attempt to influence oversight proceedings of the LSC
- initiate or participate in any class action
- represent certain categories of aliens, except that nonfederal funds could be used to represent aliens who have been victims of domestic violence
- conduct advocacy training on a public policy issue or encourage political activities, strikes, or demonstrations
- claim or collect attorneys' fees
- engage in litigation related to abortion
- represent federal, state or local prisoners
- represent clients in eviction proceedings if they have been evicted from public housing because of drug-related activities
- solicit clients
- use non-LSC funds to engage in activities prohibited with LSC funds unless specifically allowed by law and regulation

Appropriations law from 1996 forward also required LSC to set up a program of competition for LSC grants to end the practice of presumptive refunding. Prior to this reform, Legal Services programs almost uniformly received their grants regardless of whether they were doing a good job or not.

H.R. 3764 would also eliminate the provision, first passed in 1998 as an appropriations rider, which requires LSC and its programs to disclose the court cases brought by LSC-funded attorneys. Apparently, the belief is that the Congress, the media and the taxpayers are not entitled to know what cases federal taxes fund.

H.R. 3764 would largely eliminate or weaken most of the reforms that have been in place with bipartisan support since 1996.

It would also significantly weaken transparency and accountability of both LSC and the programs it funds while promoting a dramatic increase in LSC funding as well as a substantial pay increase for the LSC President.

H.R. 3764: Eliminating or Weakening Most of the 1996 Reforms

The Legal Services reforms enacted in 1996 have remained largely intact since then.

They were passed with bipartisan support and have passed as part of the LSC appropriations law every year since – regardless of which party controlled the House and Senate.

H.R. 3764 would eliminate or weaken most of the reforms and would make any kind of objective oversight of the Legal Services program virtually impossible.

At a time when the escalating federal deficit and the ballooning expenditures for entitlement programs are creating more pressure than ever to rein in discretionary spending, this legislation would mean the largest increase in LSC spending ever while guaranteeing that the types of controversies that almost sunk all federal spending for LSC in the 1990s return in full force.

When future Congresses are looking for places to cut discretionary federal funding, this legislation – if passed – is certain to put a giant bill's eye on LSC funding.

We do not have to wonder what kinds of controversies will return. All we need do is examine what Legal Services lawyers were doing before the 1996 reforms.

Prisoner lawsuits

H.R. 3764 will largely repeal the restriction against using money intended to help the poor with their day-to-day legal needs to file lawsuits on behalf of prisoners at the local, state and federal levels. The only concession is to continue to prohibit activities related to prison conditions.

This gutting of the restriction against prisoner lawsuits will allow Legal Services lawyers to once again get involved in highly controversial cases which outraged the public and Congress prior to the 1996 reforms.

Consider some of the cases in which Legal Services lawyers were involved before Congress clamped down. LSC-funded lawyers:

- sued a prison for punishing a prisoner planning a riot (Cook v. Lehman, 863 F.Supp. 207 (E.D. Penn. 1994)

- sued a prison for extending an inmate's sentence for attempting to escape (Mayner v. Callahan, 873 F.2d 1300, 9th Cir. 1989)

- sued a Florida county prison for placing an inmate caught planning to escape in solitary confinement (Chandler v. Baird, 926 F.2d 1057, U.S. App Ct, 1991)

- sought social security disability benefits for a convicted felon in a home-monitoring program with an electronic tether. The court rejected the reasoning of the Legal Services lawyer in the case, stating that the felon was not on parole and was still serving his sentence. (Calaf v. Secretary of HHS, US Dist. Ct., 1994)

- represented convicted cop-killer Joseph Bowen who was placed in solitary confinement after murdering the warden and deputy warden of a Pennsylvania prison. Legal Services lawyers got the murderer returned to the general prison population where Bowen and three other inmates held 38 people as hostage following a botched prison escape attempt. Pennsylvania's Governor Thornburgh stated, "Never again should government permit 'cause' groups…to place the purported rights of vicious criminals above the safety of law enforcement and correction officers." (Jerry Flint, "Friends in Court," *Forbes,* Dec. 21,1981, page 34.)

- sued Tennessee for delaying the parole of a violent prisoner. The inmate was found guilty of assaulting a guard and had his parole postponed. Although state law gives prison officials broad authority to adjust inmate sentences within the full sentence originally imposed, Legal Services tried to argue that authorities violated their client's rights for vague bureaucratic reasons. A state appeals court dismissed the case as groundless. (*Green v. Reynolds,* Tenn. App. Ct. 1991)

- filed an *amicus curiae* brief in a Michigan case arguing that the Michigan Dept. of Corrections was obligated to provide female prisoners free legal representation in child custody cases. A federal appeals court rejected this argument, ruling that the Constitution only mandates legal assistance for prisoners in criminal cases. The court concluded "if the ordinary law-abiding Michigander has no constitutional right" to a lawyer in civil cases, neither does a convict. (*Glover v. Johnson,* 75 F.3d 264, US App. Ct., 1996)

<u>Legislative redistricting</u>

H.R. 3764 has no provision to prohibit legislative redistricting activities by LSC-funded programs and lawyers.

The enactment of the restriction as part of the 1996 reforms has to be one of the most broadly supported restrictions of all.

I have attended many LSC appropriations and oversight hearings over the last twenty years but I have never once heard an LSC representative argue that they need more taxpayer funding in order to carry out lobbying and litigation with respect to legislative redistricting.

While LSC is supposed to help the poor with their legal needs, it is hard to imagine a less worthy use of LSC funds than something as charged with partisanship as Congressional redistricting or any other type of legislative redistricting.

With the census under way and heated redistricting battles just around the corner, spending anti-poverty funds on highly controversial Congressional redistricting lobbying and litigation efforts is a remarkably sure way to show the public just how politicized and out of control the federal Legal Services program has become.

Yet there have been activist Legal Services lawyers who have engaged in redistricting litigation prior to the restriction. In fact, when the Legal Services Corporation sought to restrict redistricting activities by regulation prior to the 1996 reforms, three LSC-funded programs (Texas Rural Legal Aid, California Rural Legal Assistance and Northern Mississippi Rural Legal Services, Inc.) sued LSC in an attempt to overturn the regulation.

One of the major controversies over the years has been the dispute as to whether the Legal Services program should stick to helping the poor with their day-to-day legal problems or whether it should push a political or ideological agenda.

Removing the restriction against legislative redistricting activities will send a loud message that Legal Services is a politicized federal program which uses taxpayers' funding to promote a political agenda.

Drug-related evictions from public housing

H.R. 3764 will largely eliminate the restriction against LSC-funded lawyers taking legal action to stop drug-related evictions from public housing.

Prior to the 1996 restrictions in which Legal Services programs and lawyers were prohibited from involvement in drug-related public housing evictions, activist LSC-funded lawyers were the major obstacle to such evictions.

After a policeman was shot to death in a n Alexandria, Virginia public housing drug raid, Secretary of Housing and Urban Development Secretary Jack Kemp wrote to all 3,300 public housing authorities in the country asking them about the extent of the drug problem in public housing and what should be done. A flood of letters came back from public housing authority officials saying that Legal Services was the chief impediment to eliminating drug dealers from public housing.

While the problem continued to fester, public outrage mounted. By 1996, one of the most popular of the LSC reforms was the restriction against representing anyone charged with or convicted of a drug offense in a public housing eviction.

The public outrage didn't stop there as the Clinton Administration supported a tough "One Strike and You're Out" policy designed to make it easier to evict drug offenders from public housing. President Clinton signed the Housing Opportunity Program Extension ("HOPE") Act of 1996 which strengthened the ability of federally subsidized housing projects to screen out and evict drug dealers who prey upon their law-abiding neighbors.

The "One Strike and You're Out" policy was drafted by Clinton's HUD Secretary Henry Cisneros. He argued that "the number one group of people" demanding such toughened eviction and screening rules "are the residents themselves" who have suffered so much from drug violence in public housing.

The H.R. 3764 language so weakens the drug-related eviction provision as to make it essentially worthless. It restricts Legal Services involvement in drug-related evictions in public housing only to when the "individual has been convicted in a criminal proceeding with the illegal sale or distribution of a controlled substance."

Compare that language to the 1996 restriction which restricts such Legal Services involvement in drug-related public housing eviction cases in which the client is "has been charged with the illegal sale or distribution of a controlled substance."

The H.R. 3764 restriction would rarely come into play for the obvious reason that someone convicted of the illegal drug sales or distribution would most likely be sent to prison making eviction something of a minor issue.

In short, H.R. 3764 will make it more difficult to solve the problem of drug violence in public housing. That may be a nice federal perk for drug criminals but anyone who believes the law-abiding poor living in public housing want to slow down drug-related evictions is out of touch with reality.

Consider the irony: a proposed piece of anti-poverty legislation that hurts the poor.

Class action lawsuits

H.R. 3764 does not restrict class action lawsuits.

The prohibition against class action lawsuits was a major feature of the 1996 reforms because class actions by LSC-funded programs were overwhelmingly political or ideological in nature. Such lawsuits were so resource-intensive that they often precluded programs from serving the day-to-day legal needs of the indigent.

Another factor contributed to the popularity of class action lawsuits with Legal Services lawyers. Many viewed Legal Services work as a stepping stone to much better paying positions in private practice. Class action skills are much better compensated than skill in assisting poor individuals with legal needs such as landlord tenant law, welfare benefits, and the like.

This attitude that routine legal services for the poor are not the mission of LSC-funded programs was expressed by a former Legal Services lawyer Mike Daniels who spoke out against the effort by Congress to direct the program back to traditional legal services:

> "I don't know how you justify taking federal money to provide routine legal services. There are other lawyers who will do those services." (*Dallas Morning News,* Aug. 21, 1996, page 25A)

Prior to the restrictions, LSC-funded lawyers used class action lawsuits to:

- challenge Atlanta Housing Authority's policy of denying housing to persons with criminal backgrounds (Bonner v. Atlanta Housing Authority, N.D. Ga., Oct 1995)

- sue Pennsylvania when Gov. Casey cut off some welfare benefits to able-bodied adults if they had no children and were fit to work (*Legal Intelligencer,* Aug. 4, 1994)

- sue INS to prevent enforcement of INS regulations denying participation in the Seasonal Agricultural Workers program to aliens convicted of a felony or more than two misdemeanors. (Naranjo-Aguilera v. INS, No. S-91-1462 EKG/GGH, Eastern District of California, June 29, 1992)

Lobbying

H.R. 3764 puts the Legal Services program back in the controversial lobbying business by allowing lobbying with non-federal funds.

Lobbying was restricted because it was not only a highly politicized activity but it siphoned off Legal Services resources that should have been used to provide traditional legal services to the poor.

Few middle class families can afford to hire lawyers to lobby for them, yet lobbying is rarely mentioned when Legal Services programs are seeking more taxpayer funds.

One of the obvious problems with lobbying is that the Legal Services programs would have a great deal of discretion as to what they take up when lobbying. It should come as no surprise that the decision is generally to lobby on an ideological or political issue that fits the political agenda of the LSC-funded program doing the lobbying.

Using taxpayers' hard-earned money for a political slush fund to allow activist lawyers to lobby is bad enough. Worse is the inclination to lobby against legislation passed by Congress or state legislators that really does help the poor.

One example seen over and over has been the attempt by Legal Services to lobby against efforts to eliminate welfare fraud. Apparently, Legal Services believes that welfare fraud is a good thing for the poor. Common sense suggests otherwise.

Attorneys' fees

H.R. 3762 ends the restriction on LSC-funded lawyers receiving attorneys' fees.

The reform was enacted in 1996 and every subsequent year as part of LSC's appropriations legislation for very sound reasons.

First, laws granting attorneys' fees were enacted generally to attract lawyers to cases which otherwise might not attract an attorney. The Legal Services program was not set up to recruit lawyers to compete with the private bar. If there are attorneys willing to take a case involving a law allowing attorneys' fees, then why should the taxpayers have to subsidize those attorneys?

Second, Legal Services lawyers are paid a salary to provide legal advice and representation to the indigent. One sound reason for the salary model and to restrict fees to LSC-funded attorneys is that the selection of cases should be based on what is best for the clients in a service area, not what is best for the bottom line of the program. To the degree obtaining fees lures Legal Services attorneys to select such cases over more deserving cases which do not generate fees, the case selection process becomes corrupted.

At its core, the reason to restrict attorneys' fees for LSC-funded lawyers is quite similar to the reason that Legal Services lawyers are not allowed to take personal injury contingency cases: there are plenty of lawyers only too eager to have a poor client with a good personal injury case.

Using non-LSC funds to conduct activities forbidden with LSC funds

H.R. 3764 eliminates the restriction against undertaking activities forbidden with LSC funds with non-LSC funds.

This would return the Legal Services program back to the "anything goes" era prior to the 1996 restrictions. Most LSC programs receive significant funding from sources other than LSC. The cat and mouse game that generated endless controversy then was for Legal Services programs to engage in almost any prohibited conduct it wanted. When a member of the public or a Congressman complained that the program was doing a prohibited activity, the program simply claimed that it was using non-LSC funds.

Given the numerous hurdles to any serious investigation, especially the fact that client files were off limits and funding is fungible, programs had wide latitude to engage in a host of political or restricted activities.

Allowing Legal Services to get back into the game of routinely undertaking a variety of restricted cases while claiming they were done with "other funds" creates an unworkable system where LSC has neither the investigative tools nor the resources to maintain the integrity of the Legal Services program. This is a victory for those who view the Legal Services program as taxpayer subsidized-legal arm of ACORN or some other activist group. It is a defeat for those who believe the role of the Legal Services program is to provide needed legal help to truly deserving poor people.

If there were true accountability – such as exists in many other federal programs which involve professional privileges – the GAO or Inspector General would have access to attorney-client privileged files for the limited purpose of determining whether waste fraud or abuses have occurred. The mechanism for this in the Medicaid program is to have incoming patients agree to a limited waiver of the physician-client privilege in cases where waste, fraud or abuse is being investigated. After all, the privilege belongs to the client or patient, not to the attorney or doctor.

Allowing restricted activities with non-LSC funds is a sure way to have a program with a long history of abuses return to its old habits.

H.R. 3764: Less Transparency and Accountability

At a time when national polls show increasing public disdain for out-of-control federal spending and non-transparent government programs, H.R. 3764 offers far less transparency and accountability for a program that hasn't been reauthorized in 30 years because of its dysfunctional reputation

Hiding LSC-funded Cases

Almost all cases funded by taxpayers through the federal government are readily identifiable. This was not the case with the cases funded through LSC. The reason was

that LSC would send its funding to programs around the country and the litigation funded by tax dollars was filed in the names of the plaintiff and the defendant. Court case records are not indexed by the name of the LSC-funded program that paid the lawyer.

There was no way to determine – short of spending untold hours examining every case in a particular jurisdiction – which ones were funded by federal tax dollars.

This state of affairs meant that the public, the media and even Congress had no knowledge as to which cases were LSC-funded cases. In an environment in which LSC-funded lawyers chaffed at restrictions, finding restricted litigation was extremely difficult with no rule requiring transparency and disclosure.

This changed with Public Law 105-119, the appropriations for LSC for 1998. Section 505 of that law required disclosure of litigation funded by LSC:

> (a) Not later than January 1, 1998, the Legal Services Corporation shall implement a system of case information disclosure which shall apply to all basic field programs which receive funds from the Legal Services Corporation from funds appropriated in this Act.
>
> (b) Any basic field program which receives federal funds from the Legal Services Corporation from funds appropriated in this Act must disclose to the public in written form, upon request, and to the Legal Services Corporation in semiannual reports, the following information about each case filed by its attorneys in any court:
>
> (1) The name and address of each party to the legal action unless such information is protected by an order or rule of the court or by State or Federal law or revealing such information would put the client at risk of physical harm.
>
> (2) The cause of action in the case
>
> (3) The name and address of the court in which the case was filed and the case number assigned to the legal action.
>
> (c) The case information disclosed in the semi-annual reports to the Legal Services Corporation shall be subject to disclosure under section 552 of title 5, United States Code.

This straightforward requirement regarding basic transparency in cases filed by LSC-funded lawyers is now found in LSC regulations at 45 C.F.R §1644.

Surely, Congress, the media and the public are entitled to know how taxpayer dollars are being spent by LSC-funded lawyers.

Yet, there is nothing in H.R. 3764 to continue this requirement.

What possible legitimate reason can there be to deny disclosure of cases being litigated with the public's tax dollars?

Hiding information from the LSC Inspector General

H.R. 3764 severely undercuts the ability of the LSC Inspector General to promote efficiency and accountability of LSC and its grantees and recipients.

In the past, the Government Accountability Office has been highly critical of the weakness of LSC's accountability practices as was clearly pointed out in the August 2007 GAO Report to Congressional Requestors in Legal Services Corporation: Governance and Accountability Practices Need to be Modernized and Strengthened. GAO-07-993

It scarcely needs arguing but a federally funded program with a thirty year track record of controversy and lack of accountability should have the strongest possible oversight from a truly independent IG if it is to have any credibility with those in Congress tasked with oversight and funding.

I'll leave more specific objections regarding the impact of H.R. 3764 on the ability of the IG to perform his job to the Inspector General.

It is appropriate to point out that if there is a common thread through the legislation, it is to make the program far less accountable to the public, to Congress and to any meaningful oversight.

Put another way, the oversight needed to maintain a responsible program depends on the type of accountability, transparency and management controls advocated in the past by LSC IGs and by the Government Accountability Office. H.R. 3764 ensures that any such oversight will be undercut severely.

H.R. 3764: More Money and a More Politicized LSC

H.R. 3764 increases the authorized funding level to $750 million.

The LSC appropriation for Fiscal Year 2010 contained in the Consolidated Appropriations Act of 2010 (Public Law 111-117) is $420 million.

The argument for this radical increase in proposed spending is that the $750 million amount, adjusted for inflation, is equal to what LSC received in FY 1980.

Here are a few things that LSC proponents do not tell Congress when seeking more taxpayer funding:

- LSC provides well less than 10% of the legal services for the poor each year. The rest comes from attorneys in private practice providing pro bono service, private non-profits which provide legal services to the poor, and a host of other sources. A study by a former LSC Inspector General based on analysis of states providing such information supports the view that most legal services provided to the indigent does not come from LSC-funded programs. (*See Capital Research Center's* Legal Services for the Poor: Is Federal Support Necessary?)

  The less than 10% figure would be even lower if other methods of providing access to justice for the indigent were calculated. These other factors include contingency fee arrangements, expanded mediation and ombudsman programs for certain types of cases and the increases in the dollar amount of cases which can be handled without an attorney in small claims courts in the last 30 years.

- Since the arbitrary benchmark year of 1980, the non-LSC funding received by LSC-funded programs has grown dramatically. The Interest on Lawyers Trust Accounts program did not exist in 1980 but by 2007 LSC-funded programs received $99.3 million in IOLTA funds alone. Additionally there has been increased federal funding since 1980 from a host of programs addressing the legal needs of the poor in domestic violence cases, seniors legal matters and even tax assistance.

- Every dollar spent on lobbying, prisoner lawsuits, stopping drug-related evictions, congressional redistricting and other activities restricted by the 1996 reforms which H.R. 3764 seeks to remove is one less dollar that can be spent on traditional legal services for the poor. The reforms forced Legal Services programs to spend more on day-to-day legal needs of the poor and the cuts in funding caused them to find sources of funding in addition to the federal taxpayer.

Conclusion

H.R 3764 eviscerates most of the bipartisan reforms that have been supported by Congress as part of LSC's appropriations every year since 1996.

We don't have to wonder why legal services attorneys and their allies want to strip out the reforms that prevented them from doing prisoner litigation, stopping drug-related evictions, lobbying for favored legislation, engaging in ideological class actions, and a host of other controversial activities.

They advocate removing the restrictions from those types of cases because those are the cases they want to bring. And will bring if they get their way.

If that happens, once again Legal Services will be known as a federal program plagued with unaccountability and controversy.

Expect more embarrassing GAO reports and audits, fights between Legal Services programs and the LSC IG, and all manner of politicized activities.

What the opponents of reform never seem to learn is that Congress prefers to fund programs which are accountable, transparent and which deliver services in an efficient, economical way.

A program which doesn't even want Congress or the public to know what cases it brings is a program headed for disaster.

In 1996, Congressional supporters of LSC knew they had to reform the program or risk being zeroed out.

In 2010, the threat is even greater due to ballooning deficits, endangered entitlement programs and a mounting public disgust with federal spending.

Mr. COHEN. Thank you, sir.

Ms. Diller is our next witness, Ms. Rebekah Diller. She is deputy director of the Brennan Center's Justice Program, coordinates the Brennan Center's legislative and public education campaign to eliminate private money restriction on Legal Service programs and other initiatives.

Prior to joining that center, she served as staff attorney at the New York Civil Liberties Union Reproductive Rights Project. She oversaw litigation and other initiatives there. She represented low-income citizens in housing and government cases, legal service of the elderly—basically the panoply of good things.

Now, if you would be so courteous as to watch the 5-minute limit, I would appreciate it, and you are recognized for your testimony.

TESTIMONY OF REBEKAH DILLER, DEPUTY DIRECTOR, JUSTICE PROGRAM, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

Ms. DILLER. Good morning, Chairman Cohen, Chairman Conyers, Representative Franks and other Members of the Subcommittee. The Brennan Center thanks you for holding today's hearing and for permitting me to testify in support of the Civil Access to Justice Act.

I will start by saying that we have heard various views about particular provisions of the bill, but one thing I hope we can all agree on is that the need right now, as others have so eloquently testified, is tremendous.

Americans are facing foreclosure at record rates. The ranks of the unemployed have swelled. Many of those folks are facing long-term unemployment. And all of this is giving rise to tremendous legal need. Often a Legal Services lawyer is a lifeline. It is the one thing standing between a family and homelessness and a downward spiral into—into more crisis.

I think it is a critical time and this bill will reinforce our Legal Services program at a time of great need and allow for the infrastructure to serve more people.

We heard today some claims about some old cases regarding restrictions. These are some cases out of a program that serves nearly a million people a year. I would like to tell you about how the restrictions are affecting Legal Services clients today. And they are affecting them in ways that have nothing to do with ideological-crusade-types of cases. They are affecting them in their daily bread-and-butter-type cases.

First of all, the most harmful restriction that we have seen has been the restriction on non-LSC funds. This is the restriction that says if you take one dollar from LSC, all the money you receive from state, local governments, IOLTA programs, private donors—all of that is restricted.

And that restriction hampers $526 million a year, or 60 percent of the funding at LSC recipient programs. So the Federal Government, which is in essence a minority stakeholder, if you will, here, is dictating to all these other players how their money gets spent.

And what we have seen is that this restriction has been tremendously wasteful for a system that already has scarce resources. In many places, state and local funders have not wanted their money

tied up by the Federal restrictions, and so they have had to form duplicate legal aid systems, which means you are paying two sets of rent, two computer networks, two copy machines. All of these extra expenses could go toward serving more clients more effectively.

Second of all, that restriction sends exactly the wrong message. We should be welcoming private participation. We should be welcoming a leveraging of the Federal funds. And instead, it says to private donors, "We will restrict how your money, your donations, are spent."

Second of all, as to the restrictions on advocacy tools, there is simply no justification in a country that promises equal justice for all for telling a low-income client that he or she cannot have access to the same legal tools that are available to a client with means.

And I would like to tell you about some of the ways this has been playing out, particularly as low-income communities and communities of color have faced crises with predatory lending and other consumer scams.

A number of providers across the country have reported this alarming incidence—this is just to give you one example—of foreclosure rescue scams. These are companies that promise you that they will refinance your mortgage. They take your money and then they are never heard from again.

And the effective way to deal with that kind of operation would be to bring a class action on behalf of your client and all others who have been affected. Unfortunately, because of the restriction, programs can't do that. They can represent one victim at a time, maybe achieve a result in that one particular case, but they can't seek the broader relief that would stop the illegal practices and bring those companies to justice.

So instead of performing some sort of ideological screening test, what the restriction has been doing is it has been really insulating those who prey on the poor from accountability and from being brought to justice.

The other thing I will just mention is we heard from the inspector general a number of suggestions for changing and improving the bill, and I would just say that we are eager to work with Subcommittee staff on a number of those which I think we could reach agreements on.

The one area where I would disagree is that—is the need to access confidential information such as client names and the like. There has simply not been a showing that there is a need to get that information. There is a way to ensure accountability by using other means without violating state confidentiality protections.

Thank you, Mr. Chairman——

[The prepared statement of Ms. Diller follows:]

PREPARED STATEMENT OF REBEKAH DILLER

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U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

Written Testimony of
Rebekah Diller, Deputy Director, Justice Program[1]
on behalf of
The Brennan Center for Justice at NYU School of Law

Submitted for the
Hearing on H.R. 3764, "The Civil Access to Justice Act of 2009"
April 27, 2010

The Brennan Center for Justice at NYU School of Law[2] thanks Chairman Cohen and the Subcommittee on Commercial and Administrative Law for holding this hearing and for permitting me to testify in support of The Civil Access to Justice Act of 2009, H.R. 3764. This legislation would reauthorize and revitalize the Legal Services Corporation ("LSC"), the cornerstone of our national commitment to equal justice, and provide urgently needed relief to the most vulnerable among us.

One of our nation's proudest traditions is that of "equal justice for all." Yet, the unfortunate and persistent truth is that too many Americans are at a great disadvantage in the courts because they cannot afford to pay for attorneys on the private market to help them in civil cases. By most estimates, 80 percent of the legal needs of low-income people go unmet.[3] The current recession, with its accompanying foreclosure epidemic, has made matters much worse by pushing more families into poverty and by creating expanded legal need for those homeowners facing foreclosure.

In the face of this challenge, nearly one million individuals receive help each year from a legal services program that works extraordinarily well. LSC-funded programs closed 889,155 cases in 2008, helping those individuals save their homes from eviction or foreclosure, resolve child custody disputes, gain protection from domestic violence, defend against scams that prey upon the poor, and resolve other life-changing legal problems.[4]

By reauthorizing and strengthening LSC, the Civil Access to Justice Act would ensure that our legal aid program can serve more individuals more effectively. By setting authorized LSC funding at the level it had reached in 1981 (adjusted for inflation) – the last time that LSC was able to provide a minimum level of access for people in need across the country – the Act would lay the groundwork for helping significantly more people. By also restoring the balance on restricted activities achieved in the original LSC Act, the bill would enable clients of LSC-funded programs to obtain more efficient and effective assistance. Finally, the bill would improve oversight and governance of LSC and thus strengthen the legal aid infrastructure.

I. AS THE JUSTICE GAP WIDENS, MORE NEED LEGAL HELP

As growing numbers of people slip into poverty and homelessness during the current recession, the need to revitalize our nation's civil legal aid system is more urgent than ever. At the same time that needs are rising, non-LSC sources of funding are drying up. Therefore, it is especially critical that Congress act now to reinforce our legal aid system.

A. The Recession Has Increased the Need for Legal Aid.

Notwithstanding the clear benefits, the overwhelming majority of people who need legal aid are unable to obtain it, due, in large part, to funding shortages. Every year, almost one million cases are turned away by LSC-funded offices due to funding shortages.[5] Study after study finds that 80 percent of the civil legal needs of low-income people go unmet.[6] This "justice gap" keeps families in poverty and threatens the stability of our court system.

The recession has made matters worse. Nearly 54 million people were income-eligible for federally funded legal aid in 2008, up from about 51 million just one year before.[7] In harsh economic times, civil legal conflicts increase in number and intensity, as do the adverse consequences of leaving them unresolved or resolving them unfavorably. These are just some of the areas in which need is on the rise:

- *Foreclosure and Eviction.* In the first quarter of 2010, foreclosure filings were reported on 932,234 properties, a 16 percent increase from the same period last year; today, one in every 138 housing units in the U.S. is in some stage of foreclosure.[8] Experts expect that the foreclosure rate will not level out until 2013,[9] and homeowners will continue to need help negotiating livable solutions. Civil legal aid lawyers help negotiate loan modifications, make sure the foreclosure process is followed properly, defend against predatory lending violations, and assist the large number of tenants who face eviction due to foreclosures against their landlords.[10]

- *Domestic Violence.* Organizations that provide support for victims of domestic violence have reported more requests for help amid the recession.

The National Domestic Abuse Hotline, headquartered in Austin, Texas, documented a 21 percent increase in calls from the third quarter of 2007 to the same period in 2008.[11]

- *Unemployment.* In March 2010, the overall unemployment rate was 9.7 percent, up from 8.6 percent in March 2009 and 4.4 percent in March 2007.[12] There were 182,261 initial claims for unemployment insurance filed in January 2010.[13] More than 25 percent of employees applying for unemployment benefits today have their claims challenged – a record high.[14] For those who have lost their jobs, a legal aid lawyer can be the difference between receiving properly owed benefits and slipping further into poverty.

- *Food Stamps.* From 2007 to 2009, the number of people receiving Food Stamps jumped to 33.7 million from 26.5 million.[15] As applications rise, so too does the number of people who need legal help making their way through the process in order to feed their families.

B. Shortfalls in State Budgets and IOLTA Revenue Make the Federal Role More Important Than Ever.

Since the creation of LSC, the federal government has funded legal services in partnership with state and local governments, the private bar, local charities and other donors. The federal role is all the more critical now as state-based sources of revenue decline. After LSC grants, state-administered Interest on Lawyer Trust Account (IOLTA) programs are the largest source of revenue for civil legal aid programs across the country. In 2007, IOLTA income reached an all-time high of $371.2 million nationally.[16] And in 2008, IOLTA revenue accounted for almost 13 percent of the funding for the nonprofit civil legal aid programs that also receive LSC funds.[17]

The tremendous decline in interest rates has meant that IOLTA revenue has plummeted. Nationally, IOLTA income fell to $284 million in 2008, a 25 percent drop in income from 2007.[18] IOLTA income fell another 32 percent in 2009, to about $92 million, spelling grant declines for legal services programs for years to come.[19] Funding shortfalls resulting in layoffs, salary reductions, and office closures are being reported by legal services programs across the country. Here are the just some of the reports:[20]

- *Arizona.* The sum of IOLTA grants awarded to legal aid programs dropped from $2.4 million to $896,000 in 2008, from $2.4 million in 2006. As a result, IOLTA funding was able to support only 10 organizations in 2008, as compared to 24 in 2007.[21] Phoenix-based, LSC-funded Community Legal Services has had to lay off 11 percent of its work force and the number of applicants it must turn away has doubled.[22] Anticipating a $100,000 drop in IOLTA income in 2009, and further losses in 2010, LSC-funded Southern Arizona Legal Aid imposed a hiring freeze and has left nine staff positions –

including six attorney positions – unfilled. The organization has also scaled back its services, offering direct representation in fewer cases.[23]

- *California.* Statewide, IOLTA revenue shrunk to an estimated $7 million in 2009, down from $22 million in 2008.[24] At LSC-funded Bay Area Legal Aid, an expected 50 percent cut in IOLTA funding would mean three layoffs.[25]

- *Georgia.* The total IOLTA contribution to LSC-funded Georgia Legal Services Program in 2010 was $1.4 million, half of the prior year's $2.8 million. Program officials expect another IOLTA drop of 50 percent in 2010-2011.[26]

- *Massachusetts.* The Massachusetts Legal Assistance Corporation (MLAC), the largest funding source for civil legal aid in the state, cut its funding for legal services by 54 percent from 2008 to 2009. This was prompted by a cut of $1.5 million in state funding for MLAC and a $10 million drop in IOLTA revenue.[27] Subsequently, it was expected that client services statewide would fall by at least 18 percent, leaving approximately 20,000 low-income individuals and families without the legal help they need.[28]

- *New York.* IOLA funding for the state's civil legal services programs has dropped precipitously, from $32 million in 2008 to less than $8 million in 2009 (a 75 percent decline), to an estimated $6.5 million for 2010.[29] Additionally, state appropriations for civil legal services for the poor fell from $15.3 million in FY 2007-2008 to an estimated $7.3 million in FY 2008-2009.[30] For FY 2010-2011, the state's chief judge set aside $15 million from the judiciary's budget to fund civil legal services, over the Governor's objection,[31] but even that additional funding would not cover recent funding loses and increased need.

- *North Carolina.* To stay afloat, LSC-funded Legal Aid of North Carolina has been forced to cut 20 part-time attorney positions and freeze contributions to staffs' retirement plans.[32]

II. CIVIL LEGAL AID MAKES A CRITICAL DIFFERENCE FOR INDIVIDUALS AND COMMUNITIES

Providing legal representation to people in trouble and otherwise unable to afford it has proven to be a success, both for the individuals and families that receive the services, and for our society. The benefits of legal aid reverberate far beyond individual cases. As Congress recognized in the original LSC Act when it stated that "providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice" and that "for many of our citizens, the availability of legal services has reaffirmed faith in our government and laws."[33]

Legal services lawyers provide a range of services that would otherwise be unavailable to families facing legal problems. In foreclosure cases, for example, lawyers help families stay in their homes or find livable, alternative solutions. In the area of family law, legal services lawyers help victims of domestic violence gain safety through protective and restraining orders and assist parents and other family members fighting for custody of a child. In consumer cases, lawyers protect the elderly and other vulnerable groups from unscrupulous or predatory lenders and help people manage and renegotiate their debt. Where families are hungry or homeless, legal services lawyers help people to appeal wrongful denials of government benefits, allowing for access to the crucial safety net they need.

Having a lawyer makes a measurable difference in a person's case. Studies show that access to a lawyer often provides the critical boost that families need to avoid homelessness, and the key factor that can enable domestic violence survivors to reach safety and obtain financial security.[34] Research reveals that a person with legal representation is more than five-times likelier to prevail in court than a self-represented person.[35]

Legal services programs also serve a critical preventive function, fending off many of the harms that communities experience when representation is unavailable. Thus, by tackling clients' mental health issues, education needs, and family disputes, they contribute to reducing re-arrests of clients with past criminal records. By fighting evictions and foreclosures, they help enable states and localities to reduce the costs associated with maintaining shelters, foster care, and a variety of other services for the homeless. And by helping clients to correct unsafe living and workplace conditions, they help to reduce government expenditures on health care.

III. THE CIVIL ACCESS TO JUSTICE ACT WOULD ENSURE THAT LEGAL SERVICES ARE PROVIDED AS EFFICIENTLY AND EFFECTIVELY AS POSSIBLE

At the inception of LSC, Congress placed some restrictions on the activities of LSC-funded lawyers, but struck a balance that enabled individuals to get essential legal work done.[36] For example, Congress banned participation in certain types of cases, including litigation related to military registration, desegregation, and attempts to procure a "non-therapeutic abortion."[37] Those restrictions remain in place and are reinforced by this bill. However, in deference to principles of federalism, the original LSC Act did not restrict how state or local government legal aid funds were spent.[38] The Act held true to its declaration that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients."[39]

However, the restrictions imposed in the 1996 appropriations process, and renewed with some modifications since then, marked a clear departure from this balance by sharply curtailing advocacy on behalf of legal services clients. These restrictions cut deeply into low-income people's capacity to secure meaningful access

to the courts, harming them unnecessarily in predatory lending cases, cases arising out of consumer scams, benefits problems, and other civil legal matters. Moreover, the appropriations rider took the extraordinary step of restricting every dollar that an LSC recipient receives from non-LSC sources, including state and local governments, private donors, IOLTA revenue, and other sources. By restricting how state, local and private funds are spent, the appropriations restrictions have squandered precious funds that could have gone toward serving more in need and have intruded on the choices available to state and local governments, as well as private foundations and individual donors, who wish to be partners in innovative efforts to expand access to justice.

The Civil Access to Justice Act would remove the most onerous of the 1996 appropriations restrictions while leaving in place and, in some cases, expanding the restrictions imposed in the original LSC Act. The legislation would restore efficiency to the legal aid system by alleviating the need for state and private funders to establish separate organizations to spend their funds free of the federal chokehold. And it would ensure that low-income individuals are not barred from using legal tools available to every other litigant.

A. The Civil Access to Justice Act Would Make Federal Dollars Go Further By Removing the Restriction on State, Local and Private Funds.

The "poison pill" restriction on non-LSC funds is wholly out of line with the way the federal government treats other non-profit grantees. Many non-profits must strictly account for federal funds, but virtually none are restricted in how they spend their funds from other sources. In 2008, the non-LSC funds restriction tied up more than $526 million in funding from state and local governments, private donations, and other non-LSC sources.[40] Nationally, this amounts to nearly 60 percent of the funding at LSC recipients. The federal tail is wagging the dog.

The restriction on non-LSC funds also undercuts the important function that state and local governments, and private donors, can play in closing the justice gap – the restriction prohibits these local authorities from running their own justice systems in the way that they, and their state and local partners, deem best. In certain states with relatively greater amounts of non-LSC funding, justice planners have created entirely separate organizations and law offices, funded by state and local public funders and private charitable sources, and dedicated performing the categories of work that LSC-funded programs cannot do. But, because the restriction requires this work to be done through a physically separate organization, overhead, personnel, and administrative costs are wasted. Dollars that could finance more services urgently needed by families across the country are eaten up by the costs of running duplicate offices.

To illustrate this problem, consider the example of Oregon, where legal aid programs spend approximately $300,000 each year on duplicate costs to maintain

physically separate offices throughout much of the state.[41] If the restriction on non-LSC funds were lifted, the redundant costs could be eliminated. The significant savings from ending the dual operating systems would enable the legal services organizations to provide coverage for conventional legal services cases – evictions, domestic violence cases, predatory lending disputes – in underserved, rural parts of the state where access to legal assistance is limited.

Removing the restriction would encourage more private donors to be brought into the system as well. For example, Legal Services NYC has been unable to obtain additional funds from a local foundation due to the restrictions on its representation of immigrants. Legal Services NYC partners with 14 community-based organizations in an innovative "Single Stop Program" that provides legal assistance and social services together at outreach sites in community-based organizations around New York City. This effort, which helps families keep their homes, obtain essential medical care, qualify for emergency food benefits, and more, has been funded by a local anti-poverty foundation. Concerned about the needs of New York's large immigrant population, the foundation added funding to ensure that legal assistance would be provided regardless of immigration status. Because of the restriction on non-LSC money, however, Legal Services NYC could not seek this added funding from the foundation to expand this successful community-based outreach program.

B. The Bill Would Permit Cases to Be Handled More Efficiently and Effectively by Restoring Access to Necessary Advocacy Tools.

Low-income communities face many types of legal problems that could be addressed more effectively and efficiently were they to have access to certain legal tools available to all other litigants. The Civil Access to Justice Act would revert to the balance achieved in the original LSC Act. Restrictions on political advocacy would be maintained to ensure the integrity of the program. However, families and individuals served by LSC-funded organizations would regain equal footing in court and would be permitted to have a voice in legislative and administrative matters affecting them.

1. Removal of Blanket Class Actions Restriction Would Restore Access to Rare But Necessary Device for Effective Representation.

The Civil Access to Justice Act would remove the blanket class action restriction in the appropriations rider. The limitation in the underlying LSC Act – which requires approval of a project director in accordance with established policies prior to filing such an action – would still apply.[42]

Class actions provide courts and litigants with an efficient mechanism for adjudicating the similar claims of individuals who comprise a group and ensuring that all similarly situated persons obtain relief when a defendant violates the law. This legal tool also provides access to the courts for individuals who might not have the

resources to bring an individual claim. In some cases, the availability of a class action ensures that essential discovery can take place as to a defendant's unlawful actions.

For poor people in particular, the availability of the class action option is critical for obtaining relief from widespread, illegal practices.[43] Access to justice and legal services commissions in Georgia, Hawaii, Missouri, New Hampshire, and North Carolina have concluded that the inability to use the class action mechanism hinders legal services offices from providing the best possible services to their clients.[44] As the North Carolina Legal Services Planning Council has concluded, challenging some "illegal but widespread practices" without a class action lawsuit is "impossible."[45]

The class action limitation has proven to be an enormous obstacle in efforts to combat predatory lending and consumer frauds that target low-income communities. Legal services programs must litigate against unscrupulous players piecemeal, helping one homeowner at a time instead of a broad class of victims. Here are some recent examples:

- For nearly seven years Neighborhood Legal Services of Los Angeles County (NLS-LA) has been working to rid the community of Discount Health Cards whose promises of savings are illusory and whose attempts to profit from medical provider referrals violates California law. NLS-LA clients Manuela and Juan Zermeno were enticed by television advertisements to sign up with Care Entree, a Discount Health Card company, which automatically deducted more than $700 from their bank account despite the Zermenos' attempt to cancel the card when the dentists referred to them refused to provide the promised discount. After a successful ruling in the California Court of Appeals in the Zermenos' case,[46] NLS-LA could be forced to abandon the case because of the LSC restriction on class actions combined with recent changes in California law requiring certain cases to be filed as a class action in order to provide injunctive relief to protect the public from illegal and unfair business practices and consumer scams. If that happens, thousands of low-income uninsured Californians will continue to face pressures to buy Discount Health Cards that give false hope of affordable health care.

- South Brooklyn Legal Services has a substantial foreclosure prevention and anti-predatory lending practice. In its representation of homeowners, it has observed that certain law firms representing lenders churn out dozens of foreclosures at a time, and in the rush, file paperwork that is inadequate. Failing to do their own due diligence, the firms bring foreclosure cases against many properties that should not be foreclosed against in the first place. Often, mortgages have been assigned to a different party than the one bringing the foreclosure action. In other cases, foreclosure is commenced even though the homeowner has entered a trial loan modification period under the federal Home Affordable Modification Program ("HAMP"), during which time foreclosure is prohibited. Addressing the problem that these "foreclosure

mills" pose without a class action is nearly impossible, as is addressing the rampant violations of HAMP. SBLS helps individual clients subject to an improper foreclosure but is unable to help others who do not reach its doors. As a result, the underlying problem of improperly filed foreclosure actions persists.

2. The Bill Would Permit a Limited Voice for Low-Income People in Legislative and Administrative Forums.

The Civil Access to Justice Act would retain the original LSC Act's restriction on using any LSC or private funds for efforts to lobby administrative or legislative bodies. However, it would permit clients of LSC recipient programs to have a limited voice in legislative and administrative advocacy when funded by state or local government funds.

Legal aid attorneys who see the legal problems faced by low-income communities on a daily basis can potentially play a critical role in alerting legislatures and other government bodies to gaps in regulation and problems in the implementation of laws. The silencing of legal aid attorneys has had dire consequences in the current mortgage crisis.[47]

Attorneys at Maryland Legal Aid Bureau ("LAB"), for example, have witnessed many of the lending abuses that have occurred over the last 10 years, but restrictions on legislative and administrative advocacy have prevented them from actively pursuing reforms.[48] Under current restrictions, the only way that a legal aid office can participate in lobbying is in response to a written request from a lawmaker.[49] Because lawmakers are often unaware of this limitation and of the need to make an extra effort to invite the participation of legal services lawyers in legislative discussions, this highly unusual requirement can shut down communication entirely.[50]

In contrast, when LAB has been able to educate lawmakers about the problems faced by its clients – at a lawmaker's invitation, as required by the restrictions – it has lent a critical voice to the process on behalf of homeowners. In 2008, Maryland's Legislature dramatically overhauled state laws regarding credit and lending processes.[51] After an invitation, an LAB attorney was able to participate in a state Senate committee workgroup, in which she was the only person representing the interests of borrowers, as opposed to the lending industry. She was able to explain how consumer protection proposals under consideration would be ineffective because they were limited to the most extreme types of loan products and that more wide-ranging consumer protections were necessary. This year, when Maryland's Governor sought to implement a mandatory settlement conference procedure for foreclosures, LAB once again was the only voice providing provide expertise and data on what would benefit homeowners in the process.

C. The Civil Access to Justice Act Would Permit Some of the Most Vulnerable Among Us to Obtain Legal Help.

The legislation would also permit some of the most vulnerable people in the legal system to access help. By reforming some of the blanket restrictions based on immigration status and imprisonment, the Civil Access to Justice Act would ameliorate some of the unduly harsh consequences of the 1996 appropriations rider. Some recent examples of the harms of these restrictions include:

- *Haitians Applying for Temporary Protected Status Unable to Obtain Help.* In the wake of the massive earthquake that hit Haiti in January 2010, the Department of Homeland Security announced that the 100,000 to 200,000 Haitians estimated to be in the U.S. without legal documentation would be granted Temporary Protected Status ("TPS"), a form of asylum that would allow them to work in the U.S. for a temporary period of time and send money back to their families in desperate need.[52] To be granted TPS, individuals are required to fill out forms and pay multiple fees. The process is complicated and often brings up other immigration issues for which individuals need legal advice. But LSC-recipient programs are barred from helping, even with state or local government funds. Many are going without help as they file for TPS, and worse yet, some have been tricked into getting help from scam immigration firms that are rushing into the breach..

- *Unskilled Guest Workers Recruited to Work in U.S. Cut Off From Help When Victimized.* One of the groups hardest hit by the immigrant restriction are those migrant workers here in the U.S. at their employer's invitation on H-2B visas, a visa category for unskilled, non-agricultural workers performing seasonal or temporary jobs. H-2B visa holders were excluded from legal aid eligibility in 1996.[53] Two years ago, Congress eased the restriction slightly and made those H-2B visa holders working in the forestry industry eligible for legal aid.[54] However, those H-2B workers employed in other industries, such as construction, canning and tourism, remain ineligible.[55] H-2B workers often perform tasks that risk physical harm and frequently are mistreated by employers.[56] Many do not speak English and work in geographically isolated areas.[57] Without access to legal services, they are virtually without recourse when their rights are violated. Employers often take advantage of this fact by misclassifying agricultural workers, who should fall under the relatively more stringent protections of the H-2A visa program, as H-2Bs.[58] LSC grantee Texas RioGrande Legal Aid describes one case that involved an "illegal guestworker importation scheme" in which a grower and two farm labor contractors used over 400 H-2B workers to harvest and pack onions and watermelons from 2001 to 2007 in south and west Texas to circumvent the protections and benefits of the H-2A program, including access to LSC-funded representation.[59] TRLA was unable to represent any of the H-2B visa holders even though there was reason to believe that they had been abused at

the hands of their employer and should have been issued visas that would have allowed them LSC representation.[60]

- *Prisoner Representation Restriction Unnecessarily Undercuts Prisoner Reentry Efforts.* This restriction has hampered efforts to resolve civil legal issues, such as those related to debt and child custody, that can help persons in prison prepare for re-entry into their communities. Michigan, for example, has a bold and innovative Prisoner Reentry Initiative – a partnership composed of community groups, faith-based organizations, and legal services providers. An important component of this project is "in-reach" – going into prisons and jails to address the problems confronting men and women prior to release. But, even though this Michigan initiative is primarily funded with state and private money, the Reentry Law Project of LSC-funded Legal Aid of Western Michigan – a key legal player on the team – is barred from representing any incarcerated person in litigation.[61] This restriction applies even though many of the problems facing prisoners would be better addressed during incarceration, so that citizens can move immediately into employment and housing upon release. For example, many prisoners face the loss of custody of their children while incarcerated and would benefit greatly from the help of an attorney as they struggle to maintain family relationships.

IV. CONCLUSION

Never in the three and a half decades since the creation of the Legal Services Corporation has there been a more urgent need to recommit to legal aid for the poor. The Brennan Center urges Congress to pass the Civil Access to Justice Act of 2009 and revitalize the infrastructure of equal justice.

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[1] This testimony was prepared with the help of Emily Savner, Research Associate in the Brennan Center's Justice Program.

[2] The Brennan Center for Justice is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Center's Access to Justice Project is one of the few national initiatives dedicated to helping ensure that individuals, families and communities can obtain access to the courts and other public institutions. Through public education, research, counseling and litigation, the Brennan Center works to expand access to civil legal services on the national and state levels and to promote policies that better enable people to resolve their problems in reliance on the rule of law. In recent years, the Brennan Center has published a number of reports related to legal aid for the poor, including Melanca Clark & Maggie Barron, *Foreclosures: A Crisis in Legal Representation* (2009), *available at* www.brennancenter.org/foreclosures; Rebekah Diller & Emily Savner, *A Call to End Federal Restrictions on Legal Aid for the Poor* (2009), *available at* www.brennancenter.org/legal_aid_restrictions; and David Udell & Rebekah Diller, *Access to Justice: Opening the Courthouse Door* (2007), *available at* http://www.brennancenter.org/content/resource/access_to_justice_opening_the_courthouse_door.

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Mr. COHEN. Thank you, Ms. Diller. I appreciate your testimony. And I will now recognize myself for questions.

Mr. Levi, first of all, we—Ms. Barnett's contract ended at the end of 2009. Where is the board in finding a permanent replacement for her?

Mr. LEVI. Well, this afternoon our search committee will have its very first meeting and will issue a request for proposals and begin the process of getting a high-quality search firm to help us. And then we intend to conduct a nationwide search and bring in somebody who is absolutely outstanding, with a distinguished career, to help in this very important problem in our country and to lead us in an innovative and forceful way.

Mr. COHEN. As new chair of the board, what are your goals and how do you see that the past problems can be rectified and the public to embrace LSC and Mr. Franks to wrap his arms around LSC?

Mr. LEVI. I hope to convince our Congressman Franks to——

Mr. COHEN. Particularly about the fraud and abuse, because that is important to all of us.

Mr. LEVI. Absolutely. And I would say we have—I have a number of priorities, but four in particular. The first, we do have to conduct a first-rate search. I have done that for other organizations. I am confident that we can get an outstanding president in.

The second is that we have to call attention throughout the country, here and elsewhere, to the existence of this problem, encouraging not only Congress but the—but private individuals, the law firms, to step up and do as much as they can to help with this situation.

The third is certainly to—and they are not in order here, but they are my priorities—to make sure as a—look, our board wants to make sure that our internal controls—my understanding is that of the GAO recommendations all 17 have been addressed.

But look, we are—we are new. We are going to take a deep dive in here and make sure to—for our own selves that appropriate controls are in place, that you and the American people can have confidence that money is being well and properly spent. And I look forward to working closely with the inspector general on that.

And finally, we have to come up with a new strategic plan. The current plan expires this year, and I look forward to developing such a plan for the corporation.

Mr. COHEN. Mr. Levi, I imagine, looking at your vitae, you do employment law. You generally represent management.

Mr. LEVI. More often management, yes.

Mr. COHEN. Business.

Mr. LEVI. Yes.

Mr. COHEN. You don't see any contradiction in any way in doing that and yet looking out for the equal justice for the poor.

Mr. LEVI. Not at all. In fact, I have been in my private life involved in doing just that for many, many years.

Mr. COHEN. Thank you, sir.

I join you and Mr. Franks and others in wanting to see the money properly spent. It galls me when I see people having trips, monster meals, limousines on government money that should be going to the public's needs and particularly to the poor.

So I appreciate the inspector general's reports, and there are things that are not in our bill that are in the Senate bill. I would like to see them get into our bill and make it as strong as possible, because that is one of the—you know, that is one of the ways you go to hell, I think, is taking money from the poor.

Mr. SCHANZ. Yes, sir. Thank you. We have worked with both staffs on the Senate side and the House side, and my long statement for the record will include most of those amendments that we need to have inserted into the bill to increase, not decrease, governance.

Mr. COHEN. Thank you, sir.

Ms. Diller, let me ask you a question about—Mr. Boehm made a point about talking about the drug situation. In drug-related cases, the change in the law would simply say that if you are convicted of a drug offense. Would you remind us something about innocent till proven guilty?

Ms. DILLER. Yes, Chairman. I mean, that is exactly the point. You are innocent until proven guilty. And this legislation would only change the existing provision to honor that principle, so that if you have not been convicted, there are cases where charges are brought, and then they are dropped later. People are acquitted. And in the meantime, you can lose your home.

So the only thing that this would do is make sure that for that set of cases where there has merely been a charge brought, you are eligible for representation, whereas once you are convicted there is no representation.

Mr. COHEN. And might people that have drug charges brought against them have families and children and——

Ms. DILLER. Absolutely. I mean, the sort of classic case is the grandmother living with her grandson or whoever——

Mr. COHEN. Right, extended family.

Ms. DILLER [continuing]. Faces eviction.

Mr. COHEN. Is there a distinction in the law between felonies and misdemeanors, possession and sale?

Ms. DILLER. I would have to double check that. I mean, my understanding was that this is a pretty far-reaching restriction.

Mr. COHEN. Thank you very much.

I now yield to the—Mr. Franks for 5 minutes of questioning.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Boehm, I guess the first question I would ask—I know that of the poor who need legal services that are not able to afford it themselves that probably only a certain percentage of them actually gain some outside help of some kind. I don't know what that is.

And you know, just for the record, you know, I certainly want to do everything I can to see that the poor receive the appropriate legal representation that they deserve under our Constitution.

With that said, I don't know what the percentage of the total poor that actually get help, but of those who get—that do get help, isn't it about 10 percent or a little less than 10 percent of them get help from LSC?

Mr. BOEHM. That is the case, sir. There have been studies of this. One was a study by a former LSC inspector general looking at pro bono activities, activities representing the poor pro bono from

groups not getting LSC funding, and the figure came out as less than 10 percent of the poor who do get some kind of legal advice and representation get it from Legal Services.

But there is another statistic, and it was mentioned by Ms. Diller, which is 60 percent of the money that goes to LSC-funded groups comes from non-LSC or non-Federal sources. So you take those figures and you actually look at it, and it is a very small percentage of the poor who get money from the LSC program.

And then, when you have all of these more politicized types of cases, prisoner cases and the rest of them, that takes away from the money that is available to the more deserving poor, to use an archaic phrase.

Mr. FRANKS. Yes. Well, I guess that is the point I wanted to make, Mr. Chairman, is that, you know, those of us that object to the Federal funds being spent in a way that it is—that is counterindicative of what the mission statement of LSC is, do so on the basis that as far as, you know, the private sector doing what they can—you know, Ms. Diller mentioned that the private sector—they want to encourage that. And certainly if this was a private endeavor I don't think there would be a hearing here. You know, you could represent who you wanted, how you wanted.

But if the Federal Government is going to take tax money from its citizens and—you know, under a obligatory scenario and give it to Legal Services, I think it has the right and responsibility to make sure that there are restrictions on what they do, what organizations that they fund.

And if we have an organization that 60 percent of which is privately funded, and they help less than 10 percent of the poor who actually get legal service help from someone, which is probably—I don't know what percentage of the poor actually get help, but I am sure it is less than it should be—then you begin to understand why there is hesitation on our part to see monies from taxpayers go to an organization that uses it for ideological purposes rather than the stated purpose of helping the poor.

So, Mr. Boehm, I guess I—you know, the 1996 restrictions I am understanding have been violated using the so-called mirror corporations that enable restrictions to be circumvented. I know you have written about that. Could you explain that, that kind of underscores one of the reasons why we are hesitant in this case?

Mr. BOEHM. Certainly. One of the ways that programs have dealt with the restrictions is to set up a closely connected but legally distinct organization. And there is a set of rules within the LSC regs as to what you can and can't do.

There was an investigation by a prior LSC I.G. into programs where they were working out of the same office. Individuals were wearing both hats. The net result was lots and lots of restricted activities were being conducted in very, very close coordination with Legal Services.

And in one case, the rent by the non-LSC group that was doing all the restricted activities hadn't been paid to the federally funded LSC group over a long period of time.

And it was basically a loophole to get around what Congress said shouldn't be done with Federal funding.

Mr. FRANKS. Well, I think, again, Mr. Chairman, that is another point that is a concern to us. The taxpayers that fund this—oftentimes, you know, they are obligated to do it under the laws. They do so to help poor people gain legal services that they need.

And so when they find themselves funding these ideological-driven issues that they may not necessarily agree with, then of course they—I think they reject that.

So my last question is can you give us a little bit of a sense of what types of ideologically motivated lawsuits brought about the 1996 restrictions?

Mr. BOEHM. Yes. There are an awful lot of cases that I think were ideological, if not political. There was a celebrated case in 1997 where Legal Services tried to overturn an election in Texas by invalidating 800 absentee ballots filed by servicemen and women.

These are people in Kosovo who were fighting for their country, received notice that they had to answer a 20-something-page case within 3 days because Legal Services was trying to overturn the election.

Now, in that particular case, they also asked for attorneys' fees, although attorneys' fees had just been banned. Fifty-eight United States senators wrote a letter, and the letter was drafted by Barbara Mikulski of Maryland, and it went to Janet Reno, the attorney general, saying, "What in the world is Federal tax money going to try to invalidate service people's absentee ballot?" If there is anybody in this country who should be entitled to an absentee ballot, it is somebody serving their country.

I think that was a very celebrated case, but that illustrates the type of mischief there can be if there aren't, in fact, real reforms that operate in a real way.

Mr. FRANKS. Well, thank you, Mr. Chairman. It also illustrates how difficult it would be in the U.S. Senate without those stalwart conservatives like Barbara Mikulski. [Laughter.]

Mr. COHEN. The gentleman's time has expired.

I now recognize the distinguished Chairman of the Committee, Mr. John Conyers of Michigan.

Mr. CONYERS. Thank you, Mr. Chairman.

I hesitate to bring up my relationship with the Levi family because if the distinguished gentleman from North Carolina didn't know the senatorial witness that came over when he was in Congress, I don't know how ancient the history would be for him to find out that I knew his father, Ed Levi, when he was the attorney general. That could go back to maybe the Hayes-Tilden controversy or—— [Laughter.]

God knows where that would lead, but I think I ought to make full disclosure before he finds this out anyway.

So I am happy to welcome Mr. Levi here today and I fondly remember his father. I was Subcommittee Chairman of Crime at the time that I appeared in the Department of Justice pretty regularly to have consultation with him.

Now, Mr. Schanz, with your background, could—we want everybody to sleep more comfortably in their beds tonight. Could you help Mr. Boehm out on anything that you think would make him more receptive to the fact that moving ahead and making the im-

provements that are embodied in the Scott legislation more palatable?

How can we make him feel better about this whole proposition that brings us here today?

Mr. SCHANZ. I want to say a snide remark, but I won't. He and I will work behind the scenes, or me lobbying him successfully. But the real answer to your question, Mr. Conyers, is transparency. I mentioned that in my prepared statement. I mentioned that in my 5-minute monologue.

But I firmly believe that if the funds maintain their Federal character all the way through the system and are transparent in their use, then there should not be a problem that we have found in the past in a lot of cases prior to my tenure here.

I do believe that with my staff and with a new president and a new chairman we can make a lot of progress in the areas of accountability, responsibility and transparency. Now, whether I can convince Mr. Boehm of that remains to be seen. It depends on my lawyerly skills, how good I still am.

Mr. CONYERS. Well, I think for the short time that I met and heard and know him that he is a reasonable person. And the one thing I am so relieved about is that he did not call for a abolition of Legal Services, and you don't harbor that thought, or do you, sir?

Mr. BOEHM. I spent my first part of my adult career—I spent the first part of my adult career being a supporter of Legal Services. I wouldn't have gone over to work there if I hadn't. I worked for a congressman, who was a Republican congressman, who had supported Legal Services.

Where I became very disenchanted was I saw firsthand the resistance to reforms that I thought were common-sense reforms. I think the real question is is the—is this program capable of the types of reforms that I think would have broad bipartisan support and then sticking to them.

My concern is that the proposed reauthorization does away with the reforms that we have had since 1996. And I think most of them were pretty reasonable reforms. If it can't, I don't believe spending Federal money for a program that can just basically do whatever it wants, without even releasing—one of the things that is cut out is a list of the cases, the litigation cases.

I don't know what policy reason you would give that the public and the Congress and even a taxpayer shouldn't know what cases are litigated with Federal funds. And yet that is one of the things that is on the cutting room floor with this legislation.

So the real answer I think is if the program were accountable and did the reforms that I think there is broad support for, I don't think there would be any problem. I have got plenty of other things to do. But if it is just going to be a blank check and do whatever you want, including redistricting, I have serious problems with that.

Mr. CONYERS. Mr. Levi, can you give him any comfort in this discussion?

Mr. LEVI. Well, first of all, as it relates to the spending of the taxpayers' money, we want to make sure that every dollar is well spent.

And I look forward to working with the inspector general and to making sure and assuring us internally that we have the best practices, modern practices, brought in to LSC throughout the country—there are 136 grantees—making sure that they are conducting their business affairs in the manner that you and we would hope.

Mr. CONYERS. Feeling better?

Mr. BOEHM. There are a couple of other issues we need to discuss.

Mr. CONYERS. All right. Last question. You co-founded the National Legal and Policy Center back in 1991. You are proud of that, I presume.

Mr. BOEHM. I was on the first board. And they were not involved in any of these activities because it was a one-person operation then.

Mr. CONYERS. With whom did you co-found it?

Mr. BOEHM. Peter T. Flaherty, who was its president.

Mr. CONYERS. Is he still around?

Mr. BOEHM. He is still around.

Mr. CONYERS. And then, finally, you are treasurer of one of the 10 largest political action committees in the country. What committee is that?

Mr. BOEHM. That was in 1980. I am much older than I think Mr. Cohen thought I was. I am 60. But that was in 1980. It was the Fund for a Conservative Majority. It was the third-largest political action committee in the country in the 1980 election cycle.

Mr. CONYERS. And so you are—you are, rightfully so, a proud Republican.

Mr. BOEHM. I have been a Republican. Sometimes I have been proud of that. [Laughter.]

Mr. CONYERS. Well, you are—well, let me ask you this. Are you proud of—sometimes proud of being a conservative Republican?

Mr. BOEHM. Yes.

Mr. CONYERS. And are you other times proud of being a—proud of being a neoconservative Republican?

Mr. BOEHM. I don't know if I am a neoconservative, because I don't know what the official definition is. That used to apply to former Democrats, I think, in the Reagan years who went over and joined the Reagan administration.

Mr. CONYERS. Yes. I yield.

Mr. FRANKS. Well, neoconservative means new conservative. It really is a—it is a liberal with a daughter in high school. [Laughter.]

Mr. BOEHM. Yes, that doesn't apply to me. I actually started out as a Democrat, if that makes you feel any better.

Mr. CONYERS. Well, a lot of people—Jarvis started out, I think, as a Democrat.

Now, you believe that there is a constitutional right to everybody receiving equal justice.

Mr. BOEHM. A constitutional right, and you do also, under the Sixth Amendment, have a constitutional right——

Mr. CONYERS. Right.

Mr. BOEHM [continuing]. To an attorney.

Mr. CONYERS. Exactly. And the Sixth——

Mr. BOEHM [continuing]. Criminal cases.

Mr. CONYERS. Exactly. And do you have an idea—are you forming some ideas about a counter bill to the one that Scott's introduced? I mean, we seem to be reaching some agreements on some very significant points here.

Would you submit to the Chairman of this Subcommittee the ideas around which you would find a bill to continue to promote Legal Services more to your liking?

Mr. BOEHM. Well, Congressman Conyers, I would be happy to. I testified before a Senate Committee 2 years ago on things that can be done that help the poor get better access to justice, and I would be happy to forward along those ideas.

And there are a lot of very good ideas that aren't touched in this that I think ought to be considered that I think cross party and ideological lines, because the real problem is getting good legal representation is not only hard for the poor, it is hard for the middle class.

And there is a lot of things that can be done that increase access to justice that can only be done on the Federal level that should be done.

And again, I would be happy, Chairman Cohen, to forward along that information.

Mr. CONYERS. Thank you very much.

Mr. COHEN. Thank you, Mr. Conyers.

I now recognize the gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for their testimony, and I am swinging back and forth here as I listen to this. Now that I know about Mr. Boehm's complete and detailed political pedigree, all the way back 30-plus years, it looks pretty stellar to me.

And I also am looking at a list here—but I direct my first question to Mr. Schanz, and that would be as you understand this legislation that is proposed that is the subject—H.R. 3764—does it remove the prohibition to Legal Services Corporation and engaging in representing cases involving illegal aliens?

I am going to give you the list—illegal aliens, abortion-related litigation, prisoner advocacy, class action lawsuits, challenges to welfare reform, and congressional redistricting cases. Are those prohibitions all removed, as you understand the language in the legislation?

Mr. SCHANZ. As I understand the language, no. My concern is a little more fundamental from an inspector general's point of view to being able to have the tools I need to enforce whatever restrictions this body—whatever Congress imposes on the Legal Services Corporation.

I need to have access to the records. I need to have the specific identifiers of Federal versus non-Federal funds. There is a lot that—within the I.G. community——

Mr. KING. Okay.

Mr. SCHANZ [continuing]. That I need to——

Mr. KING. Excuse me.

Mr. SCHANZ [continuing]. Be able to have put into this legislation so we don't revert back to the days that Mr. Boehm remembers so vividly.

Mr. KING. And I would want you to have all of those tools to examine that thoroughly, and I would want transparency and sunlight. So I would turn to Mr. Levi.

And of this list that I have read, is it your understanding that these prohibitions are removed under H.R. 3764?

Mr. LEVI. That is not my understanding.

Mr. KING. Could you then clarify to this Committee your understanding as to which provisions would be removed under 3764?

Mr. LEVI. This is an issue that we are going into in terms of the corporation's view about restrictions, and I am concerned here because LSC is charged with enforcing the restrictions throughout the country. And in fact, we are currently doing that in court.

We have staff in the field ensuring that our programs are complying with the restrictions. So as chairman of the board, I am really not comfortable speaking about any particular restrictions, and we will continue to enforce the will of Congress, whatever it would be.

Mr. KING. Okay. I thank you, Mr. Levi, and I am going to take it, then, that you are not speaking to the language in the bill but the current practice and the current statute in your response. Is that accurate?

Mr. LEVI. That is accurate.

Mr. KING. Okay, thank you. And then I would turn to Mr. Boehm.

Your response to this—have you reviewed H.R. 3764 that was testified to by Senator Harkin? And would you understand that it removes restrictions?

Mr. BOEHM. It removes most of the restrictions—removes most of the restrictions that were put in in 1996. Otherwise are modified.

On the prisoner restriction, it allows prisoner litigation but not for prisoner conditions. With respect to illegal aliens, it broadens the category exceptions of illegal aliens that can be represented, but it doesn't allow wholesale representation of illegal aliens.

One of the real problems with all of these restrictions is that—is in the LSC act, which is if LSC does not enforce something—they are the only legal body to do this. And this is one of the reasons Senator Grassley has been so interested in Legal Services, is he was involved in this battle in the 1980's.

If LSC doesn't enforce any restriction—illegal aliens, you name it—nobody else has legal standing to do it. And the one time where a program was illegally lobbying, a Federal judge did a judicial finding that they were illegally lobbying, and Legal Services challenged that and said, "Hey, we don't have to—we are not subject to judicial review. We are a 501(c)(3)." And they won, and they should have won, because legally they don't.

And so essentially, they can do anything if LSC doesn't enforce it as a practical matter, and that is pretty——

Mr. KING. Okay. So there are two components, then. This proposed legislation loosens the restrictions, some dramatically, some incrementally, and the point that the enforcement of the restriction has to be within LSC themselves, then.

Mr. BOEHM. Right.

Mr. KING. And so let me pose this question, and it is really at this point not hypothetical, under current law or under H.R. 3764

as proposed, could the Legal Services Corporation be enlisted to join in a class action lawsuit challenging the constitutionally of "Obamacare?"

Mr. BOEHM. Well, LSC itself wouldn't do it. It would be a—a program can do that sort of thing. If they are allowed to do class actions, and they have a client and there is waiting rooms full of clients, I don't see why they couldn't bring the lawsuit.

The problem is the decisions as to class actions, like lobbying, can be very, very subjective. Unlike all other Federal benefit programs, nobody has a right to be represented by Legal Services, and so the Legal Services lawyers have pretty wide discretion as to which cases they will take or don't take.

Mr. KING. Would you concede, Mr. Boehm, that I have proposed about the most improbable case that could be taken up by LSC——

Mr. BOEHM. Well——

Mr. KING [continuing]. Or their surrogates?

Mr. BOEHM [continuing]. Yes, that is pretty improbable.

Mr. KING. And that is because if I listened to your testimony that it sounds to me as though LSC has been very high percentage intensively populated with liberal activists. Could you explain to me why that would be, why that is—why we are looking at this from a political perspective?

The Chairman, Mr. Conyers, asked you a whole series of questions about your political pedigree. But as I listen to the testimony here, I would suspect that the political pedigree of the people that are—a significant percentage of those within LSC would be the exact opposite of the pedigree that he has talked with you about. Why is that? What has brought that about?

Mr. BOEHM. Well, that has been the history since it was founded.

Mr. KING. Yes.

Mr. BOEHM. It was founded as part of the Great Society. Over the years, poor people who were home-schooling their kids who had legal needs and met the legal definition of poor invariably found Legal Services' doors were closed. You know, a poor gun owner who thought the registration rules—they wouldn't get the time of day.

And so there always has been a double standard, and the double standard could be enforced because the decision to take or not take a case was so subjective and it was in the hands of the local Legal Services——

Mr. KING. Is the LSC to the right or the left of the ACLU?

Mr. BOEHM. I think they are——

Mr. COHEN. I believe that question is beyond your knowledge.

Mr. KING. I would ask unanimous consent the gentleman be allowed to answer the question.

Mr. COHEN. Five minutes has expired.

Mr. KING. Okay.

Mr. COHEN. And so we are going to——

Mr. CONYERS. I ask unanimous consent that the gentleman be given an additional minute.

Mr. COHEN. We always play bad cop and good cop, and he is the good cop.

Go ahead.

Mr. BOEHM. I appreciate that. Well, I mean, the fact of the matter is frequently in the past they joined together in cases with the

ACLU. That is public record. There are a lot of instances of that, so——

Mr. KING. And an adequate answer for me, and I thank you very much, all the witnesses.

Mr. Chairman—Chairmen, I yield back the balance of my time, and I say thank you.

Mr. COHEN. Thank you. Thank you, Mr. King.

Before I recognize Mr. Watt, just to the—I was a history major. You said that Legal Services was formed during the Great Society. Wasn't it 1974?

Mr. BOEHM. In 1974 it became a corporation—in 1974 it became a corporation. It was actually the Office of Legal Services in the 1960's under the Great Society. It was very controversial. They decided they would spin it off as a corporation.

And so the Legal Services program itself began in the 1960's. I believe it was 1966. In 1974 what happened is it became a corporation. It was reauthorized once in 1977 and then that expired in 1980 and it has been the way ever since.

Mr. COHEN. Well, I thank you. I mean, people can define the Great Society as being 1974. It just depends on your perspective. But——

Mr. BOEHM. Well——

Mr. COHEN [continuing]. Thank you.

Mr. Watt, you are recognized.

Mr. WATT. Thank you, Mr. Chairman. I want to try to get us back to a less philosophically based discussion here, if I can, by asking a couple of practical questions.

Mr. Schanz, Ms. Diller objected to one aspect of—what she understood your testimony to be, having to do with personal—identification of personal information. Is this something that you would think would be an irreconcilable problem, or did you understand what she was saying?

Mr. SCHANZ. Yes, sir, I did.

Mr. WATT. Explain that to us a little bit and tell us how we might be able to reconcile that.

Mr. SCHANZ. Well, first off, I don't think anything is unreconcilable. Secondarily, in order for me to perform the statutorily required duties of an inspector general, there are instances where in cases of fraud or embezzlement or potential fraud or embezzlement I would need access to client records to be able to identify whether or not a fraud has been perpetrated on the—on the Federal——

Mr. WATT. So—so something that gave you that access under those circumstances might——

Mr. SCHANZ. In this legislation——

Mr. WATT [continuing]. Serve the purpose.

Mr. SCHANZ [continuing]. That would be very helpful.

Mr. WATT. Yes, okay. And what is the status of your access to that information now?

Mr. SCHANZ. We have to litigate for that, and——

Mr. WATT. So you are saying you don't have that access to individualized records now under existing law.

Mr. SCHANZ. That is correct.

Mr. WATT. Okay.

Mr. SCHANZ. We have to litigate for that.

Mr. WATT. So you are saying we need to amend existing law to try to tweak that in such a way that you can serve your purposes.

Mr. SCHANZ. If I was to have the full powers of a presidentially appointed inspector general, yes. I would have those powers.

Mr. WATT. All right. I am just trying to make sure I understand what we are trying to accomplish here, and—Mr. Boehm, Ms. Diller said—and I obviously agree—that it is a lot more efficient to litigate cases that have a class impact rather than doing it one by one by one, to do it as a class action.

If we can put aside for the moment the categories of things that you would not want Legal Services to be involved in on a class action basis, would you agree with that general basic proposition?

Mr. BOEHM. Yes, I would.

Mr. WATT. Okay. So if we could find some satisfactory way of delineating the—those kinds of cases, would you have some particular problem with Legal Services having the ability to do class action cases in some limited number of cases?

Mr. BOEHM. If you could come up, I think, with a screen or a set of criteria that would address the thing that I think most of the critics, especially in Congress are concerned about—that is, redirecting the focus toward good legal services—traditional legal services——

Mr. WATT. All right. I——

Mr. BOEHM [continuing]. That is the criteria.

Mr. WATT. Yes. So but you agree that it would be more efficient to do some categories of things through class action litigation than to individual by individual—I mean, the two things that I think of—I think it was Legal Services in North Carolina that actually stopped the kind of individual by individual setting of tenants out on the street.

But it was a class action lawsuit, as I recall, that said landlords in general have to go through a process before they can set tenants out on the street.

And I think it was actually a class action lawsuit in North Carolina that resulted in substantial benefit to disabled veterans and people with disabilities under—to be able to be eligible for Social Security benefits.

Those kinds of things that are not controversial in a philosophical sense you wouldn't—you wouldn't have any problem with.

Mr. BOEHM. I think I would go beyond that, and I would say if those were the types of cases that Legal Services stuck to, there wouldn't be a controversy. The unfortunate history was——

Mr. WATT. Well, I am not dwelling on how we got here. You know, I heard a lot of discussion on how we got here. I am trying to—I am trying to pick up here and move us beyond where we are and get us back to some kind of rational set of rules going forward.

You know, it is just—it is hard for me to get in—involved in a discussion about whether Legal Services is to the right of or left of the ACLU and all of that stuff. That is history. I am trying to figure out how we can move forward in a very constructive way.

So my time has expired, and I will—I will hopefully segue to some more rational discussion with my colleagues down the way here. I will yield back.

Mr. COHEN. Thank you, Mr. Watt. I appreciate it.

And now with the burden of having more rational discussion is the Chairman of the Constitutional—the Committee on—on Antitrust, Mr. Johnson from Georgia.

Mr. JOHNSON. Well, thank you, Mr. Chairman.

And a little rationality here in the face of a lot of intellectual gymnastics that we have been playing this morning—poor people, people without the means to participate in our justice system, without any assistance whatsoever from either government or from the private charitable interests that exist is indeed unsettling to me.

And I am not one of those who grew up in a gilded setting as a child—you know, nannies, trips to Europe on vacation, spending weekends at the vacation home down on the ocean, you know, participating in horse riding activities, polo and all of the other——

Mr. COHEN. Cotillion? Were you in cotillion?

Mr. JOHNSON. I was not even in the cotillion.

Mr. COHEN. Oh, my God.

Mr. JOHNSON. Not in the Jack and Jill or any of those organizations. And that was so unfortunate.

Mr. COHEN. The Chairman is coming to tears. Please.

Mr. JOHNSON. I have been so deprived, and—of the finer things in life, and—but I did get a chance to meet a couple of poor people during my matriculation through school.

I knew some who didn't smell the best—we used to make fun of them—some who did not wear the finest clothes, and some who, you know, just were good people, but they were doing their best but their circumstances were limited.

And I have always been for the underdog. I have always been for the people who don't have the power. That is my prejudice. That is where I am coming from. My views are prejudiced.

And so when we talk about waste and fraud and abuse in a $420 million budget item, Legal Services Corporation funding—and right after I come from an Armed Services Committee hearing where at some points the armed services has to declare a period of time for vehicles to be turned in, Humvees, tanks, all kinds of vehicles, to be turned into—or back into the military's accounting system, if you will, or inventory system, after they have been lost track of, billions of dollars, and inspector general's not able to eke out a savings for the taxpayers in five, $600-billion-a-year budgets, and then I come over here and I hear from folks who want to say that—or imply that a $420 million program is riddled with fraud and waste and abuse.

It pains me. It makes me angry, especially knowing that there has been a onslaught, an assault, against the Legal Services Corporation and against the movement to help poor people be a part of this system of equal justice for all, especially when I know that since 1980 we have been getting government off the backs of the people.

After we had a campaign kickoff in Philadelphia, Mississippi where only 13, 14 years prior three—Viola Liuzzo from Detroit had been murdered, Turner—I mean——

Mr. COHEN. Schwerner, Chaney and Goodman. Liuzzo made a——

Mr. JOHNSON. Well, I think——

Mr. COHEN. Liuzzo was an Alabama victim.

Mr. JOHNSON. Less than 13, 14 years later we have an announcement for president in Philadelphia, Mississippi where those killings took place. And then we have been opposed to any efforts to help people, to help poor people.

I am just astounded by, you know, what I have heard here today, the heartlessness that is on display when folks have not even met a poor person, don't have any feeling for them one way or the other—mostly, though, despise them and wish that they could be avoided.

And so those are my impressions of our political climate. It is not about making sure that it is—government monies are used effectively. It is about depriving people of their right to legal services that they cannot afford so that business can go on as usual, so that we can—we can continue to use our voting laws in a way so as to deprive people of their right to vote. And our history of doing that in this country is well documented.

And we don't want people to be able to be able to address those concerns through government money to LSC. We don't want government funds to be used to file class action lawsuits against entities like the old Fleet Finance that was found to have engaged in predatory lending back in the 1990's.

If we had been able to file class action lawsuits, legal aid, against banks that participated in predatory lending during the early years of this century and the late years of the previous decade, we could have avoided a $700 billion taxpayer bailout.

And so if we had been able to claim attorneys' fees for engaging in that litigation, then we could have had money that would replenish the operation—the operating budget of LSC at no cost to the taxpayers.

And my last comment, Mr. Chairman, is this. Here I see a letter from the Chamber of Commerce opposing H.R. 3764 which Mr. Scott has offered and which is a very important piece of legislation. Chamber of Commerce, opposed.

Thank you, Mr. Chairman.

Mr. COHEN. Thank you, sir. I appreciate your statement.

And now Mr. Scott, the Chairman of the Subcommittee on Criminal Law and the sponsor of this legislation and distinguished champion of justice, is recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Levi, somebody made a comment—I think it was Mr. Boehm—that the receipt of these funds would not be categorized as Federal funds for the purpose of the antifraud statutes. Did you want to respond to that?

Mr. LEVI. I am sorry. I am not familiar with that question. I am sorry. I didn't hear that.

Mr. SCHANZ. Mr. Scott, that would have been me. I do want to correct for the record that also. As the current law exists in 1996, the 1996 law, we do have access to client names and records through Section 509(h). We want to see that maintained in your piece of legislation.

The one thing as an inspector general that we have to be very wary of is that we trace the Federal dollars. The former chairman of the board of the LSC said, you know, find where the money goes.

And it is part of the I.G.—that is, part of my statutory responsibility—to find out where the Federal dollars—that they continue to maintain their identity.

And that is why there has been a distinction between LSC-funded programs and restrictions inherent in that, and non-LSC funds have been in the past subject to the same restrictions as the federally funded LSC monies.

Mr. SCOTT. So that if you receive Federal funds and essentially steal it, it is not—it is a Federal offense? I am trying to understand what—I can't imagine Mr. Levi has a problem with someone being charged with a Federal offense for abusing Federal funds.

Mr. LEVI. No, not at all.

Mr. SCOTT. And so we will—well, we will follow through with that.

You mentioned, Mr. Schanz, the access to client names. This isn't the only agency that involves state bar regulations on ethics and confidentiality. How do other agencies deal with maintaining confidentiality and ethical—and avoid ethical violations and still allow oversight and accountability? How do other agencies deal with that?

Mr. SCHANZ. Well, my most recent example would be my 30-plus years in the U.S. Department of Justice where we were, as an I.G., able to obtain confidential informants' names to determine whether the funds were being protected properly or whether they were being sold back on the street.

So we were able to, as an inspector general—in that situation we had top-secret clearances, and in some cases M clearances, to make sure that nothing ever came out of the I.G.'s office that would in—that would put into danger any confidential informant or any drug buys——

Mr. SCOTT. That is confidential informant. I am talking about normal legal representation. Do you have access to client files in other agencies?

Mr. SCHANZ. Yes.

Mr. SCOTT. And——

Mr. SCHANZ. Ones that I am aware of, yes.

Mr. SCOTT [continuing]. If we could see what you have done in other agencies, that would help us deal with the problem we have got with the legal aid programs.

Mr. SCHANZ. I will get back to you on that very shortly.

Mr. SCOTT. Now, Ms. Diller, you mentioned the drug-related evictions. If someone can prove—if a defendant can prove his innocence, what happens in the meanwhile to the relatives that live in that household?

Ms. DILLER. Well, they may well have been evicted during that time, because as the law stands right now, just the mere charge of some sort of drug-related crime is enough to disqualify you from eligibility. So when you have——

Mr. SCOTT. Well, when——

Ms. DILLER [continuing]. A whole family——

Mr. SCOTT [continuing]. When you say—when you say "you," you mean the whole family?

Ms. DILLER. Well, that client who may have family members, may have children living with them—they are not eligible for representation at that point.

Mr. SCOTT. And they can be evicted. Do they have any recourse?

Ms. DILLER. At that point there is nothing you can do. And so that is why this language would be a big improvement to address that problem.

Mr. SCOTT. And if you are not allowing class actions, how would you—Ms. Diller, how would you deal with systematic ripoffs, systematic abuses like failure to comply with Fair Labor Standards Act, failure to pay minimum wage, failure to withhold Social Security? How would you deal with that if you can't use a class action?

Ms. DILLER. Well, you simply can't deal with it in the most effective way. What you can do is you can represent one client at a time, which is the most labor-intensive and inefficient way to go about dealing with those problems.

You can't really mount an effective deterrence to those who are implementing these schemes on low-income communities. And you can't get broad widespread relief. So you can represent an individual client, but then you have got to keep doing that over and over and over again, and you don't reach as many people.

Mr. SCOTT. Thank you.

Thank you, Mr. Chairman.

Mr. COHEN. Thank you, Mr. Scott.

I now recognize——

Mr. SCOTT. Mr. Chairman, could I ask unanimous consent to enter into the record a letter from numerous organizations in support of the legislation?

Mr. COHEN. That can be done, and I believe Mr. Franks wants to enter into the record a letter from an organization that is against the legislation, and that will be granted without objection as well.

[The information referred to follows:]

NATIONAL CONFERENCE OF BAR PRESIDENTS

The organization of the nation's present, past and future bar leaders

c/o ABA Division for Bar Services • 321 North Clark Street, 20th Floor • Chicago, IL 60654-7598

312/988-5353 • Fax 312/988-5492 • www.ncbp.org

Contact: Julie M. Strandlie, ABA Governmental Affairs Office
jstrandlie@staff.abanet.org, 202-662-1764

April 20, 2010

The Honorable Steve Cohen
Chairman, Subcommittee on
Commercial and Administrative Law
Committee on Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Ranking Member, Subcommittee on
Commercial and Administrative Law
Committee on Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cohen and Representative Franks:

As Presidents of State and Territorial Bar Associations and national Bars of Color, we urge Congress to work together to strengthen and improve the Legal Services Corporation (LSC) by providing at least $435 million in funding and by enacting bipartisan legislation to reauthorize the program for the first time since 1981.

Thanks to your efforts and strong bipartisan support, for FY 2010 Congress provided a much-needed $30 million increase bringing the annual appropriation up to $420 million. This increase will help thousands of the most vulnerable Americans access critical legal assistance in matters where their home, their safety and their independence are at stake.

This year, we are asking Congress to provide another increase of at least $15 million as the next step toward closing the justice gap and meeting the critical need that exists today because of the rise in foreclosures, unemployment and related issues resulting from the economic downturn. The President has requested $435 million; the House of Representatives last year approved $440 million.

At the beginning of the recession in 2008, 54 million Americans (including 18.5 million children) qualified for federally funded legal assistance. The 2009 LSC Justice Gap study reaffirms that one in every two individuals who qualified for and actually *sought* assistance from LSC-funded programs was denied help because of a lack of resources; even worse, in foreclosure cases, LSC-funded programs must turn away two eligible clients for every client served. The justice gap has grown and is likely to continue to grow this year as our country struggles to emerge from the current economic crisis. At the same time demand for help has increased, other major sources of funding for legal aid (including state appropriations, private giving and Interest on Lawyers' Trust Accounts revenue) are declining or are under severe stress.

The low-income and disadvantaged Americans who depend on LSC-funded legal aid organizations include: people facing wrongful foreclosure of their homes due to predatory lending and other consumer fraud; women and children victimized by domestic violence; veterans denied the benefits our country promised them; and many other vulnerable members of our communities. Whether these people have access to the legal help they need could mean the difference between shelter and homelessness; medical assistance and unnecessary physical suffering; food on a family's table and hunger; economic stability and bankruptcy; productive work and unemployment. The failure to resolve their basic legal issues causes even greater hardship for them and often leads to their reliance on other government programs.

Bar Presidents' Letter
April 20, 2010

LSC currently funds 136 local programs serving every county, state and Congressional District in the United States and its territories. These local programs provide direct services to approximately one million constituents who struggle to get by on incomes below or near the poverty line.

The bipartisan LSC Board requested $516.5 million for FY 2011 in its attempt to close the justice gap over the next several years. Without continued incremental increases in federal funding, many more will be denied assistance in the future. We request your support to increase LSC funding to at least $435 million to help meet this urgent need.

Finally, LSC has not been reauthorized since 1981. Over those almost 30 years, many things have changed in the delivery of legal services and in corporate governance. For the first time in almost 20 years, legislation has been introduced in both the House and the Senate to reauthorize the program. We urge Congress to work together this year to come to an agreement on a reauthorization bill that will not only improve the efficiency and the delivery of legal services to low-income persons, but strengthen governance and accountability.

Thank you for your consideration of these requests.

Sincerely,

Mary T. Torres
National Conference of Bar Presidents

Thomas J. Methvin
Alabama State Bar

Sidney K. Billingslea
Alaska Bar Association

Raymond A. Hanna
State Bar of Arizona

Donna C. Pettus
Arkansas Bar Association

Howard B. Miller
The State Bar of California

David M. Johnson
Colorado Bar Association

Francis J. Brady
Connecticut Bar Association

Benjamin Strauss
Delaware State Bar Association

James G. Flood
The Bar Association of the District of Columbia

Jesse H. Diner
The Florida Bar

Bryan Cavan
State Bar of Georgia

Hugh R. Jones
Hawaii State Bar Association

Román D. Hernández
Hispanic National Bar Association

Douglas L. Mushlitz
Idaho State Bar

John G. O'Brien
Illinois State Bar Association

Roderick H. Morgan
Indiana State Bar Association

Jane V. Lorentzen
The Iowa State Bar Association

Thomas E. Wright
Kansas Bar Association

Charles E. English, Jr
Kentucky Bar Association

Kim M. Boyle
Louisiana State Bar Association

Geraldine G. Sanchez
Maine State Bar Association

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Maryland State Bar Association

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Massachusetts Bar Association

Bar Presidents' Letter
April 20, 2010

Charles R. Toy
State Bar of Michigan

Leo I. Brisbois
Minnesota State Bar Association

George R. Fair
The Mississippi Bar

H. A. "Skip" Walther
The Missouri Bar

Cynthia K. Smith
State Bar of Montana

Joseph J. Centeno
National Asian Pacific American Bar Association

Mavis T. Thompson
National Bar Association

Lael R. Echo-Hawk
National Native American Bar Association

Michael F. Kinney
Nebraska State Bar Association

Kathleen J. England
State Bar of Nevada

James J. Tenn, Jr.
New Hampshire Bar Association

Allen A. Etish
New Jersey State Bar Association

Stephen S. Shanor
State Bar of New Mexico

Michael E. Getnick
New York State Bar Association

John R. Wester
North Carolina Bar Association

Barbara B. Weyher
North Carolina State Bar

Jane L. Dynes
State Bar Association of North Dakota

Barbara J. Howard
Ohio State Bar Association

Allen M. Smallwood
Oklahoma Bar Association

Kathleen A. Evans
Oregon State Bar

Clifford E. Haines
Pennsylvania Bar Association

Arturo L. Hernández
Puerto Rico Bar Association

Victoria M. Almeida
Rhode Island Bar Association

Fred W. Suggs, Jr.
South Carolina Bar

Bob L. Morris
State Bar of South Dakota

Gail Vaughn Ashworth
Tennessee Bar Association

Roland K. Johnson
State Bar of Texas

Stephen W. Owens
Utah State Bar

Eileen Morris Blackwood
Vermont Bar Association

Ruth Miller
Virgin Islands Bar Association

Jon D. Huddleston
Virginia State Bar

Stephen D. Busch
Virginia Bar Association

Salvador A. Mungia
Washington State Bar Association

Stephen R. Crislip
West Virginia Bar Association

Sandra M. Chapman
West Virginia State Bar

Douglas W. Kammer
State Bar of Wisconsin

William Hiser
Wyoming State Bar

Mr. FRANKS. Actually, Mr. Chairman, I have three, the letter from the U.S. Chamber of Commerce to you and to me, and the letter from Senator Grassley and Mr. Issa and myself to LSC Inspector General Jeff Schanz, and then the October 15th letter from LSC I.G. Jeff Schanz to you and to me.

Mr. COHEN. Anything personal in those letters to me? I didn't——

Mr. FRANKS. Yes, I just think you should read them.

Mr. COHEN. Thank you. Thank you. Without objection, they will be entered into the record, all of them.

[The information referred to follows:]

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

April 26, 2010

The Honorable Steve Cohen
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Ranking Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cohen and Ranking Member Franks:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million business and organizations of every size, sector, and region, opposes certain provisions in H.R. 3764, the "Civil Access to Justice Act of 2009," which would make amendments to the "Legal Services Corporation Act." While the Chamber supports the intent of the Legal Services Corporation (LSC), which provides low-income citizens with adequate legal counsel who would otherwise not be able to afford it, the Chamber is concerned with some of the provisions related to the significant expansion of funding and the repeal of restrictions on funding class action lawsuits.

The bill would increase funding for the LSC to $750 million for FY2010-FY2015—an increase of more than 75 percent from its current budget of $420 million. The LSC, in contrast, has only requested approximately $516 million for the next fiscal year. In today's harsh and unstable economic environment, the government should not be allocating additional tax-payer dollars to fund private litigation. Further, the legislation clearly reverses funding restrictions on class-action litigation that Congress implemented in 1996. Under current law, the LSC is not allowed to initiate or fund policy-changing class action litigation. To change this policy and allow the LSC to use certain funds to initiate class action litigation is effectively a federal subsidy that flows directly into the pockets of the trial bar. Class action litigation is known for providing very little benefit to class members and great benefit to those attorneys involved in the litigation. Scarce tax-payer dollars should not be used to fund such an expansion of speculative, costly, and unwise private litigation at any time, and especially not in today's vulnerable economic climate.

While supportive of the underlying purpose of the LSC, the Chamber is concerned with these particular amendments and urges you to oppose them.

Sincerely,

R. Bruce Josten

Cc: The Members of the House Subcommittee on Commercial and Administrative Law

Congress of the United States

Washington, DC 20510

October 26, 2009

Via Electronic Transmission

Jeffrey E. Schanz
Inspector General
Office of Inspector General
Legal Services Corporation
3333 K Street, NW
Washington DC, 20007

Dear Inspector General Schanz:

Whistleblowers at the Legal Services Corporation (Corporation) continue to advise us that there are and continue to be concerns with the operation of the Office of Legal Affairs (OLA) and, among other things its ability to operate independently and to provide legal opinions to the Corporation without management interference. Accordingly, and by this letter, we are requesting that the Office of the Inspector General (OIG) independently confirm the information/representation(s) made to Congress to date. Specifically, we request that the Inspector General:

1) Review the process used by the OLA to prepare internal and external opinions;

2) Provide an assessment of the process used to prepare and issue legal opinions at the Corporation and determine whether or not the mechanisms in place insure that there is no interference with, among other things, OLA's ethical obligations;

3) Determine the total number of internal and external opinions requested of the OLA, verbally or in writing, since January 1, 2004;

4) Determine how many opinions have been issued in final by the OLA since January 1, 2004;

5) Determine how many opinions have been issued in draft by the OLA since January 1, 2004;

6) Determine whether in-house counsel(s) and/or the General Counsel was directed, at any time, to refrain from putting a legal opinion in writing and why;

7) Determine whether or not the Corporations' General Counsel was ever prevented, either directly or indirectly from issuing a written legal opinion, whether prepared in writing or presented verbally, and why;

8) Describe in detail the nature of the so-called "collaborations" between the Executive Team and the OLA as referenced in the Corporation's July 27, 2009 response to Senator Grassley;

9) Confirm that the OLA is "...free to reject the feedback of the Executive Team..." and is "...expected to exercise independent judgment and offer his/her best advice on legal issues" as represented by the July 27, 2009 letter response to Senator Grassley;

10) Confirm that no legal opinion has been interfered with by President Barnett or any other member of the Executive Team due to a disagreement between the Executive Team and the OLA; and

11) Provide information obtained directly from the OLA that indicates for all opinions requested since January 1, 2004, whether verbal or written, the following:

    a) General description of the legal issue;

    b) Date on which the opinion was requested;

    c) Determine whether the request was considered internal (I) or external (E);

    d) Date that OLA's initial/preliminary opinion was presented to the Executive Team, and how it was presented(verbal/written);

    e) Date(s) of all collaborations between the Executive Team and in-house counsel staff for the purpose of discussing the opinion;

    f) Date that OLA was instructed by President Barnett and/or the Executive Team not to issue a particular opinion, if applicable;

    g) Whether or not the issuance of an OLA opinion was delayed and/or prevented from being issued in final, and if yes, was this either directly or indirectly due to the Executive Team; and

    h) The number of days the opinion was pending prior to being issued and/or the date in those instances where the opinion is not yet issued in final.

Thank you in advance for your consideration of this important issue. If you have any questions regarding this request please contact Brian Downey of Senator Grassley's staff at (202) 224-4515, Stephen Castor of Congressman Issa's staff at (202) 225-5074, Justin Long of Congressman Smith's staff at (202) 225-6906 and Jeff Choudhry of Congressman Franks' staff at (202) 226-3337.

Sincerely,

Charles E. Grassley
Ranking Member
U.S. Senate Committee on Finance

Darrel Issa
Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives

Lamar Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives

Trent Franks
Member
Committee on the Judiciary
United States House of Representatives

Legal Services Corporation
Office of Inspector General

Inspector General
Jeffrey E. Schanz

October 15, 2009

The Honorable Stephen I. Cohen
Chairman
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
1005 Longworth House
Office Building
Washington, DC 20515

The Honorable Trent Franks
Ranking Member
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
2435 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cohen and Ranking Member Franks:

I am writing to convey my concerns regarding H.R. 3764, the Civil Access to Justice Act of 2009, which is currently pending before the Committee on the Judiciary. While the bill proposes useful reforms that would strengthen the Legal Services Corporation (LSC or the Corporation) and its grantees, it also contains a number of troubling provisions that threaten to undermine the effectiveness of the Legal Services Corporation Office of Inspector General (LSC OIG) and impinge upon my ability to carry out the Inspector General's statutory responsibilities under the Inspector General Act of 1978, as amended.

The LSC OIG is charged with oversight not only of its parent agency but also of 137 separate legal aid grantees, which receive a substantial portion of their operating funds in the form of LSC grants. If H.R. 3764 is enacted in its current form, the LSC OIG will be hampered in its ability to detect and prevent waste, fraud, and abuse in the Corporation and its grantees, to ensure compliance with applicable statutory and regulatory provisions, and to improve the effectiveness, efficiency and economy of the Federal legal services program.

Certain provisions of H.R. 3764 may be read to strip the LSC OIG of its central oversight role in the grantee audit process. That process is currently governed by Section 509 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 ("1996 Act"), which established a new grantee audit regime at LSC, both expanding the scope of recipient audits and clarifying the role of the OIG in overseeing them. By enacting Section 509, Congress attempted to bring oversight of LSC grantee

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audits into line with the standards that had already been made applicable to audits of states, local governments, and nonprofit organizations receiving federal grants by the Single Audit Act of 1984, P.L. 98-502, the Single Audit Act Amendments of 1996, P.L. 104-156, and OMB Circular A-133. By repealing Section 509, Section 15 of H.R. 3764 would take LSC backwards to a time when the respective roles of LSC management, the LSC OIG, and the IPAs were unclear, leading to unnecessary confusion and overlap in functions and activities between various LSC offices. In an August 2007 report, the GAO specifically identified such confusion and overlap as a contributing factor in LSC's weak governance and accountability practices. See Legal Services Corporation: Governance and Accountability Practices Need to Be Modernized and Strengthened. In this regard, H.R. 3764 appears to run counter to the manifest intent of the Inspector General Act of 1978, *i.e.*, to bolster the ability of Federal IGs to "provide policy direction for and to conduct , supervise, and coordinate audits and investigations relating to the programs and operations of such establishment." 5 U.S.C. App. § 4(a)(1) (IG Act).

Moreover, unlike other nonprofits receiving Federal grants, which are required by OMB Circular A-133 to be audited pursuant to Government Auditing Standards, under H.R. 3764 LSC grantees would no longer be required to be audited pursuant to these well-established standards. Replacing Section 509 of the 1996 Act with audit standards that are less rigorous than those imposed on Federal grantees by OMB Circular A-133 would substantially increase the risk that more funds will be lost as a result of unreasonable or unsupportable expenditures, as well as fraud, embezzlement, or simply poor bookkeeping. In this respect, H.R. 3764 appears to conflict with the statutory mandates of the IG Act, which requires Inspectors General to ensure that non-Federal auditors examining Federal programs adhere to Government Auditing Standards. See IG Act, Section 4(b)(1)(C) ("[I]n carrying out the responsibilities specified in subsection (a)(1), each Inspector General shall . . . take appropriate steps to ensure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General [for audits of Federal establishments]").

Unlike current law, moreover, H.R. 3764 contains no provision stipulating that LSC grants are to be considered Federal funds for purposes of Federal statutes relating to the proper expenditure of Federal funds. H.R. 3764's omission of such a provision would leave the several hundred millions of taxpayer dollars of LSC's annual appropriation to be spent with considerably less accountability than at present, and would effectively place the Federal legal services program out of the reach of most of the statutes the Federal Government relies upon to protect grant money from fraud, waste, and abuse.

H.R. 3764 also would restrict access to grantee records by providing that LSC and other monitors of the Corporation's grantees (including the LSC OIG) shall not "have access to any information . . . that is confidential under the applicable rules of professional responsibility or that is subject to the attorney-client privilege." By effectively denying access to any material relating to the grantees' representation of clients, this provision would hamper the Corporation's and LSC OIG's ability to conduct adequate grantee oversight. In addition, the bill contains no provision comparable to Section 509(h) of the 1996 Act, which protects attorney client privileged information but provides the OIG access to "financial

records, time records, retainer agreements, client trust fund and eligibility records, and client names," notwithstanding local rules of professional conduct.

By thereby altering an oversight regime that for well over a decade has enabled the LSC OIG to have the access it needs to carry out effective oversight of LSC grantees while protecting attorney-client privileged information, H.R. 3764 would erode the LSC OIG's ability to obtain records in the course of audits and investigations. Because the Corporation's grantees provide legal services, and state professional responsibility rules have been read to prohibit lawyers from divulging practically any information concerning the representation of clients (including such basic information as client names), the result of this provision's enactment would likely be that the LSC OIG would be unable to obtain information it needs to carry out audits, investigations, and evaluations of LSC grantees. Such restrictions on access would make it more difficult, at times even impossible, for the LSC OIG (or other monitors such as the Government Accountability Office) to determine whether grantees are serving ineligible clients.

To propose that LSC-OIG's oversight authority should vary depending on a grantee's location is inconsistent with the OIG's authorities and responsibilities under the Inspector General Act of 1978, and defies common sense. For this reason the courts have long recognized the importance of uniform, national standards in federal investigative actions. As the D.C. Circuit has stated in the context of a subpoena enforcement action, Federal courts should decline

> the opportunity to adopt a particular state's privilege law where . . . the documents in question are sought by a governmental agency with a nationwide mandate to redress matters of pressing public concern. . . . The serious risk that inconsistent state privileges might unduly constrict [a Federal agency's] discretion in contravention of its congressional mandate makes it abundantly clear that this is a situation in which state privileges may not be adopted costlessly. A uniform rule, rather than *ad hoc* borrowing, will better promote federal policy objectives.

Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1514 (D.C. Cir. 1993).

Were H.R. 3764 to pass in its current form, however, the LSC OIG could be forced to litigate access issues in every jurisdiction in which it seeks information, rather than operating, like other Federal OIGs, under a uniform national standard.

By weakening the LSC OIG's oversight role in grantee audits, depriving LSC funds of their Federal character, and limiting the LSC OIG's access to grantee records, H.R. 3764 appears to run directly counter to Congress' intent, as expressed in the recently-enacted Inspector General Reform Act of 2008, to enhance the authority of Federal Inspectors General to root out waste, fraud, and abuse in Federally-funded programs. This is particularly worrisome given that the appropriations authorized for LSC under H.R. 3764 would be roughly double the Corporation's current appropriation. It is also particularly troubling in light of recent

reports issued by the Government Accountability Office strongly indicating that LSC needs to implement improved governance and accountability practices, and to improve its grantee oversight practices. See August 2007 GAO Report, Legal Services Corporation: Governance and Accountability Practices Need to Be Modernized and Strengthened; December 2007 GAO Report, Legal Services Corporation: Improved Internal Controls Needed in Grants Management and Oversight. See also 7/7/09 Audit of Legal Services Corporation's Consultant Contracts (finding that LSC did not regularly follow its own written policies and procedures on consultant contracting process, and may have entered into independent contractor agreements with individuals who should have been classified as employees under IRS rules); 8/10/09 Report on Selected Internal Controls, Legal Aid of Northwest Texas (finding unsupported expenditure of $188,522 by Legal Aid of North West Texas for multi-story stone wall composed of imported Italian stone).

Other provisions of H.R. 3764 are troubling as well. For example, the bill would make it more difficult for the LSC OIG and other monitors to ascertain the source of funding behind grantee activities by repealing current statutory provisions that require recipients to account separately for receipts and disbursements of LSC and non-LSC funds. In addition, the bill would repeal the current statutory requirement that grantees make their timekeeping records available to monitors, and eliminate statutory provisions designed to foster competition in the LSC grant award process.

I would appreciate the opportunity to meet with you and/or your staff at the earliest available opportunity to discuss these and other concerns regarding H.R. 3764, and to propose amendments to the bill that would enhance the LSC OIG's ability to prevent and detect waste, fraud, and abuse in LSC and its grantees, and to improve the effectiveness, efficiency and economy of the Federal legal services program. My contact information appears below.

Sincerely,

Jeffrey E. Schanz
Inspector General
Legal Services Corporation
(202) 295-1677
js@oig.lsc.gov

Mr. COHEN. Ms. Chu, the distinguished lady from the state of California, is recognized for 5 minutes.

Ms. CHU. Thank you, Mr. Chair.

Ms. Diller, there have been many questions about the restrictions in the Civil Access to Justice Act and the effect of these restrictions on both Federal and non-Federal funds. Can you clarify how the restrictions in the bill will affect organizations that accept LSC funds and distinguish between the LSC funds or non-LSC funds?

Ms. DILLER. Sure. So first of all, it is a very important distinction. What the bill would do primarily is lift restrictions on non-

LSC funds, with some exceptions—notably, the exception related to abortion litigation. That would be prohibited with any funds.

And then the bill would treat differently some of the prohibited categories of representation under the 1996 rider with Federal funds. So for example, class actions would be permitted to be brought with Federal funds. Certain types of administrative and legislative advocacy could be done.

But there are some categories where Federal funds would not be allowed to be used, and those are prison conditions cases. Those are the cases that have been restricted under the original LSC act, that have been restricted for all these years. So there still are a number of restrictions in place both on Federal funds and this one restriction still on non-Federal funds.

Ms. CHU. And it is important to distinguish the fact that certain funds would be allowed for non-LSC versus LSC funds.

Ms. DILLER. Yes. I mean, it is completely out of line with the way the Federal Government treats grantees. LSC grants money to independent local nonprofit organizations. And as I said earlier, they receive funds from a variety of sources. Sixty percent of the funds come from non-LSC sources.

And it is completely out of the ordinary for Congress to restrict how states spend their money, how local governments spend their money, how private donors spend their money. That is not the norm by any means. This is virtually the only program that operates under that kind of really overarching Federal restriction.

Ms. CHU. My office was recently contacted by the Chamber of Commerce who argued that—they say this "Class action litigation is known for providing very little benefit to class members and great benefits to those attorneys involved in the litigation. Scarce taxpayer dollars should not be used to fund such an expansion of speculative, costly and unwise private litigation at any time, and especially not in today's vulnerable economic climate."

Can you explain how LSC grantees will use class action lawsuits if these restrictions are lifted? And also, the chamber charges that attorneys involved with class action lawsuits for indigent clients will benefit monetarily from the litigation. Can you respond to all of this?

Ms. DILLER. Yes. I mean, it is simply not true that attorneys will benefit monetarily from that litigation. These are not the type of class actions that we hear so much about, like securities class actions or product liability class actions, where an attorney gets a third of the proceeds of the class action.

I mean, these are not that kind of class action. These are class actions usually for broad injunctive relief, usually to stop the kind of predatory practices that Mr. Scott mentioned and that we have talked about earlier today. These are not money-making things by any means.

And these are Legal Services attorneys who work on, I should say, the lowest salaries in the profession to help low-income people. And so there is not a monetary incentive for them to bring these big class actions.

What the language change would do is it would just allow them to help more people more efficiently.

Ms. CHU. In fact, what options are available to low-income families on the—on the foreclosure issue? I know you talked about that earlier in your testimony and the fact that these low-income persons are subject to lots of scams. What alternative is available to them without this class action ability?

Ms. DILLER. Well, I should say that, first of all, the programs are representing individual families and individuals in foreclosure cases. They are overwhelmed with them. I believe former president Helaine Barnett at one point testified that they were having to turn away two for every case that they could take.

But the problem that we have seen is that in a lot of places foreclosures were the product of predatory lending practices, and so there has not been an effective way to combat those practices without the class action mechanisms. Then there is the subsidiary issue of things—businesses cropping up, scams cropping up, that are preying on the very distress of the homeowners who are facing foreclosure.

And again, Legal Services offices have not been able to effectively combat those because of the fact that when you handle an individual case, the defendant or the—you know, it may be a plaintiff depending on the case—but the entity that has perpetrated the scam can write off an individual case as merely the cost of doing business, whereas if you are able to get broader relief, able to get relief for the whole class of victims affected, you have a much more efficient and effective response to those kind of practices.

Ms. CHU. Thank you.

I see my time is up, and I yield back.

Mr. COHEN. Thank you so much.

Before we adjourn and allow me to quelch my hunger, I do want to ask Ms. Diller or Mr. Boehm, is current law that if you are charged with the possession of a drug offense that you can't get Legal Services representation?

Mr. BOEHM. No.

Mr. COHEN. Excuse me?

Mr. BOEHM. No.

Mr. COHEN. No. What is——

Mr. BOEHM. Current law, meaning the 1996 restrictions——

Mr. COHEN. Yes, sir.

Mr. BOEHM [continuing]. Was sale or distribution——

Mr. COHEN. Okay.

Mr. BOEHM [continuing]. Only, and it had another thing, which is public housing only. So those were the two key factors as to what was restricted.

Mr. COHEN. Great. It is not as onerous as I thought. It is still onerous, but not onerous to the end.

And I thank each of the witnesses for their testimony today.

Without objection, Members will have 5 legislative days to submit any additional written questions—the witnesses, as you answer promptly as you can and be made part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

Again, I thank everyone for their time and patience and participation and service. This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 1:13 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

RESPONSE TO POST-HEARING QUESTIONS FROM JOHN G. LEVI, CHAIRMAN, BOARD OF DIRECTORS, LEGAL SERVICES CORPORATION

Submitted June 3, 2010
Page 1 of 16

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 3764, the "Civil Access to Justice Act of 2009"
April 27, 2010

John G. Levi, Chairman, Board of Directors, Legal Services Corporation

Questions from the Honorable Steve Cohen, Chairman

1. **As the need for legal assistance increases, what specifically are LSC and the legal aid community doing to stretch the limited resources available?**

Answer: In an era where every dollar counts, partnerships are important to leveraging federal funds in every community. LSC encourages legal aid programs to think strategically about partnerships and collaborations with others—such as hospitals, bar groups and foundations, law firms, law schools and community and social services agencies—that hold the promise of stretching limited resources and making LSC programs more effective and efficient.

Since 1996 when federal funding was cut by more than 30 percent, local programs have carried out aggressive fund-raising strategies and many have been successful. Today, LSC funding represents 42 percent of all funding that LSC programs receive, in contrast to 1995 when it was 60 percent.

LSC programs actively approach local and state governments to encourage increased financial support for civil legal assistance. In 2009, state funding to LSC programs totaled about $155 million, local funding was $48 million, and Interest on Lawyers' Trust Accounts (IOLTA) was $84.9 million. In the case of IOLTA, however, the 2009 funding represented a 24 percent decline from the previous year, and the outlook for this source of funds is not encouraging because of the continuing historic lows in short-term interest rates.

Encouraging private as well as public resource development is a priority for the Corporation. LSC programs pursue fundraising initiatives in such areas as: lawyer fund drives, attorney dues, bar grants, foundation and corporate grants, matching grants, United Way donations, fellowship programs, *cy pres*, individual gifts, and capital campaigns. In 2009, private funds received by LSC programs totaled almost $50 million.

In 2007, LSC issued revised Performance Criteria, which serves as a planning document to guide programs in their ongoing efforts to ensure high-quality civil legal services. One part of the Performance Criteria directs LSC programs to provide for effective governance, leadership and administration, including "general resource development and maintenance."

Under this criterion, each program "seeks to maintain and expand its base of funding, with the goal of increasing the quality and quantity of the program's services to eligible clients." This is

an area of both self-evaluation and regular review by LSC in program visits to the grantees. Programs are judged and evaluated on these criteria and the Corporation sees them as among the key measurements of the grantee's delivery of quality legal services.

In addition, when programs apply for LSC funding, the evaluations of their grant proposals include each program's plans for fundraising from non-LSC sources.

It is my understanding that many LSC programs attend training sessions on fundraising at national conferences, and such sessions provide information on best practices in fundraising strategies. LSC programs also benefit from their collaborations with the National Association of IOLTA Programs, which seeks to enhance legal services for the poor, and the American Bar Association Project to Expand Resources for Legal Services, which collects and disseminates information about fundraising initiatives to legal services and *pro bono* programs.

Fund-raising and development will be one of the areas of focus for the new LSC Board, and the Board expects to provide some leadership and direction to encourage local programs in these areas.

2. **Opponents of providing federal funding for legal service programs contend that other avenues, such as pro bono assistance programs or private funding sources, can provide sufficient legal assistance to meet the needs of the poor. Do you agree? Please explain.**

Answer: *Pro bono* work, private funds and technology are clearly beneficial tools to addressing the unmet need. However, these approaches—alone or in combination—cannot address the increasing demand for civil legal assistance by low-income Americans. During the Board of Directors' recent visit to Arizona, for example, program officials estimated that to keep up with only the increased requests for legal services emerging since the financial crisis, every lawyer in the state would have to take 20 cases—a caseload that would represent an unrealistic challenge for members of the private bar. Clearly, *pro bono* alone cannot meet all the demand for services.

The magnitude of the challenge facing legal services programs is great. Currently, 54 million Americans are eligible for LSC-funded services, and we know this number is increasing because low-income workers are among the first to lose their jobs and are among the last to benefit when the economy recovers. When there are not enough jobs, more people require assistance—whether food stamps, housing assistance or other kinds of help that require direct representation.

In 1974, Congress created the LSC Act which institutionalized the responsibility of providing legal services to low-income Americans. It has reaffirmed this responsibility annually in approving appropriations for LSC. The provision of legal services keeps faith with our nation's founding values. Ensuring that the poor are adequately represented greatly improves their chances of keeping or securing basic necessities—the keys to stability and self-sufficiency.

There are some things that only the federal government can do. Chief among them is administering justice under the law for all people and promoting equal access to justice. LSC requires federal funding to address the justice gap.

3. **In your written statement, you discuss very briefly LSC's locality pay program, and urge Congress to provide for its continuation. Would you please describe that program and its significance?**

Answer: In 1999, the Legal Services Corporation commissioned an independent study of its compensation structure, and the consulting firm issued a formal *Compensation Survey and Study* that, among other things, recommended that LSC "consider implementing an annual locality pay index to promote equity in its employee salary regarding the high geographic costs of living in the Washington, DC metropolitan area."

LSC adopted locality pay as part of its FY 2000 operating budget. LSC locality pay is based on the Federal locality pay system, which is designed to help address a gap between federal and non-federal salaries in given geographical areas.

Congress specifically included language in the Appropriations Acts fiscal year 2008 and every fiscal year since endorsing LSC's locality pay program, with the caveat that LSC locality pay not exceed federal locality pay for the Washington, DC metropolitan area. For FY 2010, the federal locality pay for the Washington area is 24.2 percent. Locality pay for LSC employees is currently at 17.1 percent with the FY 2010 rate to be determined by the LSC Board of Directors in July 2010.

We recommend that H.R. 3764 incorporate the authorization for locality pay which has for the past three fiscal years been a part of the annual appropriations act.

4. **In his written statement, IG Schanz recommends that H.R. 3764 be amended to include a requirement that LSC grantees implement a timekeeping system that links employee time records to the relevant funding source. He indicates that LSC has not been inclined to amend its Part 1635 regulations to require such a timekeeping system. Please respond.**

Answer: The Board and LSC management addressed this matter in April 2007 and determined that rulemaking to revise the timekeeping rule, 45 CFR Part 1635, was unnecessary. The Board believed the information sought by the OIG was obtainable through the recipients' accounting records. Requiring recipients to record this information as part of the timekeeping records is redundant and, therefore, an undue administrative burden. Moreover, Management was concerned that such a requirement would be problematic in that the timekeepers may not know at the time they record their hours exactly which source of funds are being used to support their activity. Accordingly, having to research the materials necessary to record that information would become burdensome. In addition, since timekeeping records are required to be maintained on a contemporaneous basis, such a requirement would force recipients to assign funding sources on a contemporaneous basis. This proposed requirement could create tension with the overall goal of diversifying funding and encouraging programs to make the most efficient use of funding during the fiscal year.

5. **How does H.R. 3764 impact LSC? How does the legislation help LSC achieve its mission?**

Answer: The Legal Services Corporation has historically supported reauthorization because it represents an expression of ongoing support for the mission of LSC—promoting equal access to justice and ensuring the provision of high-quality legal assistance to low-income Americans. Due to the serious decline in IOLTA funds, some civil legal service providers have had to enact cuts, lay-offs, furloughs, and other restrictions in services.

The higher level of authorized appropriations in H.R. 3764 would help LSC in its efforts to close the nation's justice gap and more effectively provide high-quality legal services to low-income Americans. Specifically, the bill would provide LSC with an authorization of $750 million for each year of a five-year period. Such an increase would enable LSC to provide our grantees and our citizens the support they so desperately need in this time of unprecedented demand for legal assistance coupled with extreme pressure on non-federal sources of funding.

In addition, the bill would formally authorize our Loan Repayment Assistance Program, an essential tool in recruiting and retaining new attorneys. Recipient offices face serious problems hiring and keeping experienced lawyers, even those who are dedicated to providing legal services for low-income individuals. The strikingly low salaries paid to legal services attorneys deters young and mid-career lawyers to work for programs because of their large law school debts. Furthermore, the bill responds to a request from our grantees to amend the composition requirements for their boards; and it would raise the compensation cap for LSC, a change that would greatly assist us in recruiting talented professionals.

All of these changes are in direct support to the mission of LSC and would provide the Corporation with increased support in ensuring access to justice for all Americans.

6. **LSC is appropriated $420 million for the current fiscal year. H.R. 3764 authorizes $750 million for LSC. What impact would an increase of $330 million, assuming that Congress appropriates the full authorization amount to LSC, have on legal services programs across the country? For example, how would it impact Southern Arizona Legal Aid and the Foreclosure Project of the Legal Assistance Foundation of Chicago, which you described in your opening statement? Of the 54 million American qualifying for legal assistance, how many more would benefit from a $330 million increase?**

Answer: The Corporation supports the funding ceiling authorized in H.R. 3764. The proposed funding level of $750 million would help LSC in its efforts to close the nation's justice gap and to more effectively provide high-quality legal services to low-income Americans. Due to a 24 percent decrease from 2008 to 2009 in IOLTA funding—a major source of funding for LSC grantees—programs are struggling to meet the demand for legal services. An increase of $330 million to LSC would significantly impact the programs' capacity to provide quality services to low-income Americans. For example, LSC grantees in Arizona would receive an increase of approximately $9 million and programs in Illinois would receive an increase of $11 million

from current levels. This increase would significantly help programs to assist more low-income Americans in their services areas.

As documented by the Justice Gap Report, programs are turning away at least 50 percent of the people who actually go to a legal aid office and request assistance. While it is difficult to project the exact number of eligible poor people that could be helped, LSC-funded programs would be able to help significantly more people stay in their homes, keep their jobs, get protective orders against domestic abusers, and have access to health care.

7. **H.R. 3764 seeks to authorize increased funding for LSC, eliminate many of the restrictions currently imposed on LSC and its grantees, and improve and strengthen governance and accountability. What recommendations would you suggest to improve the legislation?**

Answer: The Corporation supports the authorized funding level of $750 million because it will significantly strengthen our ability to provide legal aid to the poor. LSC also supports the provisions relating to improving governance and accountability so that every dollar is well-spent. The Board is committed to ensuring that best practices are used in an organization's accountability and transparency. We also greatly appreciate the increase in the Corporation's executive pay schedule, from the Level 5 to the Level 3.

As the legislation was being drafted, LSC responded to requests for information regarding the bill. In addition, we recommend that H.R. 3764 incorporate the authorization for locality pay which has been a part of the annual appropriations act for the past two years. There are a number of technical corrections that LSC has identified that will be provided to the subcommittee in a separate submission.

8. **In addition to implementing the GAO recommendations and those of the IG, what else will the LSC Board do to ensure Congress and the taxpayers that funding appropriated to LSC is spent efficiently, effectively, and wisely?**

Answer: The Board of Directors takes its duties very seriously and considers proper stewardship of taxpayer dollars as an extremely important responsibility. The new Board is fully committed to ensuring that our search produces an excellent President for the Corporation and will make it clear to that individual what we expect in terms of management and oversight. We will strive to have a strong working relationship with the Inspector General and evaluate him on his ability to prevent, identify, and ensure the proper handling of waste, fraud, and abuse. We will maintain a close working relationship with the leadership of the Corporation and spend the time necessary to ensure that their oversight of grantees is complete, thorough, and in accord with best grant-making practices.

9. **During his opening statement, Ranking Member Franks mentioned several GAO recommendations and studies. He indicated that a third GAO study is "coming in the near future." What is the status of that GAO study? If it has arrived, please describe it, and how LSC will respond to it.**

Answer: The GAO began a review of LSC's compliance and oversight operations and performance measurements in June 2009. An exit conference between GAO and LSC staff was held on April 6 to discuss preliminary findings by the GAO. On April 30, the GAO provided LSC a final draft report that includes 17 recommendations to improve internal controls over grant awards and grant program effectiveness. LSC Management submitted comments and responses to GAO's report on May 28, which will be included in the final report when it is released to the public.

Questions from the Honorable Trent Franks, Ranking Member

1. **What is the percentage of private funds versus federal funds received by LSC's grantees?**

Answer: In 2009, LSC funding represented 42 percent of the total funding LSC grantees received. Non-LSC funding, therefore, represented 58 percent of their total funds. Non-LSC funds include state and local (22 percent), IOLTA (9 percent), private donations (5 percent) and other federal grants such as Violence Against Women Act, Older Americans Act, and community block grants (7 percent).

a. **What about non-federal funds versus federal funds?**

Answer: See response to question number 1 above.

b. **What can be done by LSC grantees to obtain more private and other non-federal funds before seeking additional federal funds?**

Answer: Since 1996 when restrictions were imposed on the use of federal funds for the provision of civil legal assistance, LSC grantees have very actively employed a number of methods to raise non-federal funds. In 1996, LSC grantees received 60 percent of their funds from the federal government and 40 percent from non-federal sources. Today, those percentages have been essentially reversed with only 42 percent of support being received by our grantees from federal tax dollars.

The largest non-federal source of funding is state funding and LSC grantees continue to have a very active advocacy program to state legislatures. LSC programs rely on state bar associations, individual law firms, and fund raising events to sustain and increase their private support. United Way and other non-profit foundations are sources of private funds and will continue to be important avenues of support. LSC grantees have leveraged the federal dollar to increase both the range and depth of non-federal funding in what has become one of the most successful public-private partnerships in the nation.

2. **In light of Inspector General Jeff Schanz's testimony at the Subcommittee's hearing on April 27, 2010, might H.R. 3764 be improved if it were amended to maintain the status quo in regard to the authorities of the Office of Inspector General (as annually renewed in appropriations measures since P.L. 104-134)?**

Answer: As I stated at the hearing, we are not prepared to recommend changes in OIG responsibilities at this time.

3. **Are there any provisions of P.L. 104-134 that are omitted from H.R. 3764 as introduced but that should be included in H.R. 3764 through amendment?**

Answer: With the exception of the issues raised by the Inspector General, there are no additional areas which we are aware of at this time.

4. **Since 1996, does it appear that the system of competitive awards of grants and contracts for field programs established in Sec. 503 of P.L. 104-134 has been followed?**

Answer: Yes, the system of competitive awards of grants and contracts for field programs established in Sec. 503 of P.L. 104-134 has been followed.

The LSC regulation on competitive bidding for grants and contracts (45 C.F.R. Part 1634) provide the framework for ensuring the competitive grants process is comprehensive, responsive to Sec. 503 P.L. 104-134, and rigorously followed. The grants process is annually audited for compliance with 45 C.F.R. Part 1634 by an independent accounting firm. Additionally, the Government Accountability Office has conducted three separate reviews of the LSC competitive grants process with no finding that the system of competitive awards has not been followed. While the GAO has recently recommended additional documentation be included in the competition case files, not one grant award decision has been questioned.

LSC uses a variety of publications to inform the public of the grants process including newspapers, bar journals, the Internet, and the Federal Register. The request for proposals (RFP) and resource materials are available on the Internet. LSC holds an annual "Applicants' Informational Session" to further promote the competitive grants process and to respond to Applicant inquiries regarding grant application preparation.

LSC staff uses an "Evaluation Guide" to ensure a consistent and objective evaluation of grant applications. The Evaluation Guide is based on the ABA Standards for Providers of Civil Legal Aid, the LSC Performance Criteria, LSC regulations, and the RFP.

Funding recommendations, based on staff evaluations of the grant application and other relevant information, are presented to the LSC President, who makes all funding decisions. Grant conditions are attached to grant awards, where necessary, to ensure programmatic quality and compliance with LSC regulations, policies, and guidelines.

a. Are you aware of any instances in which an annual grantee faced no competitors? Please provide a list of such instances.

Answer: Although many states and localities cannot sustain multiple providers of legal services for low-income people and do not generate multiple applications to LSC from a given service area, some communities do give rise to local competition for LSC funding. The chart below identifies service area(s) in which the annual grantee faced a competitor.

Grant Year	Service Area	Applicant competing for service area
2010	MSC	Georgia Legal Services Program
2010	MSC	South Carolina Legal Services, Inc
2009	WY–4	Legal Aid of Wyoming
2009	WY–4	Wyoming Children's Access Network
2009	NWY–1	Legal Aid of Wyoming
2009	NWY–1	Wyoming Children's Access Network
2009	MWY	Legal Aid of Wyoming
2009	MWY	Wyoming Children's Access Network
2008	AL-4	Legal Advice and Referral Center
2008	AL-4	Matt Folmar
2007	FL–14	Three Rivers Legal Services, Inc
2007	FL–14	Jacksonville Legal Clinic
2007	MSC	The South Carolina Centers for Equal Justice
2007	MSC	Georgia Legal Services Program
2007	WY–4	Wyoming Legal Services, Inc
2007	WY–4	Legal Aid of Wyoming
2007	MWY	Wyoming Legal Services, Inc
2007	MWY	Legal Aid of Wyoming
2007	NWY–1	Wyoming Legal Services, Inc
2007	NWY–1	Legal Aid of Wyoming
2006	NH-1	Legal Advice and Referral Center
2006	NH-1	Community Legal Services
2005	MA–12	Legal Services for Cape Cod and Islands, Inc
2005	MA–12	New Center for Legal Advocacy, Inc
2005	MI–14	Legal Services of Eastern Michigan
2005	MI–14	Lakeshore Legal Aid
2004	MA-10	Massachusetts Justice Project (LSC Grantee)
2004	MA-10	CPF/The Fatherhood Coalition (New Applicant)
2004	MIN	Indiana Legal Services (LSC Grantee)
2004	MIN	Law Office of Buffy M. Bryant (New Applicant)
2003	MI-14	Legal Services of Eastern Michigan (LSC Grantee)
2003	MI-14	Lakeshore Legal Services (LSC Grantee)
2003	OH-19	Western Ohio Legal Services Association (LSC Grantee)
2003	OH-19	LAWCORE (New Applicant)
2002	LA–9	Capital Area Legal Services Corporation
2002	LA–9	Southeast Louisiana Legal Services Corporation

2002	LA–9	New Orleans Legal Assistance Corporation
2002	LA–10	Southwest Louisiana Legal Services Society, Inc
2002	LA–10	Acadiana Legal Service Corporation
2002	MI–1	Legal Services of Southern Michigan, Inc
2002	MI–1	Wayne County Neighborhood Legal Services, Inc
2002	MI–3	Legal Aid and Defender Association, Inc
2002	MI–3	Wayne County Neighborhood Legal Services, Inc
2002	MI–4	Wayne County Neighborhood Legal Services, Inc
2002	MI–4	Legal Services of Eastern Michigan
2002	MI–5	Wayne County Neighborhood Legal Services, Inc
2002	MI–5	Legal Services of Southern Michigan, Inc
2002	MI–6	Wayne County Neighborhood Legal Services, Inc
2002	MI–6	Lakeshore Legal Aid
2002	MI–7	Wayne County Neighborhood Legal Services, Inc
2002	MI–7	Oakland Livingston Legal Aid
2002	TX–15	Texas Rural Legal Aid, Inc
2002	TX–15	Legal Aid of Central Texas
2002	TX–15	El Paso Legal Assistance Society
2002	TX–15	Bexar County Legal Aid Assoc

b. Are you aware of any instances in which grantees were re-awarded funds from LSC despite having exhibited poor performance in the prior year in the form of wasted funds, a violation of the LSC Act, or a violation of annually renewed restriction on fund use? Please provide a list of such instances.

Answer: The LSC Offices of Compliance and Enforcement (OCE) and the Inspector General (OIG) review potential performance issues, including reports of improper expenditures and possible violations of the LSC Act and restrictions, and issue final reports on significant findings, which help inform funding decisions. The chart below lists those grantees with significant issues based on OIG and/or OCE findings and the actions taken by LSC. The chart is based on grant data from 2002 through 2010; however, there were no significant performance issues for calendar year 2002 through 2005.

	Grantee Name	Issue	Actions Taken by LSC
1	Ohio State Legal Services	• Improper accounting of LSC derivative income as non-LSC funds (by grantee subsidiary Legal Aid Society of Columbus)	• Grantee required to certify that LSC derivative income was properly accounted. • LSC reviewed grantee financial audit reports to confirm proper accounting of LSC derivative income.
2	Legal Aid of Northwest	• Purchase of stone veneer for office	• Grantee required to certify that LSC funding was not used to

	Texas	building entrance	purchase stone veneer for office building. • LSC reviewed grantee's financial audit reports to confirm proper accounting for the cost of the stone veneer.
3	Legal Aid and Defender Association	• Violation of cost standards and procedures	• LSC recovered $6,866.54 in questioned costs.
4	California Indian Legal Services	• Violation of cost standards and procedures	• LSC recovered $27,760.16 in questioned cost.
5	Legal Aid Foundation of Los Angeles	• Lobbying and certain other activities	• LSC recovered $3,580.00 in questioned cost associated with these prohibited activities
6	Bay Area Legal Aid (CA)	• Claiming and retaining attorneys' fees	• Grantee required to submit biannual reports detailing all cases in which attorneys fees had been sought, claimed, collected, or retained. • LSC reviewed reports to confirm that attorneys' fees received were not prohibited. • LSC recovered $5,057.57 in questioned costs associated with these prohibited activities.
7	Nevada Legal Services (NLS)	• Improper accounting of LSC derivative income as non-LSC funds • Engagement in lobbying activities • Inadequate timekeeping procedures • Participation in fee generating cases	• LSC reviewed grantee financial audit reports to confirm proper accounting of derivative income. • LSC placed NLS on short-term funding and required NLS to respond to a corrective action plan until each of the compliance issues were resolved. • LSC recovered: $81,815.33 in questioned costs associated with these prohibited activities.
8	Legal Services NYC	• Prohibited political activities	• LSC recovered $52,437.83 in questioned costs associated with

			these prohibited activities.
9	Legal Aid of Nebraska	• Lobbying and certain other activities	• LSC recovered $1,967.00 in questioned costs associated with these prohibited activities.
10	California Rural Legal Assistance (CRLA)	• Client solicitation • Claiming and retaining attorneys' fees • Fee generating cases	• LSC placed CRLA on short-term funding and required CRLA to respond to a corrective action plan until each of the compliance issues were resolved. • LSC recovered $18,783.00 in questioned costs associated with these prohibited activities.

LSC provides oversight to all grantees, with special oversight attention given to grantees that have caused compliance or programmatic concerns. LSC annually applies risk criteria in determining program visits, which seek to ensure grantees are providing effective legal services and have appropriate internal controls and accountability.

The relationship between the Board of Directors, the President, and Management

5. **Last year, whistleblowers claimed that LSC's management and president did not always fully disclose information to the entire LSC Board of Directors. Do you believe that the Board of Directors today has an open and honest relationship with LSC's management and president? What steps have you taken to assure that you and the rest of LSC management have an open and honest relationship with LSC's board?**

Answer: I am aware of those earlier claims and have been sensitive to the issue during this period of Board and staff leadership transition. I have no reason to believe that the management of LSC is providing anything less than full and complete information and am happy to report an open relationship with the senior staff and interim President.

The newly appointed members of this board have received two full days of orientation from LSC staff and management on the roles and responsibilities of the board and individual members, as well as the full range of issues confronting the Corporation and its grantees. We expect to receive further such briefings in the near future.

Furthermore, I can assure you that our search for a new President will produce a leader with a strong track record in this area and that through regular contact and a clear delineation of expectations, this board expects to continue enjoying a transparent working relationship with LSC's leadership.

6. **How often does LSC's Board of Directors meet? Is this frequent enough to grasp what is really happening at LSC?**

Answer: The LSC Act and Bylaws require four regular board meetings a year. In addition to those meetings, the new Board will be holding issue-oriented meetings in person or by telephone. As noted in the prior response, the outgoing Board provided orientation sessions for new Board members, and we have received and will seek additional briefings from management on various subjects and issues.

The Board meeting framework permits the Directors to engage in the business of the Corporation, set policies and deal with current issues, such as completion of recommendations by outside independent auditors and the GAO. Regular Board meetings often include a visit to an LSC-funded program so that Directors may hear first-hand from clients, local Boards and program officials. Meetings also are convened to act on Semi-Annual Reports by the LSC Inspector General and for ad hoc purposes. In addition, Board committees hold their own meetings to gather information from LSC management and staff.

Questions from the Honorable Steve King

Representing tenants who are evicted from public housing projects

1. **Does LSC have a procedure in place to determine how many cases each year involve drug-related evictions from private apartments? If so, how many such cases were handled by LSC program lawyers over the last five years?**

Answer: While LSC does not collect statistics on private housing drug-related eviction cases, it is the experience of our grantee programs that the vast majority of their private housing caseload involves non-payment of rent, overcrowding in violation of the lease and other typical landlord/tenant disputes such as complaints about noise, maintenance and building security and do not spend measurable resources representing individuals who face eviction from private housing due to drug possession or activity.. It is also important to note that some programs, including the Legal Assistance Foundation of Metropolitan Chicago, in my hometown, prioritize public housing cases over private ones and therefore do not handle many private housing cases at all.

2. **Does LSC have a procedure in place to determine how many drug-related eviction cases it has handled in public housing evictions where the charge was drug possession? If so, how many such cases have been handled by LSC program lawyers over the last five years?**

Answer: LSC-funded programs are prohibited from representing clients in public housing eviction matters where there has been a charge of drug possession. As it is prohibited from supporting any work in this area, LSC does not collect data on these types of cases. However, the LSC Office of Compliance and Enforcement monitor and review program compliance with

respect to law and restrictions and take enforcement action against any program that violates that law.

Deportation and foreclosure cases

3. **Are there any legal avenues open to LSC when a program turns away poor people with foreclosure issues while spending its tax dollars from LSC to represent prisoners being deported?**

Answer: By law, LSC grantees cannot and do not represent prisoners in any litigation, except in cases involving tribal funds, as stipulated in section 504(a)(15) of LSC's 1996 appropriation act. LSC programs, in the meantime, do assist eligible clients with foreclosure cases. In 2009, LSC grantees handled 10,000 foreclosure related matters.

4. **If so, can you identify any cases in the past five years where programs were told by LSC to represent more of the deserving poor and fewer criminals?**

Answer: As required by the LSC Act, LSC grantees can only provide civil legal assistance to eligible low-income Americans. LSC programs do not provide legal assistance to prisoners in criminal cases. As defined and authorized by Congress, LSC grantees do in fact help represent the deserving poor.

5. **Does LSC have a procedure in place to determine how many deportation cases its programs have handled and which ones involved LSC programs representing or advising aliens who violated the law and were facing deportation? If so, please provide the number of such deportation cases over the past five years.**

Answer: Grantees are prohibited from representing persons on criminal charges (45 C.F.R. Section 1613). Current law permits LSC programs to represent persons in deportation proceedings only if they fall into specific eligibility categories such as lawful permanent residents, non-citizens already known to the U.S. Citizenship and Immigration Services due to pending applications before the agency and who have a nexus to a U.S. citizen spouse, parent or child; or non-citizens who are victims of crimes (such as victims of rape, sexual assault, human trafficking, or domestic violence). Non- citizen eligibility is set out 45 C.F.R. Section 1626. Apart from the specified categories in the regulation, there is no separate designation for "deportation cases."

Challenging elections

6. **In the controversial case in Texas where LSC-funded lawyers challenged the election of two Republicans to local office by challenging the absentee voting rights of some 800 active duty military servicemen and servicewomen, the public outcry included a letter signed by a bipartisan group of 58 United States Senators to the U.S. Attorney General seeking her help to protect the voting rights of the military personnel. Please explain why nothing in the LSC Act or regulations appears to prevent LSC from diverting to such a political case funds meant to help the poor with their legal needs.**

Answer: I am not familiar with the details of the referenced case, but I am told that a case resembling that description occurred nearly 15 years ago, long before both the recent and current LSC Board and staff leadership. Controversy does not mean LSC money is being misused, especially when and if a grantee program is attempting to protect the rights of low-income Americans in our legal system.

7. **Please identify anything, if such language exists, in H.R. 3764 which would prevent either the challenging of an election or the challenging of absentee voting rights of military personnel.**

Answer: We defer to the bill sponsors and House legislative counsel for authoritative interpretation of H.R. 3764.

The number of case closures

Your testimony was that LSC closed more than 920,000 cases in 2009. In the past the GAO found case numbers to be systematically false and seriously exaggerated. Congress has a responsibility to inquire as to current claimed case closures.

8. **Is there a minimum amount of time a lawyer must spend with a client before the matter qualifies as a case? Can a single phone conversation be considered a case? Can a matter in which the lawyer never meets the client be considered a case?**

Answer: There are no minimum time requirements. The standard for whether an activity can be reported as a case is whether legal assistance was provided to an eligible client. Legal assistance must be specific to the client's unique circumstances and involve a legal analysis that is tailored to the client's factual situation. A telephone conversation can be reported as a case if program counsel devotes time giving legal counsel to a client accepted for representation.

9. **How many cases of the 920,000 involved actually going to court?**

Answer: Nationwide, approximately 10 percent of the cases closed by LSC grantees involved going to court. LSC encourages grantees to do everything possible to resolve the legal problems of grantees before going to court. Last year, grantees made community legal education presentations to more than 480,000 people who attended meetings of community groups and provided *pro se* assistance to 141,880 participants in workshops and clinics. In addition, in 2009, LSC programs reported 76,575 cases in which there was a court decision, reported settling 43,882 cases after filing a case in court, and reported litigating 31,030 cases before administrative tribunals.

10. **How many divorce cases did LSC-funded programs close in 2009?**

Answer: In 2009, LSC programs reported closing 122,692 divorce cases. Generally, LSC-funded programs only handle divorce cases that have a domestic violence or child custody aspect. With respect to uncontested divorces, most LSC programs rate the priority of uncontested divorces below the priority of other problems such as foreclosures and other housing assistance, food stamps, and domestic violence, and many LSC programs provide self-help forms on their

websites or refer people to the private bar and pro bono attorneys who have agreed to handle these types of cases.

11. Are there any legal limitations on LSC-funded lawyers taking a case if the other party cannot afford or does not have a lawyer? Please identify any such limitations in the LSC Act or regulations.

Answer: Congress authorized LSC to provide legal representation for low-income people who largely face legal matters where the opposing party is a government agency or a private party, such as landlords, having its own legal representation. For example, half of all cases handled by LSC grantees involve housing, consumer issues, and public benefits, where the opposing party is represented by counsel. Although Congress has not prohibited LSC-funded lawyers to represent individuals against opposing parties that lack their own representation, the situation is most likely to arise in divorce cases where priority in LSC-funded programs is given to matters involving domestic violence or child custody and thus raise public safety concerns.

Miscellaneous Questions

12. LSC has a regulation (45 C.F.R. §1620) regarding how LSC programs should establish priorities in the types of cases which should be taken to make the best use of limited resources. Since 1995, how many times has LSC exercised its authority under the regulation cited above to challenge priorities of legal services programs which have not set appropriate priorities? Please identify the issues in any such actions by LSC.

Answer: Our grantees are independent 501(c)(3) non-profit organizations, with their own boards of directors responsible for the financial health of their legal aid programs. As independent boards, they set appropriate priorities for cases based on the needs of their community. The priority setting process under 45 CFR Part 1620 requires that a recipient's governing body ". . . adopt written priorities for the types of cases and matters, including emergencies, to which the recipient's staff will limit its commitment of time and resources." The regulation gives guidance on the reasons for which priorities should be changed, contains reporting requirements for the recipient to its governing body, to LSC, and to the public on priorities, and requires:

- Annual review by the governing body of the recipient's priorities.
- Written statements signed by staff indicating their understanding of the priorities and the procedures for undertaking emergencies.
- Priority setting statement specifically indicating that the staff will not undertake any case or matter for the recipient that is not a priority or an emergency

LSC reviews every grantee's compliance with this regulation through on-site visits and through the recipients' reporting requirements. In providing that oversight, LSC always discusses priorities and related legal work with recipients to achieve an understanding of whether the grantee is implementing those priorities in their case acceptance policies. Since 1995, LSC has not discovered instances with inappropriate priorities of any recipients.

13. H.R. 3764 would remove the restriction against Congressional redistricting cases. Please identify whatever information LSC has received to the effect that poor people are requesting legal help to become involved in Congressional redistricting cases.

Answer: H.R. 3764 does not appear to remove the restrictions against Congressional redistricting cases with the use of federal funds.

14. Please identify anything in the current LSC Act and regulations which restrict activist groups from co-counseling LSC-funded lawyers in legal cases.

Answer: As part of its effort to maximize efficient use of its resources and to diversify funding to serve low-income individuals, LSC permits grantees to cooperate with providers who do not receive LSC funding. In doing so, LSC grantees must still maintain objective integrity and independence from any entity that engages in activities that are not authorized for LSC grantees, as made clear in 45 CFR Section 1610.8. Program integrity requires legal separation, separation of LSC funds (including LSC subsidies) and physical and financial separation. This regulation has withstood thirteen years of constitutional challenges, including First Amendment claims, in four U.S. Circuit Court decisions.

15. Legislation has been proposed previously which would allow LSC-funded lawyers to assist illegal aliens in the event of a law granting amnesty to illegal aliens. Without huge increases in LSC appropriations for this type of representation, does LSC believe such cases would undercut the ability of LSC lawyers to serve law-abiding poor citizens?

Answer: Without commenting on any proposed legislation in Congress, any change in the law that would increase the number of eligible clients would of course result in a greater demand for services. LSC grantees do not currently have the necessary resources to meet the promise of equal access to justice for all Americans. We will continue to work with the Congress to address the funding level necessary to meet the demand for legal services.

16. Pursuant to LSC appropriations laws, LSC has enacted a regulation restricting involvement of LSC-funded lawyers in cases involving assisted suicide, euthanasia, and mercy killing. Nothing in H.R. 3764 appears to continue this restriction. Please identify anything LSC has done to review the legal needs of the poor with respect to assisted suicide, euthanasia and mercy killing.

Answer: This restriction is contained in the current LSC Act and would not be changed or repealed by H.R. 3764. It is a codified statutory restriction and not an appropriations rider. The Assisted Suicide Funding Restriction Act of 1997, Public Law 105-12, amended the LSC Act to prohibit using LSC funds or private funds for assisted suicide activities as provided in that act, the terms of which appear at 42 U.S.C. Section14404.

RESPONSE TO POST-HEARING QUESTIONS FROM JEFFREY E. SCHANZ, INSPECTOR GENERAL, LEGAL SERVICES CORPORATION

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 3764, the "Civil Access to Justice Act of 2009"
April 27, 2010

Jeff Schanz, Inspector General, Legal Services Corporation

Questions from the Honorable Steve Cohen, Chairman

1. **Federal agencies have an Inspector General, with responsibilities described by the Inspector General Act. With LSC being a separate entity, not treated like a federal agency for all purposes, is the LSC IG treated differently, have separate responsibilities, have different tools, than IGs from federal agencies? Should all of the language within the Inspector General Act apply to the Inspector General of LSC?**

The authorities and responsibilities set forth in the Inspector General Act of 1978, 5 U.S.C. app. 3, are generally applicable to the LSC OIG to the same extent they are applicable to other statutory Inspectors General. The unusual legal structure of the Legal Services Corporation (LSC), however, has created some impediments to the LSC OIG's ability to exercise the full authority entrusted to it by the IG Act.

Federal OIGs and the agencies they serve reportedly always have had unquestioned access to the name of individuals receiving money or other benefits through federal grant, contract, or entitlement programs in order to trace the expenditure of federal dollars through to their ultimate recipients and thereby determine whether the funds have been expended in accordance with applicable laws and regulations. Unlike other federal OIGs, however, the LSC OIG has been subject to limitations on its access to needed records.[1]

For example, Section 1006(b)(3) of the LSC Act, 42 U.S.C. § 2996e(b)(3), provides that LSC may not

> interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction.

Grantees have argued that this section of the LSC Act would limit the OIG's access to information. Thus the LSC OIG initially had considerable difficulty obtaining client names and other case-related information (which is not, as a rule, protected by the attorney-client privilege) based in part on interpretations of state bar rules, which generally require lawyers to protect the confidentiality of virtually all information relating to clients. On a number of occasions

[1] See response to question 6 for additional discussion of the access to records issue.

recipients' denial of such information made it extremely difficult for the LSC OIG to carry out routine work, including case reporting audits; audits of client trust fund accounts; and client satisfaction surveys.

Congress attempted to address these access problems by crafting Section 509(h) of the 1996 Act, which expressly supersedes the restrictions of § 1006(b)(3). Section 509(h) provides:

> Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.[2]

Despite the clear language of Section 509(h), LSC grant recipients have continued to invoke state rules of professional responsibility to resist the enforcement of OIG subpoenas. So far, these attempts have been unsuccessful. See U.S. v. Legal Services for New York City, 249 F.3d 1077, 1083 (D.C. Cir. 2001) ("LSNYC") (noting that "§ 509(h) is an explicit exception to § 2996e(b)(3)"); Bronx Legal Services v. Legal Services Corp., 2002 WL 1835597, at * 4 (S.D.N.Y. Aug. 8, 2002) ("[E]ven if the requested information does constitute a client secret, plaintiffs are relieved of any perceived ethical obligations to withhold client names and the nature of the representation because they are required by [§ 509(h)] to disclose the requested information").

As the LSC OIG has noted in its record statement, H.R. 3764 contains no provision comparable to Section 509(h). To ensure that its access to grantee records is not impeded by the lack of such a provision, the LSC OIG has requested that H.R. 3764 be amended to incorporate the language of Section 509(h), with additional safeguards to prevent the unauthorized release of covered information to third parties.

2. Is your office sufficiently independent from the LSC Board and President? If not, what can Congress do to strengthen the LSC IG? To help it fulfill its mission? To help prevent waste, fraud, and abuse of federal funds?

Although the LSC OIG is required by the Inspector General Act of 1978 to function as an "independent and objective" unit of LSC, 5 U.S.C. app. § 2, the LSC IG's statutory independence has been seriously threatened on at least two occasions by the LSC Board. Most recently, in 2006 the LSC Board threatened to remove former IG Kirt West in apparent retaliation for reports he had issued that were critical of certain practices of the Board and LSC management. The LSC Board decided to refrain from removing Mr. West only after members of the Commercial and Administrative Law Subcommittee objected to the threatened firing.

[2] The terms and conditions to which the 1996 Act subjected LSC funding, including those bearing on the authorities of the OIG, have been incorporated by reference into all subsequent appropriations acts.

Testifying before this Subcommittee on September 26, 2006 regarding the Legal Services Corporation Improvement Act, Mr. West stated:

> Efforts by LSC Boards and LSC management to stifle Inspector General independence through intimidation and retaliation appear to have existed throughout the history of the LSC Office of Inspector General. These problems are neither new to LSC nor unique to the current Board and Inspector General. The longest-serving LSC Inspector General, Edouard R. Quatrevaux, has lent his support to your bill and has stated that the problems I am facing are the same problems he faced with a different Board and with different LSC management, leading him to conclude that LSC has an institutional problem in recognizing the proper role of an Inspector General. Inspector General Quatrevaux was criticized for issuing reports that the former Board did not like and for communicating with Congress.

9/26/06 Statement of R. Kirt West before the Subcommittee on Commercial and Administrative Law at 2-3.

As Mr. West further noted, the LSC IG has the most tenuous job security of virtually any federal IG. Although other designated federal entity ("DFE") IGs can be fired by the heads of their agencies, virtually all other DFE IGs are federal employees who may be fired only for cause. Because the LSC IG is an at-will employee, he can be removed without cause by a simple majority vote of the LSC Board; given this lack of job security, institutionally, the LSC IG is "potentially the most easily subject to undue or improper pressure." 9/26/09 Statement at 8.

To address this recurring problem, Mr. West supported legislation introduced by Rep. Cannon in the 109th Congress that would have required "the written concurrence of at least 9 members" of the LSC Board to remove the Inspector General.

Similar legislation has recently been introduced by Senator Grassley as Senate Amendment 3814 to the financial reform legislation pending in the United States Senate. Unlike Rep. Cannon's bill, however, Senator Grassley's amendment would apply to all DFEs. Senator Grassley's amendment reads as follows:

> **SEC. 989D. REMOVAL OF INSPECTORS GENERAL OF DESIGNATED FEDERAL ENTITIES.**

SEC. 989D. REMOVAL OF INSPECTORS GENERAL OF DESIGNATED FEDERAL ENTITIES.

Section 8G(e) of the Inspector General Act of 1978 (5 U.S.C. App.) is amended--

(1) by redesignating the sentences following ``(e)" as paragraph (2); and

(2) by striking ``(e)'' and inserting the following:

``(e)(1) In the case of a designated Federal entity for which a board or commission is the head of the designated Federal entity, a removal under this subsection may only be made upon the written concurrence of a 2/3 majority of the board or commission..

Enactment of this provision into law would go far in addressing the problems of intimidation and retaliation that have periodically beset LSC Inspectors General, enabling the LSC IG to fulfill his mandate of preventing and detecting fraud, waste, and abuse without fear of reprisal from the head of his agency.

3. **Please explain why it is important to foster competition in the LSC grant award process. Would more competition ensure less misuse of funds? Would it provide for more access to justice? Would it prevent waste and fraud?**

Prior to enactment of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 (1996) ("1996 Act"), incumbent LSC grantees enjoyed presumptive refunding. Section 503(b) of the 1996 Act abolished the presumptive refunding regime and required LSC to implement a competitive selection process in the awarding of grants.

Under H.R. 3764, however, LSC would once again be required to comply with time-consuming administrative procedures before it could deny an application for refunding, or terminate or suspend a grantee's funding. This would severely limit the Corporation's ability to deal with grantees engaging in fraudulent practices; non-performing grantees; and grantees failing to comply with the requirements of federal law.

The competition requirement in Section 503(c) of the 1996 Act enables LSC to cut off nonperforming grantees quickly and replace them with grantees who have demonstrated an understanding of their clients' legal needs and the capability to deliver legal services in an efficient and effective manner, as well as the ability to comply with all the statutory and regulatory requirements attached to LSC funding. By streamlining the grant award and revocation process, Section 503(c) ensures that grantees which have misused LSC funds can be cut off quickly and replaced with legal service providers who have demonstrated a willingness to abide by the applicable statutory and regulatory requirements. By preventing the diversion of LSC funds to prohibited activities the competition requirement reduces waste and fraud involving LSC funds and helps ensure that funding will be available to provide access to the justice system for eligible clients in need.

4. **Please explain the difference between Generally Accepted Auditing Standards and the standards established by the Comptroller General for audits involving federal funds. And why you assert that H.R. 3764 should be altered to reflect a different auditing standard.**

The standards established by the Comptroller General for audits, generally accepted government auditing standards or GAGAS, establish a number of reporting standards for financial audits

above and beyond those required by generally accepted auditing standards, GAAS. For example, when providing an opinion or a disclaimer on financial statements under GAGAS, auditors must also report on internal control over financial reporting and on compliance with laws, regulations, and provisions of contracts or grant agreements. To comply with GAGAS, auditors should include either in the same or in separate report(s) a description of the scope of their testing of internal control over financial reporting and compliance with laws, regulations, and provisions of contracts or grant agreements.

In addition, unlike GAAS, GAGAS requires auditors to report (1) significant deficiencies in internal control, identifying those considered to be material weaknesses; (2) all instances of fraud and illegal acts unless inconsequential; and (3) violations of provisions of contracts or grant agreements and abuse that could have a material effect on the relevant financial statements.

By repealing the requirement that audits of LSC grantees be conducted in accordance with GAGAS, H.R. 3764 would return the Corporation to the confusing state of affairs that existed in 1992, when 38% of the grantee audits submitted to LSC were conducted in accordance with GAGAS and the remainder were conducted in accordance with GAAS. Like virtually every other non-profit entity that receives substantial federal grant funding, LSC recipients should be required to account for their use of federal dollars in accordance with rigorous government auditing standards.

Replacing Section 509 of the 1996 Act with reporting requirements that are less rigorous than those imposed on federal grantees would substantially increase the risk that more funds will be lost as a result of unreasonable or unsupportable expenditures, as well as fraud, embezzlement, or simply poor bookkeeping.

In this respect, moreover, H.R. 3764 appears to conflict with the statutory mandates of the IG Act, which requires Inspectors General to ensure that non-federal auditors examining federal programs adhere to Government Auditing Standards. See 5 U.S.C. app. 3, § 4(b)(1)(C) ("[I]n carrying out the responsibilities specified in subsection (a)(1), each Inspector General shall . . . take appropriate steps to ensure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General [for audits of Federal establishments]").

5. **In your written statement, you recommend that "the Committee adopt a provision similar to Section 504(a)(19) of the 1996 Appropriations Act, but modified to correct certain deficiencies of Section 504(a)(19)." What language do you propose to correct the deficiencies within Section 504(a)(19)?**

The LSC OIG has submitted to the Committee the following proposed statutory language, to be added to Section 11 of H.R. 3764:

"(k) Federal Character of Corporation Funds for Certain Purposes.

> "The funds made available by the Corporation under this Act shall be considered to be Federal funds provided by grant or contract; the Corporation shall be considered to be a department or agency of the United

States Government; and the Corporation's employees shall be considered to be Federal employees for purposes of all provisions of Federal law relating to the proper use of Federal funds, including but not limited to:

(1) 18 U.S.C. § 201 (Bribery of Public Officials and Witnesses);
(2) 18 U.S.C. § 286 (Conspiracy to Defraud the Government With Respect to Claims);
(3) 18 U.S.C. § 287 (False, Fictitious, or Fraudulent Claims);
(4) 18 U.S.C. § 371 (Conspiracy to Commit Offense or Defraud the United States);
(5) 18 U.S.C. § 641 (Public Money, Property, or Records);
(6) 18 U.S.C. § 1001 (False Statements or Entries);
(7) 18 U.S.C. § 1002 (Possession of False Papers to Defraud the United States);
(8) 18 U.S.C. § 1516 (Obstruction of Federal Audit)
(9) 31 U.S.C. § 3729-33 (Civil False Claims) (except that qui tam actions authorized by § 3730(b) may not be brought against the Corporation or its grantees);
(10) Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812 (False Claims under $150,000).
(11) 18 U.S.C. § 666 (Theft or bribery concerning Programs Receiving Federal Funds)."

This language is adapted from Section 504(a)(19) of the 1996 Appropriations Act; LSC's implementing regulations at 45 C.F.R. § 1640.2(a)(1); and previous LSC reauthorization bills. While Section 504(a)(19) requires that grantees agree to be bound by *all* federal statutes relating to the proper use of federal funds, LSC's implementing regulations, at 45 C.F.R. § 1640, do not identify all federal statutes relating to the proper use of federal funds. The LSC OIG proposes correcting this oversight by specifying, in the statutory language, which statutes should be applicable to LSC funds, and by including two statutes in the list that were left out of LSC's implementing regulations.

First, LSC's current implementing regulations contain no mention of 18 U.S.C. § 666, which is the primary federal statute to prosecute cases involving theft or bribery involving non-federal officials who have been entrusted to administer federal funds. It was enacted to "fill a gap caused by the difficulty of tracing federal monies" in prosecutions undertaken pursuant to 18 U.S.C. § 641, which covers theft or embezzlement of federal property. United States v. Westmoreland, 841 F.2d 572, 576 (5th Cir. 1988).

Given the widely-recognized inadequacy of Section 641 for the prosecution of thefts of federal grant funds by non-federal officials, and the evident Congressional intent to include Section 666 among those federal laws which were to be made applicable to LSC funds by Section 504(a)(19) of the 1996 Act, see H.R. 2039, 102nd Cong., 2nd Sess., at § 4; H.R. 2644, 103rd Cong., 1st Sess., § 4; H.R. 1806, 104th Cong., 1st Sess., § 5; S. 1221, 104th Cong., 1st Sess., § 5 (making Section

666 applicable to LSC funds), the LSC OIG recommends that H.R. 3764 correct this oversight by making Section 666 applicable to LSC funds.

In addition, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812 ("PFCRA"), is added to the list, as it was amended to be made applicable to DFE OIGs (such as the LSC OIG) in the IG Reform Act of 2008. The PFCRA provides for administrative recovery in false claims actions involving amounts under $150,000.

6. **During the hearing, Congressman Scott asked you about client confidentiality and access to records. You indicated that you would provide further information concerning how other agencies deal with maintaining client confidentiality and avoiding ethical violations. Please provide such information.**

Having surveyed OIGs across the federal government with respect to this issue, we have not found any case in which an OIG has been unable to obtain the name of an individual who is the recipient of a benefit from a government program. At the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of Justice, the Department of Education, the National Science Foundation, and other agencies with significant grant-making or benefit-processing responsibilities, OIG investigators and auditors have reportedly always had unquestioned access to the name of individual receiving money or other benefits through federal grant, contract, or entitlement programs. This is unsurprising, as federal OIGs and the agencies that they serve must be able to trace the expenditure of federal dollars through to their ultimate recipients in order to determine whether the funds have been expended in accordance with applicable laws and regulations.

Nevertheless, some LSC grantee advocates contend that LSC and the LSC OIG cannot be entrusted with names and other identifying information concerning individual clients. Although LSC and the LSC OIG are forbidden under current law from improperly disclosing such information, to assuage any concerns the grantee advocates may have concerning such improper disclosure, the LSC OIG has proposed tightening the standards for disclosure of such information under Section 7 of H.R. 3764. Grantee advocates also contend that grantee attorneys are faced, under current law, with the dilemma of being forced to choose between complying with the disclosure requirements of Section 509(h) and running afoul of state and local rules of professional responsibility that may be interpreted to prohibit such disclosures. The LSC OIG has proposed language to assuage these concerns. As amended, the provision would read as follows (new language is bolded and italicized):

> "(j) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the ***Federal*** attorney-client privilege. ***References in this Act to applicable***

rules of professional responsibility or other laws of a State or jurisdiction regulating the practice of law shall not be construed to limit the access of any auditor or monitor, including the Office of Inspector General, to records or information described in this section which is not otherwise protectable under the Federal attorney-client privilege.

(k) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to--

(1) a Federal, State, or local law enforcement official ***for the purpose of enabling the official to conduct an investigation into an alleged violation of criminal law, provided the Office of Inspector General has determined that such release would further the OIG's statutory mission to prevent and detect fraud, waste, or abuse*; or**

(2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation ***into the alleged violation*** of a rule of professional conduct.

(l) In the event an official of the Legal Services Corporation knowingly and willfully discloses information concerning an individual client contained in a document described in subsection (h) other than to the persons or entities described in subsection (i), or to any person or entity for a purpose other than those described in subsection (i), such official shall be guilty of a misdemeanor and fined not more than $5,000."

(m) An attorney's compliance with the requirements of subsection (j) shall not constitute a violation of any applicable rules of professional responsibility or other laws of any State or other jurisdiction regulating the practice of law.

7. **In your opening statement at the hearing, you mentioned issuing fraud alerts to all of the executive directors of the LSC-funded programs. Please describe your efforts, and the success of those efforts.**

Since 2005, the OIG has issued periodic fraud alerts to all LSC programs on ways to prevent and detect fraud. Subjects have included "How to Protect Your Organization from Internal Thefts," "Employee Theft of Fees Paid by Clients, "Preventing Employee Embezzlement," and "How to Prevent Computer Laptop Theft." In addition to sending these fraud alerts to Executive Directors, copies are posted on the OIG website at www.oig.lsc.gov/fraud/fraud.htm.

The OIG issues fraud alerts to LSC grantee programs in order to share information about criminal schemes that could have an impact on them. When the OIG learns about a scheme at one or more LSC grantee programs that could have an impact on other programs, we prepare a communication to the Executive Directors of the programs. The alert advises them of the scheme, along with ways to prevent and detect the scheme in their programs. In addition, the

alert reminds programs of their responsibility to report criminal activity to the OIG, and provides them with information about contacting our OIG Hotline.

Additionally, because the OIG is committed to reducing the opportunities for LSC grantees to fall victim to fraudulent activity, the OIG also presents fraud awareness briefings at LSC grantees, sharing with them ways to try to prevent fraud, including adhering to adequate internal controls and setting the right "tone at the top." The OIG Fraud Awareness Briefing includes a PowerPoint presentation covering topics such as who commits fraud, why people commit fraud, how fraud can be prevented, how fraud can be detected, and what to do if fraud is suspected. We also describe, without mentioning program names and staff, various types of fraud schemes perpetrated against LSC grantees. The briefing provides an opportunity for program staff to ask questions and make suggestions regarding ways to prevent fraud at their legal service program. We suggest to executive directors that all their staff, as well as board members and auditors, should attend since the presentation is beneficial to all.

Often in conjunction with fraud awareness briefings provided to a grantee's executive director and chief financial officer, the OIG will conduct fraud vulnerability assessments (FVAs). The FVAs consist of a focused document review in areas identified as weak or prone to abuse and a review of grantee internal control policies versus practices. These reviews help surface both existing and potential problem areas, improve managers' awareness of their fiscal responsibilities, and serve as a deterrent by making staff aware that all LSC funds are subject to review.

Questions from the Honorable Trent Franks, Ranking Member

Restrictions on use of funds by LSC's grantees (Pub. L. 104-134)

1. **Do sections 9, 10 and 11 of H.R. 3764 have the effect of preserving or instead weakening the abortion-litigation restriction in Pub. L. 104-134 (as annually renewed in appropriations measures) with regard to the use of both federal and non-federal funds by LSC's grantees?**

Section 9 of H.R 3764 would amend section 1006 of the LSC Act to prevent provisions of law other than those in the LSC Act itself from being construed to prohibit grantees from using their LSC funds for any purpose. This section would negate all provisions of law intended to prohibit grantees from using non-LSC funds for any purpose, except for the prohibition on abortion-related litigation. Section 10 of H. R. 3764 would require laws purporting to supersede or modify the LSC Act to be promulgated as an amendment to the LSC Act or to refer specifically to Section 1006(l) of the LSC Act.[3]

Section 11 of H.R. 3764 would amend the LSC Act to prohibit LSC grantees from using Corporation funds to "participate in any litigation with respect to abortion," H.R. 3764, § 11(2)(A). Section 9 of H.R. 3764 similarly would prohibit the use of non-Federal funds to participate in abortion-related litigation. The LSC Act currently restricts the use of LSC funds for a narrower category of abortion-related litigation.[4] 42 USC § 2996h(b)(8). The Acts appropriating funds to LSC since fiscal year 1996, however, have restricted grantees' use of both LSC and non-LSC funds[5] to "participate in any litigation with respect to abortion." See Pub. L. 104-134, § 504(a)(14). Thus, H.R. 3764 would maintain the restriction on the use of both LSC and non-Federal funds for abortion-related litigation.

2. **Do sections 9 and 10 of H.R. 3764 lift all of the restrictions in Pub. L. 104-134 listed immediately below with regard to LSC's grantees' use of non-federal funds (*i.e.*, the private funds restriction)?**

   - **legislative redistricting [Sec. 504(a)(1) of Pub. L. 104-134]**
   - **lobbying government [Sec. 504(a)(4)]**
   - **class action suits [Sec. 504(a)(7)]**
   - **suits representing undocumented aliens [Sec. 504(a)(11)]**
   - **training programs encouraging political activity, labor activity, a boycott, picketing, etc. [Sec. 504(a)(12)]**
   - **suits in which attorneys' fees are collected [Sec. 504(a)(13)]**

[3] It is unclear whether the provisions in question, purporting to restrict the power of future Congresses, would be binding and would have the effect they purport to have.
[4] Although enumerating a narrower category of activities subject to the abortion related prohibition, the LSC Act prohibition applies to participation in any proceeding for purposes of those enumerated categories not just litigation.
[5] The appropriations acts contain a possible exception to this prohibition for non-LSC tribal funds. See Pub. L. 104-134, § 504(d)(2)(A).

- **suits representing prisoners [Sec. 504(a)(15)]**
- **suits regarding reform of federal or state welfare systems [Sec. 504(a)(16)]**
- **suits representing persons evicted for the sale or distribution of drugs [Sec. 504(a)(17)]**
- **solicitation of clients [Sec. 504(a)(18)].**

Section 9 of H.R 3764 would amend section 1006 of the LSC Act to prevent provisions of law other than those in the LSC Act itself from being construed to prohibit grantees from using their LSC funds for any purpose. This section would negate all provisions of law intended to prohibit grantees from using non-LSC funds for any purpose, except for the prohibition on abortion-related litigation. Section 10 of H. R. 3764 would require laws purporting to supersede or modify the LSC Act to be promulgated as an amendment to the LSC Act or to refer specifically to Section 1006(l) of the LSC Act. Any current law and any act passed by a future Congress that incorporate by reference the provisions of the 1996 or 1998 appropriations acts prohibiting the use of the funds of an LSC grantee for any particular purpose would have to comply with the requirement of Section 10 to be effective. Thus, under these sections of H.R. 3764, any act incorporating by reference the sections of the 1996 appropriations act enumerated above, including the LSC's current FY 2010 appropriations act,[6] would be of no effect.[7]

3. With regard to LSC grantees' use of both non-federal and federal funds, do sections 9 and 10 of H.R. 3764 wholly lift the restrictions in P.L. 104-134 on redistricting, lobbying, class action suits, labor activity, suits in which attorneys' fees are collected, suits to reform welfare, and solicitation of clients?

H.R. 3764 does not specifically address these restrictions. However, Section 9 of H.R 3764, which is intended to prevent provisions of law other than those in the LSC Act itself from being construed to prohibit grantees from using their LSC funds for any purpose and to negate all provisions of law purporting to prohibit grantees from using non-LSC funds for any purpose,[8] would effectively negate the restrictions in Pub. L. 104-134. Thus, were H.R. 3764 enacted, the restrictions contained in Pub. L. 104-134 prohibiting the use of non-LSC funds for any of the enumerated purposes would no longer be in place (the 1996 appropriations act does not contain a restriction on labor activity). The use of LSC funds[9] for these purposes would be governed by the LSC Act, which contains restrictions in some of the areas listed, as set out below:

Redistricting:

The LSC Act does not contain a prohibition on grantees engaging in redistricting activities. Prior to the 1996 appropriations act, however, LSC promulgated a regulation restricting grantees' involvement in certain redistricting activities.

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[6] The current LSC appropriations act lifts the restriction on claiming, collecting and retaining attorneys' fees.
[7] Such laws enacted in the future would be effective if they refer specifically to a particular subsection of the LSC Act. See also note 1.
[8] H.R. 3764 contains one exception, preserving the prohibition on using LSC funds for abortion-related litigation.
[9] H.R. 3764 would amend the LSC Act to lift the provision that had extended restrictions on LSC funds to non-Federal funds, see H.R. 3764, § 14(2)(B), amending section 1010(c) of the LSC Act.

Lobbying:

The 1996 appropriations act contains restrictions on lobbying activity, Pub. L. 104-134, §§ 504(a)(1)-(6), (12), in addition to those set out in the LSC Act. The LSC Act restrictions are as follows:

> Neither the Corporation nor any recipient shall contribute or make available corporate funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums. However, an attorney may provide legal advice and representation as an attorney to any eligible client with respect to such client's legal rights.

42 USC § 2996e(d)(4).

> With respect to grants and contracts in connection with the provision of legal assistance to eligible clients under this title, the Corporation shall—
>
> * * *
>
> insure that no funds made available to recipients by the Corporation shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State for local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative petition, except where—
>
> (A) representation by an employee of a recipient for any eligible client is necessary to the provision of legal advice and representation with respect to such client's legal rights and responsibilities (which shall not be construed to permit an attorney or a recipient employee to solicit a client, in violation of professional responsibilities, for the purpose of making such representation possible); or
>
> (B) a governmental agency, legislative body, a committee, or a member thereof--
>
> (i) requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee, or member, or
>
> (ii) is considering a measure directly affecting the activities under this title of the recipient or the Corporation.

42 USC § 2996f(a)(5).

> No funds made available by the Corporation under this title, either by grant or contract, may be used—
>
> * * *

> to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities, labor or antilabor activities, boycotts, picketing, strikes, and demonstrations, as distinguished from the dissemination of information about such policies or activities, except that this provision shall not be construed to prohibit the training of attorneys or paralegal personnel necessary to prepare them to provide adequate legal assistance to eligible clients.

42 USC § 2996f(b)(6).

Class action suits:

The 1996 appropriations act prohibits LSC from funding any grantee "that initiates or participates in a class action suit," Pub. L. 104-134, § 504(a)(7). The LSC Act limits the use of LSC funds for class action cases as follows:

> No class action suit, class action appeal, or amicus curiae class action may be undertaken, directly or through others, by a staff attorney, except with the express approval of a project director of a recipient in accordance with policies established by the governing body of such recipient.

42 USC § 2996e(d)(5).

Labor activity:

The 1996 appropriations act does not contain a restriction on labor activity. The LSC Act does not address direct labor activity, except to the extent the following provisions apply:

> No funds made available by the Corporation under this title, either by grant or contract, may be used—
>
> * * *
>
> to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities, labor or antilabor activities, boycotts, picketing, strikes, and demonstrations, as distinguished from the dissemination of information about such policies or activities, except that this provision shall not be construed to prohibit the training of attorneys or paralegal personnel necessary to prepare them to provide adequate legal assistance to eligible clients.

42 USC § 2996f(b)(6).

> No funds made available by the Corporation under this title, either by grant or contract, may be used—

* * *

> to initiate the formation, or act as an organizer, of any association, federation, or similar entity, except that this paragraph shall not be construed to prohibit the provision of legal assistance to eligible clients.

42 USC § 2996f(b)(7).

Suits in which attorneys' fees are collected:

The 1996 appropriations act prohibits LSC from funding any grantee that "claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees," Pub. L. 104-134, § 504(a)(13). The LSC Act does not prohibit grantees from collecting attorneys' fees. LSC's current appropriations act, Pub. L. 111-117, lifts the attorneys' fees restriction that had been in place since the 1996 appropriations act.

Suits to reform welfare:

The 1996 appropriations act prohibits LSC from funding any grantee "that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency [if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.]"[10] Pub. L. 104-134, § 504(a)(16).

The LSC Act does not contain a prohibition on involvement in efforts to reform a Federal or state welfare system.

Solicitation of clients:

The 1996 appropriations act prohibits LSC from funding any grantee "unless such person or entity agrees that the person or entity, and the employees of the person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation." Pub. L. 104-134, § 504(a)(18).

The LSC Act does not contain a prohibition on the solicitation of clients.

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[10] Bracketed text overruled by *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) and removed by Pub. L. 107-77, 115 Stat. 748 (November 28, 2001).

4. How exactly does section 11 of H.R. 3764 loosen the restrictions in P.L. 104-134 on representation of prisoners, undocumented aliens, and tenants evicted from public housing projects with regard to LSC grantees' use of federal or non-federal funds?

Like LSC's 1996 appropriations act, Section 11 of H.R. 3764 contains restrictions on the representation of prisoners, undocumented aliens, and tenants being evicted from public housing projects; H.R. 3764, however, modifies those restrictions.

One difference is in the treatment of non-Federal funds. The 1996 appropriations act extends its restrictions in these areas to all funds of recipients. The LSC Act extends the restrictions contained in the LSC Act to LSC and non-Federal funds (with limited exceptions). H.R. 3764 would amend the LSC Act to lift the provision that currently extends restrictions on LSC funds to non-Federal funds, see H.R. 3764, § 14(2)(B), amending section 1010(c) of the LSC Act. Thus, the restrictions in the LSC Act, including those proposed in H.R. 3764 on representation of prisoners, undocumented aliens, and tenants evicted from public housing projects, would apply only to funds made available to grantees by LSC.

The specific differences between the restrictions on representation of prisoners, undocumented aliens, and tenants evicted from public housing projects in the 1996 appropriations act and in H.R. 3764 are discussed below.

Representation of prisoners:

LSC's 1996 appropriations act prohibits LSC from funding any grantee "that participates in any litigation on behalf of a person incarcerated in a Federal, State or local prison." Pub. L. 104-134, § 504(a)(15).

Section 11(2) of H.R. 3764 would amend Section 1007 of the LSC Act by adding subsection 1007(b)(12), which would prohibit the use of funds made available by the Corporation as follows:

> to provide legal assistance with respect to litigation relating to prison conditions on behalf of any individual who is incarcerated in a Federal, State, or local prison, except that nothing in this paragraph prohibits the use of funds made available by the Corporation for litigation related to an incarcerated individual's ability to reenter society successfully.

Therefore, although the 1996 appropriations act broadly prohibited recipients from representing prisoners (defined as those persons incarcerated in a Federal, State or local prison), H.R. 3764 would allow the use of any funds to represent prisoners except that the use of LSC funds for litigation related to prison conditions would be prohibited.[11]

[11] This analysis is premised on the assumption that the exception contained in Section 11(2) of H.R. 3764, namely that "nothing in this paragraph prohibits the use of funds made available by the Corporation for litigation related to an incarcerated individual's ability to reenter society successfully," is not interpreted so broadly as to swallow the general prohibition on "legal assistance with respect to litigation relating to prison conditions." The same analytical assumption has been adopted throughout the analysis of prison related litigation below.

Representation of undocumented aliens:

H.R. 3764 contains an expanded list of categories of aliens who would be eligible for legal assistance with LSC funds (the use of non-Federal funds for the representation of documented or undocumented aliens is permitted). The list includes the exceptions provided in the 1996 appropriations act; some not included in 1996 but added by statute after 1996, for example, pursuant to the Trafficking Victims Protection Act of 2000 and the Trafficking Victims Protection Reauthorization Act of 2003; and others that are new. The new exemptions include evacuees and victims of major disasters; abused, neglected or abandoned minors under the care of a State; unaccompanied minors in the custody of Homeland Security; other aliens "authorized to work in the United States" or "otherwise lawfully present in the United States;" and aliens eligible under other statutes such as members of cross boarder tribes and aliens seeking relief under the Hague Convention regarding child abduction. Some of these new exemptions do not include a requirement that the covered individual be a citizen or documented alien. Aliens falling within some of the new exemptions, therefore, may be undocumented but nonetheless eligible for legal assistance provided with LSC funds.

Representation of tenants evicted from public housing projects:

The 1996 appropriations act prohibits LSC from funding grantees in certain eviction proceedings:

> [A recipient] that defends a person in a proceeding to evict the person from a public housing project if--
>
> (A) the person has been charged with the illegal sale or distribution of a controlled substance; and
>
> (B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency.

Pub. L. 104-134, § 504(a)(17). H.R. 3764 also addresses representation in evictions from public housing but prohibits a narrower category of representation. H.R. 3764 would amend section 1007 of the LSC Act to the following provision:

> No funds made available by the Corporation under this title, either by grant or contract, may be used—
>
> * * *
>
> to provide legal assistance with respect to the defense of an individual in a proceeding to evict such individual from a public housing project if –

(A) the individual has been convicted in a criminal proceeding with the illegal sale or distribution of a controlled substance; and
(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the individual threatens the health and safety of another tenant residing in the public housing project or an employee of the public housing agency.

H.R. 3764, § 11(2)(D). The prohibition in H.R. 3764 applies only to funds made available by LSC rather than to all funds of a grantee and would further narrow the restriction to those "convicted in a criminal proceeding" of illegal sale or distribution, whereas the 1996 appropriations act applies the prohibition to those "charged." Additionally, H.R. 3764 requires that the activity threaten the "health *and* safety" (emphasis added) of a tenant residing in the public housing project or an employee of the public housing agency, whereas the 1996 appropriations act applies if the threat is to the "health *or* safety" (emphasis added) of those persons.

5. Regarding the restriction in P.L. 104-134 on LSC grantees' representation of prisoners, would the removal of this restriction allow prisoners to sue prisons over disciplinary decisions (*i.e.*, the placement of prisoners in solitary confinement or use of other actions to punish prisoners who violate prison rules)?

LSC's 1996 appropriations act prohibits LSC from funding any grantee "that participates in any litigation on behalf of a person incarcerated in a Federal, State or local prison." Pub. L. 104-134, § 504(a)(15).

Section 11(2) of H.R. 3764 would amend Section 1007 of the LSC Act by adding subsection 1007(b)(12), which would prohibit the use of funds made available by the Corporation as follows:

> to provide legal assistance with respect to litigation relating to prison conditions on behalf of any individual who is incarcerated in a Federal, State, or local prison, except that nothing in this paragraph prohibits the use of funds made available by the Corporation for litigation related to an incarcerated individual's ability to reenter society successfully.

Under H.R. 3764, it appears that suits over disciplinary decisions would "relat[e] to prison conditions" and grantees, therefore, would be prohibited from using funds provided by LSC to sue prisons over disciplinary decisions. The use of non-Federal funds for such suits would be permitted.

a. Would the removal of this restriction allow prisoner lawsuits against wardens and prison guards?

The analysis set out above applies equally to prisoner suits against wardens and prison guards. Use of funds provided by the Corporation for such suits would be prohibited under H.R. 3764 to

the extent they relate to prison conditions; the use of non-Federal funds for such suits would be permitted.

b. Against witnesses or victims?

Suits brought by prisoners against witnesses or victims presumably would not involve prison conditions. H.R. 3764, therefore, would not prohibit such suits (although they would be prohibited in the unlikely event they do involve prison conditions).

c. Against public officials?

The analysis set out above applies equally to prisoner suits against public officials. Use of funds provided by the Corporation for such suits would be prohibited under H.R. 3764 to the extent they relate to prison conditions; the use of non-Federal funds for such suits would be permitted.

6. Prior to the restriction in P.L. 104-134 against LSC grantees' representation of prisoners, a legal services program in one controversial case sued Michigan for failing to provide free lawyers to prisoners in child custody cases. The suit was not only unsuccessful but a waste of scarce taxpayer dollars. Is there anything in H.R. 3764 that would prevent such a lawsuit by an LSC-funded program if H.R. 3764 passes?

LSC's 1996 appropriations act prohibits LSC from funding any grantee "that participates in any litigation on behalf of a person incarcerated in a Federal, State or local prison." Pub. L. 104-134, § 504(a)(15).

Section 11(2) of H.R. 3764 would amend Section 1007 of the LSC Act by adding subsection 1007(b)(12), which would prohibit the use of funds made available by the Corporation as follows:

> to provide legal assistance with respect to litigation relating to prison conditions on behalf of any individual who is incarcerated in a Federal, State, or local prison, except that nothing in this paragraph prohibits the use of funds made available by the Corporation for litigation related to an incarcerated individual's ability to reenter society successfully.

Under H.R. 3764, grantees would be prohibited from using funds provided by LSC to sue prisons over prison conditions. Because child custody cases likely would not involve prison conditions, grantees would not be prohibited from using funds provided by LSC or non-Federal sources to represent prisoners in child custody cases.

7. Would H.R. 3764 eliminate the requirement in section 505 of P.L. 105-119 (first passed in 1997 and renewed annually thereafter), which requires LSC's field programs to disclose the court cases brought by LSC-funded attorneys?

Yes, H.R. 3764 would eliminate the requirement in section 505 of Pub. L. 105-119, requiring LSC grantees to disclose the court cases brought by the attorneys they employ.

a. If H.R. 3764 eliminates this requirement (by attempting to prevent the requirement from being annually renewed in future appropriations measures), how would this elimination affect accountability, transparency, and oversight at LSC and among its grantees?

The less information that LSC grantees are required to provide regarding the cases they have filed, the more difficult it will be for OIG and OCE to oversee program compliance. In the event programs are no longer required to disclose the court cases brought by LSC-funded attorneys, OIG would have to expend considerable time and effort identifying cases and then researching court files to ascertain whether work on such cases violated LSC restrictions.

b. Is it possible that the lack of disclosure of court cases brought by LSC-funded attorneys could increase the likelihood of violations of restrictions on fund use by LSC's grantees?

By making it more difficult for OIG and OCE to learn what cases LSC grantees have filed, elimination of the requirement to disclose court cases would certainly diminish the likelihood of violations (such as prisoner lawsuits, fee-generating cases, and the like) being detected. To the extent that there are potential violators currently deterred from violating restrictions by the ability of the OIG and OCE to detect such violations, a change in the law that makes detection less likely could increase the likelihood of violations.

c. How would the Office of Inspector General overcome this lack of disclosure in detecting and investigating violations of restrictions on fund use as well as waste, fraud, and abuse?

The OIG would have to expend considerable time and effort identifying cases and then researching court files to ascertain whether work on such cases violated LSC restrictions. This also would make public the fact of an investigation, possibly prematurely.

8. Have the restrictions instituted in P.L. 104-134 and carried forward by subsequent legislation ever been violated by LSC's grantees since the restrictions were established in 1996? If so, can you provide a list enumerating each violation?

Yes. The following chart shows violations that have been substantiated.[12] The chart enumerates audit findings dating to FY 1996 but only includes investigative findings dating to FY 2006, when the OIG instituted a focused capacity for compliance investigations.

[12] The chart includes only violations of the substantive practice restrictions contained in the 1996 appropriations act. it does not include findings of failure to adhere to administrative requirements, such as timekeeping or client statements of facts, or failure to maintain adequate documentation, such as eligibility.

Legal Aid of Nebraska	prohibited legislative/administrative activities
Native Hawaiian Legal Corporation	request for attorneys' fees; use of non LSC funds for prohibited activity
East River Legal Services	outside law practice; improper use of LSC funds in criminal proceedings; improper lobbying activity
California Rural Legal Assistance, Inc	program integrity violation; solicitation of clients (two cases); taking fee-generating cases; claiming attorney's fees; associating grantee with political activities
Legal Services of South Central Michigan, Inc.	program integrity violation
Legal Services of New York City	lobbying
Legal Assistance Foundation of Chicago	class actions
Legal Aid Services of Northeastern Minnesota	restriction on representation in certain evection proceedings
Inland Counties Legal Services	request for attorneys' fees
Legal Aid Society of Greater Cincinnati	request for attorneys' fees

The Authority of the Office of the Inspector General and Related Issues

9. Without sufficient access to client names and other records under H.R. 3764 and without the same standing under federal law as enjoyed for the past decade under sections 504 and 509 of P.L. 104-134 (as annually renewed), might the LSC Office of Inspector General (OIG) under H.R. 3764 be stripped of any of the authority it needs to fulfill its mission to detect and prevent waste, fraud, and abuse?

Yes. Standing alone, the LSC Act contains certain statutory impediments to the LSC OIG's ability to exercise its full authority under the IG Act, particularly with respect to its ability to obtain information relating to clients served by means of LSC funds. For example, Section 1006(b)(3) of the LSC Act, 42 U.S.C. § 2996e(b)(3), provides that LSC may not

> interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction.

Grantees have argued that this section of the LSC Act would limit the OIG's access to information. Thus, the LSC OIG initially had considerable difficulty obtaining client names and other case-related information (which is not, as a rule, protected by the attorney-client privilege) based in part on interpretations of state bar rules, which generally require lawyers to protect the confidentiality of virtually all information relating to clients. On a number of occasions recipients' denial of such information made it extremely difficult for the LSC OIG to carry out routine work, including case reporting audits; audits of client trust fund accounts; and client satisfaction surveys.

Congress attempted to address these access problems by crafting Section 509(h) of the 1996 appropriations act, which expressly supersedes the restrictions of § 1006(b)(3). Section 509(h) provides:

> Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.[13]

Despite the clear language of Section 509(h), LSC grant recipients have continued to invoke state rules of professional responsibility to resist the enforcement of OIG subpoenas. So far, these attempts have been unsuccessful. See U.S. v. Legal Services for New York City, 249 F.3d 1077, 1083 (D.C. Cir. 2001) ("LSNYC") (noting that "§ 509(h) is an explicit exception to § 2996e(b)(3)"); Bronx Legal Services v. Legal Services Corp., 2002 WL 1835597, at * 4 (S.D.N.Y. Aug. 8, 2002) ("[E]ven if the requested information does constitute a client secret, plaintiffs are relieved of any perceived ethical obligations to withhold client names and the nature of the representation because they are required by [§ 509(h)] to disclose the requested information").

As the LSC OIG has noted in its record statement, H.R. 3764 contains no provision comparable to Section 509(h). To ensure that its access to grantee records is not impeded by the lack of such a provision, the LSC OIG has requested that H.R. 3764 be amended to incorporate the language

[13] The terms and conditions to which the 1996 Act subjected LSC funding, including those bearing on the authorities of the OIG, have been incorporated by reference into all subsequent appropriations acts.

of Section 509(h), with additional safeguards to prevent the unauthorized release of covered information to third parties.

a. How much access is OIG granted today to investigate whether grantees' matching of client names and funding sources is accurate?

With certain exceptions such as those discussed above, OIG auditors and investigators are generally granted access to "financial records, time records, retainer agreements, client trust fund and eligibility records, and client names," as required by Section 509(h) of the 1996 appropriations act. On those few occasions in which grantees have resisted providing such information despite the clear statutory language, the OIG has generally prevailed in court. See U.S. v. Legal Services for New York City, 249 F.3d 1077, 1083 (D.C. Cir. 2001); Bronx Legal Services v. Legal Services Corp., 2002 WL 1835597, at * 4 (S.D.N.Y. Aug. 8, 2002). Having to defend our access in court, however, has significantly delayed our work and, in some instances, interfered with our ability to review grantee activities effectively.

b. How much access will OIG be granted under H.R. 3764?

Because it includes no access provision similar to Section 509(h) of the 1996 Act, H.R. 3764 would subject OIG auditors and investigators to a patchwork of state and territorial rules of professional responsibility. By doing so, the bill would greatly complicate the OIG's attempts to gain access to needed information and ultimately force us to resort to issuing subpoenas and undertaking subpoena enforcement litigation in multiple jurisdictions to clarify the terms of our access to recipient files. In the meantime, LSC grantees will avoid oversight over their expenditures of federal funds.

10. Under H.R. 3764, would OIG have the authority it needs to identify and investigate grantees who do the following: illegally use federal funds for non-federal fund purposes, fail to keep track of federal versus non-federal funds, and then later claim that only private funds had been used for the restricted activities?

Under current law, grantees are required to account for LSC funds separately and in detail. This, coupled with the requirement in current law that grantees keep time records, provides a basic system to track the use of LSC funds. Additionally, because current law generally restricts the use of all (LSC and non-LSC) funds for certain purposes, it is not always necessary to determine with precision whether LSC or non-LSC funds have been used for unauthorized purposes to oversee and enforce compliance with existing restrictions. As contemplated in H.R. 3764 only the use of LSC funds is restricted; non-LSC funds may be used for purposes in ways that LSC funds may not be used. In that case, the methods used by grantees to track the use of LSC funds for direct costs, e.g., salary and benefits, and to allocate indirect costs, e.g., rent or equipment, will have to be greatly improved in order for the OIG to track the use of LSC funds effectively. LSC, including the OIG, also will need greater access to case-related information, not less as contemplated by H.R. 3764, to ensure that LSC funds are not used for restricted activity or to subsidize restricted activity (e.g., by allocating the indirect costs of restricted activity to LSC funds). In sum, by loosening accountability and access requirements at the same time as it would repeal the 1996 appropriations act restrictions on grantees' use of non-LSC funds for restricted

activities, the bill would make it nearly impossible for the OIG or any other monitor to ensure that LSC funds are not being spent in furtherance of prohibited activities.

a. Since 1996, has OIG ever investigated a grantee for using federal funds for restricted purposes? If so, please provide a list of such investigations.

The following chart lists the investigations undertaken.[14]

Land of Lincoln Legal Assistance	attorneys' fees
Legal Aid of Nebraska	prohibited legislative/administrative activities
Alaska Legal Services	attorneys' fees; outside practice of law
California Rural Legal Services, Inc.	solicitation of clients; taking fee-generating cases; class actions; attorneys' fees
Idaho Legal Services	attorneys' fees
Central Virginia Legal Aid Society	outside practice of law
Legal Aid Foundation Los Angeles	prohibited political activity
Native Hawaiian Legal Corporation	request for attorneys' fees; use of non LSC funds for prohibited activity
East River Legal Services	use of LSC funds in criminal proceedings; lobbying activity
Montana Legal Services	collection of attorneys' fees; class actions
Ocean-Monmouth Legal Services	Outreach targeted to undocumented aliens
Southern Minnesota Regional Legal Services	Program integrity/transfer of assets

b. How scrupulously have grantees in the last five years kept track of and distinguished federal from non-federal funds spent on program activities and clients' legal cases?

Please see response to (c), below.

c. How frequently have grantees in the last five years provided LSC or OIG with a report detailing exact amounts of federal versus non-federal funds spent?

LSC requires that the use of LSC funds be reported in detail each year as part of the annual audit conducted by independent public accountants. LSC does not require this for other funding sources and leaves the required level of detail for such reporting largely to the discretion of grantees. Accordingly, some grantees provide the same information for non-federal funds as is required for LSC funds and others only provide summary information regarding non-LSC funds.

[14] This chart includes investigations into potential violations of both the 1996 appropriations act and the LSC Act, but only as to substantive practice restrictions and not administrative (e.g., timekeeping, priorities) or documentation (e.g., eligibility) requirements. It includes only investigations dating to FY 2006, when the OIG instituted a focused capacity for compliance investigations. It does not include allegations for which an investigation has not been completed.

Only once in the past five years has a grantee failed to submit to the OIG an annual audit report. Wyoming Legal Services was required to have a close-out audit following the termination of its grant in October 2008, but failed to do so. LSC management has not yet contracted for such an audit and there are now questions regarding the location and condition of records necessary for an audit to be conducted.

d. After H.R. 3764 becomes law, might LSC's grantees be more tempted than before to illegally use federal funds for restricted purposes?

As discussed above, H.R. 3764 would loosen accountability requirements and limit access to records at the same time as it would repeal the 1996 appropriations act restrictions on grantees' use of non-LSC funds for restricted activities, making it make it nearly impossible for the OIG or any other monitor to ensure that LSC funds are not being spent in furtherance of prohibited activities. LSC could implement its own timekeeping requirement as well as stringent cost-accounting requirements, but without appropriate access to records it would remain extremely difficult for the OIG and other monitors to provide adequate oversight of the use of LSC funds. Any time such oversight is weakened, the possibility of the inappropriate use of LSC funds increases.

11. Since 1998, LSC has been required to obtain from the programs it funds disclosure of all litigation handled by those programs. This requirement is described in 45 C.F.R. § 1644 of the LSC regulations. Since January 1, 2008, have all funded programs submitted their disclosure information by the due date required for this information?

Note: The following answer, including all subparts, was provided to the OIG by LSC management. The OIG has not validated the information in the response. The OIG could very quickly and easily so do by examining copies of the case disclosure records filed and the documentation concerning requests for extension of the due date.

LSC Management Answer: No, but LSC has granted extensions when a program has requested additional time to submit their disclosure information. Others have been late as explained below. Ultimately, LSC has received 100 percent of the required reports.

a. How many programs have failed to submit their information by the deadline for this requirement?

LSC Management Answer: During the first half of 2008 (January 1-June 30, 2008), 71 grantees out of 137 were late in submitting their 1644 Case Disclosure Reports. The grantees were late ranging from 4 days to 3 weeks.

During the second half of 2008 (July 1 – December 31, 2008), 74 grantees out of 137 were late in submitting their 1644 Case Disclosure Reports. The grantees were late ranging from 3 days to 3 weeks.

During the first half of 2009 (January 1-June 30, 2009), 26 grantees out of 137 were late in submitting their 1644 Case Disclosure Reports. The grantees were late ranging from 1 day to 2 weeks. However, one grantee took 6 weeks to submit its 1644 report.

During the second half of 2009 (July 1 – December 31, 2009), 33 grantees out of 137 were late in submitting their 1644 Case Disclosure Reports. The grantees were late ranging from 1 day to 3 weeks.

b. Please describe exactly what steps LSC takes, if any, to ascertain the accuracy of the information required to be disclosed?

LSC Management Answer: The law does not require LSC to also verify the information, but only that programs report under the criteria set by 45 CFR Part 1644. However, in any case where there is reason to doubt the truthfulness/accuracy of the report, LSC can focus staff resources on independently verifying the details of the report.

c. In the last five years has LSC taken any action against any program to enforce this requirement?

LSC Management Answer: To date, no actions have been necessary.

12. Since 1996, has the system of competitive awards of grants and contracts for field programs established in Sec. 503 of P.L. 104-134 been followed?

Note: The following answer, including all subparts, was provided to the OIG by LSC management. The OIG has not validated the information in the response. The OIG could easily validate the information provided in response to subparts (a), (b), and (c) by examining the documentation concerning the grants awarded. Validation of the opening response to question 12, however, would take a great deal of work and would be extremely time-consuming. The only way to ensure that LSC followed the competition process in awarding each grant would be to review the process followed for each of the reported 1575 grants awarded during the time period. Somewhat less time-consuming would be the use of sampling to review the grant award process for selected grants.

LSC Management Answer: Yes, the system of competitive awards of grants and contracts for field programs established in Sec. 503 of P.L. 104-134 has been followed.

LSC promptly instituted a competitive awards system, starting with promulgation of implementing regulations, found at 45 C.F.R. Part 1634, which provide the framework for ensuring the competitive grants process is comprehensive, responsive to Sec. 503 P.L. 104-134, and rigorously followed. The grants process is annually audited for compliance with 45 C.F.R. Part 1634 by an independent accounting firm. Additionally, the Government Accountability Office has conducted three separate reviews (2002, 2007 & 2010) of the LSC competitive grants process with no finding that the system of competitive awards has not been followed. While the GAO has recently recommended additional documentation be included in the competition files, not so much as one grant award decision has been questioned.

LSC uses a variety of publications to inform the public of the grants process including newspapers, bar journals, the Internet, and the Federal Register. The request for proposals ("RFP") and resource materials are available on the Internet. LSC holds an annual "Applicants' Informational Session" to further promote the competitive grants process and to respond to applicant inquiries concerning the process and preparation of the application.

LSC staff uses an "Evaluation Guide" to ensure a consistent and objective evaluation of grant applications. The Evaluation Guide is based on the ABA Standards for Providers of Civil Legal Aid, the LSC Performance Criteria, LSC regulations, and the RFP.

Funding recommendations, based on staff evaluations of the grant application and other relevant information, are presented to the LSC President, who makes all final funding decisions. Grant conditions are attached to grant awards, where necessary, to ensure programmatic quality and compliance with LSC regulations, policies, and guidelines.

a. Since 1996, how many grant competitions have taken place in which the incumbent field program had one or more competitors?

LSC Management Answer: Since 1996, there have been 94 grant competitions in which the incumbent program had one or more competitors.

b. In how many instances was the incumbent program awarded their grant without any competition?

LSC Management Answer: Since 1996, 1,481 incumbent programs were awarded their grant without any competition.

c. In how many instances did the LSC grant go to a program which was competing for a grant against another program which previously had the grant?

LSC Management Answer: Since 1996, three non-incumbent programs won the competition for the LSC grant.

13. Over the last five years, has LSC had reason to question the costs of any program it funds and disallow such costs under 45 C.F.R. § 1630, the regulation setting forth cost standards and procedures? Please identify all such actions in the last five years by program, dollar amount questioned, and the reason for the questioned costs.

Note: The following answer, including all subparts, was provided to the OIG by LSC management. The OIG has not validated the information in the response. As to the opening response, it would be relatively easy to do so for those questioned costs identified, relying on management's representation; however, we would not be in a position to verify that LSC management had not initiated any other questioned cost proceedings. As to subpart (a), regarding grantees that were not awarded grants after having violated the LSC Act, the OIG could easily validate the information in this response by reviewing the documentation for the grantee identified and identify the grantee on a schedule of all grants awarded for the relevant time period. As to subpart (b), regarding grantees that were awarded grants after having

violated the LSC Act, it would be more difficult to validate the information in this response. A determination of all grantees having violated the LSC Act in any way would require a thorough review of all reports concerning grantees prepared by LSC management, the OIG, and the Government Accountability Office, as well as the database of findings by the grantees' independent public accountants. Additionally, the response contains opinion, which is not subject to validation.

LSC Management Answer:

(1) California Rural Legal Assistance.
Violation: Solicitation, 45 CFR Part 1638 and request for attorneys fees, 45 CFR Part 1642, Fee-Generating Cases, 45 CFR Part 1609.
Amount questioned: $18,783.00
Amount recovered: $18,783.00.

(2) Legal Services NYC
Violation: Prohibited political activities, 45 CFR Part 1608.
Amount questioned: $52,437.83
Amount recovered: $52,437.83.

(3) Bay Area Legal Aid (California)
Violation: Claiming and Retaining attorneys' fees, 45 CFR Part 1642.
Amount questioned: $15,019.17
Amount recovered: $5,057.57.

(4) Legal Services of Northwest Texas
Violation: Costs standards and procedures, 45 CFR Part 1630.
Amount questioned: $229,777.00
LSC issued a questioned cost determination and grantee has agreed to allocate the total cost of stone to non-LSC funds LSC verified that the program paid for the imported stone with private funds.

(5) Legal Aid of Nebraska
Violation: Restrictions on lobbying and certain other activities, 45 CFR Part 1612.
Amount questioned: $2,535.75
Amount recovered: $1,967.00.

(6) Legal Aid and Defender Association
Violation: Costs standards and procedures, 45 CFR Part 1630.
Amount questioned: $274,486.40
Amount recovered: $6,866.54.

(7) California Indian Legal Services
Violation: Costs standards and procedures, 45 CFR Part 1630.
Amount questioned: $79,254.09
Amount recovered: $27,760.16.

(8) Nevada Legal Services
Violations: Attorneys' fees, fee-generating cases, priorities in use of resources, restriction on solicitation, timekeeping, and cost standards and procedures, 45 CFR Part 1642, 1609, 1620, 1638, 1635, and 1630.
Amount questioned: $81,815.33
Amount recovered: $81,815.33

(9) Legal Aid Foundation of Los Angeles
Violation: Restriction on lobbying and certain other activities, 45 CFR Part 1612.
LSC recovered $3,580 from the program following a determination that the program had engaged in activities in violation of 45 CFR Part 1612.

a. Please provide each instance in which a grantee in the past five years has violated the LSC Act in any way and, therefore, subsequently was not re-awarded a grant or contract by LSC. Please name the grantee and provide a reason for why the grantee was defunded.

LSC Management Answer:

U'unai Legal Services Clinic

On March 15, 2007, the grantee ceased to be a recipient of LSC funds for the delivery of legal services in American Samoa. LSC's decision was based on the program's inability to successfully meet the requirements of LSC's competitive grant regulation, 45 CFR Part 1634. Among other deficiencies, the program received two consecutive audit reports in which the Independent Auditor was unable to express an opinion on the financial position of the program, citing a lack of internal controls that are essential in the management of public funds.

Wyoming Legal Services
In October 2008, Wyoming Legal Services notified LSC of the decision by the program's Board of Directors to relinquish the LSC grant effective October 31, 2008, after LSC provided notice to the program that it intended to initiate a termination proceeding due to violations of various LSC regulations and instructions in the CSR Handbook.

Native Hawaiian Legal Services Corporation
This grantee improperly requested, collected and retained attorneys' fees, a violation of 45 CFR 1642. LSC initiated a debarment proceeding against the program for this violation. The program and LSC negotiated an agreement in November 2008 whereby the program agreed to not apply for an LSC grant through the period December 31, 2013 and agreed to pay a $5,000 fine. Additionally, prior to the initiation of debarment procedures, the program upon instruction from LSC divested itself of the attorneys' fees.

b. Please provide each instance in which a grantee in the past five years has violated the LSC Act in any way but was nevertheless re-awarded a grant or

LSC Management Answer: LSC takes seriously each and every violation of the LSC Act. In the overwhelming majority of such cases, grantees have responded to recommended corrective actions to the satisfaction of LSC. Since June 2005, almost every program visited by LSC has been cited for non-compliance with one or more rules and/or the CRS Handbook. However, these instances of non-compliance did not rise to the level of grounds for termination of funding under 45 CFR § 1606.03 or the grounds for suspension of funding under 45 CFR § 1623.3.

As an example of LSC's commitment to holding grantees accountable for compliance with the Act, recent cases involving Wyoming Legal Services ("WLS") and Nevada Legal Services ("NLS") demonstrate how LSC engages in long-term monitoring of grantees with the goal of ensuring compliance.

As noted above, WLS relinquished its grant effective October 31, 2008. LSC gave public notice of a competitive grant process to solicit proposals for the delivery of legal services for the service area. An interim service provider, Legal Aid of Wyoming d/b/a Interim Legal Services Provider, was appointed effective December 1, 2008. Month-to-month funding was awarded to support the transfer of former clients of WLS to the interim legal services provider and to help build capacity to ensure services to eligible clients while LSC completed the competitive grants process for the Wyoming service area as required by 45 CFR Part 1634. In July 2009, the interim provider was the successful competitor in the grants competition and received a grant with substantial special grant conditions. Ongoing oversight includes reporting on special grant conditions, coaching and mentoring, and technical assistance and training.

In 2008, the NLS Board of Directors voted to relinquish funding in May of that year after notice from LSC that it intended to initiate termination proceedings for substantial violations of various regulations. NLS was then funded on a limited month-to-month basis, with special grant conditions. The program has made substantial progress in addressing the issues and LSC has approved a one-year grant with special grant conditions to the program. LSC continues to monitor the program's progress.

14. Since 1996, has LSC or its grantees made any effort to weaken what was formerly a strong monitoring, auditing and compliance operation at LSC?

The following answer was provided to the OIG by LSC management. The OIG has not validated the information in the response. Because the response largely is qualitative, the OIG would have difficulty in attempting to verify it. The OIG, however, could easily validate the limited quantitative information provided. Additionally, the response contains opinion, which is not subject to validation.

LSC Management Answer: Oversight and emphasis on monitoring and auditing of grantees and their compliance with requirements and restrictions are priorities of the LSC Board of Directors, management and staff. These responsibilities are taken seriously and LSC is committed to holding itself and its 136 grantees accountable to the highest standards. The LSC

Board authorized the Corporation to establish 10 new positions in grant compliance and enforcement, and LSC sought funding for these positions and funding to increase the number of program visits.

Auditing and compliance efforts have expanded and improved, reflecting the high performance and professionalism of the LSC staff. LSC has revised and updated written guidelines for the Corporation's oversight offices, including a full review of the procedures for on-site program assessments. When reviewing programs on-site, the Office of Compliance and Enforcement ("OCE") conducts expanded financial reviews as well as regulatory compliance reviews. The Office of Program Performance ("OPP") on-site reviews are centered around revised LSC Performance Criteria. In 2008, LSC sent advisories to all grantees reminding them about important fiscal internal control requirements and regulatory compliance requirements.

15. In recent years, has LSC or the OIG performed less on-site inspections than in the past?

Note: This response calls for information from both LSC management and the OIG. OIG responses are identified as such; otherwise, the following answer was provided to the OIG by LSC management. As to the response provided by management, the OIG has not validated the information in the response. Because the response largely is qualitative and largely based on opinion, the OIG would have difficulty in attempting to verify it. The OIG, however, could easily validate the limited quantitative information provided.

OIG Answer: No. The OIG Audit Unit has substantially increased grantee visits over the past three fiscal years (FY 2008 to FY 2010 to date) when compared to the previous three fiscal years (FY 2005 to FY 2007). Since the beginning of FY 2008 the Audit Unit has increased grantee visits while also looking at issues within LSC headquarters; the emphasis during FY 2005 to FY2007 was almost exclusively on projects within LSC headquarters. The number of onsite visits from OIG investigators has also increased in recent years. In 2007, the OIG increased its capacity for conducting compliance investigations, creating two new Investigative Counsel positions to conduct both compliance and criminal investigations. To fill those positions, the OIG hired two experienced attorneys, one with an investigations background, and another with a legal services background. Since 2007, these OIG investigative counsel (along with two experienced OIG investigators) have conducted numerous onsite investigations into alleged compliance and other violations by grantees. Many of those onsite investigations have resulted in findings of violations (which have been referred to LSC management for action) including:

Legal Aid of Nebraska – prohibited legislative/administrative activities;

Massachusetts Justice Project – failure to comply with Technology Improvement Grant requirements;

Native Hawaiian Legal Corporation – request for attorneys' fees; use of non LSC funds for prohibited activity; and

East River Legal Services – outside law practice; improper use of LSC funds in criminal proceedings; improper political activity.

In recent years the OIG Investigations Unit has also undertaken an extensive program of onsite Fraud Awareness Briefings, in which investigative staff travel to the grantees' facilities and deliver onsite presentations to grantee staff concerning fraud awareness and prevention. As a result of these field activities by OIG investigative staff a number of new grantee fraud and embezzlement cases have recently come to light.

LSC Management Answer: LSC has asked Congress for additional funding to increase on-site visits. In 2008, OPP and OCE staff engaged in oversight visits at 55 programs; in 2009, they made on-site visits to 60 programs. LSC's appropriations request seeks funding for an estimated 76 visits in 2010 and a projected 89 visits in 2011.

LSC believes that a key to improved compliance by grantees is training, and has requested funding to expand training on compliance and program quality. LSC is committed to ensuring that grantees are able to correctly and consistently apply the range of LSC requirements and restrictions.

a. When on-site inspections were performed in recent years, were they less rigorous than in the past?

OIG Answer: No. As outlined above, OIG investigators have significantly expanded the scope and rigor of their onsite activities in recent years. As to audit field work, the Audit Unit has recently been evaluating the quality of its fieldwork and making adjustments to its audit methods as circumstances and risks dictate. As a result, the Audit Unit has recently added a number of steps to its audits of grantees to heighten the rigor of its review of Technology Initiative Grants and client trust funds and is currently refining and strengthening its protocol for the review of grantee board governance issues.

LSC Management Answer: LSC takes seriously its responsibility to ensure compliance and believes that the on-site visits performed by OCE are a critical means of discovering and rectifying instances of non-compliance. An oversight visit by OCE involves a detailed and comprehensive review of how a program operates its case management system and how it applies LSC's Case Service Report requirements. OCE also reviews the systems the program has in place to ensure compliance with requirements and restrictions. It does this with a thorough document review, on-site review of operations, file reviews, and in-person interviews with program management and staff. After the on-site review, a draft report is prepared, the program has an opportunity to comment, and the final report is issued with recommendations and corrective actions, when warranted. OCE then monitors the implementation of any corrective actions and conducts follow-up on-site reviews as necessary to ensure that the corrective actions have been fully implemented and the program is in compliance. The Corporation is currently hiring additional staff for OCE to increase the number of on-site visits that OCE can perform in a year.

b. Has there ever been a mindset at LSC that there is no need to enforce restrictions if you don't already know the restrictions are being violated?

LSC Management Answer: LSC is proactive in enforcing restrictions and has vigorously defended them in the courts.

16. When this year will the GAO's third study of LSC be released? How long might it take LSC to implement the recommendations in that study?

The following answer was provided to the OIG by LSC management. The OIG has not validated the information in the response. The OIG could easily validate the limited quantitative information provided.

LSC Management Answer: The GAO began a review of LSC's compliance and oversight operations and performance measurements in June 2009. An exit conference between GAO and LSC staff was held on April 6 to discuss preliminary findings by the GAO. On April 30, the GAO provided LSC a final draft report that makes 17 recommendations to improve internal controls over grant awards and grant program effectiveness. LSC Management submitted comments and responses to GAO's report on May 28. LSC management cannot speak for the GAO on when the report will be released to the public but anticipates that it will be sometime this summer. LSC management intends to work with the GAO to implement all the recommendations within a reasonable time frame.

17. In *Regional Management Corporation v. Legal Services Corporation*, 186 F. 3d 457, U.S. Court of Appeals for the Fourth Circuit, 1999, did LSC take any action against the program whose lawyer lobbied (in violation of the restriction against lobbying) after the federal judge presiding over the case found that there was no rational basis for LSC's conclusion that the legal services lawyer was working for a client?

The following answer was provided to the OIG by LSC management. The OIG has not validated the information in the response. The OIG could easily validate the procedural history of the Regional Management case.

LSC Management Answer: In the *Regional Management* case, a loan company that had been denied a business license in Georgia and had opposed a consumer protection law in South Carolina claimed that LSC grantee attorneys had, in 1995, engaged in prohibited lobbying relating to these issues. At the time (prior to the 1996 restrictions), lobbying in the course of representation of a client was not prohibited and grantees were permitted to respond to requests for testimony from legislative and administrative bodies. LSC investigated the allegations and concluded that the LSC grantee attorneys in question had properly responded to requests for testimony in Georgia and the one of the LSC grantee attorneys involved in the South Carolina matter was properly representing a client.

The loan company sued LSC and the grantees in federal district court. The district court ruled that it had authority to review LSC's determination under a "rational basis" standard, that LSC had a rational basis for the Georgia decision, but that LSC did not have a rational basis for the

South Carolina decision because LSC should have conducted a more thorough investigation of the matter. The court based this conclusion on evidence produced through discovery that LSC unaware of at the time it made its findings. The court remanded the matter to LSC on July 2, 1998. 10 F.Supp.2d 565 (D.S.C. 1998).

By that time, the legal services program by whom the attorney had been employed, the South Carolina Legal Services Association ("SCLSA"), was no longer an LSC grantee. SCLSA had been a component of LSC-grantee Palmetto Legal Services in 1995. At the end of 1995, presumably anticipating the forthcoming 1996 LSC restrictions, SCLSA separately incorporated and then branched off from Palmetto Legal Services. As of the district court decision in 1998, SCLSA was receiving no LSC funds. Furthermore, the case was on appeal to the Fourth Circuit. In 1999, the Fourth Circuit ruled that the district court had improperly considered the merits of the complaints against the LSC grantees because Regional Management did not have a cause of action. 186 F.3d 457 (4th Circ. 1999). The Fourth Circuit remanded the case for full dismissal. However, at that point, SCLSA had not been part of an LSC grantee for three years.

Nonetheless, LSC itself responded to the district court's decision regarding the need for a more thorough investigation. One of the direct results of the *Regional Management* case was that LSC greatly enhanced its compliance function.

18. What legal remedy is there for individuals who have been harmed by a violation of the LSC Act by an LSC-funded program if LSC fails to take action?

The following answer was provided to the OIG by LSC management. In order to validate the information provided, the OIG would provide its view of the legal analysis contained in the response.

LSC Management Answer: Individuals who feel that they have been harmed by an LSC program's violation of the LSC Act or by an LSC-funded program do not have a private right of action to enforce LSC Act restrictions. (See the 4th Circuit's decision in the Regional Management case referenced above, in response to # 17.) While LSC takes seriously all concerns brought to it through any and all channels, and endeavors to address all violations of the LSC Act, the measures available to LSC to compel compliance or to penalize a grantee do not, however, constitute what is normally though of as a "remedy" to an aggrieved individual and that is not within the realm of authorities granted to LSC.

Congress did not intend, and the courts have so determined, to confer private rights of action on individuals to bring lawsuits against LSC or grantees regarding compliance with the LSC Act. Congress very specifically addressed the concern that this would compromise and disrupt the legal aid system and the provision of high quality legal services to eligible clients with limited resources. *See Regional Management Corp., Inc. v. LSC*, 186 F.3d 457, (4th Cir. 1999) (no private right of action regarding LSC enforcement decisions) (discussing legislative history of the LSC Act).

RESPONSE TO POST-HEARING QUESTIONS FROM KENNETH F. BOEHM, CHAIRMAN, NATIONAL LEGAL AND POLICY CENTER

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 3764, the "Civil Access to Justice Act of 2009"
April 27, 2010

Ken Boehm, Chairman, National Legal and Policy Center

Questions from the Honorable Steve Cohen, Chairman

1. **In his written and opening statements, Inspector General Schanz offered several recommendations "to improve the effectiveness, efficiency and economy of the federal legal services program." Do you support his recommendations concerning federal funding, timekeeping, and competition?**

   I agree with the LSC Inspector General that H.R. 3764 has no provision stipulating that LSC funds are to be considered federal funds with respect to certain federal statutes. Given LSC's record with respect to poor stewardship of taxpayer funds, this omission would deprive the Inspector General of an essential tool to protect the taxpayers' interests. Put another way: a federal program which has been plagued with mismanagement and financial irregularities – as documented by GAO audits, IG investigations, Congressional oversight hearings and years of controversial press coverage – can ill afford to strip away the few accountability requirements it currently has.

   I also believe the Inspector General's analysis of the effect of the provisions of H.R. 3764 on timekeeping is correct. To the degree that it is more difficult for the I.G. to trace the source of funds, the I.G. is thwarted in determining whether recipients of LSC funds are adhering to restrictions enacted by Congress. As the I.G. accurately notes, H.R. 3764 repeals the provisions originally enacted in Pub. L. 104-134, § 504(a)(10)(A)-(C) which are currently in practice which require that grantees make their timekeeping records available to monitors.

   The Inspector General is also correct in his assessment that H.R. 3764 would eliminate a number of statutory provisions that Congress enacted in an effort to bring competition to the LSC grant award process. His analysis specifies just how the competition requirements passed with broad bipartisan support since 1996 would be watered down and, in several cases, eliminated.

   The net effect is not difficult to see: with little or no true competition for grants, mediocre or even extremely mismanaged programs would continue to receive grants. The proponents of little or no competition may view it in their interest to be unaccountable for the quality of services which they provide the poor, but it strains credulity to say incompetent legal services programs somehow are better for assisting the poor.

2. **From statements you have provided for other committees, you have advocated alternatives to close the justice gap. Briefly, what are those alternatives?**

The U. S. Senate Committee on the Judiciary held a hearing on May 22, 2008 on the topic "Closing the Justice Gap: Providing Civil Legal Assistance to Low-Income Americans." My answers come from my testimony at that hearing.

The case for alternatives to the flawed and expensive LSC model of delivering legal assistance to the poor starts with the premise that the real objective should be justice, not necessarily a program which requires lawyers all too often spending much more in resources than whatever is at issue in a case.

The trend in recent years is for the U.S. to solve more issues in ways that do not involve expensive trips to court. As is well known, most developed nations have methods of solving civil issues which have all too often had to be handled with lawyers in the U.S. where the percentage of lawyers to the general population far outstrips any other country.

Many of these alternatives briefly listed below are already gaining ground because the middle class finds it cost-prohibitive to hire a lawyer in many instances.

Increasing the jurisdictional amount of cases allowed in small claims court

Small claims court cases are fact-based and there is typically no need for an attorney. The trend over the last three decades has been to increase the jurisdictional amount of cases which can be heard. Justice is swifter and far more cost-effective.

Increasing mediation

Many jurisdictions – including the District of Columbia – have instituted reforms requiring increased mediation of civil disputes. Mediation is far more cost-effective than a lawsuit and results in faster resolution of disputes.

Increased use of ombudsmen

States and some regulated industries have been expanding the use of ombudsmen programs to resolve relatively minor disputes. These programs provide more cost-effective justice in a more timely way.

Legal reforms which recognize that lawsuits are an anachronistic and ineffective way to provide justice for many disputes

Congress and state legislatures have a vital role in shaping reforms that make justice more accessible and affordable for all Americans. Even a cursory review of how European countries as well as other developed nations handle civil disputes underscore how out of step the U.S. has been in requiring cases with relatively limited resources at issue to be handled by lawyers and courts.

Unfortunately the organized bar has fought many attempts to reform the legal systems so as to lessen the need for lawyers. The famous line from Charles Dickens in the classic Bleak House explains this tendency:

> "The one great principle of English law is to make business for itself."

3. **From your written statement, and your testimony, you seem to oppose the legislation's intent to increase funding for LSC. In lieu of increasing funding for LSC, what do you suggest we do to increase access to justice for the poor? The ABA President at the time, Tommy Wells, testified at this Subcommittee's October 2009 hearing that pro bono services can only supplement the federal infrastructure for providing legal assistance to the poor. In other words, increasing pro bono still will not meet the demand. If pro bono is not enough, and you oppose increase LSC funding, what do you suggest that will realistically close the justice gap?**

The alternatives briefly noted in my previous answer would go a long way to eliminating the justice gap.

I have to take issue with the statement of the ABA President since it appears based on the assumption that *pro bono* services to the poor merely supplements the LSC model. By any objective yardstick that assumption is the exact opposite of the reality of legal services for the poor over the last several decades. If anything, the services provided by LSC-funded programs are a supplement – and a very expensive one – to the services rendered by private lawyers and groups which do not receive LSC funds. A study by a former LSC Inspector General, David Wilkinson, who was also a Rhodes Scholar and a state attorney general, showed that the estimated hours of *pro bono* services was approximately five times greater than the hours worked by LSC-funded lawyers. *See:* "Private Alternatives to the Legal Services Corporation," *Alternatives in Philanthropy*, October 1995, page 5.

If anything, the gap between what is provided by non-LSC-funded programs and LSC has grown greater since that study was published due to sharp increases in the number of lawyers in private practice, the increase in *pro bono* services, the huge increase in funding from non-LSC sources to LSC programs and trends cited in answer to the second question.

Ironically, the 1996 reforms forced programs to focus their resources more on traditional legal services for the poor when they restricted prisoner lawsuits, Congressional redistricting cases, the thwarting of drug-related public housing evictions and a host of other controversial political and ideological cases that were diverting resources away from helping the poor with their day-to-day legal needs.

H.R. 3764 strips out most of the 1996 reforms and would have the deleterious effect of once again having a taxpayer-funded program ignoring the needs of the poor to allow a controversial political agenda. When legal services lawyers are challenging elections,

litigating Congressional redistricting cases, stopping public housing units from screening out violent criminals and other similar activities they cannot be helping the deserving poor.

4. **During the hearing, you indicated in response to a question from Chairman Conyers that you could provide to the Committee ideas for legislation to promote legal services. Please provide such language or your ideas on how Congress can help increase access to justice.**

The single best approach Congress could take would be to provide better access to justice for all Americans would be to redraft civil codes to provide a variety of alternative dispute resolutions methods such as the ones mentioned earlier.

Such an approach would replace the requirement that certain types of cases be determined in U.S. District Courts – with the expense, delay and need for legal counsel that such cases entail – be allowed to be determined through increased use of mediation, fact-based adjudicatory panels, ombudsmen, and other mechanisms. As cited, this approach is already working at the state and local level and has been an alternative to our present system in Japan, Europe and elsewhere.

The economic inefficiency of the current arrangement frequently breeds palpable injustice. One of the enduring complaints against LSC has come from the agricultural community where for years LSC-funded lawyers have been filing meritless and trumped up federal lawsuits against farmers knowing that many farmers could not afford a court battle and would be forced to settle.

One case which received national attention involved a 70-year-old Ohio vegetable farmer, Russell Garber, sued in federal court by an LSC-funded program under a federal law which did not apply to a small family farm. Rather than cave in to what Mr. Garber considered extortion, something all to many farmers feel compelled to do, he fought the case on principle:

> "I didn't do anything wrong, Mr. Garber said. So he fought the case, on principle. And won. A lower court summarily dismissed the case, and last year a unanimous three-judge federal appeals court decision affirmed the dismissal, saying Garber is a family farmer not covered by the law cited in the suit.
>
> The price tag of victory was more than $100,000, he said.
>
> "That's a chunk of change for an old farmer," he said. "I had to borrow the money. I don't have that kind of money lying around."
>
> *See:* Principled Planter; Venerable farmer's roots are set in hard work, fairness," *Dayton Daily News*, July 21, 2004, page E1.

5. **During the hearing, you indicated in response to a question from Congressman Watt about class action litigation which you would support allowing LSC-funded programs to bring class action litigation in certain categories. Please list the types of categories in which you would or would not support allowing LSC-funded programs to bring class action litigation. Please explain your reasoning for each category in which you would or would not support allowing LSC-funded programs to bring class action litigation.**

   The reason Congress restricted class action lawsuits in 1996 is that most of the previous class action lawsuits funded through LSC were expensive undertakings which dried up resources for providing the day-to-day legal services for the poor that were supposed to be the staple of LSC-funded programs. The class action lawsuits were overwhelmingly political or ideological in nature.

   Any review of the class action lawsuits undertaken prior to 1996 would show cases designed to challenge welfare reform or to challenge efforts to stop welfare fraud. Using taxpayer funds to legally challenge laws passed by Congress or state legislatures was controversial in itself.

   Other controversial cases undertaken by LSC-funded lawyers often harmed the interests of the poor people that LSC was supposed to be helping. One notable class action law suit filed by LSC-funded lawyers just a year before the restrictions was a case (Bonner v. Atlanta Housing Authority, N.D. Ga., Oct. 1995) against the Atlanta Housing Authority's policy of denying housing to persons with criminal backgrounds. How using federal anti-poverty legal funds to challenge a policy designed to keep violent criminals from public housing helps the poor people in public housing is a worthy use of taxpayer funds has not been explained by those who want to remove all restrictions.

   A very limited case can be made for instances where a class action lawsuit might be an economical approach to solving legal problems of many poor clients. The limitations would include restrictions against most of the cases for which class action lawsuits were used prior to the 1996 reforms. As such, proponents of the activist lawyer model for LSC would be opposed to such constraints.

Questions from the Honorable Trent Franks, Ranking Member

Restrictions on use of funds by LSC's grantees (Pub. L. 104-134)

1. **Have the restrictions instituted in P.L. 104-134 and carried forward by subsequent legislation ever been violated by LSC's grantees since the restrictions were established in 1996? If so, please provide a list enumerating each violation of which you are aware.**

The restrictions and reforms found in P.L. 104-134 have been repeatedly violated by LSC's grantees and by LSC itself. This has been amply documented in Congressional hearings, LSC Inspector General reports and audits, and in numerous news articles.

An oversight hearing on LSC conducted by the U.S. House Subcommittee on Commercial and Administrative Law featured testimony illustrating the widespread violation of the reforms first enacted as part of P.L. 104-134. My own testimony at that hearing, "Thwarting the Will of Congress: How the Legal Services Corporation Evaded, Diluted and Ignored Reform," contained numerous examples showing how LSC-funded programs and LSC itself sought to evade the restrictions. That statement ran 29 pages and was further augmented by other testimony at that hearing.

Among the highlights:

· LSC refused to properly investigate an improper legislative lobbying by an LSC grantee even after a federal judge ruled that the lobbying in question "transgressed the clear language of federal law and LSC guidelines…"

· The LSC Inspector General reported to Congress that "Grant recipients have repeatedly denied the Office of Inspector General access to information" and "…the LSC President and Board of Directors have undermined the OIG by encouraging grantees to refuse to provide information to the OIG." [Letter of LSC IG to Rep. Hal Rogers, Chairman of the Appropriations Subcommittee which funds LSC, Sept. 14, 2000]

· Shortly after the IG complained to Congress that "…it is no longer possible to conduct oversight activities efficiently and effectively..." it was announced that the IG was no longer working for LSC. [Legal Times, Dec. 4, 2000]

· Five legal services programs funded by LSC filed a lawsuit in federal court challenging the 1996 reforms. The challenge to the reforms enacted by Congress was defeated, appealed and then defeated on appeal. [*Legal Aid Society of Hawaii, et al. v. LSC,* 981 F.Supp 1288 (19970]

· LSC-funded lawyers from Farmworkers Legal Services of North Carolina took an illegal trip to Mexico to recruit clients to sue North Carolina farmers. Candidly shot video showed the lawyers in Mexico violating the restrictions. The case resulted in critical commentary in *The Wall Street Journal,* criticism at LSC's appropriations hearing in February 1998 and a Congressional call for an investigation. Although LSC was forced to defund the errant program, the lawyers who organized the illegal trip simply went to work for another LSC-funded program.

· When it became apparent that LSC lawyers were representing clients outside the United States despite legislative language requiring that no alien could be represented "unless the alien is present in the United States," LSC's board convened a totally biased "commission" which found that "is present" must mean "was present." They cited no legislative history and

arbitrarily wrote a regulation allowing LSC-funded lawyers to represent aliens not in the United States.

· The reforms found in P.L. 104-134 required LSC to institute a system of competition for the award of all grants to legal services programs. This reform was required when LSC's own data showed a substantial decline in productivity by programs who received a grant renewal regardless of how mediocre or mismanaged their program was. Despite the requirement for competition, incumbent programs almost always won their old grant with little or no competition whatsoever.

· The lack of any meaningful competition and oversight led a LSC Vice President to candidly assert in a paper delivered to the International Legal Aid Group in Melbourne, Australia that "....we have also tolerated the existence of legal services programs that we know are functioning below appropriate levels. That reality has been one of our 'dirty little secrets'."

· Despite the reform which flatly stated that no LSC funds could go to any program that "initiates or participates in a class action," LSC turned a blind eye to class action lawsuits undertaken after the restriction went into place. Under the LSC Act, no other person or group has standing to enforce the LSC Act in court other than LSC itself. LSC-funded lawyers in California defended their taking of class action lawsuits by calling them "representative actions." Ballentine's Law Dictionary has a remarkably succinct definition of what a representative action is:

representative action same as class action

· When Congress learned that LSC-funded programs and LSC itself were ignoring the restriction against class actions, they placed the following language in House Report 106-680:

> "The Committee also reminds the Corporation that its grantees are prohibited by section 504(a)(7) of P.L. 105-119 from participating in class action suits and directs the Corporation to comply."

· Despite a clear restriction against LSC-funded lawyers seeking attorneys' fees, lawyers from Texas Rural Legal Aid (TRLA) sought attorneys' fees when they sued to overturn the election of two Republicans to local office in Texas. The legal services lawyers challenged the absentee voting rights of 800 active duty military. The case was so outrageous that 58 U.S. Senators signed a letter to the U.S. Attorney General asking her to intervene to protect the voting rights of the military. Texas Attorney General Dan Morales, a Democrat, filed a brief challenging the legal services lawyers' interpretation of Texas election law.

While LSC wrote to TRLA stating that the request for attorneys' fees was an apparent violation of the law, LSC never challenged TRLA for getting involved in a partisan effort to overturn an election. Worse, the LSC spokesperson stated that the "suit was perfectly valid."

· When LSC-funded lawyers complained about not being able to take attorneys' fee cases, LSC wrote a regulation carving out a large loophole which – despite the clear statutory restriction against attorneys' fees – would allow such fees. The proposed regulation came to the attention of the House Commerce, Justice, State, the Judiciary and Related Agencies Subcommittee at their Feb. 26, 1997 hearing. When LSC officials tried to justify changing the statutory language with a proposed regulation, the Chairman, Rep. Hal Rogers, responded with both common sense and bluntness:

> "It's outrageous that your interpretation would be that minute considering all the hot water you're in." [The Recorder, Mar. 5, 1997, page1.]

Following more LSC explanations as to how they came to propose a regulation which so plainly undercut the statutory language, Chairman Rogers reaction became even more pointed:

> "You can't seem to help yourself. You do not grasp reality. Some of us are losing patience." [New Jersey Lawyer, March 10, 1997, Page 3.]

2. **Do sections 9, 10 and 11 of H.R. 3764 have the effect of preserving or instead weakening the abortion-litigation restriction in Pub. L. 104-134 (as annually renewed in appropriations measures) with regard to the use of both federal and non-federal funds by LSC's grantees?**

The abortion restriction is one of the very few restrictions which remain. However, the almost total evisceration of other accountability provisions relating IG authority, access to documents, audits, program integrity rules, etc. would make it almost impossible to detect or prevent programs setting up legally distinct but closely affiliated programs which would allow activist lawyers ample opportunities to misuse federal LSC funds to provide pro-abortion legal services. This abuse of "mirror corporations" has been used for years to evade restrictions. The only thing different if H.R. 3764 passed was that such improper actions would be much more difficult to detect or prevent.

3. **Do sections 9 and 10 of H.R. 3764 lift all of the restrictions in Pub. L. 104-134 listed immediately below with regard to LSC's grantees' use of non-federal funds (*i.e.*, the private funds restriction)?**

- **legislative redistricting [Sec. 504(a)(1) of Pub. L. 104-134]**
- **lobbying government [Sec. 504(a)(4)]**
- **class action suits [Sec. 504(a)(7)]**
- **suits representing undocumented aliens [Sec. 504(a)(11)]**
- **training programs encouraging political activity, labor activity, a boycott, picketing, etc. [Sec. 504(a)(12)]**
- **suits in which attorneys' fees are collected [Sec. 504(a)(13)]**

- **suits representing prisoners [Sec. 504(a)(15)]**
- **suits regarding reform of federal or state welfare systems [Sec. 504(a)(16)]**
- **suits representing persons evicted for the sale or distribution of drugs [Sec. 504(a)(17)]**
- **solicitation of clients [Sec. 504(a)(18)].**

The cited sections of H.R. 3764 have the effect of eliminating the restrictions from covering any funds provided to LSC recipients from sources other than LSC. The exception is to continue the prohibition against abortion-related activities with respect to both LSC and non-LSC funds.

As a practical matter, given the wholesale evisceration of accountability and transparency contained in H.R. 3764, the net effect would be to strip out almost all restrictions. By eliminating the tools needed by both the LSC IG and by a responsible LSC management monitoring operation, LSC would become little more than a check writing operation.

4. **With regard to LSC grantees' use of both non-federal and federal funds, do sections 9 and 10 of H.R. 3764 wholly lift the restrictions in P.L. 104-134 on redistricting, lobbying, class action suits, labor activity, suits in which attorneys' fees are collected, suits to reform welfare, and solicitation of clients?**

The purpose of the reforms and restrictions found in P.L. 104-134 and incorporated by reference in subsequent years' appropriations bills, with only minor modifications, was to provide the troubled program funded by LSC an opportunity to reassert the belief that the program should focus on more traditional legal services for the poor. It was not politically possible to reauthorize LSC in 1996. In fact, there was widespread sentiment that the program was so resistant to reform that it should be eliminated.

The political bargain struck was that efforts to phase out funding for LSC over a three year period would be held in abeyance to see if the reforms and restrictions might have the effect of redirecting the program away from the controversial political and ideological activities that had so marred the program's reputation.

The appropriations riders were seen as a way to clean up the program until such time as there was a political consensus broad enough to support a reauthorization. Passage of a reauthorization bill would eliminate the need for the riders and it is prudent to assume that any restrictions not found in the reauthorization would not be found in any subsequent appropriations.

As such, the only restrictions which would remain would be restrictions explicitly found in H.R. 3764.

In that sense, H.R. 3764 represents a truly radical departure from any previous statutory framework for the federal legal services program. A program whose existence was threatened because of outrageously politicized and controversial activities would now be

granted the widest possible latitude to conduct the very kinds of cases which got them in trouble for years.

To make matters worse, the same reauthorizing legislation would deny the LSC IG the capacity to investigate waste, fraud and abuse. And what little accountability and transparency exists now – far less than most federal programs – would be gutted.

5. **Would section 11 of H.R. 3764 loosen the restriction in P.L. 104-134 on representation of undocumented aliens with regard to LSC grantees' use of non-federal or federal funds? If so, how exactly is this restriction loosened?**

There is no doubt that section 11 of H.R. 3764 would loosen the restriction in P.L. 104-134 on representation of undocumented aliens.

The current restriction on the representation of undocumented aliens was originally set forth in P.L. 104-134 and incorporated by reference in subsequent appropriations laws for LSC. The LSC regulation covering this restriction, titled "Restrictions on Legal Assistance to Aliens," can be found at 45 CFR § 1625.

A careful reading of the proposed H.R. 3764 language shows that LSC-funded programs would be allowed to represent most categories of aliens who are in the U.S. legally as well as expand the categories of illegal aliens who may receive legal services.
Illegal aliens who are disaster victims, children in certain cases and or who claim that their deportation may result in torture would now be able to receive legal services.

Recent legislative history also suggests that any amnesty legislation passed as a result of a comprehensive immigration "reform" measure may include language allowing LSC-funded lawyers to represent illegal aliens covered by the amnesty for specified purposes since this was a provision of such proposed legislation in past years. Given the more than 12 million estimated illegal aliens in the United States, it is not difficult to see how such a potential expansion of services may divert resources from the traditional role of legal services to provide day-to-day legal services to the poor.

6. **Please provide examples, before and after 1996, where grantees of LSC represented undocumented aliens or were investigated or suspected of representing undocumented aliens.**

Representation of undocumented aliens both before and after the 1996 reforms has been one of the more heated controversies plaguing LSC and its programs.

Prior to the 1996 reforms, programs would represent illegal aliens by claiming that the representation was done with non-LSC funds. By thwarting access to clients' files and not being required to publicly disclose cases on which legal services lawyers worked, activist attorneys were able to provide significant legal resources to illegal aliens.

Examples of such cases include:

· Medicaid for Illegals

An LSC-funded program sued California when it passed a law requiring those seeking care under Medicaid disclose their immigration status. When the California Supreme Court rejected the legal services argument, they announced plans to take the case to the Supreme Court of the United States. [*BNA Health Care Daily,* Dec. 30, 1994]

· Expulsion of Mexicans Illegally Attending U.S. Public Schools

When school officials in California's Mountain Empire District, on the Mexican border, expelled hundreds of Mexicans illegally attending public schools there, California Rural Legal Assistance immediately denounced the action. The students lived in the nearby Mexican town of Tecate. Students, regardless of nationality, can only attend schools in another district if they pay $3,000 tuition. Although the expulsions saved the taxpayers $1 million, it was estimated that the total cost of this fraud along the border was $29 million. {*Washington Times,* May 22, 1994]

· Legal Services Sues INS for trying to Enforce Immigration Laws

In 1993, INS required all residents to renew green cards issued before 1978 by paying a $70 fee. The replacement program was part of the agency's effort to end widespread document fraud. The legal services attempted to sink the plan by claiming the $70 fee was too high. [*The Los Angeles Times,* Nov. 6, 1993

· Residency for Criminals

Legal services lawyers sued INS to overturn a rule that denied legal residency to agricultural workers with serious criminal records who applied under the 1986 SAW amnesty. In response to a 1990 law passed by Congress, the INS issued a rule denying amnesty to aliens with one felony or three misdemeanor convictions. Legal services lawyers argued that this violated the undocumented aliens' 5th Amendment rights.
A U.S. Appeals Court rejected the 5th Amendment claims. [Naranjo v. U.S. INS, 30 F.3d (US App Ct.) 1994]

· Drivers License for Illegal Aliens

Two grantees of the Legal Services Corporation sued California's Dept. of Motor Vehicles for refusing to issue drivers licenses to illegal aliens. As mandated by law, the DMV required all applicants to provide proof of legal residency in order to obtain licenses and registration. The legal services lawyers sued the DMV on behalf of several illegal aliens who had their applications rejected, taking the position that even if their clients were in the country illegally, they were still entitled to a drivers license. A state appeals court rejected the argument and ruled, "DMV is not only authorized but obligated" to deny licenses to illegal aliens. [Lauderbach v. Zolins, 35 Cal. App. 4th 578, May 30, 1995]

- Deportation of Murderers and Drug Dealers

On 1993, Atlanta Legal Aid Society attempted to halt the deportation of Cuban nationals convicted of committing serious crimes including murder and drug trafficking. Part of the 1980 Mariel Boatlift, the Cubans committed the crimes while on immigration parole. After release from prison, their immigration parole was revoked and they were placed in detention awaiting deportation. Legal services lawyers said detention was a violation of their constitutional rights. A U.S. Appeals Court rejected the petition. [Gisbert v. U.S.A.G., 988 F.2d 1437 (U.A. App Ct.) 1993]

General Questions

7. **Given LSC grantees' misuse of federal funds as reported by LSC's Office of Inspector General, the GAO, and various news articles in recent years, do you feel it is wise to loosen or lift restrictions on grantees' use of funds and significantly increase LSC's federal funding authorization level at this time?**

It is hard to imagine a more short-sighted way to deal with a program widely known for its mismanagement, politicized cases and violations of Congressional reforms.

The proposed legislation appears to make the case that a federal program with a long history of abuses should best be dealt with by removing all of the restrictions backed by a bipartisan majority every year since 1996. And at the same time H.R. 3764 would make any kind of accountability to the public, the LSC Inspector General and Congress almost impossible.

Many of the proposals have almost no constituency in Congress or anywhere else. Specifically, removing the restriction against using LSC funds to lobby and litigate on Congressional redistricting cases makes a mockery out of the stated purpose of the program. Nothing is more political than influencing the shaping of Congressional districts. Can any proponent of this provision seriously argue that this kind of legal services helps the poor or should be done with taxpayer funding?

At a time when elected officials of all parties and the general public are calling for more transparency in government, the effect of H.R. 3764 is to eliminate what little transparency exists at LSC. For more than ten years, the appropriations laws governing LSC have required public disclosure of all cases litigated with LSC funds. This provision has had broad bipartisan support for obvious reason: why shouldn't Congress, the media and taxpayers know what cases are being litigated with federal funds? H.R. 3764 eliminates this fundamental transparency. If enacted, LSC will be the only federal program with no practical way of determining what cases are litigated with its funds.

Every one of the restrictions and reforms which were incorporated in Public law 104-134 was in response to years of abuses, complaints and controversies. The wholesale elimination of almost all of these restrictions and reforms will turn back the clock to a time when LSC was widely viewed as an out of control program.

We don't have to wonder why these restrictions are being removed. We know that the more political and activist lawyers in the LSC network want to do political cases and advance their ideological goals. At the risk of stating the obvious, much of those types of cases not only outraged Congress but hurt the poor.

Using scarce federal resources to fight drug-related evictions from public housing does not help the poor. Using legal services funding to try to overturn elections or deny military servicemen and women their absentee voting rights is just plain wrong.

Anyone who has followed the twists and turns of LSC's relationship with Congress can easily predict what passage of H.R. 3764 will mean. It will mean that at a time when federal budgets are strained beyond sustainability, a rogue program will be given a green light to return to virtually all of the questionable practices which almost resulted in its elimination. In the end, passage of H.R. 3764 will confirm what LSC's many critics have said all along: LSC cannot be reformed because it does not want to be reformed. It simply wants a blank check from Congress and as little accountability as possible.

8. Does H.R. 3764 strip LSC's Office of Inspector General (OIG) of too much authority?

The testimony of LSC IG Jeffrey E. Schanz, a man with some 36 years of experience in audits and IG work, very accurately analyzes the many ways in which H.R. 3764 would undercut his ability to do his job.

The problem traditionally facing the LSC IG has been that there were not enough tools, such as the ones available to IGs in most federal departments and agencies, to provide the oversight needed for a program troubled with more than its share of waste, fraud and abuse. Part of this is due to inherent problems with the way the original LSC Act was drafted. It provided for so much independence that LSC was unable to adequately oversee the use of funds by its recipients.

LSC did not get its first IG until 1989. Since then activist attorneys have repeatedly challenged LSC IGs attempting to do their jobs. Even worse, a number of the LSC IGs were undercut by LSC management and the LSC board, resulting in confrontations which frequently made their way into the media and to Congress.

The additional tools provided by Congress in 1996 and subsequently are now endangered by the provisions of H.R. 3764. One of the goals of P.L. 104-134 was to grant LSC IGs the types of audit tools already being used effectively by the overwhelming majority of government IGs. This type of oversight was opposed by activist legal services lawyers and various ideological groups which have traditionally seen the federal legal services program as a taxpayer-funded litigation ally.

As the LSC IG testified, the H.R. 3764 provisions would eliminate the audit-related requirements of P.L. 104-134.

H.R. 3764 also ignores a variety of typical IG functions, such as overseeing the work performed by non-federal auditors.

H.R. 3764 eliminates other provisions of P.L. 104-134 such as the requirement for interim reporting by programs which have been shown to be in non-compliance during an audit.

H.R. 3764 has the net effect of eviscerating a whole range of important standards long proven to be effective in preventing waste, fraud and abuse. If the goal is to promote such waste, fraud and abuse with LSC and its recipients, then H.R. 3764 is the perfect vehicle. If the goal is to make sure that taxpayers get their money's worth and programs meant to help the poor are not woefully mismanaged, then H.R. 3764 is a disaster.

9. **Under H.R. 3764, can LSC's OIG get sufficient access to client records and distinguish private from federal funds for the purpose of ensuring that restrictions on federal fund use are not violated?**

Perhaps the greatest problem with respect to H.R. 3764's weakening of the role of the LSC IG is the substantial restriction which it places on the IG's access to documents. The principal way this is done is by tying access to a crazy quilt of state and local bar rules which can limit the OIG's access in an almost unlimited fashion. As the LSC IG testified this provision would "substantially restrict the OIG's access to grantee information and seriously hamper its ability to carry out meaningful audits and investigations."

This draconian restriction of access to documents represents a wholesale elimination of the reforms in P.L. 104-134. It is also dramatically different than any situation which applies to other federal programs with IGs.

It should come as no surprise that legal services programs have been battling the 1996 reforms by refusing to turn over documents clearly required by section 509 of P.L. 104-134. Legal services lawyers have fought these access provisions twice in federal court. Both times they lost. H.R. 3764 rewards their intransigence by simply eliminating the section 509 requirements. One major program is still refusing the LSC IG access to documents.

10. **Which provisions in H.R. 3764 do you consider to be the most damaging to the authority of the Office of the Inspector General (OIG)?**

While the incredible denial of access to documents discussed in my previous answer is probably the damaging to the authority of the LSC IG, a close second would be various provisions weakening the audit standards. This dilution of audit standards will frustrate the ability of the LSC IG to play a meaningful role in the oversight of LSC grantee audit process. This is great for hiding financial mismanagement but not so great for anyone who believes federal fund s should be handled responsibly.

11. **Since 1996, does it appear that the system of competitive awards of grants and contracts for field programs established in Sec. 503 of P.L. 104-134 has been followed? Are you aware of specific instances or reports indicating that grantees sometimes have no competitors and sometimes are re-awarded funds despite poor performance? Please provide a list of such instances or reports.**

The requirement by Congress in P.L. 104-134 that LSC award grants for provision of legal services in a competitive manner has not been just largely ignored, it has been systematically undermined.

The competition requirement was enacted by Congress because even the most demonstrably incompetent legal services programs were routinely being awarded new grants, almost always without any competition. This practice became known as "presumptive refunding." Quality did not count. Being the incumbent program did count. Despite the recognized benefits of competition in both the private sector and the awarding of federal grants, the legal services model was to consider federal money an entitlement to whatever program first received the money.

Congress wanted competition after wave after wave of controversy involving legal services programs which routinely showed questionable judgment and routine mismanagement continued to be funded. A study by law professor Douglass Besharov examined the quantity and quality of legal services funded by LSC. In his book, Legal Services for the Poor: A Time for Reform, Besharov concluded that efficiency among grantees varied widely but that LSC's own data showed "a substantial decline in productivity." He concluded that one of the sources of the mediocre levels of efficiency was the automatic refunding mechanism.

From the start, both programs and LSC itself opposed competitive grant awards. But Congress had mandated competition so there was a need to at least set up a façade of competition.

Immediately there was a problem as incompetent programs faced with a denial of funding used political means to fight back. The first successful challenge of an incumbent program was in Pennsylvania where a law firm challenged the grant of a less-than-stellar program. ["Law firm awarded federal legal aid grant," The Legal Intelligencer, Feb. 27, 1997, page 1.]

The losing program mounted a political effort to change the decision. They got their Congressman to attend a board meeting of LSC to make their case. The office of the law firm that won the grant was picketed. The president of the program which lost the grant, who had been sanctioned by a judge for unethical conduct, demanded the law firm withdraw its bid. One of the law firm's clients, a teachers union, also called for a withdrawal. The barrage of pressure tactics worked. The law firm withdrew its winning bid. ["Concern Over Client Led to Dropping Legal Aid Bid," The Legal Intelligencer, March 19, 1997]

The lesson was clear. Any attempt to set up true competition would be met with political pressure, demonstrations and economic pressure. The losers were the poor -who just might benefit from a competent program - and the taxpayers.

After six years of purported competition, a study by law professor Ronald Sutherland found that competition was alive in name only. Most incumbent programs get their grants renewed with little or no competition. This result shows that the legal services program just will not allow reform – even when mandated by the Congress that funds it.

12. If H.R. 3764 passes in its current form, could LSC's implementation of the GAO's 2007 recommendations be insufficient to prevent fund waste and ideologically-motivated lawsuits?

- **GAO-07-993 "LSC: Governance and Accountability Practices Need to Be Modernized and Strengthened," August 2007**
- **GAO-08-37, "LSC: Improved Internal Controls Needed in Grants Management and Oversight," December 2007**

There is no question that if H.R. 3764 passes, there will be very little to prevent the types of waste, fraud, abuse and mismanagement which have been found so often by the GAO, LSC IGs, the media and Congressional oversight.

Any review of GAO audits of LSC and its programs leads one to conclude that even with the reforms of H.R. 3764, the program had far more problems than other government programs its size.

For example, following a national Associated Press story that LSC and its programs had systematically been providing Congress and the public with greatly inflated case numbers, the GAO was asked by Congress to investigate. They found large inflations of case numbers at every program examined.

While the 2007 GAO recommendations showed serious problems with LSC and its programs, it should be kept in mind that those document problems were found after the reforms which Congress mandated were put into place. H.R. 3764 would largely strip out those reforms so it is not difficult to imagine what kind of future GAO audits might say if H.R. 3764 passes.

13. Please provide any additional information which you believe may be helpful to the Subcommittee or Committee in evaluating H.R. 3764 and issues related to LSC.

Supporters of the LSC program should be just as alarmed at the provisions of H.R. 3764 as critics. Stripping away the reforms that made survival of LSC possible is a recipe for repeating the controversies which almost resulted in the elimination of LSC.
The big difference is that federal discretionary spending is under more pressure today than in 1996 and the fact that 60% of the funding for LSC-funded programs comes from non-LSC sources – far more than in 1996. Those facts and the removal of anything resembling accountability from LSC operations appears to pave the way for its elimination.

RESPONSE TO POST-HEARING QUESTIONS FROM REBEKAH DILLER, DEPUTY DIRECTOR, JUSTICE PROGRAM, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

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May 26, 2010

Representative Steve Cohen
Chairman, Subcommittee on Commercial and Administrative Law
U.S. House of Representatives Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Re: Hearing on H.R. 3764 (April 27, 2010)
"Civil Access to Justice Act of 2009"
Responses to Questions for the Record
Subcommittee on Commercial and Administrative Law

Dear Chairman Cohen:

The Brennan Center greatly appreciates the opportunity to have testified in support of the Civil Access to Justice Act of 2009 before your subcommittee and now submits the following responses to your supplementary questions. I hope these responses are helpful as the subcommittee further considers this reauthorizing legislation for the Legal Services Corporation (LSC).[1]

1. Please provide some typical stories of cases handled by LSC-funded legal aid programs which may be of interest to members of this subcommittee.

- **Memphis Mother And her Four Children Avoid Homelessness When Landlord Pursues Illegal Eviction.** MB lives with her four children, and attends school at a community college in Memphis, Tennessee. She rented her residence from a landlord who owns multiple rental properties in the area. MB got behind on the rent. Although the landlord had been

[1] In recent years, the Brennan Center has published a number of reports related to legal aid for the poor, including Melanca Clark & Maggie Barron, *Foreclosures: A Crisis in Legal Representation* (2009), *available at* www.brennancenter.org/foreclosures; Rebekah Diller & Emily Savner, *A Call to End Federal Restrictions on Legal Aid for the Poor* (2009), *available at* www.brennancenter.org/legal_aid_restrictions; and David Udell & Rebekah Diller, *Access to Justice: Opening the Courthouse Door* (2007), *available at* http://www.brennancenter.org/content/resource/access_to_justice_opening_the_courthouse_door. Much of the information in this testimony derives from those reports and the Brennan Center hereby seeks to include the above-mentioned reports in the record.

accepting partial payments, he decided, with less than 24 hours oral notice to MB, that he would no longer do so. After a conversation in November 2009, in which he gave MB until 5 p.m. to produce the money she owed, he sent his son to her home to remove the doors and appliances, which he did. During this encounter, the son apparently also turned off the gas, so there was no heat. The actions of the landlord violated the Tennessee law on evictions. MB could not afford a motel room and had nowhere else to go. She nailed plastic sheeting and a blanket over the door opening. All of her perishable food spoiled. Her youngest child (a toddler), fell out of the door opening before it was covered, suffering bruises and scratches. LSC-funded Memphis Area Legal Services ("MALS") filed an emergency Petition for Injunction and other relief. At the hearing, MB was granted a temporary injunction which required the landlord to replace the doors and appliances and to refrain from further violations of her rights. The landlord complied and then ultimately filed an eviction action, which MALS defended. The case garnered local media attention. Ultimately, MB was allowed to remain in the residence through the end of November at no charge – with heat, doors and appliances -- and the eviction case, including the claim for over $1000 in back rent, was dismissed. Also, there is no eviction on her record, and the landlord, after the expense and media exposure, was, hopefully, dissuaded from this kind of conduct in the future.[2]

- **Disabled Woman's Rights Vindicated in Suit Over Access to Store.** FJ, uses a wheelchair. She tried to shop, several times, at a regional women's clothing store near her home. The only entrance where she could enter was a delivery door in an alley behind the store. To gain access, she had to knock on the window at the front of the store to get someone's attention, and then negotiate with them to let her in the back. She would often sit at the back alley entrance for long periods of time. At least once, she was denied entrance entirely, after a lengthy wait at the back entrance. LSC-funded Memphis Area Legal Services filed suit on her behalf under the Americans With Disabilities Act (ADA) and simultaneously filed a complaint with the United States Department of Justice. The Department of Justice immediately expressed interest in intervening in the case. They sent their experts to survey the store and developed a list of modifications that needed to be made in order for the store to achieve ADA compliance. A settlement was reached and a Consent Decree entered with the Court, where those modifications were made. FJ was recently honored by the Memphis Center for Independent Living in recognition of her courage in challenging barriers to persons with disabilities. The front entrance, cashier's station, dressing rooms, and restroom in the store are now accessible.[3]

[2] Story provided by Memphis Area Legal Services Inc.
[3] Story provided by Memphis Area Legal Services Inc.

- **Couple Saves Home With Mortgage Modification Thanks to Legal Aid's Intervention.** When LSC-funded Memphis Area Legal Services ("MALS") first met their clients, a local married couple, their home was scheduled for foreclosure the next week and the husband had been laid off from his job. The couple had requested relief from their mortgage loan servicer, to no avail. MALS' review of the information the couple had received from the loan servicer revealed that the information was consistently inaccurate and misleading and it appeared that the servicer had improperly applied the guidelines of the federal Home Affordable Modification Program ("HAMP") program, denying them a modification. MALS contacted the legal department at Freddie Mac, the investor for the loan, and found that they, too had received inaccurate information from the loan servicer. With MALS help, the couple requested and received a postponement of the foreclosure, in order to provide time for a fair review under the HAMP program and avoid being forced into a bankruptcy. The couple ultimately was granted a loan modification that capitalized roughly $19,000 in arrearages to bring their loan current, their interest rate was reduced and their home was saved.[4]

- **With Legal Aid's Support, Arizona Woman is Able to Escape Violent Marriage.** A client came to LSC-funded Southern Arizona Legal Aid seeking legal advice concerning a long-term, violent marriage. She had four sons ranging in age from 7 to 17. She had no knowledge of her spouse's income and no access to property of the marriage, including money and transportation. Out of fear of her spouse, she was forced to sneak to Legal Aid's office and was terrified about filing for divorce. Legal Aid advocates gave her confidence that she could escape the violent marriage. Legal Aid helped her file for divorce and she was awarded child custody, support and a fair division of the marital property.[5]

- **Ohio Woman Victimized by Shady Lender Gets Relief.** "Jenny" purchased an automobile from a local car dealer and arranged for payments to be automatically withdrawn from her checking account. The lender removed double payments for eight months before Jenny realized what was happening. She requested reimbursement for the eight months of double-dipping. The loan company refused and said they would just not collect for the next eight months. After a few months however, the lender repossessed the car and sold it. The lender then sued Jenny for an uncollected balance. Jenny went to small claims court on her own where she was directed to LSC-funded Legal Aid of Western Ohio. After a legal aid attorney advocated on Jenny's behalf, the loan company wanted to settle. But Jenny's attorney stated that Jenny was unwilling to pay

[4] Story provided by Memphis Area Legal Services Inc.
[5] Story adapted with minor changes from Southern Arizona Legal Aid Inc.'s 2008 Annual Report, available at http://www.sazlegalaid.org/files/2008areport.pdf.

anything because the repossession was wrong from the start. The court agreed, dismissing the case again Jenny.[6]

- **Legal Aid Assists Iowa Senior Whose Home Was Wake of Flood Damage.** "Dorothy" is a 72-year-old woman who lives in a Time Check neighborhood in Cedar Rapids, Iowa. Her daughter, who has a disability, lives with her. The Cedar River inundated their home in June, 2008, damaging their main floor, basement, foundation, and porch. Dorothy received FEMA and Jumpstart assistance to repair the home and they lived in a FEMA trailer while the repairs were being completed. Dorothy paid the general contractor timely under the contract. Unfortunately, the general contractor did not pay the subcontractors. Dorothy contacted LSC-funded Iowa Legal Aid after a mechanic's lien was filed on her home. She also had some concerns about the quality of the work that had been performed. Iowa Legal Aid was able to negotiate with the general contractor and final payment on the contract was withheld until the general contractor identified all the subcontractors that had performed work on the home, provided documentation that all had been paid in full, and provided documentation that the home had passed all inspections. Once Iowa Legal Aid confirmed all of the above terms had been met, the client made her final payment with peace of mind. Dorothy and her daughter are back living in their home. They live in a Block by Block neighborhood and are receiving reconstruction assistance for repairs not covered by FEMA and Jumpstart. Soon their home will be fully restored.[7]

- **Legal Aid Helps Disabled Couple Victimized By Mortgage Foreclosure Rescue Scam.** "Sam" and "Martha" are both disabled and living off of very little income. They were having difficulty making their monthly house payments. Sam saw an advertisement on television for a service that claimed they could help people in foreclosure work out a modification with their mortgage company. Sam and Martha sent the company $1,500. When they were served with a foreclosure petition, Sam and Martha contacted the company again and were told the legal department would be filing something and they should not worry about it. When nothing was filed, a default decree was entered against Sam and Martha and their home was scheduled for sheriff's sale. LSC-funded Iowa Legal Aid filed a Motion to Set Aside the Default Decree. The mortgage company agreed to give Sam and Martha a six-month delay in the sale of the home and Iowa Legal Aid is working with Sam and Martha on a settlement which will keep them in their home.[8]

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[6] Story adapted with minor changes from Legal Aid of Western Ohio's website, http://www.lawolaw.org/index.php?option=com_content&task=view&id=1770&Itemid=987.
[7] Story provided by Iowa Legal Aid.
[8] Story provided by Iowa Legal Aid.

- **Domestic Violence Victim Able to Restore Housing Voucher with Legal Aid's Assistance.** "Lisa" lived in Section 8 housing. Her abuser threatened to hurt her if she did not relinquish her housing voucher. So, under duress, she contacted the Housing Authority and relinquished the voucher. Lisa fled to a domestic abuse shelter, and while in the shelter, was evicted from her apartment by the landlord. Lisa contacted Iowa Legal Aid when she could not get her Section 8 housing assistance reinstated. LSC-funded Iowa Legal Aid worked with Lisa to get a meeting with the Housing Authority. After Iowa Legal Aid provided the Housing Authority with information about the abuse and other documents they needed, the Housing Authority returned the housing voucher to Lisa.[9]

- **Legal Aid Gets Abused Family Members Out of Harm's Way.** "Mary's" husband abused her throughout their 10-year marriage. The abuse ranged from beatings to attempted forced intercourse at gunpoint. One night, Mary's husband came home from a night of drinking and demanded sex. She locked herself in the bedroom, but her husband picked the lock with a knife and both assaulted and threatened to kill her. Mary called the police, and her husband fled the scene. She did not press charges but did seek a protective order from the court. After she obtained an ex parte order, her husband returned to the marital home and beat her severely, leaving bruises and handprints on her. Mary attempted to flee with their three children, and her husband tried to back their automobile into their three-year-old son. He was arrested and charged with two violations of the ex parte order, assault on a female, and two counts of attempted murder. Lawyers in the LSC-funded Legal Aid of North Carolina office in Greenville represented Mary at the hearing to obtain a domestic violence protective order. Legal Aid was successful in obtaining an order that met all of Mary's needs, including full custody of the children with no visitation for the husband.[10]

- **Sick Children Get Legal Help at Michigan Children's Hospital.** In Detroit, the LSC-funded Legal Aid and Defender Association assists sick children and their families at the Children's Hospital of Michigan and provides education and training to the medical staff to identify legal issues that, if resolved, can positively contribute to the successful treatment and recovery of the children from injury and illness. These services also promote family stability and permit the families to concentrate on helping their children get through their medical care and treatment rather than on legal difficulties.[11]

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[9] Story provided by Iowa Legal Aid.
[10] Story adapted with minor changes from Legal Aid of North Carolina's 2008 Annual Report, available at http://www.legalaidnc.org/Public/Learn/publications/Annual_Reports/2008_AR_LANC.pdf.
[11] Story adapted with minor changes from the Michigan Bar Foundation's 2008 Annual Grants Report.

- **Georgia Senior Legal Hotline Untangles Credit Mess for Elderly Man.** An elderly man called the LSC-funded Atlanta Legal Aid Society's senior legal hotline. He explained that he had gone to a local store to purchase a new hearing aid. The salesman told him to get his ears cleaned before getting fitted. However, the salesman demanded that the man sign a sales contract. The salesman handed the man several forms to sign, including an application for a "medical services" credit card and a statement that the man had received the hearing aid. The man left, had his ears cleaned and then returned to the store for the fitting. The salesman told the man that the man had already received the hearing aid; he showed the man the signed statement of receipt. The man left the store empty handed. Later, the credit card company began to call and harass the man about the outstanding $4,690 charge. The hotline attorney sent a demand letter to the hearing aid store and a dispute letter to the credit card company. In her letter, the attorney showed that the elderly man visited the doctor after his first visit to the store and that the store's technician could not have fitted the man with a hearing aid. The credit card company stopped harassing the man and eventually agreed to remove the charge from his account.[12]

- **Legal Aid Helps Families Save Homes from Foreclosure.** Jose R., a small business owner in the newspaper delivery industry, had lived with his family in their modest home for more than 10 years. When the recession hit, his business failed. Initially, Jose contacted his lender in an attempt to work out a loan modification, but had no success. He had previously refinanced his home to support his business and signed up for an optional adjustable rate mortgage "pick a payment loan," a now notorious "innovative" loan product with payment terms that have proved to be deceptive and ultimately damaging to many consumers. The loan documents themselves were difficult to understand: "fixed rate, adjustable loan." Jose admits that his limited English and the broker's misleading explanation left him confused about the payment options and consequences. Desperate to keep his home, Jose came to LSC-funded Legal Aid Foundation of Los Angeles and met with a seasoned consumer law advocate who was able to help him secure a revised loan agreement. Ultimately, Jose was able to find other employment and his wife returned to work and, though the new loan agreement is far from ideal, he has been able to remain in his home.[13]

- **Legal Aid Offers Help to Veterans Too Often Left Out in the Cold.** A legal resident from Mexico, "Eduardo" joined the US Army envisioning the honor and respect he would enjoy for serving his adopted country. He proudly finished boot camp and received the accolades bestowed upon the

[12] Story adapted with minor changes from Atlanta Legal Aid Society's 2009 Annual Report, available at http://www.atlantalegalaid.org/ar.pdf.
[13] Story adapted with minor changes from Legal Aid Foundation of Los Angeles' 2008 Annual Report, available at http://www.lafla.org/pdf/annual_2008.pdf.

American soldier. However, during his service in the Army, Eduardo contracted a serious blood disorder, which attacked his liver and heart. Eventually, Eduardo was honorably discharged from the military with the promise he would receive military compensation benefits. Unfortunately, Eduardo's benefits never arrived. Eduardo's disability scarred him mentally and physically. Unable to work and without a means to support himself, he ended up destitute, homeless and without hope. Eduardo sought help from the Veteran's Administration ("VA"), but the VA offered him a fraction of the assistance he needed. Moreover, Eduardo stated that the VA withheld his benefits due to his only being a US resident and not a citizen. Homeless, Eduardo wandered from shelter to shelter, his appeals for more assistance from the VA falling on deaf ears. Eventually Eduardo was referred to the attorneys at LSC-funded Legal Aid Foundation of Los Angeles' Bill Smith Homeless Veterans Project ("BSHVP"), who helped him fight for justice. After a lengthy fight with the VA, the administration conceded that Eduardo's disabilities were a result of his service and he was subsequently found completely disabled. BSHVP attorneys were able to obtain nearly $63,000 in retroactive benefits, including a generous monthly stipend, medical care, and supported services. Eduardo now enjoys not only the honor and respect for service to his adopted country, but our gratitude as well.[14]

- **Legal Aid Helps the Unemployed Obtain Earned Benefits.** "Alice" worked 25 hours per week as a cashier at a truck stop. Her husband had suddenly passed away and she became the sole provider for her son. Alice had worked for over five years and never received any negative performance reviews or warnings of improper conduct. One day her employer accused her of stealing $14 from the cash drawer and fired her. Alice insisted that she did not steal any money and that she had followed proper procedures for settling her cash drawer. When Alice applied for unemployment benefits her employer contested the claim and she was denied benefits. Alice came to LSC-funded Virginia Legal Aid Society for help at that point, and a Legal Aid attorney represented her at the hearing with the Virginia Employment Commission. At the hearing, the attorney was able to show that Alice did not leave her job voluntarily, and that there was no proof of misconduct. Obtaining benefits allowed Alice to continue paying for rent and groceries while she looked for another job.[15]

2. In his written statement, Mr. Boehm states several reasons why he believes that the restriction on attorneys' fees should continue. He poses a question: If there are attorneys willing to take a case involving a law

[14] Story excerpted from Legal Aid Foundation of Los Angeles' website, http://www.lafla.org/service.php?sect=govern&sub=veterans.

[15] Story adapted with minor changes from Virginia Legal Aid Society's 2008 Annual Report, available at http://www.vlas.org/documents/427741Final%20Version%20-%202008%20Annual%20Report.pdf.

allowing attorneys' fees, then why should the taxpayers have to subsidize those attorneys? (Those attorneys presumably being legal services attorneys.) Please respond to his question.

Mr. Boehm's question rests on a fundamental misconception of the law surrounding cases involving attorneys' fees. He implies that legal services attorneys are taking cases that could instead by handled for money by the private bar. However, this is inaccurate. LSC-funded attorneys are already barred from taking cases that the private bar would be likely to take because they are "fee-generating." 42 U.S.C. § 2996f(b)(1). Cases that "reasonably may be expected to result in a fee for legal services from an award to a client, from public funds or from the opposing party" are therefore generally off-limits for LSC-funded programs, except under limited circumstances that are spelled out in detail in the LSC regulations, such as when the case has been rejected by a local lawyer referral service or by two private attorneys or when the case is one that private attorneys in the area ordinarily do not accept. *See* 45 C.F.R. § 1609.3.

The attorneys' fee restriction in the 1996 Appropriations Act – which Congress removed in last year's appropriations process – was much more far-reaching than the restriction on fee-generating cases. The appropriations restriction on attorneys' fees prohibited LSC-funded programs from being awarded fees in cases that were permissible for recipients to handle under the fee-generating case restriction.

Attorneys' fee awards often are authorized under civil rights and consumer protection laws in order to level the playing field for those whose rights have been violated and in order to deter bad conduct. Typically, when legal services programs handle these types of cases, it is precisely because these cases are not "money-makers" that the private bar is likely to take on. They are not cases in which the private bar would be willing to represent the client on a contingency basis or cases in which it appears at the outset that substantial attorneys' fees would likely be awarded, which might entice a private attorney to agree to undertake the representation. These are generally cases where low-income clients would not be able to obtain representation if LSC-funded programs were not able to assist them.

In its fiscal 2010 appropriations legislation, Congress saw fit to repeal the overreaching restriction on attorneys' fees, and the Civil Access to Justice Act would merely reinforce Congress' decision in this regard.

3. **Congress and the LSC Act currently impose restrictions on the ability of LSC-funded programs to undertake certain cases or represent certain individuals. Please discuss how the restriction on collecting attorneys' fees impacts LSC-funded legal aid programs. And how this restriction**

impacts clients seeking legal assistance from LSC-funded legal aid programs.

For cases in which legal services organizations represent clients, attorneys' fee awards serve three related, and equally important, functions. First, fee awards provide a reason, within an ongoing case, to encourage a party to agree to a settlement; second, they act as a deterrent to discourage people from violating laws that are designed to protect the public; and third, they enable legal aid programs to bring in additional revenue from non-LSC sources in order to do more work to protect poor clients and poor communities.[16] Until its removal in last year's appropriations process, the restriction on attorneys' fees severely undermined each of these important ways in which LSC-funded programs assist the poor.

Fee awards play an especially critical role in consumer protection and mortgage fraud cases. In all but five states, consumer protection statutes that prohibit deceptive practices permit prevailing plaintiffs to recover attorneys' fees from defendants who have been found to have violated the law.[17] On the federal level, the Fair Housing Amendments Act, 42 U.S.C.A. 3601 *et seq.*, a tool for combating racially discriminatory bias in predatory lending, also provides for attorneys' fee awards when a plaintiff has prevailed.[18] The Real Estate Settlement Procedures Act, which prohibits kickbacks to mortgage brokers, authorizes prevailing parties to obtain attorneys' fee awards.[19] In addition, fees are authorized under the Truth in Lending Act ("TILA"),[20] which mandates certain disclosures in home equity lending, and the Home Ownership and Equity Protection Act,[21] an amendment to TILA that mandates additional disclosures for high cost home loans and prohibits certain loan terms such as negative amortization and balloon payments.

The possibility of having to pay attorneys' fees provides critical leverage to ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the poor client's resources and those of the legal aid lawyer. As the New York Court of Appeals has stated, the availability of attorneys' fees is "an incentive to resolve disputes quickly and

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[16] *See, e.g.*, Duell v. Condon, 84 N.Y.2d 773, 780 (1995); Maplewood Mgmt. v. Best, 533 N.Y.S.2d 612, 613-14 (N.Y. App. Div. 1988); Cal. Legal Servs. Coordinating Comm., California State Justice Plan 2001: Response to LSC Program Letter 2000-1, at 32 (2001) [hereinafter Cal. Legal Servs.].

[17] *See* Carolyn L. Carter, Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* 21 (2009), *available at* http://www.nclc.org/issues/udap/content/UDAP_Report_Feb09.pdf.

[18] 42 U.S.C. § 3613(c)(2) (1988) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs.").

[19] 24 C.F.R. § 3500.21(f)(1)(iii) (2009).

[20] 15 U.S.C. §§ 1601 *et seq.* (1976).

[21] 15 U.S.C. § 1639 (1994).

without undue expense" on the part of the court and litigants.[22] In predatory lending cases, for example, where the underlying loan to the homeowner may be a product of deceptive or overreaching strategies on the part of the lender, the unfairness inherent in the original agreement may be compounded if the lender has no incentive to conduct the litigation responsibly. Without the ability to level the litigation playing field, low-income families were placed at a disadvantage, both in the litigation and in settlement negotiations.

LSC-funded South Brooklyn Legal Services ("SBLS") has one of the nation's leading predatory lending practices. While the restriction on collecting attorneys' fees was in effect, it reported that the inability to seek fee awards frequently resulted in predatory lenders dragging out cases that might otherwise settle if fees were available to serve as an incentive to resolve the cases before the investment of substantial attorney time.[23] In one case against Ameriquest Mortgage Co., one of the nation's largest subprime lenders, SBLS represented an elderly African-American widow who alleged she had been conned into an unaffordable mortgage when she needed to make repairs to her home of over 25 years.[24] After meeting with Ameriquest representatives, this client received a 2/28 mortgage (a 30-year mortgage with two years at a fixed rate and 28 years at an adjustable rate) with initial monthly payments of $2,300, nearly three times her monthly income.[25] To make it appear as if she could afford the loan, Ameriquest allegedly created a fake set of financial documents to include in her loan file, including a 401(k) document, employment statement, lease agreement and tax returns.[26] With SBLS's assistance, she brought a case alleging violations of the Fair Housing Act, Truth in Lending Act, Real Estate Settlement Procedures Act, New York Deceptive Practices Act, and other violations of additional laws.[27]

In an attempt to prove that the company engaged in a pattern of extending unaffordable loans to borrowers, SBLS sought the lender's loan files for other borrowers around New York.[28] Ameriquest initially refused to turn over the documents and the company was able to draw out a lengthy court battle due to the severe mismatch in negotiating stances.[29] Eventually, Ameriquest was ordered to produce 50,000 pages of documents, which took two attorneys hundreds of hours to review and was an enormous drain on

[22] Duell v. Condon, 84 N.Y.2d 773, 780 (1995) (describing New York's Real Property Law § 234, which permits tenants to obtain attorneys' fees when a residential lease term permits landlords to collect fees).
[23] Brennan Center Memorandum (May 8, 2009) [hereinafter Brennan Ctr. Memo] (on file with the Brennan Center) (summarizing interviews with legal services programs).
[24] Complaint at 1, Overton v. Ameriquest Mortgage Co. et al., No. 05-CV-4715 (E.D.N.Y. Oct. 6, 2005).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Brennan Ctr. Memo, *supra* note 23.
[29] *Id.*

SBLS resources.[30] The case eventually settled.[31] Had SBLS been permitted to seek attorneys' fees at the time, Ameriquest might have had an incentive to limit the amount of time the plaintiffs' attorneys had to spend on the case, thus, speeding up the litigation process. In addition, the possibility of a fee award could have given the SBLS client a less vulnerable position in settlement negotiations.

The award of attorneys' fees also serves a deterrent purpose. For example, it ensures that wrongdoers suffer some additional financial penalty for violating a consumer protection or civil rights statute and cannot merely write off the costs incurred in the litigation as a cost of doing business. If low-income victims of such violations cannot seek fee awards, however, that purpose is frustrated. As new "foreclosure consultant" scams – in which unsavory "consultants" make money by falsely promising to help distressed homeowners refinance or otherwise reduce their mortgage debt – have popped up with alarming regularity around the country, the fee restriction had hampered efforts to shut them down.

LSC-funded Legal Aid Foundation of Los Angeles ("LAFLA") estimates that as many as 30 to 40 percent of homeowners contacting its office last year for foreclosure-related assistance had either already paid a foreclosure consultant or had been contacted by one.[32] To protect homeowners and ensure that they are informed of their rights, California law regulates the practices of these foreclosure consultants.[33] Even with this law on the books, LAFLA reports that some consultants illegally provide little or no services and divert homeowners from seeking legitimate assistance. In many cases against deceitful foreclosure consultants, actual damages would be in the range of $1,500 to $2,500, but this small amount limits the effectiveness and feasibility of litigation.[34] Despite the statutory provision for attorneys' fees in the California law, there are inadequate resources available among those entities that could pursue fees, including the private bar and criminal prosecutors, to fight these predatory consultants. Prior to the removal of the attorneys' fee restriction, LAFLA was prohibited from seeking fees in these cases, which could have raised the consultants' costs of continuing these illegal practices, perhaps high enough to put them out of business.

Attorneys' fees also deter wrongful conduct by individuals who flout court orders. In one aspect of LSC-funded Legal Aid of West Virginia's practice, staff attorneys and volunteer private attorneys represent victims of domestic violence who seek protective orders.[35] However, when an abuser

[30] *Id.*
[31] *Id.*
[32] Brennan Ctr. Memo, *supra* note 23.
[33] Cal. Civ. Code § 2945(c)(1) (1980).
[34] Brennan Ctr. Memo, *supra* note 23.
[35] *Id.*

repeatedly flouted court orders, the victim was not able to seek attorneys' fees to deter such flagrant and dangerous violation of the law.

Finally, the attorneys' fee restriction had cut off a key mechanism that, while promoting enforcement of the law, had the added benefit of enabling programs to bring in additional funds to enable more clients to protect their rights. The California Legal Services Commission has observed that in addition to impeding successful case resolutions, the attorneys' fee award restriction created serious funding problems for LSC grantees.[36] Prior to the restriction's enactment, LSC-funded organizations in California recovered approximately $1.75 million annually in attorneys' fees, a revenue source that was not available to them while the restriction was in effect.[37]

4. In his written statement, IG Schanz recommends that H.R. 3764 include the timekeeping requirement set forth in Section 504(a)(10) of the 1996 Appropriations Act. What is your view of this recommendation? How will it impact LSC grantees? Is it onerous or a reasonable tool to ensure accountability?

I do not oppose this recommendation. Although the requirement is onerous, recipients have been keeping time under this Appropriations Act requirement since it was imposed and have developed sophisticated timekeeping systems that will help to show that LSC funds are not used to support activities that are still restricted under CAJA but for which non-LSC funds may be used.

5. Congress and the LSC Act currently impose restrictions on the ability of LSC-funded programs to undertake certain cases or represent certain individuals. Please discuss how the restriction on class action litigation impacts LSC-funded legal aid programs. And how this restriction impacts clients seeking legal assistance from LSC-funded legal aid programs.

The restriction on class action litigation has insulated those who prey upon the poor from accountability. The restriction deprives legal aid clients of an efficient mechanism to deter unlawful conduct, particularly consumer scams. It also prevents programs from obtaining relief for a broad group of clients at once in the most efficient manner possible. Class actions provide courts and litigants with an efficient mechanism for adjudicating the similar claims of individuals who comprise a group and to ensure that all similarly situated persons obtain relief when a defendant violates the law. They also provide access to the courts for individuals who might not have the resources to bring an individual claim.

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[36] Cal. Legal Servs. Coordinating Comm., California State Justice Plan 2001: Response to LSC Program Letter 2000-1, at 32 (2001).
[37] *Id.*

For poor people in particular, the availability of the class action option has proven to be an essential tool for obtaining relief in those select instances in which individuals are harmed by widespread, illegal practices.[38] Thus, class actions brought by legal services programs in the past ensured that poor children obtained medical coverage,[39] required the Social Security Administration to abide by court rulings,[40] and challenged consumer fraud.[41] Access to Justice Commissions and legal services commissions in Georgia, Hawaii, Missouri, New Hampshire, and North Carolina have found that the inability to use the class action mechanism hinders poor individuals from obtaining legal assistance that they require.[42] As the North Carolina Legal Services Planning Council has concluded, challenging some "illegal but widespread practices" without a class action lawsuit is "impossible."[43]

Legal aid programs around the country report that their efforts to combat illegal practices are severely hampered by the class action restriction. The need for class action representation is most urgent in combating mortgage foreclosure rescue scams and other consumer fraud. LSC-funded Legal Assistance Foundation of Metropolitan Chicago routinely sees clients victimized by fraudulent loan modification consultants. While the activity is illegal under the Illinois Mortgage Rescue Fraud Act, it makes no sense to try to deter this conduct and prevent future scams by bringing individual cases. Usually the scammer takes about $1,000, which is not enough to save a home or meet the legal aid program's general triage guidelines. But if victims were able to file a class action and thus shut down one or more of the rescue scams, it would be of great benefit to a lot of homeowners.

Legal aid programs around the country also report repeated problems faced by seniors and the disabled who have improperly had their bank accounts garnished. Income received from Social Security, pensions and disability benefits is exempt from debt collection after judgment. Notwithstanding those protections, legal aid programs report persistent incidents in which banks allow creditors to seize funds in bank accounts that hold exempt income. Consumers, especially seniors and the disabled, may not

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[38] *See* Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1, 10-14 (2005).
[39] *See id.* at 11 (describing case brought by the Tennessee Justice Center).
[40] *See* David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon Describe the Costs*, 17 Yale L. & Pol'y Rev. 337, 340-41 (1998).
[41] *See id.* at 347.
[42] *See* Reports from 21 States Identify Federal LSC Restrictions as a Barrier to Justice, Brennan Center for Justice, http://www.brennancenter.org/content/resource/reports_from_21_states_identify_federal_legal_services_corporation_restrict/.
[43] N.C. Legal Servs. Planning Council, *North Carolina Statewide Legal Needs Assessment 2003*, at 49 (2003), *available at* https://www.legalaidnc.org/Public/Participate/Legal_Services_Community/Planning_Council/NC%20Statewide%20Needs%20Assessment%2003%2024%2003.pdf.

know the rules on exemption. These practices cause disruption of income and can lead to late rent, mortgage payments, food deprivation and other problems. Individual cases are a terribly inadequate way to address this problem. Class action tools could ensure that those who repeatedly violate these protections by seizing exempt income stop their practices.

6. **During his opening statement, Mr. Boehm stated that H.R. 3764 would allow prisoner lawsuits with the exception of prisoner conditions. He further stated that H.R. 3764 would "be wasting scare resources on civil lawsuits on behalf of prisoners." What types of legal assistance would be given to prisoners under H.R. 3764? What types of claims would LSC-funded programs likely offer assistance to prisoners who request assistance?**

Persons in prison face a range of civil legal problems that can undermine any chance of a successful transition to life outside the prison. These problems include lost visitation rights; lost child custody and parental rights; ruined credit histories; the loss of a family car or home; and lost public benefits, including health care and income supports. Under H.R. 3764, civil legal services programs would be permitted to help those in prison with such legal problems.

However, under the current 1996 Appropriations Act restriction, LSC recipients are barred from assisting those in prison with such cases. This restriction undermines the growing movement to promote the successful reentry into society of persons in prison.

The restriction also undercuts state funded efforts to promote reentry. Michigan, for example, has a bold and innovative Prisoner Reentry Initiative that aims to help incarcerated people as they prepare to reenter society.[44] A team of community groups, faith-based organizations, and legal services providers stands ready to provide essential services.[45] An important component of this project is "in-reach" – going into prisons and jails to address the problems confronting these men and women prior to release.[46] But, even though this Michigan initiative is primarily funded with state and private money, legal services programs, such as the Reentry Law Project of LSC-funded Legal Aid of Western Michigan – a key legal player on the team – is barred from providing litigation services to anyone in a prison.[47] The Reentry Law Project can only provide such assistance once individuals are released, even though many of the problems facing prisoners would be better

[44] Mich. Prison Reentry Initiative, *The Three-Phase, Decision-Point MPRI Model*, http://www.michpri.com/index.php?page=how-it-works (last visited Apr. 12, 2009).
[45] *Id.*
[46] *Id.*
[47] *See* § 504(a)(15).

addressed during incarceration, so that citizens can move immediately into employment and housing upon release.[48]

Far from wasting scarce resources, H.R. 3764's provision on prisoners would save money by permitting those about to transition to life outside prison to obtain the assistance they need. Such assistance can promote successful reentry and thereby prevent the recividism that threatens public safety and strains state budgets. For these reasons, a wide range of reentry experts and advocates – including Prison Fellowship, the National H.I.R.E. Network and National CURE (Citizens United for Rehabilitation of Errants) – has supported reform of the 1996 Appropriations Act's prisoner restriction. In 2004, over 30 national and local organization and several reentry advocates sent a letter to the chair and ranking member of the then-House Appropriations Subcommittee on Commerce, Justice, and State, the Judiciary, and Related Agencies, urging reform of the restriction on prisoner representation because of its repercussions on reentry.[49]

7. During his opening statement, Mr. Boehm discussed how H.R. 3764 would allow LSC-funded programs to participate in lawsuits concerning redistricting. Is redistricting an area which the legal services community so desperately needs removal of the current restriction?

Redistricting activities have never been a major priority for most LSC grantees, but in some areas of the country, redistricting is a significant issue for the client community. In addition to barring redistricting activity, Section 504(b)(1) of the 1996 appropriations rider prohibits LSC recipients from "influencing the timing or manner of the taking of a census." This part of the restriction has proved to be a major impediment to assisting client communities in responding to the census, an important civic goal. Many low-income communities have low response rates to the census and end up being undercounted. Legal services offices can play a role in educating clients about the census, encouraging low income people to participate in the census, and dispelling myths about how responses will be used. The current language has chilled legal services recipients' participation in these vital activities.

Should the committee revisit the question of imposing the restriction contained in Section 504(b)(1) we urge that, at minimum, the prohibition against "influencing the timing or manner of the taking of a census" be removed.

8. LSC is appropriated $420 million for the current fiscal year. H.R. 3764 authorizes $750 million for LSC. What impact would an increase of $330

[48] Brennan Ctr. Memo, *supra* note 23.

[49] *See* Letter from Reentry Advocates to Rep. Frank R. Wolf and Rep. José E. Serrano (Jun. 7, 2004), *available at* http://www.brennancenter.org/page/-/d/letter%20to%20congress%20reentry%20legal%20aid.pdf.

million, assuming that Congress appropriates the full authorization amount to LSC, have on legal services programs across the country?

The impact of a $330 million increase in funding would be a tremendous step toward closing the Justice Gap. The value in real dollars of the funding appropriated by Congress to LSC has declined dramatically over the last three decades. In fiscal year 1981, Congress allocated $321.3 million to LSC, which at the time was seen as the level sufficient to provide a minimum level of access to legal aid in every county – defined as two lawyers, with appropriate support, per every 10,000 low-income persons – although not enough to actually meet all the serious legal needs of low-income people.[50] The $750 million authorized under H.R. 3764 would roughly approximate the 1981 high-water funding mark, adjusted for inflation.

By setting a higher benchmark for funding, the bill would promote expanded assistance at a time of great need. On average, every legal aid attorney, funded by LSC and other sources, serves 6,415 people. In contrast, there is one private attorney for every 429 people in the general population.[51]

As a result of money shortfalls, LSC-funded programs turn away at least one person seeking help for each person served.[52] This means that approximately one million cases per year are turned away due to lack of funding. As striking as these figures are, they understate the real number of low-income people who go unserved because they do not include those who do not seek out help, those who were turned away from non-LSC-funded legal aid providers, or those who received limited advice but required full representation.

The increased in authorized funding level would come at a time when federal support for legal services is critical as other sources of funding dry up. After LSC grants, state-administered Interest on Lawyer Trust Account (IOLTA) programs are the largest source of revenue for civil legal aid programs across the country. In 2007, IOLTA income reached an all-time high of $371.2 million nationally. And in 2008, IOLTA revenue accounted for almost 13 percent of the funding for the nonprofit civil legal aid programs that also receive LSC funds. However, as interest rates plummeted to low levels not seen in decades, IOLTA revenue, too, has plummeted. Nationally, IOLTA income fell to $284 million in 2008, a 25 percent drop in income from 2007. IOLTA income fell another 32 percent in 2009, to about $92 million, spelling grant declines for legal services programs for years to come.

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[50] Legal Services Corporation, *Documenting the Justice Gap in America* 1 (2005), *available at* http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.
[51] Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 1 (Sept. 2009), *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf.
[52] *Id.* at 1.

Funding shortfalls resulting in layoffs, salary reductions, and office closures are being reported by legal services programs across the country.[53]

Increased funding also would allow programs to raise salaries to more reasonable levels, reducing staff turnover and the attendant costs of recruiting, training and supervising new employees. Legal aid attorneys' pay is the lowest of all public service attorneys, a category of pay that is substantially lower than in the private sector. The median starting salary for a legal aid lawyer is only $40,000, and that of a legal aid attorney with 11 to 15 years experience a mere $55,000. These salaries occur against the backdrop of ever rising educational debt that can total more than $100,000 for law school graduates.

9. In your written statement, you stated that "The Civil Access to Justice Act would retain the original LSC Act's restriction on using any LSC or private funds for efforts to lobby administrative or legislative bodies." Is your statement accurate? Please explain.

That statement was inaccurate. The corrected statement is as follows: The Civil Access to Justice Act would retain the original LSC Act's restriction on using any LSC funds for efforts to lobby administrative or legislative bodies, except under narrowly defined circumstances.

10. As you are aware, Congress has placed restrictions on the ability of LSC-funded programs to spend their funds from other sources. Are you aware of similar situations where Congress has placed restrictions on the ability of non-profits, which received Federal funding, from spending their funds from other sources?

The restriction on non-LSC funds is virtually unprecedented. This punitive measure subjects legal services offices to a more stringent regime than almost any other federal grantee.[54]

It is fairly common for the federal government to restrict the activities it funds; however, it is extremely rare and raises grave constitutional concerns when Congress restricts the activities that grantees choose to finance with their own, non-federal funds. Under LSC's "program integrity regulation," 45 C.F.R. § 1610, the only way that a recipient program could spend their own non-LSC funds on restricted work would be to operate a new organization out of a physically separate office, with separate staff and equipment. In practice,

[53] *See* The Economy and Civil Legal Services, Brennan Center for Justice, http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services/.

[54] We are aware of another restriction on grantees that applies to non-federal funds which has been adopted in the context of the government's program to combat HIV/AIDS internationally. *See* 22 U.S.C. § 7631(f). That restriction is currently the subject of ongoing First Amendment litigation that has resulted in a preliminary injunction against its enforcement. *See Alliance for Open Society Int'l, Inc. v. USAID*, 570 F.Supp.2d 533 (S.D.N.Y. 2008).

these conditions are so onerous that almost no program in the country has been able to create a separate affiliate under its control through which to conduct privately financed, restricted activities.

This model is wholly out of step with the traditional model for public-private partnerships. Other non-profits must account strictly for their receipt of government funds, but are not forced to operate dual systems out of separate offices in order to use their private funds to engage in constitutionally protected activities.

For example, faith-based organizations that receive government funds are subject to a much more relaxed regime. Even though the First Amendment's Establishment Clause bars the federal government from subsidizing or endorsing a religious grantee's religious activities, the government allows religious organizations to rely on a single set of staff to run federally-funded non-religious programs in a single physical space in which the organizations conduct privately financed religious activities such as worship and proselytization.

The punitive nature of LSC's physical separation regime is further underscored by contrasting it with the more reasonable rules applied in 2002 to federally funded stem cell research. Scientists using private funds to conduct research on federally-proscribed stem cell lines were required, for years, to operate two entirely separate labs, one for their privately funded research, another for their publicly funded research. In 2002, the National Institutes of Health found this restriction so expensive, inefficient, and contrary to principles of scientific research that it removed the restriction. NIH permitted government funded scientists to conduct privately-funded stem cell research alongside federally-funded research, in a single lab, so long as they use rigorous bookkeeping methods to ensure that any restricted stem cell experiments are financed exclusively with private dollars.

LSC-funded organizations should, at minimum, be placed on a level playing field with these and other federal grantees. In addition, given the stringent accounting and auditing requirements enforced by LSC, the federal government would have every assurance that its money would be spent for the purposes for which it was appropriated. LSC grantees abide by strict accounting rules that ensure that costs are properly allocated among LSC and other grants.

11. In your opening statement, you indicated that you do not support providing access to confidential information, such as client names, to the LSC Inspector General. However, you suggest that "there is a way to ensure accountability by using other means without violating state confidentiality protections." Please explain in more detail your suggestion.

Many of the clients who consult with legal services programs do so at considerable risk. Domestic violence victims face imminent physical harm should it be revealed that they have sought legal help. Tenants can face forcible evictions and other forms of retaliation when landlords learn that tenants have complained about conditions. Migrant farmworkers have been summarily fired and ejected from labor camps when a grower learns that they have sought legal help. For these reasons, the act of seeking legal help or advice is itself highly confidential. When such clients' names are linked with a "problem code" that identified the subject of their request for assistance, it is even more necessary that confidentiality be maintained.

In light of these concerns – many of which undergird the stringent protections provided by privilege laws and ethical rules that govern the legal profession – it is crucial that the bill minimize intrusions on confidentiality while ensuring that the Office of the Inspector General and other compliance authorities retain the tools necessary to ensure accountability.

Accountability has been and can continue to be maintained by the use of alternate protocols for protecting confidential client information. LSC's Office of Compliance and Enforcement, for example, has used unique client identifiers – alpha-numeric codes that have a one-to-one correspondence to a given person, place, or thing – in its compliance investigations of grantees as a means of obtaining necessary information while respecting the confidentiality of those who seek assistance as well as privilege laws. Indeed, the Office of the Inspector General itself has also used protocols at times that limit the disclosure of client names.

12. How does H.R. 3764 impact legal services programs across the country?

As the backbone of our nation's civil legal aid system, the Legal Services Corporation is in desperate need of revitalization and increased support, and H.R. 3764 is an essential first step toward fulfilling that need in several ways.

First, H.R. 3764 would pave the way to greatly expanded access to justice by authorizing $750 million in annual funding for LSC, the level necessary to return to the high water mark for funding reached in 1981, the last time a minimum level of access to LSC services was achieved.

Second, H.R. 3764 would lift a number of overreaching restrictions that prevent LSC grantees from most efficiently and effectively serving their clients. Most importantly, the bill would lift the onerous restriction on non-LSC funds that ties up over $526 million in non-LSC funding annually. The repeal of the restriction on non-LSC funds is key to allowing legal aid clients to obtain the same quality of legal services as all of those people who can afford the help of a private attorney, ensuring that state and other money is spent in the way it is intended, encouraging increased investment in legal aid

from non-federal donors, and avoiding the waste generated when programs are forced to set up separate offices to "unrestrict" their non-LSC money.

Lastly, the legislation contains a number of provisions that would modernize oversight and governance of LSC, addressing concerns that have been voiced by the Government Accountability Office and allowing LSC to move forward.

As the nation continues to reel from the economic crisis, civil legal aid has never been more important. More and more of our nation's families are turning to the courts with pressing civil legal needs, and both individuals and society suffer when these issues are left unresolved, or resolved unfavorably. The Civil Access to Justice Act goes a long way toward renewing our promise to "equal justice for all" and ensuring that all Americans are able to obtain the services they need to meaningfully access the courts.

Thank you again for the opportunity to provide information on the impact of H.R. 3764. Please let me know if the Brennan Center can be of further assistance.

Sincerely,

Rebekah Diller
Deputy Director, Justice Program

MATERIAL SUBMITTED BY THE HONORABLE TRENT FRANKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA, MEMBER, COMMITTEE ON THE JUDICIARY, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

TESTIMONY OF DONALD SAUNDERS

Director of Civil Legal Services

On Behalf Of

THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Before The

COMMERCIAL AND ADMINISTRATIVE LAW SUBCOMMITTEE

Of The

HOUSE JUDICIARY COMMITTEE

October 27, 2009

NLADA PRESENTATION TO THE
COMMERCIAL AND ADMINISTRATIVE LAW SUBCOMMITTEE
OF THE HOUSE JUDICIARY COMMITTEE

October 27, 2009

Good afternoon, Mr. Chairman. My name is Donald Saunders, and I am the Director of the Civil Division of the National Legal Aid & Defender Association ("NLADA"). I submit this testimony at the request of Chairman Cohen, and I would like to thank him and the members of the Subcommittee for giving NLADA the opportunity to voice its support for the Legal Services Corporation ("LSC") and to comment on the provisions of the Civil Access to Justice Act of 2009 ("House Bill") that was recently introduced by Subcommittee member Scott and numerous co-sponsors, including Chairman Cohen and Subcommittee Members Watt, Delahunt, Johnson and Conyers.

NLADA, founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating for equal access to justice for all people. For almost a century, NLADA has championed effective legal assistance for people who cannot afford counsel. We serve as a collective voice for both civil legal services and public defense services throughout the nation, and provide a wide range of services and benefits to its individual and organizational members. Among NLADA's 700 program members and 15,000 attorney members are most of the 137 recipients of LSC funds. I am proud to be here on their behalf and on behalf of the legal services community as a whole.

Framework for the Federal Legal Services Program

In the Preamble to the Constitution, our forefathers stated clearly and forcefully the purpose of the government they were creating:

> *We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense…*

and so on. It is noteworthy that "establish justice" comes before and is the basis for "domestic tranquility" and that both come before "provide for the common defense." I think the sequence and those priorities are not accidental and we need to constantly bear them in mind.

Until passage and implementation of the Economic Opportunity Act of 1964 ("OEO"), the federal government had not sought to "establish justice" for poor people and had not provided any support for their representation in civil legal matters. With the passage of the OEO, the federal government began its efforts to fill this void. Ten years later, in 1974, Congress passed and the President signed the Legal Services Corporation Act ("LSC Act"), the comprehensive legislation to make permanent the vital legal services program started under the OEO.

The findings and declaration of purpose to the original LSC Act set out the appropriate framework for considering how to once again move forward on establishing justice for poor people.[1] Congress found that--

1. "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;
2. "there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel…[;]
3. "[there is a need] to continue the present vital legal services program;
4. "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of [the Act];
5. "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;
6. "to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and
7. "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the [Model Rules of Professional Responsibility] …and the high standards of the legal profession."

It is important to keep in mind these critical principles, which are as salient today as they were when the LSC Act was first passed, and to evaluate where we are at present and where we should go in the future.

What we have today is a fundamentally sound legal services delivery system. Although it is woefully underfunded, unfairly restricted and continually besieged by its critics, the legal services delivery system continues to work extraordinarily well for those of our clients that it does serve. Of course, it can be made to work better. There is no enterprise, whether in government or in the private sector, that cannot benefit from efforts to enhance and improve it. That certainly includes the delivery of legal services to poor people in this country which has been evolving in form and in scope now for more than a century. Nevertheless, the basic system established by the LSC Act has served us well for 35 years; it should be improved and enhanced, not undermined or limited.

The civil legal aid system should be funded adequately and strengthened to provide meaningful access to our system of justice for low-income persons residing in the United States. Currently, the system is severely underfunded and LSC funding has remained relatively stagnant for more than a decade. As we show later in our testimony, LSC funding has gone down in real dollar terms by more than 48% since its high water mark in 1980. Yet, civil legal aid is a federal responsibility. LSC continues to be the primary single funder for civil legal aid, provides the underpinning and sets the standards for the entire program. To achieve equal access to justice in our country, it is therefore essential to increase LSC funding to provide a firm foundation for the rest of the legal aid system.

Nevertheless, increasing LSC funding is not sufficient to guarantee equal access to justice. Equal access is not a reality when legal services attorneys are not able to use

[1] See 42 USCA§2996 (Section 101 of the LSC Act).

the same tools and strategies that other members of the legal profession are free to use on behalf of their clients. For example, the current appropriations act restriction on claiming attorneys' fees in those situations where other lawyers are permitted to seek them limits the leverage which legal aid attorneys can use in negotiations with defendants and undermines the fundamental policy goals of awarding attorneys' fees against losing parties which are to deter and punish illegal conduct. These and other similar restrictions on what legal services attorneys can do on behalf of eligible clients that were imposed by appropriations riders in 1996 are inconsistent with the purposes of the LSC Act and limit the ability of LSC-funded programs to provide effective and efficient legal assistance to the disadvantaged residents of the United States.

Restricting what LSC programs can do with non-LSC funds is particularly troubling. Even though such restrictions were inappropriate in our view regarding LSC funds, there was no justification whatsoever for also preventing LSC programs from receiving non-LSC funds that are provided for purposes that Congress does not want to fund with federal dollars. State legislatures and other public funders as well as private donors should have the same opportunity as Congress to determine the purposes for which their funds will be used and to select the institutions that can best carry out those purposes. Congress should not interfere in decisions by other public funders, including state controlled IOLTA programs, on how to allocate their funds and with whom to contract, nor should it intrude unnecessarily into the funding decisions of the private sector. Moreover, Congress should encourage, rather than discourage, the creation of alternative funding sources for civil legal services and should encourage public-private collaboration to ensure the provision of effective legal services and efficient use of resources, rather than stimulate wasteful duplication of programs that occurs when funders are forced to put their resources elsewhere in order to accomplish their purposes.

Legal Needs of the Disadvantaged

As the testimony from the Legal Services Corporation, the American Bar Association and Harrison McIver of Memphis Area Legal Services aptly demonstrates, low-income households experience large numbers of legal needs, and the resources that are available to meet those needs are wholly inadequate. Legal needs studies conducted by numerous states during the past several years found that the combined efforts of publicly-funded legal services providers and the private bar serve only a small portion of the legal needs reported by low-income households. The LSC *Justice Gap* report showed that 50% of the eligible applicants who actually found their way to an LSC-funded program were turned away for lack of resources. Since 2000, numerous legal needs studies have been completed, and they have found that in the states studied, only 9% to 29.4% of the legal needs of low-income households were being met by legal aid programs or members of the private bar.

New legal needs are constantly arising to challenge the ability of legal aid programs to serve the low-income community. Current Census data reveals that the number of people in the United States eligible for LSC-funded services has increased significantly over the last several years, and, with the current economic crisis, the numbers of unemployed and newly poor who are likely to be eligible for LSC-funded services is growing rapidly. Low-income people are increasingly losing their homes to foreclosure, including large numbers of tenants who are being evicted because their landlords are facing foreclosure on rental properties. Low-wage workers are facing

major job losses as significant lay-offs continue. Instances of domestic violence are rising as individuals face significant stress caused by economic insecurity. Low-income consumers are experiencing mounting credit problems. As a result, the need for civil legal assistance is on the rise.

The current foreclosure crisis facing many thousands of low-income homeowners and tenants clearly illustrates the need for a strong legal services program. Families of limited means across the United States have turned to LSC-funded providers in increasing numbers to protect their vital interests in remaining in safe and affordable housing. LSC grantees in every region of the nation are reporting significant increases in the number of applicants needing legal assistance to prevent them from losing their homes to foreclosure. Many of these clients, both homeowners and tenants, have defenses that can only be raised by skilled and knowledgeable LSC attorneys. Otherwise, the legal system is hopelessly skewed in favor of lenders who fail to follow the law regarding interest rates, fees or other consumer protections.

The following stories from actual cases handled by legal services programs in the last several years amply underscore the fact that justice often turns on access to representation:

- Southern **Arizona** Legal Aid (SALA) helped a 55-year housecleaner stay in her home that had fallen prey to foreclosure. After living in her home for twenty years, she began struggling with her payments due to a 9.38 percent hike on the interest rate of her subprime loan. A SALA attorney assigned to her case sought a loan modification with her servicer to prevent her home from going into foreclosure. She was successful in negotiating a loan agreement that modified the interest rate to an amount that SALA's client could afford.

- Communities served by LSC grantee Neighborhood Legal Services of **Los Angeles County** are not only at the epicenter of the foreclosure crises, but are now looking at unemployment rates of 15% or more. Jobs in the informal service sector of the economy that many low-income families depend upon for survival have virtually disappeared - leaving homeowners jobless while they struggle with unconscionable mortgage payments to protect homes that are more than $100,000 underwater. For these families threatened with homelessness LSC-funded legal services programs are the safety net of last resort.

  Neighborhood Legal Services has responded decisively to meet this crisis by collaborating with community groups and local officials to develop creative pre-foreclosure solutions to keep families in their homes and maintain vibrant local communities. The City of Los Angeles has invested more than $1 million to pilot a model developed by NLS-LA and its partners in the Northeast San Fernando Valley that avoids foreclosures through a mortgage renegotiation framework that reduces principal and leaves homeowners with fixed-rate interest loans and affordable payments. NLS-LA is implementing similar models with the African-American middle class communities of South Los Angeles and in the multi-ethnic San Gabriel Valley City of El Monte. Next month the same model will be presented to HUD Secretary Donovan.

NLS-LA is also at the forefront of providing emergency help to families struggling to keep their lives together. In 2009 alone, NLS-LA's widely praised system of court-based Self-Help Legal Access Centers will assist more than 100,000 people with family law and eviction problems. And, through $1.2 million of city and county grants from HUD's stimulus-funded Homeless Prevention and Rapid Re-Housing Program (HPRP), NLS-LA added 7 new staff to help the newly unemployed avoid homelessness.

- "Rhonda" had lived with her husband Samuel in Shelby County **Iowa** for almost ten years with their three children. In their rural home, he controlled what she wore, who she spoke to, and where she went. There was always emotional abuse, but as the years passed, Richard became physically abusive. She didn't know where to turn and felt like she could not reach out or he would find out. She lived through many assaults, many injuries-- even while she was pregnant with his children. Richard has even raped her.

  At the end of 2008, Richard strangled Rhonda until she blacked out then he held her hostage behind locked doors for two days. When he left the home, she escaped and was able to get to help. She made contact with Iowa Legal Aid to discuss what options were available to protect her and the children from his violence. Legal Aid attorney staff helped her get a protection order that restrained him from further abuse. Rhonda and her children were able to live without the daily fear and isolation that Richard imposed, though not entirely. Richard violated the order many times, and Iowa Legal Aid was there to help her with holding him in contempt of the protection order, and helping her contact law enforcement. Richard eventually spent time in jail for his many violations and Rhonda and the children are working toward healing.

- The Miller family of Central **Massachusetts** thought they had exhausted all of their options in trying to save their home. Then they called legal aid.
  Marine specialist Philip Miller, his wife Morgan, and their two young children were close to being evicted after the mortgage company foreclosed on their home. Philip had returned injured after an 18-month tour of duty in Iraq and was unable to work due to injuries. At the same time, the couple's adjustable rate mortgage jumped to almost 11 percent.

  The Millers were unable to afford the inflated payments, and the mortgage company was unwilling to negotiate. Then, their legal aid attorney stepped in and got the mortgage company to dismiss the eviction. Now, more than a year later, the Millers are working with their attorney to renegotiate the terms of their loan, with the goal of buying back their home. Spc. Miller is healthy again and preparing to leave for his second tour of duty in Iraq.

- When Congress bailed out Fannie Mae, one provision included in the legislation instructed Fannie Mae not to evict tenants from foreclosed buildings, if the tenants were in good standing (paying their rent). The provision makes good sense -- in an economy in which foreclosed buildings sit empty, why should people be made homeless to create streets lined with empty buildings, when the current tenants want to stay and keep paying their rent? Fannie Mae was not complying with this requirement, however -- until lawyers at New Haven Legal

Assistance (not an LSC grantee) representing families threatened with illegal eviction threatened to file a national class action to force Fannie Mae to comply. Officials at Fannie Mae reached a settlement instructing their national network to follow the law. Since then, legal aid programs **across the country** have been working on behalf of paying tenants to enforce individual compliance with the corrected national Fannie Mae policy.

Along with the growth in those low-income populations that have traditionally been served by legal aid programs and the newly poor suffering from the recession, other new legal needs are also arising with respect to returning veterans from Iraq and Afghanistan, many with limited income and severe physical and mental disabilities, including post traumatic stress disorder and traumatic brain injuries, have begun to further swell the ranks of the low-income population and strain existing legal aid resources. Nationally, 5.6% of all veterans live below the poverty line, and a disproportionately high number are among America's homeless population. Many of these veterans have unique legal needs associated with their military service as well as the more typical legal problems experienced by low-income populations.

Reauthorization of the Legal Services Corporation Act

For many years LSC has enjoyed the support of a strong bi-partisan majority in Congress. Both the House of Representatives and the Obama Administration have sought a significant increase in funding for LSC for FY 2010. Nevertheless, the last time that Congress reauthorized LSC was 1977, and that reauthorization expired in 1980. Since 1980, LSC has been funded through annual appropriations that have often been encumbered by a series of riders that have been imposed, at least in part, because the LSC Act has not been revisited and thoughtfully revised through the reauthorizations process to take into account changing needs and circumstances.

Earlier this month, Representative Scott introduced the Civil Access to Justice Act of 2009 (H.R. 3764).[2] The House Bill represents a thoughtful reevaluation of and a significant improvement over the current LSC Act. The House Bill authorizes a significant increase in funding for LSC; it updates or eliminates numerous outdated LSC Act provisions; and eliminates or incorporates and improves upon a wide variety of provisions from the current appropriations act.

NLADA strongly supports the passage of the Civil Access to Justice Act of 2009.

The House Bill Responds to the Needs of the Low-Income Client Community

The House Bill includes numerous provisions that would, if enacted, assist LSC grantees to better respond to the legal needs of the low-income client community. The bill would authorize Congress to appropriate up to $750 million, which represents the inflation-adjusted amount that was appropriated for LSC in 1981, which was the high-

[2] In March of 2009, Senator Harkin introduced the Senate version of the Civil Access to Justice Act of 2009 (S. 718) ("Senate Bill") which is, in most respects very similar to the House version. However, the House Bill differs from its Senate counterpart in several aspects, and the House version improves upon the Senate Bill in a variety of ways.

water mark for LSC funding. That amount would go a long way toward filling the justice gap that exists.

The House bill would also eliminate the provision in the current appropriations act that restricts non-LSC funds to the same degree as LSC funds. The bill would permit grantees to use their non-LSC funds to serve categories of low-income clients who are not now permitted to be served by LSC grantees with any funds, including certain aliens and prisoners. The House Bill would still prohibit LSC funds from being used to represent these ineligible aliens and prisoners.

The House Bill also would eliminate the current restriction on attorneys' fees and class actions and would permit grantees to engage in legislative and administrative representation under a wider range of circumstances than is currently allowed, so that LSC funded advocates would be able to utilize the advocacy tools to represent their low-income clients that other lawyers are permitted to use on behalf of their paying clients.

While there are numerous restrictions and requirements that are included in the current appropriations act that NLADA has long opposed, since 1996 the appropriations acts have also added numerous positive improvements to the LSC system that have been incorporated into the House Bill which we support. The House Bill incorporates a system of competition for grants and census-based funding to help insure that LSC grantees provide high quality legal assistance and that limited LSC resources are fairly and appropriately distributed. The House Bill requires grantees' advocates to maintain timekeeping records to ensure the correct allocation of resources among funders and to improve accountability. And the House Bill continues to authorize funding for technology grants which have been crucial in grantees' efforts to improve the delivery of legal assistance.

The House Bill also includes a number of additional provisions to strengthen and improve LSC and its grantees. It contains a series of new LSC governance requirements recommended by the Government Accountability Office, including new requirements for LSC to improve its internal control structure and to protect against the impact of disasters. The bill also includes new restrictions on LSC's private fundraising and new requirements on LSC's use of funds for certain representational and other activities.

The House Bill requires LSC to develop new training standards on compliance and encourages training on domestic violence or other areas where grantee training is needed. In addition, the bill contains provisions that are intended to increase the participation of private attorneys in the delivery of legal assistance by encouraging pro bono services by private lawyers and requiring grantee boards to include pro bono liaisons to the State Bar. To promote the recruitment and retention of high quality recipient staff, the bill authorizes the continuation of LSC's pilot loan repayment assistance or initiation of other programs. To give grantees flexibility to include on their governing boards individuals who are able to assist in fundraising, development of relationships with the business community, and support from the public, the bill lowers the number of board members who are required to be lawyers.

In order to better protect the client privacy and confidentiality of client records, the House Bill limits LSC's access to client records that are confidential under applicable rules of professional responsibility. The bill eliminates the current appropriations act

provision that undermines the authority of State courts and bar associations to enforce the rules of professional responsibility dealing with client confidentiality that apply to the lawyers practicing within their jurisdictions, and restores the original LSC Act provision that respects that authority. Despite arguments that have long been made by LSC's Inspector General, LSC does not need to have access to client names in order to ensure compliance with Congressional mandates and other requirements. LSC's Office of Compliance and Enforcement ("OCE") and numerous other grant making agencies have successfully used unique client identifiers to check grantee records for compliance with restrictions and requirements and to ensure that clients are appropriately served.

The House Bill's Approach to Restrictions

Since 1996, LSC grantees have been encumbered in their efforts to represent their clients by a significant number of restrictions and requirements that apply to a grantee's LSC funds as well as to funds received from other federal, state, local and private funds. The House Bill would eliminate most of these restrictions and requirements that have hampered LSC grantees in their ability to provide a full range of legal assistance to the low-income client community.

As noted above, the House Bill would eliminate the restriction on the use of non-LSC funds, as well as the attorneys' fee and class action restriction. In addition, the bill retains but modifies several of the appropriations act restrictions on use of LSC funds. The House Bill would expand the categories of aliens who could be represented with LSC funds to include most aliens who are in the US legally and several limited categories of undocumented aliens including disaster victims, certain groups of children, and some victims of torture. The bill would limit the restriction on representation of prisoners to litigation involving prison conditions, and specifically permit prisoner re-entry litigation. The bill would limit the restriction on eviction defense for public housing residents to those who have been convicted of certain drug related charges.

The original LSC Act, as it was amended in 1977, included a number of limitations on LSC recipients. The House Bill leaves in place most of these LSC Act restrictions and requirements including the restrictions on: legislative and administrative advocacy; public policy advocacy training; organizing; priorities; financial eligibility; outside practice of law; political activity; fee-generating cases; criminal representation; habeas corpus representation; desegregation; and representation in Selective Service cases. The House Bill also leaves in place the appropriations act restriction on the use of both LSC and non-LSC funds for representation in abortion litigation.

Additional Needed Improvements

While we are very supportive of the House Bill as it is currently drafted, we think there may be areas where there could be additional improvements. For example, we believe it would be helpful if the bill made it clear that LSC grantees are subject to the OMB Circular A-133 ("A-133") and that grantee audits should be done using Government Auditing Standards ("GAS"). We also think that the bill should make it clear that LSC funds are to be considered Federal funds for purposes of Federal statutes relating to the proper expenditure of Federal funds.

We also believe that the bill should limit the authority of the LSC Office of Inspector General ("OIG") to impose additional auditing requirements on grantees

beyond those required by OMB A-133 and GAS. Although the OIG should have the authority to audit grantees to respond to complaints and to audit to ensure against instances of waste, fraud and abuse, the bill should clarify that regular monitoring for compliance with substantive statutory and regulatory restrictions is the role of OCE, not OIG or grantee auditors ("IPAs"). NLADA is willing to work with the Subcommittee staff as well as with LSC Management and the OIG to address these or any other concerns that they may have about the bill's treatment of grantee audits, ensuring compliance, and any other issues.

Need for Increased Funding

The $750,000,000 authorized by the House Bill is essential to ensure the ability of LSC grantees to close the widening justice gap in America.

Since its inception in 1975, the Legal Services Corporation has been the principle source of financial support for legal aid programs across the country. In its early days, LSC set a "minimum access" goal for federal funding of its grantees that would have provided enough federal dollars to support two LSC-funded lawyers for every 10,000 eligible poor people. Congress responded to LSC's effort, and by 1980 LSC funding had reached $300 million, the "minimum access" goal. By 1981, funding for LSC was $321,300,000, but that success was short lived. In 1982, in response to efforts by the Reagan Administration to eliminate the program in its entirety, Congress cut LSC funding by 25 percent, to $241 million.

Although the program survived, it was not until 1990 that LSC funding again surpassed, in actual dollars, the level it had reached in 1980, with an appropriation of $316,525,000. However, when adjusted for inflation, that amount still represented a cut of one-third from LSC's 1980 funding level. During the early 1990s, funding for LSC rebounded slowly, reaching its all-time high of $400 million in 1995. However, when adjusted for inflation, even that amount still represented a 28 percent cut from its 1980 funding level.

In 1996, Congress again decided to slash LSC funding, this time by 30 percent, to $278 million. When adjusted for inflation, this amount represented more than a 50 percent cut from LSC's 1980 funding level. Since 1996, LSC funding has remained relatively static with small cuts or modest increases in most years. In 2007, Congress provided LSC with $348 million, an increase of $22 million over the 2006 appropriation, its first significant increase in more than a decade. But each year, inflation has continued to eat away at the buying power of LSC grant funds. In 2008 Congress appropriated only $350,490,000, despite bills in both the House and the Senate that would have provided substantial increases over the amount appropriated for 2007. In 2009, Congress increased LSC funding to $390 million, but after taking account of inflation, the 2009 appropriation still represented a 48.2 percent cut from LSC's 1980 funding level. To keep up with inflation, 2009 LSC funding would have to have reached $752,938,299.

Non-LSC Funding

In part in response to the reductions in LSC funding in the early 1980s and mid 1990s, numerous legal aid programs have aggressively sought resources from non-LSC funding sources. Even though LSC remains the largest single source of legal aid funding, in many states around the country, the legal aid program today is primarily supported by funds from other sources. As a result, over the last twenty years, there has been a radical shift in funding from LSC and other federal programs to a more diversified funding base, including substantial increases from state sources, and the percentage of total legal aid funding provided by the federal government through LSC has shrunk significantly.

Since 1982, legal aid funding from state and local governments has increased from a few million dollars to over $370 million.[3] Most of this increase can be attributed to proceeds from Interest on Lawyer Trust Account ("IOLTA") programs, which have now been implemented in every state. A number of new initiatives resulted in expansions in IOLTA revenue in many states. These initiatives included changes from voluntary to mandatory IOLTA, or from opt-in to opt-out programs, changes in legislation or court rules regarding interest rates that must be paid on IOLTA accounts, and, in some states, aggressive and successful negotiations with financial institutions. In 2007, IOLTA resources rose to $123,924,000. However, because of significant drops in interest rates, increases in bank fees and substantial slowdowns in real estate transactions and general business activity, IOLTA revenues have dropped significantly in the last year from what programs had expected to earn. In addition, because IOLTA programs still vary significantly from state to state, available IOLTA funding for legal aid programs differ greatly, depending on the location. In 2008, IOLTA income was down 23% nationwide, reflecting both dwindling IOLTA fund balances and the miniscule federal funds interest rate. In some states, IOLTA income was down over 60%. While cumulative data is not yet readily available regarding the overall perspective on state and local public appropriations, many states report the potential for significant cuts in these areas as well.

Within the last several years, substantial new state funding for legal aid has come from general state or local governmental appropriations, filing fee surcharges and other state governmental initiatives. Until the recent economic downturn, it appeared that significant state funds would likely continue to be available for legal aid programs because state revenue growth seemed to be strong enough to support spending demands. However, in the last year, states have begun to experience extremely tight fiscal conditions, and these conditions are having a substantial impact on the amount of funds appropriated for civil legal assistance programs. It is impossible to predict future state spending on civil legal aid, as well as on other areas that will have an impact on the demand for legal assistance, because state fiscal conditions may change and the federal government may continue to shift more costs to state governments. With prospects for continued increases in state funding dimming, expanded federal funding becomes even more important.

Significant Geographic Funding Disparities

[3] The exact amount of state funding for civil legal assistance has not been fully documented, because much of this funding has gone to non-LSC funded programs, which, unlike LSC-funded programs, do not have to report to any central funding source.

While LSC funds are distributed according to the 2000 census data on individuals living below the Federal Poverty Line, non-LSC funding sources are not distributed equally among states, and there are enormous disparities in the legal aid resources that are available in different parts of the country. The lowest-funded states are in the South and Rocky Mountain states, and the highest-funded states are in the Northeast, Mid-Atlantic, Midwest, and West.

LSC funding provides the critical foundation for legal aid programs across the country. Those LSC grantees in areas of the country where it is difficult to raise substantial amounts of non-LSC resources are almost wholly dependent on LSC funds for their continued existence. In other states, LSC funding provides the essential foundation to leverage and raise other resources. Regardless of where on the spectrum of non-LSC funding a program lies, increased federal funding is absolutely critical to expanding their ability to provide access to legal assistance for the low-income community and to close the justice gap.

But federal funding has not kept pace, and today the money programs receive from LSC purchases only half of what it did in 1980, when LSC appropriations provided "minimum access," an amount that could support two lawyers for every 10,000 poor people in a geographic area. In order to secure the foundation of the civil legal aid program, federal funding must be increased and secured into the future.

Conclusion

We believe that, if adopted, the House bill will significantly improve the ability of LSC grantees to effectively serve the low-income community. The bill includes a framework to provide additional resources that are sorely needed to help fill the enormous justice gap that exists today. The bill eliminates numerous restrictions that have impeded the ability of LSC grantees to fully serve many financially eligible members of the low-income community and to utilize the tools that attorneys with paying clients can now use to represent their clients. The bill respects the historical role of States to establish and enforce rules of professional responsibility for the attorneys who practice in their jurisdictions

In conclusion, I would like to thank you for holding this hearing and for your support for LSC and the civil legal services community. Providing civil legal aid is an integral part of constructing the foundation for ensuring that the least advantaged among us receive the help they need to build healthy, happy families and live constructive, fulfilling lives. A 48.2 percent reduction in funding for LSC and turning away 50 percent of those who seek legal aid is NOT living up to the constitutional promise of "establish[ing] justice" that we all embrace. The federal government can and should do more. The House Bill will enhance the goal of "justice for all," not erode it with unreasonable restrictions. Our clients and your constituents deserve no less.

MATERIAL SUBMITTED BY THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

National Council of the Churches of Christ in the USA
Office of the General Secretary

November 29, 2005

The Honorable Frank R. Wolf
Chairman
Subcommittee on Science, State, Justice and Commerce
Committee on Appropriations
241 Cannon House Office Building
Washington, DC 20515-4610

The Honorable Alan B. Mollohan
Ranking Member
Subcommittee on Science, State, Justice and Commerce
Committee on Appropriations
2302 Rayburn House Office Building
Washington, DC 20515-4801

Dear Chairman Wolf and Congressman Mollohan:

As faith-based organizations serving low-income communities, we write today to voice our concern about a federal appropriations law that interferes with privately financed activities of deep importance to our country's most vulnerable families.

The law – a restriction annually accompanying federal funding distributed by the Legal Services Corporation – limits the work that independent civil legal aid programs can do with their own funds that they raise from private, state and local sources. We are deeply concerned that this "private money restriction," which encumbers more than $300 million in non-federal funds each year, hurts the families we serve, imposes unnecessary costs, and sets a dangerous precedent for public-private partnerships.

The law closes the doors of justice for many low-income individuals and families who simply cannot afford to hire a private lawyer to help them in civil matters. Our organizations need to rely on local legal aid programs to help people in difficult circumstances resolve problems that can otherwise undermine and even destroy their lives. A legal aid advocate is often a lifeline for low-income families, victims of domestic violence, the elderly and the disabled. We are particularly concerned about the law's effect in denying basic legal assistance to immigrant communities and to all people who are incarcerated.

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We understand that LSC has applied the private money restriction by requiring nonprofits that wish to spend their own funds on restricted categories of advocacy to first establish a physically separate office – with separate staff, office space, and equipment. This compulsory physical separation imposes unnecessary costs on financially strapped legal aid programs and creates costly obstacles to private philanthropy.

We are also concerned that this physical separation model establishes a dangerous precedent, more generally, for a range of public-private partnerships. Currently, recipients of federal funds under the Faith-Based Initiative and Charitable Choice programs – like virtually all other federal grantees – are free to use non-federal, privately raised funds to finance a broad range of activities without stringent restrictions like those imposed on LSC grantees. But we are mindful that if the physical separation model for legal aid is imported into faith-based settings (as may occur if the government continues to defend this model in litigation and policy debates), the result would likely undermine our efforts to foster partnerships between faith-based organizations and government to deliver services to low-income communities.

We greatly appreciate your support for civil legal aid and for its important role in enabling thousands of low-income families nationwide to resolve disputes and move forward with their lives. The core values of our faiths teach us to care for society's most vulnerable members. The services provided by LSC recipient programs are vital for this purpose and should not be unwisely restricted. Please continue your leadership on behalf of America's families by removing the LSC private money restriction.

Sincerely,

National Council of Churches of Christ in the USA
Rev. Eileen W. Lindner, PhD
Deputy General Secretary of Research and Planning
New York, New York

Pax Christi USA
Erie, Pennsylvania

National Baptist Convention, USA
Reverend Dr. William Shaw, President
Philadelphia, Pennsylvania

Forever Crowned Ministries
Wichita, Kansas

Evangelicals for Social Action
Dr. Ronald J. Sider, President
Wynnewood, Pennsylvania

Latino Leadership Foundation
Chicago, Illinois

Exodus Transitional Community, Inc.
New York, New York

Metropolitan Area Church Council of Columbus
Columbus, Ohio

Virginia Interfaith Center for Public Policy
Richmond, Virginia

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Baptist General Convention of Texas
Dallas, Texas

Reverend Guillermo Marquez-Sterling
Coral Gables Congregational Church
Coral Gables, Florida

Heartsong Hermitage
Alberta, Virginia

New Jersey Council of Churches
Trenton, New Jersey

Tulsa Ten-Point Coalition
Tulsa, Oklahoma

Lutheran Office of Governmental
Ministry in New Jersey
Trenton, New Jersey

High Impact Leadership Coalition
College Park, Maryland

New City Kids Church
Jersey City, New Jersey

Interfaith Legal Services
Columbus, Ohio

Mississippi C.U.R.E. (Citizens United for
Rehabilitation of Errants)
Philadelphia, Mississippi

Alfred Santino
Director, Holistic Ministry Team
Christian Reformed Church
Classes Hudson - Hackensack
Philadelphia, Pennsylvania
New York, New York

New Jersey Catholic Conference
Trenton, New Jersey

Reverend Dr. William H. Gray III
Pastor of Bright Hope Baptist Church
Philadelphia, Pennsylvania

Austin Interfaith
Austin, Texas

Catholics for Faithful Citizenship
Columbus, Ohio

Bet Tzedek Legal Services
Los Angeles, California

MUST Marietta/MUST Housing
(Ministries United for Service Training)
Marietta, Georgia

Catholic Social Services
Anchorage, Alaska

Victory Center Ministries
Clinton, Iowa

Abe Brown Ministries
Tampa, Florida

Homeless Coalition of
Hillsborough County
Tampa, Florida

Reverend Ken Vander Wall
Campus Pastor of Varsity Christian
Fellowship
North Haledon, New Jersey

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LegalTimes.com

Let's Heal Legal Services

Bob Barr

12-12-2005

For the last nine years Congress has imposed a wasteful, anti-libertarian, and downright dangerous restriction on how legal aid organizations funded by the federal **Legal Services Corp.** can spend *private* donations and state grants.

I know. I was partly responsible. But the LSC has improved in the years since I voted to impose this restriction. And now, for the sake of our nation's low-income families in need of legal representation, often to fight oppressive government power, it's time to rethink some of these financial constraints.

A few years ago I said, plain and simple, "I'm not a fan of spending federal money on the Legal Services Corporation." As a member of Congress in 1996, I voted for a series of restrictions — which President Bill Clinton signed into law — that put a severe damper on the controversial LSC. To depoliticize (and thereby improve) legal services for our nation's indigent, we prohibited LSC-funded groups from filing class actions and collecting attorney fees. We also banned LSC attorneys from representing anyone in prison and many classes of immigrants.

Ten years later, the LSC is here to stay, and, more important, it's improved since 1996. As the chair for two years of the House oversight committee that monitors the LSC and as a member of the Judiciary Committee for the entire eight years I served in Congress, I know the organization's problems better than almost anyone. The LSC needed cleaning up, and with that done, many conservatives can and should support much of its work.

Surprised? Many others would be too, but think about it: Empowering citizens to fight oppressive or overly powerful government is a very conservative notion. And there are many examples of the important work that legal services programs do every day.

Take one: I have been pleased — and more than a little shocked — to learn that **South Jersey Legal Services**, an LSC-funded program, is helping low-income individuals and families in Camden defend their property rights against an expansive eminent domain seizure by the city. They don't want to leave their homes so that a private company can come in, redevelop the neighborhood, and turn a healthy profit. But not all low-income families will be so lucky to have such legal representation.

COMPLETELY SEPARATE

Unfortunately, a restriction on the LSC, the "physical-separation requirement," limits the work LSC grantees can do. The requirement forces them to strictly quarantine privately funded activities from those financed with federal money. Civil legal aid groups can perform restricted activities — such as seeking court-ordered attorney fees and helping incarcerated people plan for re-entry — only with nonfederal money and only if they carry out those activities in a physically separate facility with separate staff.

However, from a practical standpoint, because setting up a separate organization with its own office, executive director, computers, copiers, and personnel costs so much, few organizations can bear the financial burden of complying with physical separation.

The effect? State, local, and private donations get washed away. Funds are siphoned off to cover

unnecessary administrative expenses. And lawyers fighting civil legal battles each year on behalf of our nation's low-income families must turn away thousands of poor Americans who need legal representation.

Frustrated and fed up, three legal services offices in New York City challenged the physical-separation requirement in 2001. The case is *Velazquez v. Legal Services Corp.* In court the LSC, defending the legislative restriction, claimed that physical separation is necessary to ensure that the federal government does not subsidize or appear to support activities Congress has chosen not to fund. A more lenient regime, it argued, simply would not suffice.

On the other side, the legal services programs aptly argued that the physical-separation requirement is unconstitutional because it limits speech protected by the First Amendment. They pointed out that less burdensome measures, such as precise bookkeeping, could ensure that government grants don't fund restricted activities.

U.S. District Judge Frederic Block of the Eastern District of New York agreed with the three legal services providers. Last year, in a sound, well-written opinion, he issued a preliminary injunction barring the LSC from enforcing the physical-separation requirement against the three plaintiffs. He also set out a sensible model for tracking funds that would allow the government to determine how federal money is spent without meddling unnecessarily with local, state, and private funds.

But the LSC and the Department of Justice appealed Judge Block's decision. The case is fully briefed, and the U.S. Court of Appeals for the 2nd Circuit heard oral argument on Nov. 2.

I hope that the appeals court will agree with Judge Block and allow the plaintiffs to do their important work in a much more efficient manner, one less controlled by the federal government. But even if the 2nd Circuit upholds the lower court's ruling, the decision will apply at most to the LSC programs in that jurisdiction — not to all LSC grantees across the country. Other legal services offices, state and local governments, and private donors will not be free of this onerous restriction. This means that the vast majority of local, state, and private donations will remain tangled up in this federal rule.

If the LSC and the Justice Department insist on wasting time and taxpayer dollars defending an unconstitutional and unwise law, it is up to Congress to correct this mistake. Just as we don't want a nanny state telling us not to smoke cigarettes, we don't want a nanny Congress telling government partners how to spend nonfederal dollars.

It's one thing to disfavor a federal program; it's quite another to tell private citizens and states how *their* money can or cannot be used. Yet that is the practical effect when states and private donations must be diverted to separate organizations for poor families to obtain legal representation in certain types of civil cases.

FAITH-BASED SEPARATION

In other areas, the government does not require such stringent separation between federally and nonfederally funded activities. Take, for example, grantees of President George W. Bush's **Faith-Based and Community Initiatives**. Faith-based organizations guarantee that government money intended to fund social services does not support religious activities in violation of the establishment clause. They ensure this by keeping careful records. But they are not forced to run their religious activities and social services out of two separate facilities with two separate staffs. Why not apply the same standards for separation to civil legal aid groups?

Or, perhaps more important for many conservatives, what if the courts accept the government's argument in *Velazquez* that physical separation is a necessary requirement for legal services programs?

If physical separation's web of waste grows to entangle faith-based organizations, these groups could very well themselves be required to cordon off religious activities from their hugely successful, government-funded social services initiatives.

With this risk looming, faith-based groups are beginning to rally to stave off what could lead to the

death of public-private partnerships as we know them. Just last month, 31 leading faith-based groups — including **Evangelicals for Social Action**, the **National Council of Churches of Christ**, the **Exodus Transitional Community**, the **Virginia Interfaith Center for Public Policy**, and the **National Baptist Convention** — signed a letter urging Congress to lift the physical-separation requirement. These groups represent more than 55 million Americans of faith.

Last year groups committed to helping prisoners re-enter society and rebuild their lives, such as Chuck Colson's **Prison Fellowship International**, also sent a letter to Congress expressing their concern about the physical-separation requirement. Clearly, it is time for the broader conservative community to mobilize against this pernicious restriction.

The physical-separation requirement prevents thousands of Americans from receiving adequate civil legal representation. It wastes both taxpayer dollars and charitable contributions. It needlessly trespasses into the affairs of private citizens, and it threatens to destroy the public-private partnership model that has reaped great benefits since the Reagan years.

Today, no American should be proud of this wasteful restriction. I'm certainly not, and neither should my fellow conservatives.

Bob Barr *represented the 7th District of Georgia in the U.S. House of Representatives from 1995 to 2003. He currently is president of* ***Liberty Strategies*** *and practices law in Atlanta.*

national association of Evangelicals
COOPERATION WITHOUT COMPROMISE

July 13, 2006

The Honorable Richard C. Shelby
Chairman
Subcommittee on Commerce, Justice and Science
Committee on Appropriations
U.S. Capitol, Room S-146A
Washington, DC 20510

The Honorable Barbara A. Mikulski
Ranking Member
Subcommittee on Commerce, Justice and Science
Committee on Appropriations
Senate Dirksen Building, Room 144
Washington, DC 20510

Dear Chairman Shelby and Senator Mikulski:

Ministering to the poor, the persecuted, the disabled, the sick, and the oppressed is among the most important callings of evangelical Christians. With that responsibility in mind, the National Association of Evangelicals is deeply concerned about a federal appropriations law that interferes with privately financed activities of deep importance to our country's most vulnerable families.

The law – an appropriations rider attached annually to the Legal Services Corporation's federal funding – limits the work that independent civil legal aid programs can do with the more than $300 million that they raise each year from non-federal sources. This "private money restriction" hurts the most vulnerable people in our society, erects unnecessary bureaucratic barriers to community-based services, and sets a dangerous precedent for public-private partnerships.

The law closes the doors of justice for many low-income individuals and families who simply cannot afford to hire a private lawyer to help them in civil matters. Without a helping hand from legal aid programs and the shared blessings of others, low-income families too often have no place else to turn for help. A legal aid advocate is often a lifeline for low-income families, victims of domestic violence and human trafficking, people preparing to reenter society from prison, immigrants, the elderly, and the disabled.

As you know, LSC has applied the private money restriction by requiring nonprofits that wish to spend their own funds on restricted categories of advocacy to first establish a physically separate office – with separate staff, office space, and equipment. This compulsory physical separation imposes unnecessary costs on financially strapped legal aid programs and creates costly obstacles to private philanthropy. The costs associated with this duplication often means the local and state LSC chapters cannot furnish that assistance at all because they do not have sufficient funds to pay for duplicate offices, staff and equipment.

I am also concerned that this physical separation model establishes a dangerous precedent, more generally, for a range of public-private partnerships. Currently, recipients of federal funds under the Faith-Based Initiative and Charitable Choice programs – like virtually all other federal grantees – are free to use non-federal, privately raised funds to finance a broad range of activities without stringent restrictions like those imposed on LSC grantees. But I am mindful that if the physical separation model for legal aid is imported into – or required to be applied to – faith-based settings (as may occur if the government continues to defend this model in litigation and policy debates), the result would likely undermine our efforts to foster partnerships between faith-based organizations and government to deliver services to low-income communities.

I greatly appreciate your support for civil legal aid and for its important role in empowering low-income families to resolve disputes and move forward with their lives. God measures societies by how they treat the people at the bottom, and He teaches us to care for the poor and oppressed among us. The services provided by LSC recipient programs are vital for this purpose and should not be unwisely restricted. Please continue your leadership on behalf of America's families by working to eliminate the LSC private money restriction.

Sincerely,

Rev. Richard Cizik
Vice President for Governmental Affairs
National Association of Evangelicals

The Honorable Barbara Mikulski
Chair, Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
144 Dirksen Office Building
Washington, DC 20510

The Honorable Alan Mollohan
Chair, Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
Room H-309, The Capitol Building
Washington, DC 20515

The Honorable Richard Shelby
Ranking Member, Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
123 Hart Office Building
Washington, DC 20510

The Honorable Frank Wolf
Ranking Member, Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
1016 Longworth House Office Building
Washington, DC 20515

June 3, 2009

Dear Chairwoman Mikulski, Chairman Mollohan, Senator Shelby and Representative Wolf:

We write to urge the Commerce, Justice, and Science Appropriations Subcommittees to lift several of the restrictions in the Legal Services Corporation ("LSC") appropriation rider that interfere with the effective and efficient delivery of legal aid. Specifically, we call on Congress to lift the legal services restriction on state, local, and private funds[1] as well as to eliminate some of the restrictions on LSC funds that bar LSC-funded attorneys from using the full range of legal tools for effective representation and thereby prevent low-income people from obtaining their fair day in court. This change would, at no cost to the federal government, vastly expand access to justice for low-income families.

Since 1996, a rider has been placed on LSC's annual federal appropriation, limiting both the tools LSC-funded legal services providers can use when representing eligible clients and the types of clients those providers can represent. Families and communities across the country are suffering because of the restrictions: victims of consumer fraud and illegal housing practices are placed at a disadvantage because LSC-funded attorneys cannot seek attorneys' fees; efforts to help prisoners reenter society are needlessly postponed; communities are hamstrung in their ability to combat predatory lending practices because legal aid clients cannot participate in class actions; and those most knowledgeable about issues critical to low-income clients cannot engage themselves in legislative and administrative reform efforts.

[1] This letter does not seek to eliminate the rider's current ban on using LSC or non-LSC funds for abortion-related litigation.

The most onerous of the restrictions extends all of the restrictions to every dollar of revenue that LSC-funded legal services providers receive, including revenue from state and local governments, private donors and other federal, non-LSC sources. A virtually unprecedented federal overreach, this restriction encumbers more than $490 million in non-LSC dollars nationally and 58.1 percent of LSC-grantees' total funds.[2] In some states, this "restriction on state, local and private funds" gives the federal government remarkably disproportionate control over programs' funds regardless of the funding source. For example, in New Jersey, only 13 percent of LSC-funded programs' total funding comes from LSC,[3] yet the restriction on state, local and private funds dictates how the other 87 percent of funds may be spent.

The restriction on state, local and private funds also results in the wasteful spending of precious public resources. In many states, justice planners have had to set up entirely separate organizations and law offices, funded by state and local public funders and private charitable sources, to do the work that LSC-funded programs cannot do, resulting in wasteful duplication of overhead, personnel and administrative costs.

The recent economic crisis has only exacerbated the effects of the restrictions and heightened the need to eliminate the most burdensome of them. The legal problems associated with the housing market crisis have further disadvantaged clients of LSC-funded organizations in court, as their lawyers lack the often crucial leverage of attorneys' fees when fighting deceitful foreclosure consultants and as affected clients are unable to join class action lawsuits against predatory lenders.

In addition, at a time of rising need, plummeting interest rates have dried up a key source of legal aid revenue, IOLTA funds, forcing legal aid offices to lay off staff, cut salaries and leave increasing numbers without needed assistance. Money now wasted in duplicative expenditures could be redirected to serve more clients if the restriction on state, local and private funds were removed. Moreover, permitting LSC-funded organizations to collect attorneys' fees would be a much needed revenue-generator.

For all these reasons, we urge you to amend the rider in the fiscal 2010 appropriation to LSC, a no-cost way to help make LSC-funded programs more efficient and effective, and to improve access to justice for the most vulnerable during these harsh economic times.

Thank you for your consideration of this important issue.

Sincerely,[4]

National Organizations

AARP

Alliance for Justice

Asian American Legal Defense and Education Fund

Boat People SOS

Brennan Center for Justice at NYU School of Law

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[2] *See* Legal Servs. Corp., Fact Book 2007, at 10 (2008), *available at* http://www.lsc.gov/pdfs/factbook2007.pdf.
[3] *Id.* at 9.
[4] Signatory list current as of June 4, 2009. An earlier version of this letter was sent on May 4, 2009.

Center for Law and Social Policy

Center for Lobbying in the Public Interest

Child Care Law Center

Cleary Gottlieb Steen & Hamilton LLP*

Disability Rights Education and Defense Fund, Inc.*

Elias Foundation

Ella Fitzgerald Charitable Foundation

Equal Justice Society*

Equal Justice Works*

Evangelicals for Social Action

Families USA

Garvey Schubert Barer*

Human Rights Watch

Independent Sector

Insight Center for Community Economic Development (formerly NEDLC)*

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America and Local 2320, the National Organization of Legal Services Workers

Leadership Conference on Civil Rights

Legal Action Center

Lowenstein Sandler PC*

Medicare Rights Center

Mexican American Legal Defense and Educational Fund

National Association of IOLTA Programs

National Center for Law and Economic Justice*

National Center for Lesbian Rights*

National Committee for Responsive Philanthropy

National Council of Nonprofits

National Employment Law Project

National Health Law Program

National Housing Law Project*

National Legal Aid & Defender Association

National Organization of Social Security Claimants' Representatives

National Senior Citizens Law Center*

OMB Watch

Orrick, Herrington & Sutcliffe LLP*

Poverty & Race Research Action Council

Prison Fellowship

Sargent Shriver National Center on Poverty Law

Service Employees International Union

Schulte Roth & Zabel LLP*

Skadden, Arps, Slate, Meagher & Flom LLP*

Youth Law Center*

State & Local Organizations

Access Now, Inc. (Florida)

AIDS Legal Referral Panel (California)*

Affordable Housing Advocates (California)*

Alabama Civil Justice Foundation

Alameda County Bar Association (California)*

Arizona Foundation for Legal Services & Education

Asian Law Alliance (California)*

Asian Law Caucus (California)*

Bet Tzedek Legal Services (California)*

Bread for the City (Washington, D.C.)

The Bronx Defenders (New York)

The Children's Law Center (Washington, D.C.)

California Advocates for Nursing Home Reform

Californians for Legal Aid*

Casa Cornelia Law Center (California)*

Centro Legal de la Raza (California)*

Coalition of California Welfare Rights Organizations, Inc.*

Colorado Lawyer Trust Account Foundation

* Signed on after May 4, 2009

Community Foundation of St. Joseph County (Indiana)

Community Legal Services, Inc. (Pennsylvania)

Disability Rights California*

Disability Rights Legal Center (California)*

Empire Justice Center (New York)

D.C. Employment Justice Center

Family Violence Law Center (California)*

ForeverCrowned Ministry, Inc. (Kansas)

Harriett Buhai Center for Family Law (California)*

Housing and Economic Rights Advocates (California)*

Impact Fund (California)*

Inland Empire Latino Lawyers Association, Legal Aid Project (California)*

La Raza Centro Legal (California)*

Law Foundation of Silicon Valley (California)*

Legal Aid Association of California*

Legal Aid Foundation of Colorado

Legal Aid Society of San Mateo County (California)*

Legal Aid Society of the District of Columbia

Legal Services Corporation of Virginia

Legal Services for Children (California)*

Legal Voice (formerly Northwest Women's Law Center) (Washington)*

Los Angeles Center for Law and Justice (California)*

Lutheran Office of Governmental Ministries in New Jersey

Maine Bar Foundation

Maryland Association of Nonprofit Organizations

Maryland Legal Services Corporation

Massachusetts Law Reform Institute

Mental Health Advocacy Services, Inc. (California)*

Michigan Designated State Planning Body for Legal Services

Michigan Nonprofit Association

Mississippi Center for Justice*

Montana Justice Foundation

MUST Ministries (Georgia)

Nevada Law Foundation

New Hampshire Bar Foundation

New Jersey Catholic Conference

Nonprofit Coordinating Committee of New York

Peter Edelman, Chair
District of Columbia Access to Justice Commission

Public Advocates Inc. (California)*

Public Counsel (California)*

Public Interest Clearinghouse (California)*

Public Interest Law Project (California)*

Salt Lake County (Utah) Aging Services*

San Diego Volunteer Lawyer Program, Inc. (California)*

STEPS to End Family Violence (New York)

Texas Access to Justice Foundation

Virginia State Bar

Washington Legal Clinic for the Homeless (Washington, D.C.)

Western Center on Law and Poverty (California)*

Worksafe Law Center (California)*

* Signed on after May 4, 2009

The Washington Post

A Fair Shake for Legal Aid

Congress begins to see the value of helping the underprivileged get attorneys.

Monday, July 13, 2009

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FOR THE past 13 years, the Legal Services Corp. has had its hands tied while trying to fulfill its mission of representing poor people in civil matters. Legal aid lawyers, for example, have been prohibited from using federal and even privately procured or state and local funds to initiate class actions; they have also been barred from seeking attorney's fees even when they prevail in court -- a benefit available to other lawyers in many civil rights or consumer protection matters. What's worse, legal aid clinics have been grossly underfunded, a result of cutbacks after the 1994 Republican congressional victories.

This year, even lawmakers who once looked askance at legal aid programs as either a waste of money or a waste of time are rethinking their positions, in large part because more and more constituents need legal guidance to secure such things as unemployment benefits or to maneuver through foreclosure proceedings. It is unfortunate that it took a deep economic recession to highlight the importance of legal aid, but it is gratifying to see -- finally -- an appropriate legislative response.

Senate appropriators agreed two weeks ago to lift almost all restrictions on how legal aid offices may use non-federal funds; they also have given legal aid lawyers the right to seek reimbursement of attorney's fees in litigation underwritten with non-federal money. Sen. Barbara A. Mikulski (D-Md.), chairwoman of the subcommittee that oversees legal aid funding, deserves credit for these latest developments, which won bipartisan approval from committee members. The full Senate is expected to vote on the bill before the August recess; the Senate must reconcile its bill with one passed by the House this year.

The Senate effort is preferable to the House version because it goes further in freeing up legal aid lawyers, but it is not perfect. Legal aid lawyers may not seek fees in cases funded with federal dollars -- a nonsensical restriction that prevents legal aid clinics from generating more of their own revenue. The bill also would prohibit legal aid lawyers from using even non-federal funds to represent clients in abortion- or prison-related matters.

Senate lawmakers have thus far also not been as generous as their House counterparts in setting the LSC's budget for fiscal 2010. Senators anted up $400 million -- $40 million less than the House and $35 million less than requested by President Obama. The Senate should move closer to the House number, given the tremendous need for these services and the fact that even the $440 million would essentially only restore LSC's funding to what it was a decade ago.

View all comments that have been posted about this article.

And Justice for All

Prioritizing Free Legal Assistance During the Great Recession

Joy Moses July 2009

WWW.AMERICANPROGRESS.ORG

And Justice for All

Prioritizing Free Legal Assistance During the Great Recession

Joy Moses July 2009

Executive summary

"Did you hear the one about the lawyer . . ." is a familiar beginning to jokes about a profession often labeled with negative stereotypes such as unethical, overpriced, and "ambulance chasing." For millions of low-income families, however, lawyers are individuals who assist them in securing basic necessities such as shelter, food, education, income, and physical safety. The talents of this group of service-oriented attorneys are sorely needed during the current recession as the number of people experiencing poverty expands along with their list of legal troubles.

Families are struggling with the challenges associated with the foreclosure crisis as well as with accessing government benefits, dealing with family strife caused by stress, and consumer concerns. They need attorney representation to help deal with these concerns, but representation is not always available to low-income people due to a previously existing justice gap between the haves and the have-nots that results in a shortage of good lawyers providing free legal services to the poor.

The recession is only widening this gap as avenues that provide free legal services to the poor are facing a series of financial challenges:

- Although Congress increased funding in 2009 for the Legal Services Corporation—a federal agency that funds and monitors free civil legal services—the estimated per-person investment is only $6.85—the lowest in the program's more than 30-year history.
- Many states and localities are operating under deficits and are struggling to balance budgets, which limits their ability to help.
- Plummeting interest rates and shrinking amounts of available principal are reducing revenues for Interest on Lawyers Trust Account programs that make grants to legal aid providers.
- Declines in the stock market are affecting the ability of foundations and individual donors to make contributions to legal services nonprofits.

The Center for American Progress suggests the following in order to help manage this crisis:

- Congress should increase fiscal year 2010 appropriations for the Legal Services Corporation. They should match the corporation's request for $485.1 million or at the very least implement the House-passed figure of $440 million. Congress should also lift current restrictions on legal services organizations when it passes appropriations legislation because the restrictions waste resources and hinder the pursuit of justice.

- Congress should pass H.R. 1728 and S. 718, which are pieces of legislation designed to expand the resources available to legal aid organizations.
- States must avoid making cuts to legal aid programs while seeking creative solutions that actually increase funding for these vital services.
- The private bar should continue to expand current efforts that are leading to increased amounts of pro bono service.

In short, closing the justice gap and ensuring low-income families can access needed resources will require substantial new commitments. At this point the federal government and the private bar may be best suited to contribute to the solution, but state and local governments, law schools, foundations, and individual donors can also play a role.

Increased need for legal services

Helaine Barnett, the president of the Legal Services Corporation, used the succinct yet descriptive words "our challenge is large" to describe the current circumstances facing her grantees.[1] LSC is an entity that uses an annual congressional appropriation to provide nationwide funding to 137 legal aid programs with 920 offices that employ approximately 58 percent of attorneys working within such programs.[2] As a result of the recession, legal aid organizations—both those that are and aren't funded by LSC—are seeing an increased demand for their services. For example, by the end of last year Neighborhood Legal Services in Massachusetts experienced a 35-percent increase in requests for assistance while the Legal Aid Society of Cleveland handled 22 percent more cases between 2006 and 2008.[3]

As unemployment and underemployment rise, incomes shrink and the number of people who qualify for free legal assistance grows. LSC currently provides services to individuals and families living at or below 125 percent of poverty ($27,563 for a family of four).[4] LSC estimates that their eligible population will increase by 22 percent between 2007 and 2009 based on patterns from previous downturns.[5]

What's more, recessions tend to increase the likelihood that low-income families will have certain legal needs, including those related to housing, income, and basic necessities.

Housing. Housing has played a central role in the current economic downturn. The foreclosure crisis resulting from subprime loans, growths in unemployment and underemployment, and other financial hardships has obviously impacted low-income homeowners. However, renters have also been affected. At the end of last year the National Low Income Housing Coalition estimated that 40 percent of those losing their homes due to foreclosures were renters, a group that is disproportionately low-income and racial minorities.[6] These families have a history of being unaware that their landlords are behind on mortgage payments and they have received little to no notice before having to leave their homes as a result of the owners' foreclosures.

Prior to the current crisis, laws governing foreclosures, renters' rights, and predatory lending practices existed at various levels of government, but the protections were by no means universal and varied greatly from jurisdiction to jurisdiction.[7] Since the crisis began, governments have responded with new activity—some have instituted new legal provisions while others are in the process of making even more changes. Notably, Congress recently

> The provision of legal assistance to poor men, women and children is essential to ensuring equal access to justice in this country. The network of legal aid programs across the United States is the backbone that enables people, regardless of income, to be able to obtain high-quality, respectful, supportive legal advice and assistance to ensure basic human rights to housing, food, and to be free from abuse and violence in their home. Without these programs, homelessness will increase, domestic violence will not be eradicated, and the embarrassingly large percentage of children living in poverty in this country will increase exponentially.
>
> *Don Saunders, Director of Civil Legal Services, National Legal Aid and Defender Association*

passed the Helping Families Save Their Homes Act (Public Law 111-22), which aims to prevent foreclosures and extend greater protections to renters in foreclosed properties.

Low-income families would greatly benefit from legal assistance given the immense complexity of mortgage agreements, the number of laws affecting owners and renters, and the fact that these laws are currently evolving. Legal aid attorneys understand the law and keep track of changes, which allows them to effectively 1) advise low-income homeowners and renters of their options, 2) assist them in renegotiating loans, 3) help with rental property evictions and navigating government programs that can help with emergency housing and permanent relocations, and 4) provide representation during any court or alternative dispute resolution proceedings.

Access to government benefits. With rising unemployment more people are in need of necessary supports such as unemployment insurance, food stamps, and health care—for example, Medicaid, the State Children's Health Insurance Program, and COBRA. Legal services organizations assist individuals in navigating the sometimes complicated processes for obtaining these benefits while also helping to resolve any barriers affecting access.

Family law issues. Economic distress can result in family stressors that require legal assistance. For example, between 2007 and 2008 the National Domestic Violence Hotline reported a 21-percent increase in calls, with 54 percent of callers reporting a recent change in their family's financial circumstances.[8] Legal aid organizations help victims with protection orders and custody issues.

Consumer issues. The recession has also increased bankruptcies, collections, repossessions, and delinquent utility bills. Legal aid attorneys can help their clients understand their legal options, negotiate payment arrangements, or pursue action against unfair practices.

Tax credits. Low-income families greatly benefit from the additional income made available through the Earned Income, Child, and Making Work Pay tax credits in challenging times. Expansions of these credits were included in the American Recovery and Reinvestment Act of 2009, so many families may be eligible for elevated tax refunds through 2010. Some legal services providers help low-income families understand which tax laws apply to them and/or assist with filings.

Recession compounds previous justice gap

Prior to the beginning of the recession there was a shortage of good lawyers providing free legal services for the poor. This crisis is commonly referred to as the "justice gap," reflecting the notion that there are disparities in one's ability to obtain justice that are tied to income. Justice isn't free and is often denied if an individual can't afford a lawyer and is unable to secure the assistance of a legal aid attorney.

The gap isn't small, either. Organizations funded by the Legal Services Corporation turn away approximately 1 million cases per year—representing 50 percent of income-eligible people seeking legal assistance—simply because they don't have the resources to handle them.[9] Untold numbers of additional people don't even make it to the doors of a LSC-funded organization, perhaps not even realizing that free legal services are available in their community or that they have a problem for which a lawyer could provide assistance. A different line of studies based on random sampling has produced some distressing results—in one state (Vermont) as little as 9 percent of the legal problems of low-income households were addressed by a lawyer, and in no state studied were more than 20 percent of legal problems addressed.[10]

Funding and resource crisis

Multiple funding sources help provide free legal services to poor and low-income households, including government grants, Interest on Lawyer Trust Accounts, or IOLTA programs, foundation grants, and charitable giving.

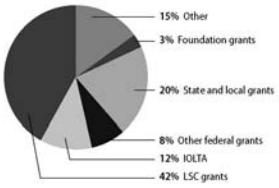
Chart 1 demonstrates the monetary distribution for programs funded through the Legal Services Corporation. Comprehensive information about the funding of other legal aid organizations is not available, but those groups tend to rely on IOLTA, other types of government grants, and foundations. Law firms and law schools also add to legal aid organizations' efforts.

Unfortunately all of these resources and entities are facing significant challenges as a result of the recession, limiting their ability to address increased demands for services. Each is considered below and evaluated according to its current ability to generate new funds or other resources aimed at reducing the justice gap. Despite current challenges it is important to note that many dedicated individuals in all of these areas are finding ways to reduce negative outcomes and secure access to justice for as many people as possible.

CHART 1

Monetary distribution in 2007 for programs funded through the Legal Services Corporation

Funding comes from the Legal Services Corporation but also federal, state, local, and foundation grants, among others



The federal government

The federal government is one source in a good position to provide new resources to help address the current crisis. It can do so by providing suitable appropriations for relevant programs, lifting restrictions on LSC organizations, and instituting new legislative solutions.

LSC funding. The federal government recently began increasing the Legal Services Corporation's funding levels. The fiscal year 2009 allotment is $390 million—an 11-percent increase over the previous year.[11] This sum, however, is only a first step toward reversing a longstanding trend of seriously deflated investments. **In nearly 60 percent of budget cycles since 1976, LSC has experienced cuts in real dollars** (see Chart 2,

Appendix). Previous funding highs were $750 million and $554 million (in inflation-adjusted terms) in 1981 and 1995 respectively. Thus the value of the program's budget is almost half of what it was nearly three decades ago.

In the current era of increasing poverty, it is also important to examine appropriations levels in relation to the number of people who qualify to receive legal services. Chart 3 demonstrates that the inflation-adjusted per person investment was $7.04 in 2007, much lower than the $20 and $21 per person (in real dollars) that were spent in 1981 and 1995 respectively (see Appendix).

Unfortunately, the eligible population has been growing significantly as a result of the recession. LSC predicts a 22-percent increase between 2007 and 2009, representing more than 11 million people.[12] This increase dramatically affects the nation's per person investment. Although Congress increased LSC funding in 2009 the estimated per person investment is only $6.85—the lowest in the program's more than 30-year history.

The House of Representatives has approved $440 million (or a 13-percent increase) for the Legal Services Corporation in FY2010, which is slightly more than President Barack Obama's request for $435 million.[13] However, LSC has asked Congress for a little more—$485.1 million.[14]

All of these sums are modest given the increased demand for services and the elevated number of people that income-qualify for free legal services. The size of the poverty population will likely remain a concern next year since the Federal Reserve has predicted continued elevated rates of unemployment in 2010, impacting poverty levels.[15] The LSC's budget request would result in an approximate per person investment of $7.82 presuming the continuation of current estimates of the eligible population, while the House's number would allow for $7.09 per person, which is slightly more than the nation's 2007 investment.

LSC restrictions. Current LSC restrictions tied to federal funding result in costly and inefficient practices. Lawyers are not allowed to collect attorneys' fees from opposing parties,[16] which is a typical practice when individuals bring valid cases and are ultimately victorious. Such fees would be beneficial additions to the frequently limited resources of these nonprofits.

Legal services organizations are also prohibited from pursuing systemic change because they are unable to bring class-action lawsuits or petition governments to make legislative or regulatory changes.[17] These

CHART 2

Congressional appropriations for the Legal Services Corporation, 1976-2009

The value of the program's budget is almost half of what it was nearly three decades ago.

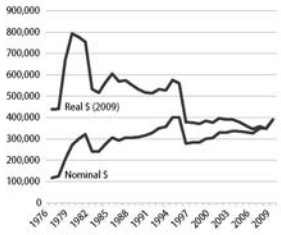
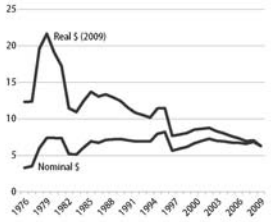


CHART 3

Per-person investment in the Legal Services Corporation

Congress has increased appropriations but because of increases in the eligible population per-person investments are declining.



Understanding LSC restrictions

A sample scenario from Anywhere, USA

A legal services office in Anywhere, USA, has had multiple homeless clients enter its doors all complaining about the same problem—local school district policies that do not allow their children to enroll in school. The school district says that federal law sanctions their policy of requiring all students to provide proof of residence (a lease agreement or proof of homeownership). The legal services attorneys believe that federal law allows homeless students to enroll without these documents, so there is a disagreement between the two parties about what the law says and how it should be applied.

The legal services attorneys could pursue the following approaches to help the homeless families:

1. **Case-by-case lawsuits.** The attorneys could file litigation on behalf of each student who seeks help for this problem. Thus, if 50 children come through their doors, they file 50 cases in the local court.
2. **Class action lawsuits.** They could file one case on behalf of all current and future homeless students. The judge would read and interpret the law to determine once and for all if homeless students are able to enroll without a lease agreement. The school district policy would either be sanctioned or changed based on the judge's decision. If victorious the legal aid organization may be able to collect attorneys' fees.
3. **Petition school board.** The attorneys could go to the school board, explain the problem, and ask it to change the district's policy about documents that homeless children must provide to enroll in school.

Current LSC restrictions prevent organizations from pursuing the last two approaches, which also have the benefit of affecting all current and future homeless students. Left with the ability to only utilize the case-by-case approach, the organization wastes time and resources and is only able to help 50 students enroll in school.

avenues could prevent costly and repetitive litigation and may require less staff time, freeing up financial and human resources within organizational budgets. Further, pursuing policy change often leads to better outcomes for low-income people, at times promotes quicker resolutions to problems, and frequently benefits significant numbers of individuals who are not actually clients of the legal services organization.

LSC restrictions further hinder reductions in the justice gap by preventing participating organizations from representing particular clients, including undocumented immigrants, people in prison, and some individuals being evicted from public housing.[18]

Finally, an additional restriction prohibits LSC organizations from using non-LSC funds for any of the above purposes.[19] Those organizations receiving LSC dollars are therefore absolutely prohibited from engaging in these activities even if they were to obtain private funds for the related expenses.

Other federal programs. Some legal aid organizations benefit from other sources of federal funding. For example, the Violence Against Women Act provides grants for work related to domestic violence, the Older Americans Act funds legal assistance for the elderly, and AmeriCorps employs attorneys who work with law students and lawyers to provide legal services to low-income individuals and families. Thus, the funds for such programs should be appropriately increased.

State and local governments

Some legal aid organizations receive funds from state or local governments, many of which are under severe financial strain. The Center on Budget and Policy Priorities reports that 47 states are facing budget shortfalls this year and/or next year, with projected deficits amounting to $350 billion to $370 billion between 2009 and 2011.[20] As a result at least 36 states have imposed budget cuts that affect public services, including those benefiting low-income residents.[21]

Cities are also suffering because the recession is lowering their revenues.[22] Waning home values are lowering property tax assessments. Some communities are experiencing increased property tax defaults. Local sales tax revenues are being undermined by declines in consumer confidence and purchases. Local income taxes bring in less money as unemployment rises. In response to these circumstances 83 percent of cities have already cut expenditures and services and 80 percent expect continued cuts for the next fiscal year.[23]

The federal American Recovery and Reinvestment Act will go far in helping to relieve these budgetary stressors by providing about $144 billion to state and local governments,[24] but it will not completely solve the crisis.

Despite current challenges it is not impossible for states and localities to increase their contributions to legal services organizations. New Jersey has been facing budget constraints, but the state provided an additional $9.5 million to state legal services at the end of last year when it became apparent that a multimillion dollar shortfall was on the horizon.[25] There is also some room for creativity in finding ways to generate new revenue—Connecticut recently passed legislation that increases certain court filing fees in order to help prevent cuts to its legal aid programs.[26]

"We first looked at what we could do immediately to try to impact our situation. And the immediate thing we could do was to cut back on our salaries and hours . . .So we are trying to hold on to the staff as best we can. And so the staff, incredibly, heroically, took a 20-percent cut in hours and pay from what weren't terrific salaries to begin with. We also restructured our health care benefits so they are less expensive while still providing quality health care. The managers in our program took a 25 percent to 35 percent cut, and so that got us part way into the deficit that we were facing. And then we went out and started trying to raise money like crazy, and we have been very active in sending out applications for money from various private sources and government sources . . ."

Steve Eppler-Epstein, Executive Director, Connecticut Legal Services

Interest on Lawyers Trust Accounts

Governments are important contributors to the budgets of legal aid organizations, but other supports such as the Interest on Lawyers Trust Accounts, or IOLTA programs, are available. In 2007 IOLTA programs provided $212.2 million in grants to legal services groups and pro bono programs.[27] They account for 12 percent of the budgets of LSC-funded organizations as a whole.[28] However, some states and communities traditionally depended on IOLTA to a much greater degree—for example, 60 percent of the revenues for New Jersey Legal Aid programs typically came from IOLTA.[29] Unfortunately, the recession is severely affecting IOLTA's income.

The program—as its title implies—generates money by collecting interest on accounts held by lawyers. The accounts are used to temporarily hold money belonging to clients, including settlement checks, real estate escrows, fees paid in advance for services that have

yet to be performed, and money for court fees. IOLTA accounts pool the money of many individual clients whose funds are either too small or held for too short a time to realize any net income for the clients. Lumping the funds of many people—each with money moving in and out of the account—generates a sizable amount of interest that is used to provide grants to legal aid organizations.

Current problems with IOLTA are rooted in the fact that the value of the accounts is tied to interest rates and principal balances. The Federal Reserve Board lowered interest rates in response to the economic downturn, which is its typical response to recessions.[30] Further, for some programs principal dollars are lower due to reductions in real estate transactions and other business activities involving lawyers. So many IOLTA programs have been and will be generating far less money than in previous years. For example, Connecticut's IOLTA revenue was $21 million in 2007, but it is projected to be $4 million in 2009.[31] Similarly, New Jersey's IOLTA funds dropped from $40 million to an estimated $25 million between 2008 and 2009.[32]

Some IOLTA programs had reserve funds and other structures that have helped soften the blow of declining revenues, and this has minimized changes to the amount of funding provided to legal aid organizations. Nevertheless, other programs are in critical condition and may be serving organizations that do not receive LSC funding, so recent federal efforts to assist by providing increased appropriations for LSC are not reaching these organizations.

Foundation grants

Foundations supporting nonprofits have also been hit by the economic crisis. According to the *The Chronicle of Philanthropy* 104 of the largest grant makers lost more than $50 billion in assets in 2008.[33] This is certainly affecting grant availability. A full 62 percent of surveyed grant makers expected their giving to decline in 2009, with nearly half —48 percent—expecting a 10-percent or more dip in grant awards.[34] Many others are aiming to simply maintain previously existing funding levels. Foundations formed by corporations are facing distinct challenges—with the majority of these being connected to banking and financing companies, they were among the first to be hit by the economic downturn.[35]

Despite this grim portrait of the bigger picture, it is evident that foundations are concentrating their existing resources on low-income populations, human services, and economic development. They may be cutting grants in other areas, but 76 percent of foundations are either increasing or maintaining grants for programs targeting families affected by the downturn.[36] Six percent are newly working in these areas. The most popular areas to fund are food assistance, emergency housing, job training or employment, and health care assistance.

Seeking increased private foundation funding may be a possibility for some legal aid organizations as foundations seek to target their existing resources to low-income populations. Legal aid offices, however, may need a strong sales pitch to compete with the popular

choices of providing direct assistance to cover basic needs. Further, foundations typically accounted for only 3.1 percent of the budgets of LSC organizations —although potentially figuring more significantly into the budgets of legal aid organizations not receiving LSC funding.[37] Dramatically growing this already low percentage would likely prove challenging.

Individual giving

Many Americans' finances are on the decline due to increased unemployment, reduced work hours, foreclosed homes, and sagging home and stock values. Historically, individual giving has decreased by an average of 3.9 percent in inflation-adjusted terms during years marked by long recessions lasting eight months or more.[38] In a recent survey of nonprofits a little over a third reported decreased contributions in 2008 as compared to the previous year.[39] Of those experiencing declines, 63 percent reported reduced giving by individuals.[40]

For LSC organizations individual giving already represents a small portion of their budgets—less than 6.1 percent.[41] Given the strong possibility that donations are on the decline, it is unlikely that legal services groups will be able to increase personal contributions to the degree necessary to narrow the justice gap and manage recession-related needs.

Law firms

Law firms make significant contributions toward reducing the justice gap via direct monetary donations to nonprofits or volunteer work also known as pro bono service. However, the economy has weakened these institutions and reduced profits. As a result the list of law firms engaging in layoffs has grown significantly since the beginning of the year, with over 10,000 legal professionals—including 3,881 lawyers—and counting losing their law firm jobs.[42] Additionally, many students who were scheduled to begin work this fall had their job offers postponed or rescinded.

Importantly, there may be a silver lining within this dark cloud hovering over private law firms. According to the Pro Bono Institute there is a strong likelihood that pro bono activities are increasing during the economic downturn.[43] Some firms and nonprofits are developing new initiatives designed to find temporary full-time placements in legal aid organizations for the following groups of underutilized law firm talent:

- Attorneys who were laid off and perhaps provided with a severance package.
- Attorneys employed at firms but lacking enough paid work to fill their time.
- New associates who were scheduled to begin work in the fall but have had their start dates postponed for months or even a year or more.

These programs ensure that workers are engaged in productive activities rather than sitting on the couch at home or surfing the Internet at their desk. They also provide an opportunity to develop professional skills, with some attorneys continuing to earn income from their firm—even if it is a bit less than their original salary. Legal aid organizations benefit from increased human resources at a time when many are reducing their staffing due to budgets cuts caused by reductions in IOLTA, foundation, and government funding.

Looking back: Lessons learned from the 1980s recession

(Paul Igasaki, deputy chief executive officer, Equal Justice Works)

There are lessons to learn from the crisis that civil legal services for the poor faced in the early 1980s, the legal profession's response, and the long-term results of those efforts. I was a Reginald Heber Smith Community Law Fellow with Legal Services of Northern California in Sacramento in 1980. When President Ronald Reagan took office, eliminating the federal involvement in legal services was a priority of the administration. He attempted to eliminate the federal program. The American Bar Association, along with many state bar associations and prominent lawyers of all political parties joined in an effort to save the program.

For those of us in legal services, many of our colleagues were laid off due to budget reductions and all of us that remained absorbed sizeable caseloads. As a Reggie Fellow, my project changed radically as we tried to meet the need. At the same time, restrictions on full legal services were instituted, limiting who could get services and on the nature of the legal rights that would be protected.

To help meet the need, the organized bar, led by the ABA, the Legal Services Corporation, and the community of legal service providers committed themselves to maximizing the amount of services provided by private attorneys. There were a number of contract and other experiments, but primarily, this meant a dramatic increase in pro bono work by private lawyers. LSC required first a 10-percent portion of each local program budget to be devoted to making this happen. Later it was increased even further. I went to work at the American Bar Association first as pro bono coordinator, then as staff director of the ABA private bar involvement program. We put on conferences in each region of the country to bring together the organized bar and legal services programs.

There was distrust in the beginning. Many of the dedicated legal services lawyers, having lost colleagues, doubted that for-profit lawyers would have the sensitivity or knowledge to serve poor clients or the understanding that poverty lawyers were specialists just as they were. Some private lawyers assumed that legal services lawyers were less skilled or trained especially considering the low salaries they earned. There were efforts that did not work so well. But, over time, the number of private lawyers serving poor clients mushroomed. And as programs developed with training, supervision, and strategic matching between lawyers and clients, pro bono work increased in quality and in volume. The respect also increased over time—pro bono programs institutionalized as part of legal services offices, state or local bar associations, and as part of the larger law firms. Firms employ public interest or pro bono coordinators on their staffs and compete to show substantial contributions to their communities. The private side of the legal profession understands better than ever, due in large part to pro bono work, the complexities of the needs faced by poor clients and the tremendous gap that still remains between those needs and the resources available to meet them.

Just as the profession back then pulled together with lasting results, I hope that the current crises will also be met with long-term benefits especially for the poor, those facing discrimination, or other beneficiaries of this increase in private resources. It will require flexibility and cooperation on the part of all entities, but it does seem headed in the right direction. There might ultimately be longer-term changes in legal education and the profession generally. Perhaps the seeds of a stronger legal profession may lie in solutions explored by law schools, law firms, bar associations, the government, and public interest organizations.

It is too soon to tell how many current and former law firm attorneys will be placed in legal aid organizations. These shifts will undoubtedly be fraught with many challenges that are both logistical and cultural as many nonprofits try to absorb attorneys who may be unaccustomed to working with poverty populations and within offices with limited resources—available supervisors, office space, equipment, and training opportunities, for example—to support their work.

There are further questions about how long these attorneys will be available and their dependability, given the fact that they may be searching for new work opportunities and are not being directly paid by host organizations. Also there are important concerns about the fairness of private practice attorneys being placed in nonprofit jobs at a time when those who have a history of being dedicated to such work are losing their jobs or are being denied opportunities due to declining resources at the nonprofits. Despite these factors, the opportunity for positive outcomes should not be denied as more hands come on deck to help reduce the justice gap.

Law schools

Many law schools throughout the nation provide free legal services via clinical education programs. Professors teach law students practical skills and supervise their representation of real world clients. Unfortunately, these programs may also suffer during the recession as institutions have fewer dollars to grow valuable programs.

Many law schools at public universities are slashing their budgets. Since education is the largest component of state spending it is an area that is likely to face cuts as states seek to eliminate deficits.[44] At least 28 states have made cuts to public colleges and universities and/or increased tuition in response to reductions in state funding.[45] Private law schools are also being affected due to their reliance on endowments. The plunging stock market has caused endowments to lose 20 percent to 40 percent of their value.[46] For example, the Harvard University endowment began the year with a $36.9 billion loss since the previous summer.[47]

Law schools are making hard choices in response to these changed circumstances, laying off faculty and staff, freezing pay, raising tuition, reducing course offerings, and increasing class sizes.[48] Thus, it may not be an opportune time for law schools to expand clinical programs that play a role in reducing the justice gap.

However, on a more positive note, a limited number of law schools are helping unemployed 2009 graduates find positive uses for their time. Institutions such as Northwestern, Columbia, Boston College, the University of Michigan, and Georgetown are connecting their students to temporary placements in nonprofit organizations, with some schools offering small stipends to help support the work or their alums. These law schools are playing a role in reducing the justice gap in encouraging unemployed graduates to offer their time.

Recommendations

The federal government and the private bar are currently the best equipped to help reduce the recession-related growth of the justice gap, but states and localities can play a role as well. Reducing the gap will require much work.

The federal government can aid in reducing the current justice gap via the following:

- **Legal services appropriations.** Congress is currently in the process of developing its annual appropriations bills for 2010. The provisions applying to LSC should:

  - *Increase program funds.* The U.S. House of Representatives has approved $440 million—or a 13-percent increase—for the Legal Services Corporation, which is slightly more than President Obama's request of $435 million. The House's figure is a modest but respectable increase given the recession-related growth in the eligible population and current record-low per-person investments in the program. However, low-income populations would be more properly served by the $485.1 million proposed by LSC.

  - *Eliminate LSC restrictions.* Appropriations legislation provides an opportunity to eliminate certain LSC restrictions that are not cost effective. Allowing organizations to utilize time-efficient techniques that also minimize the use of costly litigation will ultimately produce financial savings for legal services organizations and court systems. A recently passed House appropriations bill eliminates the current restriction on collecting attorneys' fees, but more should be done. At an absolute minimum Congress should strike the restriction that prohibits LSC organizations from using non-LSC funds to engage in otherwise restricted activities.

- **Appropriations for other federal programs.** Congress should make increased investments in other federal programs that provide grants to legal aid organizations. These include AmeriCorps, the Older Americans Act, and the Violence Against Women Act, among others.

- **Fund housing-related legal assistance.** Much of the increased demand for civil legal assistance is tied to the foreclosure crisis. Congress should bolster funding for legal aid organizations to work in this area given the enormity of the problem, the complexity of the transactions, and the evolving nature of related laws in this area. The Mortgage

Reform and Anti-Predatory Lending Act (H.R. 1728) includes provisions that would do just that. It was recently passed by the House of Representatives and must still be considered by the Senate.

- **Civil Access to Justice Act (S.** 718). Congress should pass S. 718 to help advance long-term solutions. This legislation was introduced by Sen. Tom Harkin (D-IA) and would increase LSC's authorized funding level to $750 million, eliminate the restrictions on non-LSC funds and certain restrictions on LSC funds, and provide new federal funding for law school clinical programs.

The private bar should act as follows:

- **Continue and expand pro bono and fundraising activities.** Law firm attorneys have been contributing their time to pro bono activities, with some recently taking on full-time legal aid work due to disruptions in the legal employment market. In doing so they are making valuable contributions. In conjunction with nonprofit organizations, these members of the private bar should continue to explore how they can improve and expand such services. Further, law firms and attorneys often make direct financial contributions to legal aid. They should continue to do so to the greatest extent possible.

- **Consider legal aid when steering evolutions in the world of private practice.** The private bar is experiencing major changes as a result of the recession. Law firms are reconsidering hiring practices, training structures, and salary scales, among other things. As they proceed they should give thought to how such changes could affect pro bono activity and how the changes can be used to advance the cause of reducing the justice gap.

Finally, states and localities can contribute via the following:

- **Find ways to put more funding for legal aid organizations into their budgets.** This is obviously challenging for most governments at this time, but they should be open to creative solutions such as those implemented in Connecticut—for example, making slight increases to government fees attached to the legal profession.

- **Avoid cutting current grants to legal aid organizations.**

All of the above efforts would greatly advance the goal of closing the justice gap, which is currently widening due to recession-related and preexisting causes. Various levels of government and private actors all have a part to play and should be called upon to make a contribution. We must ensure as a nation that justice and pathways out of poverty are not sacrificed during hard times, because this is when they are most needed.

Appendix

TABLE 1
History of LSC appropriations in actual and inflation-adjusted dollars

Year	LSC appropriation (Actual $)	LSC appropriation (2009 $)	Percentage change from previous year (2009 $)
1976	116,960,000	438,323,000	—
1977	125,000,000	439,851,000	0.3%
1978	205,000,000	670,463,000	52%
1979	270,000,000	793,041,000	18%
1980	300,000,000	776,359,000	-2%
1981	321,300,000	753,730,000	-3%
1982	241,000,000	532,548,000	-29%
1983	241,000,000	515,972,000	-3%
1984	275,000,000	564,398,000	9%
1985	305,000,000	604,444,000	7%
1986	292,363,000	568,827,000	-6%
1987	305,500,000	573,458,000	1%
1988	305,500,000	550,675,000	-4%
1989	308,555,000	530,615,000	-4%
1990	316,525,000	516,418,000	-3%
1991	328,182,000	513,814,000	-1%
1992	350,000,000	531,960,000	4%
1993	357,000,000	526,828,000	-1%
1994	400,000,000	575,547,000	9%
1995	400,000,000	559,685,000	-3%
1996	278,000,000	377,825,000	-32%
1997	283,000,000	375,993,000	-0.5%
1998	283,000,000	370,227,000	-2%
1999	300,000,000	383,986,000	4%
2000	303,841,000	376,255,000	-2%
2001	329,274,000	396,467,000	5%
2002	329,300,000	390,328,000	-2%
2003	336,645,488	390,142,000	0%
2004	335,282,450	378,484,000	-3%
2005	330,803,705	361,191,000	-5%
2006	326,577,984	345,434,000	-4%
2007	348,578,000	358,494,000	4%
2008	350,490,000	347,132,000	-3%
2009	390,000,000	390,000,000	12%

TABLE 2

Estimated amount spent per qualifying person in actual and inflation-adjusted dollars

Grant year	# of people below 125% of poverty	$ per qualifying person (actual)	$ per qualifying person (2009 $)
1976	35,509,000	$3.29	$12.33
1977	35,659,000	$3.51	$12.35
1978	34,155,000	$6.00	$19.62
1979	36,616,000	$7.37	$21.65
1980	40,658,000	$7.38	$19.10
1981	43,748,000	$7.34	$17.22
1982	46,520,000	$5.18	$11.45
1983	47,150,000	$5.11	$10.94
1984	45,288,000	$6.07	$12.46
1985	44,166,000	$6.91	$13.69
1986	43,486,000	$6.72	$13.07
1987	43,032,000	$7.10	$13.33
1988	42,551,000	$7.18	$12.94
1989	42,653,000	$7.23	$12.43
1990	44,837,000	$7.06	$11.52
1991	47,527,000	$6.91	$10.82
1992	50,592,000	$6.92	$10.52
1993	51,801,000	$6.89	$10.17
1994	50,401,000	$7.94	$11.42
1995	48,761,000	$8.20	$11.47
1996	49,310,000	$5.64	$7.67
1997	47,853,000	$5.91	$7.85
1998	46,036,000	$6.15	$8.05
1999	45,030,000	$6.66	$8.52
2000	43,612,000	$6.97	$8.63
2001	45,320,000	$7.27	$8.75
2002	47,084,000	$6.99	$8.29
2003	48,687,000	$6.91	$8.01
2004	49,693,000	$6.75	$7.62
2005	49,327,000	$6.71	$7.33
2006	49,688,000	$6.57	$6.95
2007	50,876,000	$6.85	$7.04
2009	62,068,720	$6.28	$6.28

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Acknowledgements

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Alan Houseman, Center for Law and Social Policy
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Steven Grumm, National Association for Law Placement
Beverly Groudine, American Bar Association
Paul Igasaki, Equal Justice Works

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Conference of Chief Justices

Policy Statements & Resolutions

Resolution 11
In Support of Increased Federal Funding For the Legal Services Corporation

WHEREAS, the Conference of Chief Justices and the Conference of State Court Administrators have worked steadfastly to maintain access to justice as a cornerstone of our legal system; and

WHEREAS, the Legal Services Corporation (LSC) was established in 1974 by bipartisan vote of the United States Congress to meet the access to justice needs of those excluded from the legal system because of the unavailability of legal resources; and

WHEREAS, the LSC is a critical component of the national access to justice system through its funding of nonprofit organizations that provide legal services in every state and territory; and

WHEREAS, the number of individuals in need of legal services has dramatically risen due, in part, to increased unemployment, foreclosures, debt problems, and difficulties accessing medical care as a result of the current financial crisis; and

WHEREAS, Documenting the Justice Gap in America indicates that, in 2005, even before the current economic crisis, half of those who applied for services from LSC grantees were turned away due to a lack of resources; and

WHEREAS, the current economic crisis is greatly restricting state and local capacity to support programs that provide legal services, including a very dramatic reduction in funding available from Interest on Lawyer Trust Accounts due to a substantial decline in interest paid on lawyers' trust accounts which is used to fund local legal services programs; and

WHEREAS, the federal 2009 LSC budget is significantly lower than the inflation-adjusted 1995 appropriation, and although the President's 2010 budget proposes increased LSC funding, LSC funding will remain more than $140 million less than its inflation-adjusted 1995 appropriation;

NOW, THEREFORE, BE IT RESOLVED that the Conferences support increased federal funding on a continuing basis for LSC to better meet the demand for legal services and to ensure access to justice for all.

Adopted as proposed by the CCJ/COSCA Public Trust and Confidence in the Judiciary Committee at the CCJ/COSCA Annual Meeting in August 2009.

LETTER IN SUPPORT OF
THE CIVIL ACCESS TO JUSTICE ACT (S.718, H.R. 3764)

February 12, 2010

Dear Senators and Members of Congress:

We write to urge your support for the *Civil Access to Justice Act of 2009* (S.718, H.R. 3764), an Act that would reauthorize and revitalize the Legal Services Corporation (LSC), the backbone of our nation's civil legal aid system. LSC is a non-profit corporation created by Congress in 1974. Funded by the federal government, LSC grants money to local legal services programs in every state, which, in turn, assist low-income families with the civil legal issues they may face – protecting spouses and children from domestic violence, fighting predatory lenders, saving homes from foreclosure, ensuring child support payments, and helping seniors and the disabled obtain necessary benefits.

LSC is in need of revitalization. Severely underfunded, LSC reports that more than half of all eligible clients who seek legal help from LSC-funded programs are turned away due to insufficient resources. Additionally, LSC-funded programs' ability to help their clients is hampered by outdated restrictions, imposed in the mid-1990s.

The *Civil Access to Justice Act* would reauthorize LSC for the first time in over 30 years and would expand access to justice for the poor during this time of extraordinary need. The bill would: 1) expand access to justice by authorizing $750 million in annual funding for LSC, the level necessary to return to the high water mark for funding reached in 1981, the last time a minimum level of access to LSC services was achieved; 2) lift a number of overreaching restrictions that prevent LSC grantees from most efficiently and effectively serving their clients; and 3) improve oversight and governance of LSC.

As the nation continues to reel from the economic crisis, civil legal aid has never been more important. More and more of our nation's families are turning to the courts with pressing civil legal needs, and both individuals and society suffer when these issues are left unresolved, or resolved unfavorably. With the courts and legal aid programs now overwhelmed, Congress must act to help low-income individuals access and navigate the courts, which oftentimes is only possible with the help of a legal aid lawyer.

The *Civil Access to Justice Act* goes a long way toward renewing our promise to "equal justice for all" and ensuring that our neighbors are able to obtain the services they need to meaningfully access the courts. Please support this legislation to reauthorize and revitalize LSC.[1]

Sincerely,

National Organizations

AARP

Alliance for Justice

American Civil Liberties Union

American Judicature Society

Asian American Legal Defense and Education Fund

Boat People SOS

Brennan Center for Justice at NYU School of Law

Campaign for Community Change (CCC)

Center for Law and Social Policy

Center for Lobbying in the Public Interest

Center for Medicare Advocacy, Inc.

Consumers for Auto Reliability and Safety

Disability Rights Education and Defense Fund

Ella Fitzgerald Charitable Foundation

Equal Justice Society

Equal Justice Works

Evangelicals for Social Action

Garvey Schubert Barer

Independent Sector

Insight Center for Community Economic Development

International Center for Civil Society Law

The Leadership Conference on Civil and Human Rights

Lowenstein Center for the Public Interest

Lowenstein Sandler PC

Medicare Rights Center

Mexican American Legal Defense and Educational Fund

National Association of Counsel for Children

National Association of IOLTA Programs

National Center for Law and Economic Justice

National Center for Lesbian Rights

National Committee for Responsive Philanthropy

National Consumer Law Center

National Employment Law Project

National Housing Law Project

National Immigration Law Center

National Legal Aid & Defender Association

National Organization of Social Security Claimants' Representatives

National Senior Citizens Law Center

National Women's Law Center

OMB Watch

Orrick, Herrington & Sutcliffe LLP

Sargent Shriver National Center on Poverty Law

Schulte Roth & Zabel LLP

Service Employees International Union

Skadden, Arps, Slate, Meagher & Flom LLP

UAW International and Local 2320, the National Organization of Legal Services Workers

Workplace Fairness

Youth Law Center

State & Local Organizations

Access Now, Inc. ®, Florida

Advocates for Basic Legal Equality, Inc. (ABLE), Ohio

AIDS Legal Referral Panel, California

Alabama Civil Justice Foundation

Alameda County Bar Association, California

Alameda County Bar Association, Volunteer Legal Services Corporation, California

Arizona Foundation for Legal Services & Education

Asian Law Alliance, California

Asian Law Caucus, California

Asian Pacific American Legal Resource Center, Washington D.C.

The Association of the Bar of the City of New York

Bet Tzedek Legal Services, California

The Bronx Defenders, New York

California Advocates for Nursing Home Reform

California Reinvestment Coalition

California Women's Law Center

Californians for Disability Rights, Inc.

Californians for Legal Aid

Center for Civic Values IOLTA Program, New Mexico

Center for Civil Justice, Michigan

Centro Legal de la Raza, California

Children's Law Center, Washington D.C.

Civil Justice Clinic, University of California Hastings College of the Law

Coalition of California Welfare Rights Organizations, Inc.

Community Foundation of St. Joseph County, Indiana

Community Legal Services in East Palo Alto, California

Community Legal Services, Inc., Pennsylvania

Connecticut Bar Foundation

DC Consortium of Legal Services Providers[2]

Democratic Processes Center, Arizona

Disability Rights California

Disability Rights Legal Center, California

Disability Rights Network of Pennsylvania

Don't Waste Arizona

East Bay Community Law Center, California

Education Law Center of Pennsylvania

Empire Justice Center, New York

Family Violence Law Center, California

The Fund for Modern Courts, New York

Harriett Buhai Center for Family Law, California

Hawaii Justice Foundation

HIV & AIDS Legal Services Alliance, California

Homeless Persons Representation Project, Inc., Maryland

Housing and Economic Rights Advocates, California

The Impact Fund, California

Indiana Lawyers Committee

Inland Empire Latino Lawyers Association, California

King County Coalition Against Domestic Violence, Washington

La Raza Centro Legal, California

Law Foundation of Silicon Valley, California

Lawyers Trust Fund of Illinois

Legal Aid Association of California

Legal Aid Justice Center, Virginia

Legal Aid Society of San Mateo County, California

Legal Aid Society of the District of Columbia

Legal Assistance of Washington County, Minnesota

Legal Foundation of Washington

Legal Information for Families Today (LIFT), New York

Legal Services Corporation of Virginia

Legal Services for Children, California

Legal Services of Southern Piedmont, North Carolina

Legal Voice, Washington

Los Angeles Center for Law and Justice, California

Lutheran Office of Governmental Ministry in New Jersey

Maine Bar Foundation

Maine Justice Action Group

Massachusetts Access to Justice Commission

Massachusetts Law Reform Institute

Michigan Designated State Planning Body for Legal Services

Michigan Disability Rights Coalition

Mid-Minnesota Legal Assistance

Minnesota Legal Services Planning Committee

Minnesota State Bar Association

Montana Access to Justice Committee

Montana Equal Justice Task Force

Montana Justice Foundation

New Jersey Association on Correction

New York State Bar Association

North Carolina Justice Center

Ohio Legal Assistance Foundation

Oregon Law Center

Oregon Law Foundation

Oregon State Bar

Pennsylvania Council of Churches

Peter Edelman, Chair, District of Columbia Access to Justice Commission

Philadelphia Unemployment Project, Pennsylvania

Public Advocates, Inc., California

Public Counsel, California

Public Interest Clearinghouse, California

The Public Interest Law Project/ California Affordable Housing Law Project

Public Justice Center, Maryland

Quality Trust for Individuals with Disabilities, Washington D.C.

San Diego Volunteer Lawyer Program, Inc., California

Senior Citizens Legal Services of Santa Cruz & San Benito Counties, California

Social Justice Initiatives, Columbia Law School, New York

Student Advocacy, New York

Texas Access to Justice Foundation

University of the District of Columbia David A. Clarke School of Law

The Utility Reform Network, California

Vermont Legal Aid

Virginia State Bar

Washington Lawyers' Committee for Civil Rights and Urban Affairs, Washington D.C.

Washington Legal Clinic for the Homeless, Washington D.C.

Washington State Access to Justice Board

The Watsonville Law Center, California

Western Center on Law and Poverty, California

Wisconsin Trust Account Foundation, Inc.

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[1] For more information about this letter, contact Rebekah Diller, Justice Program Deputy Director, at the Brennan Center for Justice (rebekah.diller@nyu.edu, 212.992.8635).

[2] The following members of the DC Consortium of Legal Services Providers join this letter: The American Civil Liberties Union of the National Capitol Area; Advocates for Justice and Education; The Archdiocesan Legal Network, Catholic Charities; The Asian Pacific American Legal Resource Center; Ayuda, Inc.; Bread for the City; Capital Area Immigrants Rights (CAIR) Coalition; Central American Resource Center (CARECEN); The Children's Law Center; The Employment Justice Center; DC Crime Victims Resource Center; DC Law Students in Court; DC Volunteer Lawyers Project; Domestic Violence Legal Empowerment and Appeals Project (DV LEAP); The Legal Aid Society; Legal Counsel for the Elderly; Our Place, DC; The Public Defender Service of DC; The Quality Trust for Individuals with Disabilities; University of the District of Columbia David A. Clarke School of Law; University Legal Services; The Washington Lawyers' Committee for Civil Rights and Urban Affairs; The Washington Legal Clinic for the Homeless; Whitman-Walker Clinic Legal Services Program; Women Empowered Against Violence (WEAVE). Due to funding restrictions on advocacy, two members of the Consortium have not joined this letter: Neighborhood Legal Services Program (NLSP) and the DC Bar Pro Bono program.

NATIONAL CONFERENCE OF BAR PRESIDENTS

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Contact: Julie M. Strandlie, ABA Governmental Affairs Office
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April 20, 2010

The Honorable Steve Cohen
Chairman, Subcommittee on
Commercial and Administrative Law
Committee on Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Ranking Member, Subcommittee on
Commercial and Administrative Law
Committee on Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cohen and Representative Franks:

As Presidents of State and Territorial Bar Associations and national Bars of Color, we urge Congress to work together to strengthen and improve the Legal Services Corporation (LSC) by providing at least $435 million in funding and by enacting bipartisan legislation to reauthorize the program for the first time since 1981.

Thanks to your efforts and strong bipartisan support, for FY 2010 Congress provided a much-needed $30 million increase bringing the annual appropriation up to $420 million. This increase will help thousands of the most vulnerable Americans access critical legal assistance in matters where their home, their safety and their independence are at stake.

This year, we are asking Congress to provide another increase of at least $15 million as the next step toward closing the justice gap and meeting the critical need that exists today because of the rise in foreclosures, unemployment and related issues resulting from the economic downturn. The President has requested $435 million; the House of Representatives last year approved $440 million.

At the beginning of the recession in 2008, 54 million Americans (including 18.5 million children) qualified for federally funded legal assistance. The 2009 LSC Justice Gap study reaffirms that one in every two individuals who qualified for and actually *sought* assistance from LSC-funded programs was denied help because of a lack of resources; even worse, in foreclosure cases, LSC-funded programs must turn away two eligible clients for every client served. The justice gap has grown and is likely to continue to grow this year as our country struggles to emerge from the current economic crisis. At the same time demand for help has increased, other major sources of funding for legal aid (including state appropriations, private giving and Interest on Lawyers' Trust Accounts revenue) are declining or are under severe stress.

The low-income and disadvantaged Americans who depend on LSC-funded legal aid organizations include: people facing wrongful foreclosure of their homes due to predatory lending and other consumer fraud; women and children victimized by domestic violence; veterans denied the benefits our country promised them; and many other vulnerable members of our communities. Whether these people have access to the legal help they need could mean the difference between shelter and homelessness; medical assistance and unnecessary physical suffering; food on a family's table and hunger; economic stability and bankruptcy; productive work and unemployment. The failure to resolve their basic legal issues causes even greater hardship for them and often leads to their reliance on other government programs.

Bar Presidents' Letter
April 20, 2010

LSC currently funds 136 local programs serving every county, state and Congressional District in the United States and its territories. These local programs provide direct services to approximately one million constituents who struggle to get by on incomes below or near the poverty line.

The bipartisan LSC Board requested $516.5 million for FY 2011 in its attempt to close the justice gap over the next several years. Without continued incremental increases in federal funding, many more will be denied assistance in the future. We request your support to increase LSC funding to at least $435 million to help meet this urgent need.

Finally, LSC has not been reauthorized since 1981. Over those almost 30 years, many things have changed in the delivery of legal services and in corporate governance. For the first time in almost 20 years, legislation has been introduced in both the House and the Senate to reauthorize the program. We urge Congress to work together this year to come to an agreement on a reauthorization bill that will not only improve the efficiency and the delivery of legal services to low-income persons, but strengthen governance and accountability.

Thank you for your consideration of these requests.

Sincerely,

Mary T. Torres
National Conference of Bar Presidents

Thomas J. Methvin
Alabama State Bar

Sidney K. Billingslea
Alaska Bar Association

Carolyn B. Lamm
American Bar Association

Raymond A. Hanna
State Bar of Arizona

Donna C. Pettus
Arkansas Bar Association

Howard B. Miller
The State Bar of California

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Geraldine G. Sanchez
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Bar Presidents' Letter
April 20, 2010

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Jon D. Huddleston
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Stephen D. Busch
Virginia Bar Association

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Sandra M. Chapman
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Douglas W. Kammer
State Bar of Wisconsin

William Hiser
Wyoming State Bar

The National Association of IOLTA Programs (NAIP)
REMOVING THE LSC RESTRICTION ON IOLTA AND OTHER NON-LSC FUNDING

Background: The restriction on state, local and private money encumbers non-LSC dollars. This restriction prevents LSC-recipient programs from using any non-LSC funds, including individual donations, foundation grants, IOLTA grants and state and local government funds, for any service or activity that the program is barred from doing with LSC dollars. Under LSC's "program integrity regulation", 45 CFR sec. 1610, if a legal services program wishes to spend private funds on these restricted services or activities, it must set up a separate office and duplicate overhead, personnel and administrative costs.

NAIP's Position: NAIP is a national organization whose members include state IOLTA programs that are major funding partners of legal aid programs, and in a great many states, are the leading funders of these programs. The NAIP Board of Directors is elected by member programs to guide and support the goals of the organization, including promoting effective use of IOLTA funds to support civil legal aid for the poor. Therefore, NAIP's members have a significant interest in arguing for the removal of the restriction on the funding it provides to legal aid. The notion that a small portion of the total funding base for legal aid programs controls how all the other funds are used, even against the wishes of those other and often larger funders, is confounding at best and works against the very goals and strategies for providing legal assistance to low-income people that so many of us have developed in our states and localities. These goals and strategies have been developed by state and local service providers with the input of their state and locally appointed boards, local officials, the client community and other service providers. The NAIP Board of Directors has continuously reaffirmed their position that the restriction on non-LSC funding should be removed and support the current Civil Access to Justice Act, H.R. 3764, sponsored by Rep. Scott that would remove this restriction.

Mark Braley, President
National Association of IOLTA Programs
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(804)782-9438

BRENNAN
CENTER
FOR JUSTICE

A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR

Rebekah Diller and Emily Savner

Brennan Center for Justice *at New York University School of Law*

ABOUT THE BRENNAN CENTER FOR JUSTICE

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Executive summary

Created thirty-five years ago under President Nixon, the Legal Services Corporation ("LSC") helps poor families obtain access to the courts when they face pressing civil legal matters. More than 900,000 people are helped each year by the lawyers in LSC-funded programs across the country. With LSC-funded lawyers at their side, people can obtain protection from abusive spouses, retain custody of their children, fight unlawful employment practices and even save their homes from foreclosure. But a set of federal funding restrictions is severely undercutting this important work, and doing so in the midst of an unprecedented national financial crisis. The time has come to eliminate the most severe of the LSC funding restrictions.

A sign of the program's success in representing poor people, LSC came under attack in the mid-1990's as part of the extraordinary conservative backlash that, at one point, led to the shutdown of the federal government. Not only was the federal government's funding of LSC cut by one-third, but also an onerous set of restrictions was imposed on the independent non-profit organizations that receive LSC funding. The funding cuts, and the funding restrictions, had devastating effects. They left LSC seriously underfunded and sharply circumscribed.

The funding restrictions cut especially deep. Unlike anyone able to hire a private attorney, people relying on a lawyer in an LSC-funded program cannot claim an award of attorneys' fees even when consumer protection or civil rights laws authorize fee awards for the specific purpose of encouraging enforcement of the law and penalizing wrongdoers. They cannot participate in class action lawsuits even when doing so offers the best and most efficient way to obtain relief from widespread illegal practices, such as predatory lending or foreclosure rescue scams. They cannot lobby for policy reform either – a general ban prohibits their lawyers from reaching out to legislators to offer advice on how to fix federal, state, or local laws.

In short-sighted attacks on prisoners and immigrants, the restrictions banned these individuals from obtaining the representation offered by lawyers in LSC programs. Incarcerated people cannot obtain the LSC-funded help they need to tackle common legal problems – with housing, debt, and familial relations – that threaten their successful reentry into society. Certain groups of lawfully admitted and fully documented immigrants are barred from obtaining LSC-funded help even with concerns unrelated to their immigration status, such as those related to their work conditions, wages, and housing.

In a virtually unprecedented overreach, Congress applied this set of restrictions not just to the funds it appropriates, but to all of the money that an LSC grantee possesses. This poison pill restriction on state, local and private funds annually ties up over $490 million in non-LSC funding, or 58% of the funds at LSC-recipient organizations. The restriction denies state, local, and private funders control over how their money is spent, deters non-federal spending on legal services, and wastes scarce resources when states are forced to set up duplicative, separate entities to "unrestrict" at least a portion of their funds.

In the thirteen years since they were implemented, the restrictions have effectively denied countless people equal access to justice. They have squandered funds on duplicate costs that could have gone toward serving more in need. They have prevented victims of predatory lending and consumer fraud from obtaining their full measure of justice. And by shutting down legislative

and administrative advocacy, they have prevented elected representatives and government officials from learning about the legitimate policy needs of poor communities.

In light of the harms the restrictions have caused and the unprecedented need for legal services amid the economic crisis, **Congress should take the following, cost-free steps:**

1. Remove the application of the LSC restrictions to state, local, private and other non-LSC funds that legal aid organizations receive.

2. Remove restrictions on LSC funds that interfere with the ability of legal services attorneys to protect their clients' rights, that is, eliminate the restrictions: on seeking attorneys' fee awards; on class actions; on legislative and administrative advocacy, and on solicitation.

3. Remove restrictions that prohibit representation of documented immigrants and people in prison who need help with reentry matters.

Such a solution would leave certain federal restrictions in place while ensuring that legal aid organizations are able to help their clients most efficiently and effectively. In combination with increased funding for legal services, the removal of these select restrictions would expand access to justice at a time of massive need.

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I. INTRODUCTION

As the economic crisis pushes growing numbers of people into poverty and homelessness, the need to revitalize our nation's civil legal aid system is more urgent than ever. For families trying to save a home from a predatory lender, recover unpaid wages from an employer, or obtain food for a sick child, civil legal aid can be a lifeline. Studies show that access to a lawyer often provides the critical boost that families need to avoid homelessness, and the key factor that can enable domestic violence survivors to reach safety and obtain financial security.[1]

Notwithstanding the clear benefits, the overwhelming majority of people who need legal aid are unable to obtain it, due, in large part, to the limited capacity of the Legal Services Corporation ("LSC"), the cornerstone of the nation's institutional commitment to equal justice.[2] Every year, one million cases are turned away by LSC-funded offices due to funding shortages.[3] Study after study finds that 80 percent of the civil legal needs of low-income people go unmet.[4] There are 6,861 low-income people for every legal aid attorney funded by LSC and other sources.[5] In contrast, one private attorney exists for every 525 people in the general population.[6] This "justice gap" keeps families in poverty and threatens the stability of our court system.

STUDY AFTER STUDY FINDS THAT 80 PERCENT OF THE CIVIL LEGAL NEEDS OF LOW-INCOME PEOPLE GO UNMET.

The justice gap is not solely a product of funding shortages; it is also the result of funding restrictions imposed on legal aid programs by Congress in 1996.[7] In an attempt to deprive families of full legal representation, Congress restricted the advocacy tools available to them. For individuals whose lawyers work at programs that receive LSC funds, the legal tools relied on by clients of other attorneys are off limits. Options such as participating in class actions, claiming court-ordered attorneys' fee awards, and conducting advocacy before legislatures and administrative bodies are prohibited.[8]

Additionally, Congress defined some categories of people to be ineligible for legal services representation; all undocumented immigrants, certain categories of lawfully documented immigrants and people in prison, simply cannot qualify.[9]

And, Congress imposed an extraordinarily harsh, poison pill restriction on LSC-funded programs. This restriction on state, local and private funds, or "non-LSC funds restriction," extends the federal funding restrictions to limit all the activities conducted on behalf of clients of LSC programs, even when those activities are financed with the programs' non-LSC funds.[10] As a result, justice planners in many states have had to set up two, inevitably duplicative, legal aid systems in order to ensure that state and other funds are not constrained by the non-LSC funds restriction.[11] The result is that scarce funds must be spent on duplicative administrative costs – two rents, two copy machines, two computer networks, two executive directors. In some locations with less state funding for legal aid, there are no non-LSC-funded organizations to perform the restricted work, so this work simply is not done.

In the decade and a half that has passed since the restrictions were pushed through the Congress as an outgrowth of the Gingrich-era Contract with America, the restrictions have denied countless people equal access to justice. This paper surveys the impact that the LSC restrictions are having on the ability of families to obtain justice, particularly in the midst of the national financial crisis. And, it explains why now is the time to fix these restrictions in order to put an end to their worst effects.

II. LSC: Committed to the American Promise of Equal Justice

LSC embodies the federal government's most sustained effort to deliver on the oft-touted American promise of equal justice for all.[12] President Nixon and the Congress created LSC in 1974 to provide high-quality civil legal assistance to people unable to afford to retain private attorneys.[13] By providing legal assistance in the wake of the riots that occurred in major American cities in the late 1960s and early 1970s, Congress aimed to promote equal access to the justice system, improve economic opportunities for low-income people and reaffirm faith in the legal system.[14]

LSC-FUNDED ORGANIZATIONS HELP NEARLY ONE MILLION PEOPLE A YEAR.

LSC is structured not as a federal agency but rather as a quasi-private, non-profit corporation, a design that was intended to insulate it from the political winds of any given moment. It is governed by an 11-person, bipartisan board of directors appointed by the President and confirmed by the Senate.[15] LSC operates by providing grants to independent, local non-profit organizations, incorporated under state law, which in turn provide direct legal services within their communities.[16] LSC-funded organizations help nearly one million people a year.[17] Those local non-profits determine their own priorities for service provision, taking into account the particular needs of the client communities they serve.[18] Legal services offices handle cases concerning basic needs: family matters (38%), housing (23%), income maintenance (13%) and consumer issues (12%).[19]

LSC is the single greatest source of funding for legal aid in the U.S., but it is just one participant in a three-pronged partnership that also includes state and local governmental institutions, and private donors.[20] In 2007, LSC provided more than $330 million in grants to 138 programs with more than 900 offices.[21] In the same year, more than $490 million was received by LSC programs from non-LSC sources: state and local governments, Interest on Lawyers' Trust Accounts ("IOLTA") programs, foundations and private donors and other, non-LSC federal grant programs.[22] The proportion of non-LSC funds possessed by LSC-recipient organizations has risen substantially since the federal funding restrictions were put in place, from 40.33 percent in 1996 to 58.1 percent in 2007;[23] however, recent declines in IOLTA funding and state budget shortfalls due to the national economic crisis may reverse that trend.

Many federal legislators become familiar with LSC because of the substantial role performed

by LSC grantees in responding to the otherwise unmet needs of their constituents. Legislative staff routinely refer families to the legal aid programs in their home districts to obtain relief for a broad range of civil legal problems.

III. The LSC Restriction Regime

At the inception of LSC, Congress placed some restrictions on the activities of LSC-funded lawyers, but struck a balance that enabled individuals to get essential legal work done.[24] For example, while some limits were imposed on tools of advocacy – class actions, for example, could only be undertaken with the approval of a program director – they were not completely barred.[25] Congress also banned participation in certain types of cases that reflected particular controversies of the time, including litigation related to military registration, desegregation, and attempts to procure a "non-therapeutic abortion."[26] However, LSC-recipient programs could still represent clients in such cases if a state or local government funder wished to finance the effort.[27]

AT THE INCEPTION OF LSC, CONGRESS PLACED SOME RESTRICTIONS ON THE ACTIVITIES OF LSC-FUNDED LAWYERS, BUT STRUCK A BALANCE THAT ENABLED INDIVIDUALS TO GET ESSENTIAL LEGAL WORK DONE.

For the most part, Congress held true to its declaration that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients."[28]

A. 1996 Restrictions Sharply Curtail Advocacy Available to Poor Clients.

The restrictions imposed in 1996 marked a clear departure from this balance by sharply curtailing advocacy on behalf of legal services clients. The 1996 restrictions were the culmination of attacks on legal services for the poor that began soon after LSC's formation. At the time, the hostility came in large part from agribusiness interests in farm states, which were angered by the work of legal services lawyers who helped farmworkers pursue owed wages and improved working conditions.[29] President Reagan's election in 1980 provided an eager ally in the White House. The Heritage Foundation's conservative agenda, published on the eve of President Reagan's first term, *Mandate for Leadership*, detailed steps to eliminate LSC or, at least, to reduce its effectiveness.[30] Declaring LSC "so basically flawed that it is beyond reform sufficient to justify its continuation," the plan called for the wholesale destruction of LSC.[31] If complete elimination proved infeasible, the Heritage Foundation urged steep budget cuts and broad restrictions (to be imposed through LSC appropriations riders) as a second-best alternative.[32]

LSC survived the attempts to eliminate it under the Reagan Administration, though with less funding.[33] However, the blueprint for hobbling LSC ultimately was put in place during the 104th Congress, when Republicans took control of both houses for the first time in decades and, through the "Contract with America," renewed the call for elimination of LSC.[34] The House of Representatives, led by Newt Gingrich, adopted an initial budget that would have cut LSC funding by one-third for FY 1996, a second third

for FY 1997, and then eliminated all federal funding in the subsequent year.[35] Through a compromise brokered by then-Senator Pete Domenici (R-NM) and others, the plan to entirely de-fund LSC was averted.[36] Instead, Congress cut LSC funding by one-third in the 1996 appropriation and imposed the set of funding restrictions that severely limit the work of LSC-funded programs, including the work done with the money received from non-LSC sources.[37]

Under the 1996 appropriations rider, which has been carried forward in subsequent years with only slight modification, non-profit organizations receiving LSC funds are barred from using the following tools of advocacy for their clients, even though such tools are available to individuals who are represented by privately funded attorneys:

- class action litigation;
- claims for court-ordered attorneys' fee awards, authorized by underlying law;
- policy advocacy for legislative and administrative reforms (with certain exceptions); and
- educating potential clients about their rights and then offering to represent them.

The restrictions also effectively prevent certain individuals from qualifying for LSC-funded services, including:

- incarcerated people;
- undocumented immigrants, and certain documented immigrants; and
- individuals facing eviction from public housing projects who are charged with a drug offense.

The rider also includes other restrictions, such as a ban on all abortion-related litigation and on redistricting cases.[38]

B. Extraordinary, Poison Pill Restriction is Out of Step with Private Public Partnership Model.

In a somewhat unprecedented power grab, Congress prohibited LSC-funded programs from engaging in these restricted activities or representing restricted clients not just with LSC funds, but with any funds, no matter the source.[39] Once an organization receives its first dollar of LSC funding, all of its funds from state and local governments, other federal programs, and private foundations and donors are restricted.[40] Not only did this extension of federal power shift policy dramatically away from the balance struck in the LSC Act, which permitted recipients to use funds from other government sources for the purposes for which they were intended,[41] but the 1996 law also marked a stark departure from the usual model for federal grant-making. It is fairly common for the federal government to restrict the activities it funds; however, it is extremely rare and raises grave constitutional concerns when Congress restricts the activities that grantees choose to finance with their own, non-federal funds.

The 1996 restrictions prompted almost immediate challenges in court on First Amendment grounds. A federal district court in Hawaii ruled that the restriction on non-LSC funds violated the First Amendment because it did not afford a recipient non-profit any avenue through which to use its non-LSC funds to engage in constitutionally protected speech and advocacy on behalf of its low-income clients.[42] A federal district court in New York was also entertaining a separate First Amendment challenge to the restriction on non-LSC funds, as part of a comprehensive First Amendment challenge to the full set of funding restrictions.[43]

ONCE AN ORGANIZATION RECEIVES ITS FIRST DOLLAR OF LSC FUNDING, ALL OF ITS FUNDS FROM STATE AND LOCAL GOVERNMENTS, OTHER FEDERAL PROGRAMS, AND PRIVATE FOUNDATIONS AND DONORS ARE RESTRICTED.

In the wake of the Hawaii court's ruling, and in anticipation of briefing in support of the New York plaintiffs' motion seeking to enjoin LSC from enforcing the restriction on non-LSC funds, LSC attempted to salvage the constitutionality of the non LSC-funds restriction by issuing a so-called "program integrity regulation."[44] Acknowledging that the non-LSC funds restriction had overreached, LSC claimed that its regulation was intended to provide recipients with the opportunity to use their own non-LSC resources to finance the restricted activities.[45]

Yet, it is clear from the operation of the regulation that its real intent is to make it as difficult as possible for a recipient to use private funds to engage in restricted representation. To spend their own non-LSC funds on restricted work, grantees must operate a new organization out of a physically separate office, with separate staff and equipment.[46] In practice, LSC's program integrity regulation imposes conditions so onerous that almost no program in the country has been able to rely on it successfully to create a separate affiliate under its control through which to conduct privately financed, restricted activities.

IV. THE LSC RESTRICTIONS OBSTRUCT JUSTICE FOR LOW-INCOME INDIVIDUALS AND WASTE SCARCE FUNDS

Over a decade of experience with the legal services restrictions has shown that they prevent people with pressing needs from obtaining full access to the justice system. They deny low-income people the legal tools available to those who can afford to pay for a lawyer. The restrictions constrict the choices available to state and local governments, as well as private foundations and individual donors, who wish to be partners in innovative efforts to expand access to justice. Finally, they squander precious funds that could go toward representing more underserved clients.

A. Limits on Advocacy Tools Available to Low-Income Clients Obstruct Equal Justice.

Notwithstanding the restrictions, legal services offices continue to provide high-quality representation and assist client communities in addressing legal problems. However, clients face many types of legal problems that could be addressed more effectively and efficiently were they to have access to the legal tools available to all other litigants. This section describes the impact of particular advocacy restrictions – those prohibiting attorneys' fee awards, class actions, and legislative and administrative advocacy – and includes examples of specific cases that the Brennan Center has gathered from legal services offices around the country.

Many of the examples involve efforts to combat predatory lending and other consumer scams that are tied to the mortgage meltdown and foreclosure crisis. In the midst of the national financial crisis, legal aid providers are being inundated with requests for help by people about to lose their homes.[47] The need is tremendous and the resources available are limited. When legal aid offices are able to take cases in which consumer fraud was involved,[48] the restrictions – particularly the class action and attorneys' fee restrictions – limit the ability of LSC recipients to perform their private attorney general role in the consumer protection enforcement scheme and enable wrongdoers to write off individual cases as a mere cost of doing business.[49] Moreover, the restrictions on legislative advocacy have gagged legal aid attorneys from performing their critical role in alerting legislatures to the problems of low-income communities, including those that led to the subprime lending crisis.[50]

1. Attorneys' Fee Award Restriction Prolongs Litigation and Undercuts State and Federal Regulatory Schemes.

For cases in which legal services organizations represent clients, attorneys' fee awards serve three related, and equally important, functions. First, fee awards provide a reason, within an ongoing case, to encourage a party to agree to a settlement; second, they act as a deterrent to discourage people from violating laws that are designed to protect the public; and third, they enable legal aid programs to bring in additional revenue from non-LSC sources in order to do more work to protect poor clients and poor communities.[51]

ATTORNEYS' FEE AWARDS ACT AS A DETERRENT TO DISCOURAGE PEOPLE FROM VIOLATING LAWS THAT ARE DESIGNED TO PROTECT THE PUBLIC.

Fee awards play an especially critical role in consumer protection and mortgage fraud cases. In all but five states, consumer protection statutes that prohibit deceptive practices permit prevailing plaintiffs to recover attorneys' fees from defendants who have been found to have violated the law.[52] On the federal level, the Fair Housing Amendments Act ("FHAA"), a tool for combating racially discriminatory bias in predatory lending, also provides for attorneys' fee awards when a plaintiff has prevailed.[53] The Real Estate Settlement Procedures Act ("RESPA"), which prohibits kickbacks to mortgage brokers, authorizes prevailing parties to obtain attorneys' fees.[54] In addition, fees are authorized under the Truth in Lending Act ("TILA"),[55] which mandates certain disclosures in home equity lending, and the Home Ownership and Equity Protection Act,[56] an amendment to TILA that mandates additional disclosures for high cost home loans and

prohibits certain loan terms such as negative amortization and balloon payments.

The possibility of having to pay attorneys' fees provides critical leverage to ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the poor client's resources and those of the legal aid lawyer. As the New York Court of Appeals has stated, the availability of attorneys' fees is "an incentive to resolve disputes quickly and without undue expense" on the part of the court and litigants.[57] In predatory lending cases, for example, where the underlying loan to the homeowner may be a product of deceptive or overreaching strategies on the part of the lender, the unfairness inherent in the original agreement may be compounded if the lender has no incentive to conduct the litigation responsibly. Without the ability to level the litigation playing field, low-income families are placed at a disadvantage, both in the litigation and in settlement negotiations.

WITHOUT THE ABILITY TO LEVEL THE LITIGATION PLAYING FIELD, LOW-INCOME FAMILIES ARE PLACED AT A DISADVANTAGE, BOTH IN THE LITIGATION AND IN SETTLEMENT NEGOTIATIONS.

LSC-funded South Brooklyn Legal Services ("SBLS") has one of the nation's leading predatory lending practices. It reports that the inability to seek fee awards frequently results in predatory lenders dragging out cases that might otherwise settle if fees were available to serve as an incentive to resolve the cases before the investment of substantial attorney time.[58] In one case against Ameriquest Mortgage Co., one of the nation's largest subprime mortgage lenders, SBLS represented an elderly African-American widow who they allege had been conned into an unaffordable mortgage when she needed to make repairs to her home of over 25 years.[59] After meeting with Ameriquest representatives, this client received a 2/28 mortgage (a 30-year mortgage with two years at a fixed rate and 28 years at an adjustable rate) with initial monthly payments of $2,300, nearly three times her monthly income.[60] To make it appear as if she could afford the loan, Ameriquest allegedly created a fake set of financial documents to include in her loan file, including a 401(k) document, employment statement, lease agreement and tax returns.[61] With SBLS's assistance, she brought a case alleging Fair Housing Act, Truth in Lending Act, Real Estate Settlement Procedures Act, New York deceptive practices act and other violations.[62]

In an attempt to prove that the company engaged in a pattern of extending unaffordable loans to borrowers, SBLS sought the lender's loan files for other borrowers around New York.[63] Ameriquest initially refused to turn over the documents and the company was able to draw out a lengthy court battle due to the severe mismatch in negotiating stances.[64] Eventually, Ameriquest produced 50,000 pages of documents, which took two attorneys hundreds of hours to review and was an enormous drain on SBLS resources.[65] The case eventually settled.[66] Had SBLS been permitted to seek attorneys' fees, Ameriquest might have had an incentive to limit the amount of time the plaintiffs' attorneys had to spend on the case, thus, speeding up the litigation process. In addition, the possibility of a fee award could have given the SBLS client more leverage in settlement negotiations.

The award of attorneys' fees also serves a deterrent purpose. For example, it ensures that wrongdoers suffer some additional financial penalty for violating a consumer protection or

civil rights statute and cannot merely write off the costs incurred in the litigation as a cost of doing business. When low-income victims of such violations cannot seek fee awards, however, that purpose is frustrated. As new "foreclosure consultant" scams – in which unsavory "consultants" make money by falsely promising to help distressed homeowners refinance or otherwise reduce their mortgage debt – pop up with alarming regularity around the country, the fee restriction hampers efforts to shut them down.

WHEN AN ABUSER REPEATEDLY FLOUTS COURT ORDERS, THE VICTIM CANNOT SEEK ATTORNEYS' FEES TO DETER SUCH FLAGRANT AND DANGEROUS VIOLATION OF THE LAW.

LSC-funded Legal Aid Foundation of Los Angeles ("LAFLA") estimates that as many as 30 to 40 percent of homeowners contacting its office last year for foreclosure-related assistance had either already paid a foreclosure consultant or had been contacted by one.[67] To protect homeowners and ensure that they are informed of their rights, California law regulates the practices of these foreclosure consultants.[68] Even with this law on the books, LAFLA reports that some consultants illegally provide little or no services and divert the homeowner from seeking legitimate assistance. In many cases against deceitful foreclosure consultants, actual damages would be in the range of $1,500 to $2,500, but this small amount limits the effectiveness and feasibility of litigation.[69] Despite the statutory provision for attorneys' fees in the California law, there are inadequate resources available among those entities that could pursue fees, including the private bar and criminal prosecutors, to fight these predatory consultants. If LAFLA could seek fees in these cases, it could raise the consultants' costs of continuing these illegal practices, perhaps high enough to put them out of business.

Attorneys' fees also deter wrongful conduct by individuals who flout court orders. In one aspect of LSC-funded Legal Aid of West Virginia's practice, staff attorneys and volunteer private attorneys represent victims of domestic violence who seek protective orders.[70] However, when an abuser repeatedly flouts court orders, the victim cannot seek attorneys' fees to deter such flagrant and dangerous violation of the law.

PRIOR TO THE RESTRICTION'S ENACTMENT, LSC-FUNDED ORGANIZATIONS IN CALIFORNIA RECOVERED APPROXIMATELY $1.75 MILLION ANNUALLY IN ATTORNEYS' FEES, A REVENUE SOURCE THAT IS NO LONGER AVAILABLE TO THEM.

Finally, the attorneys' fee restriction cuts off a key mechanism that, while promoting enforcement of the law, has the added benefit of enabling programs to bring in additional funds to enable more clients to protect their rights. The California Legal Services Commission has observed that in addition to impeding successful case resolutions, the attorneys' fee award restriction creates serious funding problems for LSC grantees.[71] Prior to the restriction's enactment, LSC-funded organizations in California recovered approximately $1.75 million annually in attorneys' fees, a revenue source that is no longer available to them.[72]

2. Class Action Restriction Prevents Use of Rare But Necessary Device for Effective Representation.

Class actions provide courts and litigants with an efficient mechanism for adjudicating the similar claims of individuals who comprise a group and to ensure that all similarly situated persons obtain relief when a defendant violates the law. They also provide access to the courts for individuals who might not have the resources to bring an individual claim. In some cases, the availability of a class action ensures that broad discovery can take place as to a defendant's unlawful actions.

For poor people in particular, the availability of the class action option is critical for obtaining relief from widespread, illegal practices.[73] Historically, class actions by legal services programs ensured that poor children obtained medical coverage,[74] forced the Social Security Administration to abide by court rulings,[75] and challenged consumer fraud.[76] Access to justice and legal services commissions in Georgia, Hawaii, Missouri, New Hampshire, and North Carolina have concluded that the inability to use the class action mechanism hinders legal services offices from providing the best possible services to their clients.[77] As the North Carolina Legal Services Planning Council has concluded, challenging some "illegal but widespread practices" without a class action lawsuit is "impossible."[78]

> CHALLENGING "ILLEGAL BUTWIDESPREAD PRACTICES" WITHOUT A CLASS ACTION IS "IMPOSSIBLE."

As with the attorneys' fee restriction, the class action limitation has a particularly harmful effect on efforts to combat consumer fraud that targets low-income communities. In predatory lending cases, for example, legal services programs must litigate against unscrupulous players piecemeal, helping one homeowner at a time instead of a broad class of victims. A recent suit by eight first-time homebuyers against United Homes, LLC, a self-titled "one-stop shop" of real estate companies, lenders, appraisers, and lawyers, illustrates the inability of the courts to fully enforce consumer protection laws without the option of a class action.[79]

Represented by South Brooklyn Legal Services, the eight African-American homebuyers allege that United Homes conspired with appraisers, lenders, and attorneys to sell "overvalued, defective homes financed with predatory loans."[80] In seeking to vacate the underlying mortgage obligations, they allege that United Homes failed to disclose their properties' histories, inflated the homes' values with inaccurate appraisals, overstated the buyers' assets and incomes on loan applications, concealed information about loan terms, sold the homes in uninhabitable conditions and refused to make agreed-upon repairs.[81] The homebuyers also allege that "United Homes exploited the racially segregated housing market to engage in 'reverse redlining,' the practice of intentionally extending credit to members of minority communities on unfair terms."[82] The bulk of the plaintiffs' claims have survived a motion to dismiss and the case continues.[83] Given the alleged nature of this "one-stop shop," it is hard to imagine that these eight individual plaintiffs are the only people in Brooklyn who

fell victim to the defendant's practices. However, unable to file a class action against United Homes, SBLS cannot seek more widespread relief for other homebuyers potentially taken advantage of by United Homes.

3. Legislative and Administrative Advocacy Restriction Strips the Poor of a Powerful Voice.

Low-income people are at a distinct disadvantage in raising their concerns before legislative and administrative bodies. They lack the lobbyists, trade associations and donation money that provide corporate and other well-resourced interests access to the political process. At the same time, their daily lives are often inextricably linked with the operations of government and law.[84]

Legal aid attorneys who see the legal problems faced by low-income communities on a daily basis can potentially play a critical role in alerting legislatures and other government bodies to gaps in regulation and problems in the implementation of laws. The silencing of legal aid attorneys has had dire consequences in the current mortgage crisis.[85] Attorneys at Maryland Legal Aid Bureau ("LAB"), for example, have witnessed many of the lending abuses that have occurred over the last 10 years, but restrictions on legislative and administrative advocacy have prevented them from actively pursuing reforms.[86] Under the restrictions, the only way that a legal aid office can participate in lobbying is in response to a written request from a lawmaker.[87] Because lawmakers are often unaware of this limitation and of the need to make an extra effort to invite the participation of legal services lawyers in legislative discussions, this highly unusual requirement can shut down communication entirely.[88]

LEGAL AID ATTORNEYS WHO SEE THE LEGAL PROBLEMS FACED BY LOW-INCOME COMMUNITIES ON A DAILY BASIS CAN POTENTIALLY PLAY A CRITICAL ROLE IN ALERTING LEGISLATURES AND OTHER GOVERNMENT BODIES TO GAPS IN REGULATION AND PROBLEMS IN THE IMPLEMENTATION OF LAWS.

In contrast, when LAB has been able to educate lawmakers about the problems faced by its clients – at a lawmaker's invitation, as required by the restrictions – it has lent a critical, non-mortgage-industry voice to the process. In 2008, the Maryland Legislature dramatically overhauled state laws regarding credit and lending processes.[89] Because of a lawmaker's invitation, a LAB attorney was able to participate in a state Senate Finance Committee workgroup on revising consumer protection safeguards that was otherwise composed of representatives from the lending, mortgage and banking industries.[90] The LAB attorney was the only person in the workgroup positioned to represent the interests of borrowers.[91] Input from this attorney ensured that the proposed consumer protections were not unduly limited to the most extreme types of loan products, as the industry representatives had proposed, and resulted in a more wide-ranging consumer protection bill being passed by the Legislature.

B. Restrictions on Unpopular Clients Render Courts Off-Limits for the Most Vulnerable.

Reflecting the extraordinary political winds of the time, the 1996 restrictions prohibited legal services attorneys from representing many categories of immigrants and all prisoners.[92] These exclusions further marginalize those with the least access to the civil justice system.[93]

1. Immigrant Representation Restriction Bars Assistance to Lawfully Present Documented Workers.

For certain categories of immigrants, including many who are lawfully in the United States, the restriction places legal representation out of reach even when the stakes are high. In many parts of the country, there are no non-LSC-funded legal aid offices that can serve excluded immigrants.[94] As a result, they have no place to turn when they face unlawful eviction, consumer fraud or an employer who has cheated them out of wages.

One of the groups hardest hit by the immigrant restriction are those migrant workers here in the U.S. at their employer's invitation on H-2B visas, a visa category for unskilled, non-agricultural workers performing seasonal or temporary jobs. H-2B visa holders were excluded from legal aid eligibility in 1996.[95] Last year, Congress eased the restriction slightly and made those H-2B visa holders working in the forestry industry eligible for legal aid.[96] However, those H-2B workers employed in other industries, such as construction, canning and tourism, remain ineligible.[97]

H-2B workers often perform tasks that risk physical harm and frequently are mistreated by employers.[98] Many do not speak English and work in geographically isolated areas.[99] Without access to legal services, they are virtually without recourse when their rights are violated. Employers often take advantage of this fact by misclassifying agricultural workers, who should fall under the relatively more stringent protections of the H-2A visa program, as H-2Bs.[100]

H-2B workers in need of assistance have to be turned away by LSC-funded programs.[101] LSC-funded Texas RioGrande Legal Aid describes one case that involved an "illegal guest-worker importation scheme" in which a grower and two farm labor contractors used over 400 H-2B workers to harvest and pack onions and watermelons from 2001 to 2007 in south and west Texas to circumvent the protections and benefits of the H-2A program, including access to LSC-funded representation.[102] TRLA was unable to represent any of the H-2B visa holders even though there was reason to believe that they had been abused at the hands of their employer and should have been issued visas that would have allowed them LSC representation.[103]

2. Prisoner Representation Restriction Unnecessarily Delays Reentry Services.

Legal services organizations are prohibited from representing anyone in prison in litigation.[104] This restriction has hampered efforts to resolve civil legal issues, such as those related to debt and child custody, that can help persons in prison prepare for re-entry into their communities. In some parts of the country, the restriction has left those in prison with virtually no access to civil legal representation.[105]

IN SOME PARTS OF THE COUNTRY, THE RESTRICTION HAS LEFT THOSE IN PRISON WITH VIRTUALLY NO ACCESS TO CIVIL LEGAL REPRESENTATION.

Michigan, for example, has a bold and innovative Prisoner Reentry Initiative that aims to help incarcerated people as they prepare to reenter society.[106] A team of community groups, faith-based organizations, and legal services providers stands ready to provide essential services.[107] An important component of this project is "in-reach" – going into prisons and jails to address the problems confronting these men and women prior to release.[108] But, even though this Michigan initiative is primarily funded with state and private money, legal services programs, such as the Reentry Law Project of LSC-funded Legal Aid of Western Michigan – a key legal player on the team – is barred from providing its services to anyone in a prison.[109] The Reentry Law Project can only assist individuals once released, even though many of the problems facing prisoners would be better addressed during incarceration, so that citizens can move immediately into employment and housing upon release.[110] For example, many prisoners face the loss of custody of their children while incarcerated and would benefit greatly from the help of an attorney as they struggle to maintain family relationships.[111]

In states that lack other funding or organizations designed to assist those in prison, the restriction has meant that legal representation is effectively out of reach. For example, in Hawaii, where the incarcerated population grew 138 percent from 1990 to 2006, the ACLU of Hawaii is the "only legal service agency with the potential to assist the inmate population; however, due to their limited resources they only accept cases which would result in a larger impact on the overall corrections system."[112]

C. The Restriction on Non-LSC Funds Wastes Precious Funds and Unfairly Burdens State and Local Efforts to Expand Access to Justice.

The most draconian aspect of the LSC funding restrictions is the application of this entire set of limitations to all of the state, local, private and other non-LSC funds possessed by LSC recipients. This punitive measure subjects legal services offices to a more stringent regime than almost any other federal grantee. It has interfered with efforts at the state level to leverage resources for the efficient and effective provision of legal aid. Finally, in a field notoriously under-resourced, the restriction on non-LSC funds has wasted precious dollars and driven away private funding opportunities.

1. Non-LSC Funds Restriction is Out of Step With the Government's Approach to Public-Private Partnerships.

The restriction on non-LSC funds, and the program integrity regulation that implements the restriction, are out of step with the traditional model for public-private partnerships. Non-profit organizations that receive part of their funding from LSC are treated more stringently than almost all other government-funded non-profits, including faith-based organizations.[113] Other non-profits must account strictly for their receipt of government funds, but are not forced to operate dual systems out of separate offices in order to use their private funds to engage in constitutionally protected activities.[114]

LSC has sought to defend this "physical separation" model in court by claiming that such stringent separation is necessary to ensure that it does not indirectly subsidize or appear to endorse the disfavored, restricted activities, such as representation of undocumented immigrants or class actions.[115] However, that claim is belied by the fact that faith-based organizations that receive government funds are subject to a much more relaxed separation regime.[116]

More specifically, the First Amendment's Establishment Clause bars the federal government from subsidizing or endorsing a religious grantee's religious activities,[117] yet, under the current federal Faith-Based Initiative, the government allows religious organizations to rely on a single set of staff to run federally funded, non-religious programs in a single physical space in which the organizations conduct privately financed religious activities such as worship and proselytization.[118] The government has asserted that such a modest level of separation is good enough to avoid subsidization as well as the appearance of endorsing a privately funded religious message.[119] The disparity in treatment with legal services programs is particularly striking since the Constitution's Establishment Clause actually forbids governmental endorsement of a religious message, whereas the Constitution does not require the government to distance itself from the provision of legal representation and, indeed, in some cases may even require government to provide representation.[120]

The punitive nature of LSC's physical separation regime is further underscored by contrasting it with the more reasonable rules applied in 2002 to federally funded stem cell research. Scientists using private funds to conduct research on federally proscribed stem cell lines were required, for years, to operate two entirely separate labs, one for their privately funded research, another for their publicly funded research.[121] In 2002, the National Institutes of Health found this restriction so expensive, inefficient, and contrary to principles of scientific research that it removed the restriction.[122] NIH permitted government funded scientists to conduct privately funded stem cell research alongside federally funded research, in a single lab, so long as they use rigorous bookkeeping methods to ensure that any restricted stem cell experiments are financed exclusively with private dollars.[123]

LSC-funded organizations should, at minimum, be placed on a level playing field with these and other federal grantees. In addition, given LSC's stringent accounting and auditing

requirements, the federal government would have every assurance that its money would be spent for the purposes for which it was appropriated. LSC grantees abide by strict accounting rules that ensure that costs are properly allocated among LSC and other grants.[124] LSC recipients also must abide by stringent time-keeping requirements; attorneys keep track of their time in quarter-hour segments.[125] Additionally, each LSC-funded program is audited annually by the Office of the Inspector General.[126] These accounting procedures are more rigorous than those that exist for many other federal grantees and would continue to ensure that LSC funds are not misspent if the non-LSC funds restriction, or any other restrictions, were removed.

2. Restriction on Non-LSC Funds Interferes With Growing State and Local Efforts to Expand Access to Justice.

State and local governmental institutions and private charitable donors are essential partners in state justice systems designed to expand access to civil justice. For example, money for civil legal services is contributed by Interest on Lawyers' Trust Accounts (IOLTA),[127] state legislative appropriations, civil court filing fees, and a variety of other state and local contributions, all intended to enable low-income individuals, families, and communities to obtain civil legal assistance.[128] But, the federal government undercuts this important function, by effectively limiting how state and local contributions can be spent by local legal aid non-profits.

THE NON-LSC FUNDS RESTRCITION CURRENTLY TIES UP APPROXIMATELY $490 MILLION IN NON-LSC FUNDING ANNUALLY, MUCH OF IT FROM THESE STATE AND LOCAL GOVERNMENT SOURCES.

The non-LSC funds restriction currently ties up approximately $490 million in non-LSC funding annually, much of it from these state and local government sources.[129] Real federal funding levels have declined from the high water mark achieved in FY 1981.[130] Since that year, annual federal underfunding of LSC has meant that LSC finances less and less of legal services organizations' work while the restriction continues to apply federal control over the entirety of those organizations' activities. Nationally, 58.1 percent of the funds that go to LSC grantees came from non-LSC sources in 2007, up from 40 percent the year the restriction was enacted.[131]

The proportion is much more skewed in some states. In New Jersey, for example, LSC funds amounted to only 13 percent of legal aid programs' total funding in 2007, yet the restriction encumbered the remaining 87 percent.[132] Overall, LSC grantees in 28 states received less than half of their funds from LSC sources in 2007,[133] yet the restriction limited what these programs could do with all of their funds. Thus the restriction, coupled with funding trends in recent years, has given the federal government increasingly disproportionate control over legal services organizations' activities and over the money of state, local, and private contributors.

IN NEW JERSEY, LSC FUNDS AMOUNTED TO ONLY 13 PERCENT OF LEGAL AID PROGRAMS' TOTAL FUNDING IN 2007, YET THE RESTRICTION ENCUMBERED THE REMAINING 87 PERCENT.

3. Restrictions Waste Precious Resources that Could Go Toward Serving More Families in Need.

In some states with significant non-LSC funding, justice planners have established entirely separate organizations and law offices, funded by state and local public funders and by private charitable sources, to carry out the activities that LSC-funded programs are otherwise prohibited from conducting.[134] However, because LSC's program integrity regulation requires physical separation between LSC-funded and non-LSC-funded organizations, the costs associated with overhead, personnel, and administrative expenditures are duplicated.[135]

Twin systems inevitably cost more to run. And, thus, the restriction creates dramatic inefficiencies in a system that is already under-funded. The money contributed by state and local governmental funders, and by private charitable donors could be used to finance basic legal services for families, but instead has to be spent on duplicate offices, equipment, executive directors, and the time spent coordinating their efforts.

In Oregon, for example, legal aid programs spend approximately $300,000 each year on duplicate costs to maintain physically separate offices throughout the state.[136] If the restriction on state and local governmental funds and private money were lifted, the redundant costs could be eliminated. The significant savings from ending dual operating systems would enable legal services organizations to cover more conventional legal services cases – evictions, domestic violence cases, predatory lending disputes – in underserved rural parts of the state where access to legal assistance is limited.

The restrictions also make LSC-funded organizations ineligible to receive certain private funding. Legal Services NYC has been unable to obtain additional funds from a local foundation due to the restrictions on its representation of immigrants.[137] Legal Services NYC partners with 14 community-based organizations in an innovative "Single Stop Program" that provides legal assistance and social services together at outreach sites in community-based organizations around New York City.[138] This effort, which helps families keep their homes, obtain essential medical care, qualify for emergency food benefits, and more, has been funded by a local anti-poverty foundation.[139] Concerned about the needs of New York's large immigrant population, the foundation added funding to ensure that legal assistance would be provided to immigrants regardless of immigration status.[140] Because of the restriction on non-LSC money, however, Legal Services NYC could not seek this added funding from the foundation to expand this successful community-based outreach program.[141]

Finally, as is described above (in Part IV.A.1), the restrictions prohibit legal aid organizations from relying on additional revenue through court-ordered attorneys' fee awards to finance additional work on behalf of families in need.

All of these limits are unjustifiable in a system desperate for funds.

V. The Solution

A growing number of national, state, and local voices have called for reform of the legal services restrictions. In 21 states, reports authored by planning bodies dedicated to promoting access to justice and to closing the justice gap have identified the federal legal services restrictions as substantial barriers to justice.[142] Many others institutions and leaders have spoken out about the harms of the LSC restrictions, and particularly about their application to non-LSC funds. Describing a lawsuit filed by Oregon against the "program integrity rule," Governor Ted Kulongoski said: "The important point is that for the first time a *state* is now party to a suit that attempts to free Legal Aid from restrictions that serve no purpose other than to close the courthouse door to plaintiffs who have no ability to hire private attorneys."[143]

The calls for change are coming from across the political spectrum. In 2005, the National Council of Churches, along with 31 other groups of faith, sent a letter to leaders in the House of Representatives urging Congress to lift the restriction on non-LSC funds.[144] In 2006, the National Association of Evangelicals urged Congress to do the same.[145] The removal of restrictions is likewise a priority of the civil rights community.[146]

The President has asked Congress to remove the non-LSC funds restriction and the restrictions that prohibit programs from using LSC funds to participate in class actions and to claim attorneys' fee awards.

Now the national economic crisis has cast a bright light on the problem, making clearer than ever the need for immediate correction of the LSC restrictions. With homeowners facing foreclosure at alarming rates and thousands of people losing jobs each month, the need for legal services is urgently pressing.[147] In a time of austerity, correcting the LSC restrictions would bring in additional funds to finance legal representation of the poor.

Given this widespread support and recognition of the growing need, steps are being taken within the federal government to fix the problem. The Civil Access to Justice Act of 2009, recently introduced in the Senate, would ease the most troubling restrictions put in place in 1996.[148] More recently, the Obama Administration, in its FY 2010 budget, recommended that Congress lift three of the major restrictions in this year's federal appropriations process. Specifically, the President has asked Congress to remove the non-LSC funds restriction and the restrictions that prohibit programs from using LSC funds to participate in class actions and to claim attorneys' fee awards.[149] This support from the Obama Administration is complemented by a broad range of organizations that are calling for reform: recently, more than 100 leading groups from the access to justice, non-profit advocacy, faith-based and civil rights community called on Congress to eliminate the most egregious restrictions on legal aid.[150]

Congress should take the following, cost-free steps:

1. Remove the application of the LSC restrictions to state, local, private and other non-LSC funds that legal aid organizations receive.

2. Remove restrictions on LSC funds that interfere with the ability of legal services attorneys to protect their clients' rights, that is, eliminate the restrictions: on seeking attorneys' fee awards; on class actions; on legislative and administrative advocacy, and on solicitation.

3. Remove restrictions that prohibit representation of documented immigrants and people in prison who need help with reentry matters.

Across America, families and communities face unprecedented financial pressures and look to civil legal aid programs for essential help. In combination with necessary funding increases, the removal of these select LSC funding restrictions will help revitalize the nation's legal services system at a critical moment.

ENDNOTES

1 *See* Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 Contemp. Econ. Pol'y 158, 169 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419, 429 (2001); *see also* Rebecca L. Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* 3 (Mar. 26, 2008) (unpublished manuscript, on file with the Brennan Center) (concluding that "lawyer-represented cases are more than 5-times more likely to prevail in adjudication than cases with self-represented litigants.").

2 What is LSC, http://www.lsc.gov/about/lsc.php (last visited April 12, 2009) [hereinafter What is LSC] (noting that LSC is "the single largest provider of civil legal aid for the poor in the nation.").

3 Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 5 (2005) [hereinafter Justice Gap].

4 *Id.* at 14.

5 *Id.* at 17.

6 *Id.*

7 *See* Deborah L. Rhode, Access to Justice 104 (2004) (noting that the "current legal aid structure denies assistance to the politically unpopular groups who are least able to do without it and blocks the strategies most likely to address the root causes of economic deprivation.").

8 *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53-1321-56 (1996). Congress has carried forward these restrictions each year by incorporating them in the annual appropriations rider for LSC.

9 *See id.* at 1321-56.

10 *See id.* § 504(a) (prohibiting any "entity" that engages in enumerated restricted activities from receiving LSC funds).

11 *See, e.g.*, Legal Aid Servs. of Or. v. Legal Servs. Corp., 561 F.Supp.2d 1187 (D. Or. 2008); J.J. Sullivan, C.C. Carr, & A. Santos-Singh, *An End to Redundancy? CLS and PLA Anxiously Await Federal Court Ruling on Working Together*, Phila. Law., Fall 2005, at 18 (describing dual system set up in Philadelphia).

12 As Deborah L. Rhode has succinctly phrased it, "'[e]qual justice under law is one of America's most proudly proclaimed and widely violated legal principles." Rhode, supra note 7, at 3.

13 *See* 42 U.S.C. § 2996 (1977).

14 *Id.*

15 *See id.* § 2996c.

16 *See id.* § 2996e.

17 What is LSC, *supra* note 2.

18 *See* 42 U.S.C. § 2996f(a)(2)(C).

19 What is LSC, supra note 2.

20 Legal Servs. Corp., *Legal Services Corporation Fact Book 2007*, at 8 (2008) [hereinafter *Fact Book 2007*], *available at* http://www.lsc.gov/pdfs/factbook2007.pdf.

21 What is LSC, *supra* note 2.

22 Fact Book 2007, *supra* note 20, at 7.

23 *Compare id.* at 6, *with* Legal Servs. Corp., 1996 LSC and Non-LSC Funding [hereinafter 1996 LSC] (on file with the Brennan Center).

24 *See* Alan W. Houseman & Linda E. Perle, Ctr. for Law and Soc. Policy, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States* 21 (2007), *available at* http://www.clasp.org/publications/legal_aid_history_2007.pdf.

25 42 U.S.C. § 2996e(d)(5) (1977). Congress also prohibited recipients from using LSC and private funds to engage in administrative and legislative lobbying, unless such representation was "necessary to the provision of legal advice and representation with respect to such client's legal rights." Recipients were free to engage in lobbying with other non-LSC government funds, such as funds from local and state governments, if the sources of those funds permitted such activities. *See* 42 U.S.C. § 2996h (2004).

26 42 U.S.C. § 2996f(b) (1977).

27 Id. § 2996h.

28 Id. § 2996(6).

29 *See, e.g.*, Robert Hornstein et al., *The Politics of Equal Justice*, 11 Am. U. J. Gender Soc. Pol'y & L. 1089, 1096 (2003); Editorial, *A Brazen Assault on Legal Services*, N.Y. Times, June 23, 1990, at 22, *available at* http://www.nytimes.com/1990/06/23/opinion/a-brazen-assault-on-legal-services.html.

30 Alfred S. Regnery, *Action, Legal Services Corporation and Community Services Administration*, *in* Mandate For Leadership. Policy Management in a Conservative Administration 1057, 1061-62, 1068 (Charles L. Heatherly ed., 1981).

31 *Id.* at 1061.

32 *Id.*

33 *Fact Book 2007, supra* note 20, at 7.

34 *See* Houseman, *supra* note 24, at 36.

35 *See id.*

36 *See id.*

37 *See id.* at 36-37.

38 *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53-1321-56 (1996).

39 *See id.*

40 *See id.*

41 42 U.S.C. § 2996i(c) (1977).

42 Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Haw. 1997).

43 Velazquez v. Legal Services Corp., 985 F.Supp. 323 (E.D.N.Y., 1997).

44 *See* 62 Fed Reg. 27,695 (May 21, 1997) (to be codified at 45 C.F.R. pt. 1610) (describing history of the program integrity rule).

45 *See id.*

46 *See* 45 C.F.R. § 1610.8 (1997).

47 *See* Brennan Ctr. for Justice, The Economy and Civil Legal Services (Feb. 1, 2009), *available at* http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services.

48 It is becoming increasingly acknowledged that the subprime mortgage meltdown was not just the result of objective economic forces but also the product of fraud in the mortgage business. As Sen. Patrick Leahy recently stated when introducing a bill to help federal agencies crack down on mortgage and other financial fraud, law enforcement cannot keep pace with the number of complaints: " . . . suspicious activity reports alleging mortgage fraud that have been filed with the Treasury Department have increased more than tenfold, from about 5,400 in 2002 to more than 60,000 in 2008." 155 Cong. Rec. S1679, S1682 (2009) (statement of Sen. Leahy).

49 *See* Laura K. Abel, *Lawyers for the Poor Muzzled in Subprime Mess*, The Nation, Jan. 16, 2008 [hereinafter Abel, *Lawyers*], *available at* http://www.thenation.com/doc/20080128/abel.

50 *See id.*

51 *See, e.g.*, Duell v. Condon, 84 N.Y.2d 773, 780 (1995); Maplewood Mgmt. v. Best, 533 N.Y.S.2d 612, 613-14 (N.Y. App. Div. 1988); Cal. Legal Servs. Coordinating Comm., California State Justice Plan 2001: Response to LSC Program Letter 2000-1, at 32 (2001) [hereinafter Cal. Legal Servs.].

52 *See* Carolyn L. Carter, Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* 21 (2009), *available at* http://www.nclc.org/issues/udap/content/UDAP_Report_Feb09.pdf.

53 42 U.S.C. § 3613(c)(2) (1988) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs.").

54 24 C.F.R. § 3500.21(f)(1)(iii) (2009).

55 15 U.S.C. §§ 1601 *et seq.* (1976).

56 15 U.S.C. § 1639 (1994).

57 Duell v. Condon, 84 N.Y.2d 773, 780 (1995) (describing New York's Real Property Law § 234, which permits tenants to obtain attorneys' fees when a residential lease term permits landlords to collect fees).

58 Brennan Center Memorandum (May 8, 2009) [hereinafter Brennan Ctr. Memo] (on file with the Brennan Center) (summarizing interviews with legal services programs).

59 Complaint at 1, Overton v. Ameriquest Mortgage Co. et al., No. 05-CV-4715 (E.D.N.Y. Oct. 6, 2005).

60 *Id.*

61 *Id.*

62 *Id.*

63 Brennan Ctr. Memo, *supra* note 58.

64 *Id.*

65 *Id.*

66 *Id.*

67 Brennan Ctr. Memo, *supra* note 58.

68 Cal. Civ. Code § 2945(c)(1) (1980).

69 Brennan Ctr. Memo, *supra* note 58.

70 *Id.*

71 Cal. Legal Servs., *supra* note 51, at 32.

72 *Id.*

73 *See* Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1, 10-14 (2005).

74 *See id.* at 11 (describing case brought by the Tennessee Justice Center).

75 *See* David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon Describe the Costs*, 17 Yale L. & Pol'y Rev. 337, 340-41 (1998).

76 *See id.* at 347.

77 *See* Appendix.

78 N.C. Legal Servs. Planning Council, *North Carolina Statewide Legal Needs Assessment 2003*, at 49 (2003), *available at* https://www.legalaidnc.org/Public/Participate/Legal_Services_Community/Planning_Council/NC%20Statewide%20Needs%20Assessment%2003%2024%2003.pdf.

79 Barkley v. Olympia Mortgage Co., 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007).

80 *Id.* at *1.

81 *Id.*

82 *Id.* at *2.

83 *Id.* at *23.

84 *See generally* Barbara Gault et al., *Prospects for Low-Income Mothers' Economic Survival under Welfare Reform*, 28 Publius 175 (2008) (describing effects of welfare reform laws and policies on low-income mothers); Christopher Mazzeo *et al.*, *Work-First or Work-Only: Welfare Reform, State Policy, and Access to Postsecondary Education*, 586 Annals Am. Acad. Pol. & Soc. Sci. 144 (2003) (describing effects of welfare reform and state implementation on educational attainment of low-income people).

85 Abel, *Lawyers*, *supra* note 49.

86 Brennan Ctr. Memo, *supra* note 58.

87 *See* 45 C.F.R. § 1612.6 (1997).

88 Abel, *Lawyers*, *supra* note 49.

89 *See, e.g.*, Andy Rosen, *Foreclosure Reform Bills Take Stage in Maryland Legislature*, The Daily Rec., Feb. 6, 2008, http://findarticles.com/p/articles/mi_qn4183/is_20080206/ai_n21226608.

90 Brennan Ctr. Memo, *supra* note 58.

91 *Id.*

92 *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-53-1321-55 (1996).

93 *See* Rhode, supra note 7, at 115-16.

94 *See. e.g.*, The Legal Aid Safety Net: A Report on the Legal Needs of Low-Income Illinoisans 170, 181 (2005), *available at* http://www.equaljusticeillinois.org/docs/LegalNeeds.pdf (describing lack of non-LSC-funded legal aid organizations outside urban centers of the state).

95 *See* § 504(a)(11).

96 *See* Press Release, Legal Servs. Corp., Temporary Forestry Workers Now Eligible for LSC-Funded Services (Jan. 10, 2008), *available at* http://www.lsc.gov/press/updates_2008_detail_T220_R0.php.

97 *See id.*

98 *See Hearing Before the Subcomm. On Immigration, Citizenship, Refugees, Border, Security, and International Law Membership of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of George Miller, Chairman of the Education and Labor Comm.), *available at* http://judiciary.house.gov/hearings/pdf/Miller080416.pdf.

99 *See* Mary Bauer, S. Poverty Law Ctr., *Close to Slavery: Guestworker Programs in the United States* 31 (2007). *available at* http://www.splcenter.org/pdf/static/Close_to_Slavery.pdf.

100 *See Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hired From Abroad?: Hearing Before the H. Comm. on Education and Labor*, 100th Cong. 90 (2008) (statement of Javier Riojas, Branch Manager, Tex. RioGrande Legal Aid), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:41982.wais.

101 *See id.*

102 *See id.*

103 *See id.*

104 *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15).

105 *See, e.g.*, Rhode, *supra* note 7, at 116; *The 2007 Assessment of Civil Legal Needs and Barriers of Low- and Moderate-Income People in Hawai'i* II-24 (2007), *available at* http://www.hsba.org/resources/1/Documents/Access%20to%20Justice.pdf [hereinafter *The 2007 Assessment*].

106 Mich. Prison Reentry Initiative, *The Three-Phase, Decision-Point MPRI Model*, http://www.michpri.com/index.php?page=how-it-works (last visited Apr. 12, 2009).

107 *Id.*

108 *Id.*

109 *See* § 504(a)(15).

110 Brennan Ctr. Memo, *supra* note 58.

111 *Id.*

112 *The 2007 Assessment*, *supra* note 105, at II-24.

113 *See* Office of Mgmt. and Budget, Circular No. A-122: Cost Principles for Non-Profit Organizations, *available at* http://www.whitehouse.gov/omb/circulars/a122/a122.html (setting forth accounting requirements for recipients of federal grants).

114 *See id.*

115 *See* Velazquez v. Legal Servs. Corp., 349 F. Supp. 2d 566, 607 (E.D.N.Y. 2004).

116 Exec. Order No. 13279, 67 Fed. Reg. 77,141 (December 12, 2002); *White House Office of Faith-Based & Comty. Initiatives, Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government* (2002) [hereinafter *Faith-Based*], *available at* www.ethicsinstitute.com/pdf/Faith%20Based%20Federal%20Grants.pdf. This paper takes no position on whether the Faith-Based Initiative enables the government to fulfill its constitutional obligations.

117 *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 609 (1992) ("[O]ur cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.").

118 Exec. Order No. 13279, 67 Fed. Reg. 77141; *Faith Based, supra* note 116.

119 Exec. Order No. 13279, 67 Fed. Reg. 77141; *Faith Based, supra* note 116.

120 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

121 Laura K. Abel, *Drawing Lines for Dollar, Legal Times*, Sept. 30, 2002, at 62, *available at* http://www.brennancenter.org/page/-/Justice/DrawingLinesforDollars.pdf.

122 *Id.*

123 *See* FAQs [Stem Cell Information] (last visited Oct. 9, 2008) (on file with the Brennan Center). The restrictions on federally funded stem cell research have since been eased further by the Obama Administration; *see* Executive Order: Removing Barriers to Responsible Scientific Research Involving Human Stem Cells (March 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/Removing-Barriers-to-Responsible-Scientific-Research-Involving-Human-Stem-Cells/.

124 *See* 45 C.F.R. § 1630.

125 *See* 45 C.F.R. § 1635.

126 *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 503(b), 110 Stat. 1321, 1321-53-56 (1996).

127 When lawyers hold clients' funds that are either nominal in amount, or expected to be held only for a short term, they must place the funds in an interest-bearing "IOLTA account." Pursuant to state law, the interest from these accounts are pooled (note: such interest would not exist but for such pooling) and used to fund civil legal aid for low-income people and to fund improvements to the justice system. More information *available at* IOLTA.org Leadership for Greater Justice, http://www.iolta.org/ (last visited Apr. 12 2009).

128 *See* Legal Servs. Corp., *Legal Services Corporation Fact Book 2006*, at 14 (2007), *available at* http://www.rin.lsc.gov/Rinboard/2006FactBook.pdf.

129 *Fact Book 2007, supra* note 20, at 6.

130 *Justice Gap, supra* note 3, at 2.

131 In 2007 dollars, non-LSC funding increased from $276 million in 1996 to $490 million in 2007, while LSC funding decreased from $408 million in 1996 to $354 million in 2007 (dollar amounts adjusted for inflation using CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl). *See Fact Book 2007, supra* note 20, at 6; *1996 LSC, supra* note 23.

132 *See Fact Book 2007, supra* note 20, at 9. The "legal aid programs" discussed here include only those programs that received some LSC funding.

133 *See id.* at 9-10.

134 *See, e.g.*, Legal Aid Servs. of Or. v. Legal Servs. Corp., 561 F.Supp.2d 1187 (D. Or. 2008); Sullivan, *supra* note 11, at 19 (describing dual system set up in Philadelphia).

135 *See* 45 CFR §1610.5(a) (1997).

136 *See* Legal Aid Servs. of Or., 561 F. Supp. 2d at 1201.

137 Brennan Ctr. Memo, *supra* note 58.

138 Legal Servs. NYC, Single Stop, http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=37&Itemid=66 (last visited Apr. 19, 2009).

139 *Id.*

140 Brennan Ctr. Memo, *supra* note 58.

141 *Id.*

142 *See* Appendix.

143 Governor Ted Kulongoski, Guardians of Democracy: Public Service and the Rule of Law, Robert Abrams Public Service Lecture at NYU Law School (Jan. 23, 2006), *available at* http://www.oregon.gov/Gov/speech/speech_012306.shtml.

144 Letter from Nat'l Ass'n of Evangelicals, to Senators Richard C. Shelby and Barbara A. Mikulski (July 13, 2006), *available at* http://www.brennancenter.org/page/-/d/download_file_36360.pdf; Letter from Prison Fellowship, to Rep. Frank R. Wolf and José E. Serrano (June 7, 2004), *available at* http://www.brennancenter.org/dynamic/subpages/letter%20to%20congress%20reentry%20legal%20aid.pdf.

145 *See* Letter from Rev. Richard Cizik, Vice President for Governmental Affairs, Nat'l Ass'n of Evangelicals, to Rep. Frank R. Wolf and Rep. Alan B. Mollohan (July 13, 2006) (on file with the Brennan Center).

146 Letter from Leadership Conference on Civil Rights, to Congress (Jan. 6, 2009), *available at* http://www.civilrights.org/library/advocacy-letters/lccr-legislative-priorities-111.html; *see also* Rebekah Diller, Ctr. for Am. Progress Action Fund, *Restoring Legal Aid for the Poor: Our Nation Needs a Robust Legal Services Corporation* (2008), *available at* http://www.americanprogressaction.org/issues/2008/changeforamerica/pdf/legal_services.pdf.

147 *See* Press Release, RealtyTrac, Detroit, Stockton, Las Vegas Post Highest 2007 Metro Foreclosure Rates (Feb. 13, 2008), *available at* http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4119&accnt=64847 (reporting a 79% increase in the percent of U.S. households filing for foreclosure between 2006 and 2007). The Bureau of Labor Statistics reports that, from March 2007 to March 2009, the unemployment rate has risen 4.1% to 8.5%. *See* Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000. The U.S. Census Bureau reports a .2% increase in the number of Americans living at or below 125% of the federal poverty line in 2007 as compared to 2006 (not statistically significant). *See* Bureau of Labor Statistics & U.S. Census Bureau, Annual Social and Economic (ASEC) Supplement, http://pubdb3.census.gov/macro/032007/pov/new01_125_01.htm and http://pubdb3.census.gov/macro/032006/pov/new01_125_01.htm.

148 *See* S. 718, 111th Cong. (2009) (eliminating, *inter alia*, the restriction on non-LSC funds and attorneys' fees and easing limits on class actions, administrative and legislative advocacy, and representation of prisoners and documented immigrants.).

149 *See* Budget of the U.S. Government, Fiscal Year 2010 Appendix, at 1243 (May 8, 2009), *available at* http://www.whitehouse.gov/omb/budget/fy2010/assets/appendix.pdf.

150 *See* Joint letter to Senators Mikulski and Shelby and Representatives Mollohan and Wolf (June 3, 2009), *available at* http://www.brennancenter.org/page/-/Justice/090604.LegalServices-Sign-onLtr.pdf

APPENDIX

Reports from 21 States Identify Federal Legal Services Corporation Restrictions as a Barrier to Justice

The reports cited below were written by state bar associations, court-established Access to Justice Commissions and state legal services planning bodies to evaluate the provision of legal services in a particular state and to document the impact of any shortcomings on unserved and underserved populations.

State commissions have found that the restrictions placed on organizations receiving federal Legal Services Corporation ("LSC") funds:

- **Present "major barriers to justice for low-income persons . . ."** (Arkansas)
- **Prevent representation "in cases ranging from an illegal tenant lockout to consumer fraud, to civil rights enforcement."** (New Hampshire)
- **Have a "negative impact," "in actual practice (causing great inefficiencies in the way applicants for service must be processed and referred) and principle (denial of essential and fundamental legal assistance to some who need it)."** (New Jersey)
- **Are "major obstacles . . . for achieving 'equal access' for disfavored clients and politically unpopular cases."** (Texas)
- **Limit programs' "use of the most appropriate legal strategies to effectively represent low income clients with high priority legal needs."** (Washington)

Excerpts from state reports:

1. Alaska

An Alaska state planning report discusses the problems created by the state's dual program system. In 2000, Alaska Pro Bono Program, a new legal services program, was separated out of Alaska's LSC-funded program, Alaska Legal services Corporation ("ALSC"), "primarily to free its pro bono attorneys from the LSC restrictions, which had impacted on ALSC's advocacy in particularly unfortunate ways."[1] Because of the restriction on non-LSC funds, each component of the state's legal services delivery system has its own accounting, human resources management system, and case management system.[2]

2. Arkansas

According to the Center for Arkansas Legal Services, "federal funding cuts and restrictions on advocacy continue to present major barriers to justice for low-income persons in Arkansas."[3]

3. California

The attorneys' fee award restriction is identified as particularly damaging by the California Legal Services Commission. Prior to the 1996 restrictions, LSC-funded organizations recovered $1.75 million annually in attorneys' fees, and even having attorneys' fees as a "leveraged threat" helped in resolving problems for clients in the past. The Commission reports, "If this restriction were lifted, our state would immediately benefit."[4]

4. Georgia

In addition to mentioning that Georgia's growing poor population is putting a strain on the availability of affordable legal services, the state's Committee on Civil Justice finds that "[a]nother challenge arises because legal services providers are sometimes restricted in the types of cases they are authorized to handle," specifically citing LSC-funded organizations' inability to "initiate, participate, or engage in" class action lawsuits.[5]

5. Hawaii

A report from Hawai'i's Access to Justice Hui comments on the inadequacy of the civil legal services available to the state's incarcerated population, which grew 138 percent from 1990 to 2006. "Currently, ACLU of Hawai'i is the only legal service agency with the potential to assist the inmate population; however, due to their limited resources they only accept cases which would result in a larger impact on the overall corrections system" and cannot meet the "increased the need for individual legal assistance."[6]

Additionally, as one of its recommended "systematic changes," the report includes "increasing class action lawsuits to reduce illegal conduct against the poor."[7] While several legal services providers operate in Hawaii, the Legal Aid Society of Hawai'i ("LASH"), which is LSC-funded and thus restricted, is by far the largest. LASH employs 39 of the state's 68.2 legal aid staff attorneys. The other 29.2 are spread across 12 fairly specialized organizations, leaving few legal aid attorneys to do the work that LASH is prohibited from doing.[8]

6. Idaho

Noting several of the groups of people unable to receive assistance from LSC-funded programs, in one state planning report, Idaho Legal Aid Services writes, "[t]here is a need to establish and/or support an entity or attorneys available to provide services to these populations."[9] However, the report also comments that while the Idaho Justice Center was formed to handle LSC-prohibited work after the restrictions were enacted, "[t]he Center, although still in existence, is essentially inactive due to lack of resources."[10]

7. Illinois

In discussing gaps in current service and possible remedies, the Equal Justice Illinois Campaign recommends that privately funded entities be developed in order to utilize the advocacy tools no longer available to LSC-funded organizations, specifically class action lawsuits. "The three LSC-funded programs in Illinois . . . still engage in policy work and impact litiga-

tion within the limits set by the 1996 regulations, but they are barred from using many of the tools and strategies that had been most effective in the past."[11]

The Campaign also suggests that new methods be developed to address the currently unmet legal needs of certain groups that are ineligible for LSC-funded organizations' help, including immigrants. While the state's three LSC-funded organizations' offices are geographically well-distributed, covering distinct areas across the state and thus collectively able to serve clients statewide, non-LSC-funded legal services providers that direct services at LSC-ineligible cases, like those involving immigrants, are headquartered in urban centers and do not have the resources to establish regional offices. Because of the specialization of services required by the restrictions, "geography is a major impediment to the efficient delivery of legal services."[12]

The Campaign's report also stresses the need to diversify funding for legal services programs because, "[w]hile LSC was intended to serve as a stable source of general operating funds for its grantee organizations, free from the vicissitudes of politics, this has not proven to be the case."[13] As is true with most states, LSC funding as a proportion of total funding for legal services has been declining in Illinois, representing only 40 percent of the state's legal aid funding in 2007.[14]

8. Maryland

Discussing the statewide provision of legal services, the Legal Aid Bureau ("LAB") of Maryland reports that "due to LSC restrictions, it is unable to assist prisoners meaningfully and unable to assist most immigrants at all."[135] The report explains that immigrant populations are going underserved in the state because only a few non-LSC funded programs exist that "focus resources on immigrants/low-English capability persons." None of these programs, the report notes, are able to provide the full range of legal services that LAB offers.[16]

9. Michigan

A Michigan state planning report asserts that the restrictions prevent Michigan legal services programs from ensuring a "full range of services" to all low-income people with legal problems. The report urges LSC to "ameliorate these over broad restrictions" and details how the class action, attorneys' fee award and prisoner-related restrictions have prevented programs from meeting clients' needs completely.[17]

Detailing "examples of restrictions that low income advocates have identified as interfering with full services to clients," the report states:[18]

> **Class Actions.** There are many relatively routine civil disputes that can only be handled efficiently though the procedural tool of class actions. Under the current restrictions, LSC-funded programs cannot efficiently litigate these claims. The results are that claims may be litigated in a very inefficient manner (for the courts, the clients, and for all the parties) or that the legitimate claims of low income consumers cannot be raised . . .[19]

> **Attorneys' Fees.** Under Michigan law, a nominal fee applies to every case handled in Michigan courts . . . There are other cases (e.g., under Fair Housing statutes or consumer protection laws) where congressional policy clearly favors fee-shifting and where prohibiting low income clients from raising a fee claim significantly undermines an LSC-funded program's ability to adequately represent the client . . . [B]ecause an LSC program is prohibited from raising the fee claim, the client is punished—their claim is now worth less than congress intended when it passed the law . . . The fee provision places legal services attorneys in a terrible ethical bind: it is ethically difficult to accept this type of case, because the value of the case to the client is significantly diminished if the client is represented by an LSC-funded program; it is ethically difficult to reject the case because, as a practical matter, no other counsel is available to the client.[20]
>
> **Claims on Behalf of Prisoners.** While this prohibition might appear to be aimed at prisoners' rights cases, the reality is that there has been little or no prisoners' rights litigation filed by Michigan programs for many years. Most claims on behalf of 'prisoners' historically handled by Michigan programs are priority cases in family law or housing law areas where an eligible client is incarcerated for a short period of time for reasons not directly related to the civil legal case . . . The effect of this restriction is that vulnerable clients with compelling civil cases that fit directly within traditional legal services' case priorities are left without counsel as they face a court hearing.[21]

10. Minnesota

Prior to the 1996 restrictions, Mid-Minnesota Legal Assistance ("MMLA") used to deliver services for Central Minnesota Legal Services ("CMLS"), an LSC-funded entity, in a subcontract arrangement. However, a state planning report details that, "[s]ince over 83 percent of MMLA's funds were non-LSC, and since MMLA's other funders did not share Congress's support of the restrictions, MMLA's board declined to let a minority stakeholder control all of MMLA's activities." The MMLA/CMLS contract was terminated.[22]

11. Missouri

A state planning report states:

> Restrictions imposed by Congress on legal services providers are also barriers that need to be addressed. One of the most troublesome restrictions is the prohibition on legal services providers requesting or collecting attorney fees from opposing parties. The restriction on filing class actions suits removes one tool that all attorneys, other than those working for a legal services program, have at their disposal to help clients.[23]

12. New Hampshire

A state planning report describes the federal restrictions as "an additional challenge" for legal services providers. Congressional restrictions on seeking attorneys' fee awards "prevent legal services representation in cases ranging from an illegal tenant lockout to consumer fraud, to civil rights enforcement." The report also notes that prohibitions on class actions, and representation in rule making and legislative proceedings "ended services customarily provided to clients by LSC funded programs in New Hampshire for nearly twenty-five years."[24]

13. New Jersey

Despite the "degree of coordination and structured collaboration" among New Jersey's legal services providers that "is not matched elsewhere," a state planning report strongly emphasizes the "negative impact" of the "discouraging and constricting" restrictions "in actual practice (causing great inefficiencies in the way applicants for service must be processed and referred) and principle (denial of essential and fundamental legal assistance to some who need it)." The report envisions a system in which "restrictions based upon negative views toward certain categories of clients, or certain types of legal problems or situations" are not imposed on legal services work.[25]

In its discussion of the strengths of the current legal services system, the report notes that the New Jersey State Bar Association has worked against restrictions on legal services, and that New Jersey Legal Services, "not encumbered by the myriad LSC restrictions," can lobby on issues concerning low-income people's legal problems. The report finds that "major challenges" still include "[f]inding new, more efficient approaches for addressing on a broader scale recurrent, repetitious and costly legal problems and case types, including adequate representational capacity in alternative forums, such as the legislature and administrative agencies," forums in which LSC-funded organizations' activities currently are restricted.[26]

14. New Mexico

A report by the New Mexico's Access to Justice Commission lists funding state legal services priorities as its first funding goal: "Highest priority should be given to obtaining state goals for the system."[27] However, the federal restriction on non-LSC funds ensures that state goals cannot govern the use of all funds, nor can they govern the use of just state-appropriated funds. The federal government's application of the restrictions to the entire pool of money received by LSC grantees ensures that state goals cannot take precedence.

Along with increased federal LSC funding, the Commission recommends the "removal of Congressional restrictions on LSC recipients" and states that the Commission "should actively support any efforts by the National Legal Aid and Defender Association (NLADA) to remove or modify selected restrictions on LSC funds."[28]

15. North Carolina

A report by the Legal Services Planning Council describes how the restrictions related to representing immigrants greatly affect the ability of Legal Aid of North Carolina's "Farmworker

Unit" to serve all migrant farmworkers in the state. Specifically, the report identifies the ban on class actions as negatively affecting the representation of H-2A (temporary foreign agricultural) workers in North Carolina, as it states that challenging "illegal but widespread practices" among employers without a class action is "impossible."[29]

16. Oklahoma

In its assessment of the legal services system's weaknesses, the Oklahoma Bar Association states that because of "institutional barriers or LSC restrictions," some client groups are "especially under-served," identifying nursing home residents, the mentally ill, juveniles, incarcerated persons with civil problems, and undocumented aliens as examples.[30]

17. Pennsylvania

A 1998 Pennsylvania state planning report highlights the disparity between LSC funding amounts and the ultimate percentage of total legal services' funds that falls under the federal restriction. In 1998, Pennsylvania legal services organizations received 37 percent of the funding from LSC; however, 17 LSC-funded organization received "substantial amounts of other funding," and because of the federal restriction on non-LSC funds, "a total of 75 percent of the legal services funding in Pennsylvania is *de facto* restricted in this way." The report suggests that funding be reallocated to "un-restrict" services so that "residents everywhere in the state, and/or special client populations that currently need unrestricted services but are not covered by an unrestricted program would be covered." [31] (Today, even with non-LSC funds going to unrestricted legal services providers, the LSC restrictions encumber the $25.6 million that LSC-funded Pennsylvania programs receive from non-LSC sources.[32])

18. Texas

A state plan for the delivery of civil legal services states:

> For those who truly believe in the concept of 'equal justice for all,' a state system for the delivery of legal services to the poor must contain adequate resources for the representation of clients who are ineligible for federally-funded legal services and for those eligible but whose legal needs cannot be met by the LSC grantees due to restrictions. Unfortunately, there are major obstacles in Texas for achieving 'equal access' for disfavored clients and politically unpopular cases.[33]

The delivery plan finds, "Texas needs an unrestricted source of funds that will allow any indigent person full access to the system of justice without limitations or exceptions."[34]

In a self evaluation report, the Texas Access to Justice Commission stresses the need to resolve the "dual dilemma" of inadequate funding and restrictions on legal services programs.[35]

19. Virginia

A state planning report identifies providing low-income people "access to a full range of services" as a primary goal and lists encouraging the removal of restrictions at a national level as the first strategy for accomplishing this goal.[36] The report also recommends that each program monitor the federal restrictions' impact on clients and develop a plan for helping all clients gain access to an attorney with "an appropriate range of legal options."[37]

20. Washington

In a study of the implementation of regional access to justice plans, the Washington Access to Justice Commission identifies, in almost every region of the state, a dearth of services available for those who are ineligible for state or federally funded legal services due to restrictions. The Commission finds the restrictions to be "highly problematic obstacles to access to justice."[38] "Planners also noted that confusion still exists regarding how the legal aid entities relate to each other."[39]

The Commission states:

> . . . federal and state legislative restrictions continue to significantly limit the Alliance [for Equal Justice]'s ability to provide access and a full range of civil legal services to all low income communities by excluding certain classes of clients from publicly funded legal assistance, and limiting the Alliance's use of the most appropriate legal strategies to effectively represent low income clients with high priority legal needs.[40]

21. West Virginia

A state planning report states:

> No firm, group or organization now provides widely available access to the legal system, or even information, except the LSC funded programs which are limited by the various LSC regulations on client eligibility, reporting and subject restrictions. A large number of needs of low income people remain unmet because of limited funding for non-LSC programs and restrictions on LSC programs.[41]

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11 The Chicago Bar Foundation et al., *The Legal Aid Safety Net: A Report on the Legal Needs of Low-Income Illinoisans*, at 170 and 181 (Feb. 2005), *available at* http://www.equaljusticeil-linois.org/docs/LegalNeeds.pdf.

12 *Id.* at 53 and 60.

13 *Id.* at 127.

14 Legal Services Corporation, *Fact Book 2007*, at 9 (June 2008), *available at* http://www.lsc.gov/pdfs/factbook2007.pdf.

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18 *Id.* at 27.

19 *Id.* at 27-8.

20 *Id.* at 28-9.

21 *Id.* at 29.

22 *Minnesota State Planning Self-Evaluation Report*, at 30-31 (Sept. 2001), *available at* http://www.lri.lsc.gov/state_planning/slfevals/mn_slfeval_02.pdf.

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24 *State Planning Report of the New Hampshire Legal Services Community*, at 3 (Oct. 1998), *available at* http://www.lri.lsc.gov/state_planning/stateplans/NH130010.pdf.

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39 *Id*. at 9.

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ARTICLE: RESTORING LEGAL AID FOR THE POOR: A CALL TO END DRACONIAN AND WASTEFUL RESTRICTIONS

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SUMMARY:
... Finally, Congress imposed an extraordinarily harsh, "poison pill" restriction on LSC-funded programs that extends the federal funding restrictions to limit all the activities conducted on behalf of clients of LSC programs, even when funded by non-LSC funds. ... They also exclude the politically disfavored - prisoners and certain immigrants - from access to representation and thereby access to the courts. ... This section describes the impact of particular advocacy restrictions - those prohibiting attorneys' fee awards, class actions, and legislative and administrative advocacy - and includes specific case examples that the Brennan Center has gathered from legal services offices around the country. ... For cases in which legal services organizations represent clients, attorneys' fees serve three related, and equally important, functions. ... As with the attorneys' fee restriction, the class action limitation has a particularly harmful effect on efforts to combat consumer fraud that targets low-income communities.

TEXT:
[*688] Introduction

As the burgeoning economic crisis pushes growing numbers of Americans into poverty and homelessness, the need to revitalize the civil legal aid system is more urgent than ever. For low-income families, a civil legal aid lawyer can be a lifeline to preserve a home against foreclosure by a predatory lender, recover back wages from a cheating employer, or secure sufficient food for a sick child. Studies have shown that access to a lawyer can be the critical boost that families need to avoid homelessness and the key factor that domestic violence survivors need to achieve physical safety and financial security. n1

Notwithstanding the clear benefits, the overwhelming majority of low-income people who need legal aid cannot obtain it, in large part due to political attacks that have compromised the Legal Services Corporation ("LSC"), the cornerstone of the nation's institutional commitment to equal justice. n2 Every year, one million cases are turned away by LSC-funded offices due to funding shortages. n3 Study after study finds that 80% of the civil legal needs of low-income people go unmet. n4 On average, every legal aid attorney funded by LSC and other sources serves 6861

people. n5 In contrast, there is one private attorney for every 525 people in the general population. n6 This "justice gap" keeps families in poverty and threatens the stability of our court system.

The justice gap is not solely a product of funding shortages; it is also the result of extreme and ill-conceived funding restrictions imposed on legal aid programs by Congress in 1996. n7 In an effort to deprive the low-income [*689] clients of LSC-funded programs of full legal representation, Congress restricted the advocacy tools available to LSC clients. Clients of programs that receive LSC funds are denied access to the full range of legal tools available to people who have private lawyers, such as participating in class actions, claiming court-ordered attorneys' fee awards, and pursuing legislative and administrative advocacy. n8 Second, Congress made some categories of individuals ineligible for legal services representation; all undocumented immigrants, certain categories of documented immigrants, and people in prison simply cannot qualify. n9 Finally, Congress imposed an extraordinarily harsh, "poison pill" restriction on LSC-funded programs that extends the federal funding restrictions to limit all the activities conducted on behalf of clients of LSC programs, even when funded by non-LSC funds. n10

In the thirteen years that have passed since the restrictions were pushed through the Congress as part of the Gingrich-era "Contract with America," the restrictions have denied countless people equal access to justice. They have prevented victims of predatory lenders from obtaining their full measure of justice. They have contributed to the widespread abuse of immigrant laborers, including those legally in the United States, at their employers' invitation. Further, by shutting down legislative advocacy, they have prevented legislators from learning about the legitimate concerns of low-income communities.

The most draconian aspect of the restrictions - the poison pill restriction on non-LSC funds - has warped the civil legal aid delivery system and wasted precious public and private money that could go toward serving more clients. In many states, justice planners have had to set up two, duplicative legal aid systems in order to ensure that state and other funds are not constrained by the non-LSC funds restriction. n11 The result is that scarce funds must be spent on duplicate administrative costs - two rents, two copy machines, and two computer networks. In other locations with less state funding for legal aid, there are no non-LSC-funded organizations [*690] to perform the restricted work. As a result, whole communities are unserved. Parts I and II of this Article survey the impact that the LSC restrictions have had on the ability of low-income clients to obtain justice. Part III provides examples of the manifold harms that the Brennan Center has identified in its multi-year effort to educate the public and lawmakers about the damage caused by the restrictions. Finally, it argues that now is the time for Congress to ease the restrictions to eliminate their worst effects.

I. LSC: Committed to the American Promise of Equal Justice

LSC embodies the federal government's most sustained effort to deliver on the oft-touted American promise of equal justice for all. n12 Congress created LSC in 1974 to provide high-quality civil legal assistance to those unable to afford attorneys. n13 By providing legal assistance, Congress aimed to promote equal access to the justice system, improve economic opportunities for low-income people, and reaffirm faith in the legal system. n14 LSC built on the federal government's initial foray into funding civil legal services under the auspices of the Office of Equal Opportunity ("OEO"), which administered the Johnson Administration's War on Poverty programs in the late-1960s.

LSC was structured not as a federal agency, but rather as a quasi-private, non-profit corporation to insulate it from the political battles that periodically enveloped the OEO legal services program. It is governed by an eleven-person, bipartisan board of directors appointed by the President and confirmed by the Senate. n15 LSC operates by providing grants to independent, local non-profit organizations, incorporated under local state law, that in turn provide direct legal services within their communities. n16 LSC-funded programs help nearly one million people a year. n17 Those local non-profit organizations determine their own priorities for service provision, taking into account the particular needs of the client communities they serve. n18 Legal services offices handle cases concerning basic needs: family [*691] matters (38%), housing (23%), income maintenance (13%) and consumer issues (12%). n19

LSC is the single greatest source of funding for legal aid in the United States, but it is just one part of a three-pronged partnership that also includes state and local governmental institutions, and private donors. n20 In 2007, LSC provided more than $ 330 million in grants to 138 programs with more than 900 offices. n21 In the same year, more than $ 490 million was received by LSC programs from non-LSC sources: state and local governments, Interest on Lawyers' Trust Accounts ("IOLTA") programs, foundations and other private donors. n22 The proportion of non-LSC funds possessed by LSC-recipient organizations has risen substantially since the restrictions were put in place, from 40.33% in 1996 to 58.1% in 2007; n23 however, recent declines in IOLTA funding and state budget shortfalls due to the national economic crisis may start to reverse that trend.

II. The LSC Restriction Regime

At the inception of LSC, Congress placed some restrictions on the activities of LSC-funded lawyers, but struck a balance that enabled individuals to perform essential legal work. n24 For example, while some limits were imposed on tools of advocacy - class actions, for example, could only be undertaken with the approval of a program director - they were not completely barred. n25 Congress also banned certain participation in certain types of cases that reflected particular controversies of the time, including litigation related to military registration, desegregation, and attempts to procure a "non-therapeutic abortion." n26 However, LSC-recipient programs could [*692] still represent clients in such cases if a state or local government funder wished to finance the effort. n27 For the most part, Congress held true to its declaration set forth in the LSC Act that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients." n28

A. 1996 Restrictions Sharply Curtail Advocacy Available to Poor Clients

The restrictions imposed in 1996 marked a clear departure from this balance by sharply curtailing advocacy on behalf of legal services clients. The 1996 restrictions were the culmination of attacks on indigent legal services that began soon after LSC's formation. Hostility came in large part from agribusiness interests in farm states, which were angered by the representation of farmworkers conducted by legal services offices. n29 Ronald Reagan's 1980 election provided an eager ally in the White House. The Heritage Foundation's conservative agenda, Mandate for Leadership, published on the eve of President Reagan's first term, detailed steps to take to eliminate LSC or, at least, to reduce its effectiveness. n30 Declaring LSC "so basically flawed that it is beyond reform sufficient to justify its continuation," the plan called for the wholesale destruction of LSC. n31 If complete elimination proved infeasible, the Heritage Foundation urged, steep budget cuts and broad restrictions (to be imposed through LSC appropriations riders) would be the second-best alternative. n32

LSC survived the attempts to eliminate it under the Reagan Administration, though with less funding. n33 However, the blueprint for hobbling LSC was ultimately put in place during the 104th Congress, when Republicans took control of both houses for the first time in decades and, through the "Contract with America," renewed the call for elimination of LSC. n34 The House of Representatives, led by Newt Gingrich, adopted an initial budget that would have cut LSC funding by one-third for FY 1996, a second third [*693] for FY 1997, and then, eliminated all federal funding in the subsequent year. n35 Through a compromise brokered by then-Senator Pete Domenici (R-NM) and others, the plan to entirely de-fund LSC was averted. n36 Instead, Congress cut LSC's appropriation by almost one-third and imposed a set of funding restrictions that severely limit the work that LSC-funded programs could do, including with the money they received from non-LSC sources. n37

Under the 1996 appropriations rider, which has been carried forward in subsequent years with only slight modification, non-profit organizations receiving LSC funds are barred from using the following tools of advocacy for their clients, even though such tools are available to individuals who are represented by privately funded attorneys:

. class action litigation;

. claims for attorneys' fee awards;

. most legislative and administrative advocacy; and

. educating potential clients about their rights and then offering to represent them.

The restrictions also prohibit LSC-funded organization from representing categories of clients, including:

. incarcerated people;

. undocumented immigrants, and certain documented immigrants; and

. individuals facing eviction from public housing projects who are charged with a drug offense.

Other restrictions include a ban on all abortion-related litigation and on redistricting cases. n38

B. Extraordinary, Poison Pill Restriction Is out of Step with Private-Public Partnership Model.

In a somewhat unprecedented power grab, Congress prohibited recipients from engaging in these restricted activities not just with LSC funds, but with any funds, no matter the source. n39 Once an organization receives its first dollar of LSC funding, all of its funds from state and local governments, other federal programs, and private foundations and donors are restricted. n40 [*694] Not only did this extension of federal power shift policy dramatically away from the balance struck in the LSC Act - which permitted recipients to use funds from other government sources for the purposes for which they were intended n41 - but the 1996 law also marked a stark departure from the usual model for federal grant-making. It is fairly common for the federal government to restrict the activities it funds; however, it is extremely rare and raises grave constitutional concerns when Congress restricts the activities that grantees choose to finance with their own, non-federal funds.

The 1996 restrictions faced almost immediate challenges in court on First Amendment grounds. A federal district court in Hawaii ruled that the restriction on non-LSC funds violated the First Amendment because it did not afford a recipient non-profit any avenue through which to use non-LSC funds to engage in constitutionally protected speech and advocacy. n42 In the wake of this ruling, LSC attempted to salvage the constitutionality of Congress's law by issuing a so-called "program integrity regulation." n43 Acknowledging that the non-LSC funds restriction had overreached, LSC claimed that its regulation was intended to provide recipients with the opportunity to use their own non-LSC resources to finance the restricted activities. n44

Yet, it is clear from the operation of the regulation that its real intent is to make it as difficult as possible for a recipient to use private funds to engage in restricted representation. To spend non-LSC funds on restricted work, grantees must operate a new organization out of a physically separate office, with separate staff and equipment. n45 In practice, LSC's program integrity regulation imposes conditions so onerous that almost no program in the country has been able to successfully rely on it to create a separate affiliate through which to conduct privately financed, restricted activities. n46 [*695] The regulation continues to be the subject of ongoing litigation that challenges its impact on protected First Amendment activity. n47

III. The LSC Restrictions Obstruct Justice for Low-Income Individuals and Waste Scarce Funds

Over a decade of experience with the legal services restrictions has shown that they prevent people with pressing needs from obtaining full access to the justice system. They deny low-income people the legal tools available to those who can afford to pay for a lawyer. They also exclude the politically disfavored - prisoners and certain immigrants - from access to representation and thereby access to the courts. The restrictions constrict the choices available to state and local governments, as well as private foundations and individual donors, who wish to be partners in innovative efforts to expand access to justice. Finally, they squander precious funds that could go toward representing more underserved clients.

A. Limits on Advocacy Tools Available to Low-Income Clients Obstruct Equal Justice.

Notwithstanding the restrictions, legal services offices continue to provide high-quality representation and assist client communities in addressing widespread legal problems. n48 However, clients face many types of legal problems that could be addressed more effectively and efficiently were they to have access to the legal tools available to all other litigants. This section describes the impact of particular advocacy restrictions - those prohibiting attorneys' fee awards, class actions, and legislative and administrative advocacy - and includes specific case examples that the Brennan Center has gathered from legal services offices around the country.

[*696] Many of the examples involve efforts to combat predatory lending and other consumer scams that are tied to the mortgage meltdown and foreclosure crisis. Legal aid providers have been inundated with requests for help by people about to lose their homes. n49 The need is tremendous and the resources available are limited. When legal aid offices are able to take cases in which consumer fraud was involved, n50 the restrictions - particularly the class action and attorneys' fee restrictions - limit the ability of LSC recipients to perform their private attorney general role in the consumer protection enforcement scheme and enable wrongdoers to write off individual cases as a mere cost of doing business. n51 Moreover, the restrictions on legislative advocacy have gagged legal aid attorneys in their critical role in alerting legislatures to the problems of low-income communities, including those that led to the subprime lending crisis. n52

1. Attorneys' Fee Award Restriction

Much has been written about the role of attorneys' fee award mechanisms in encouraging private attorneys to take cases that vindicate important social goals such as the elimination of discrimination. n53 For cases in which legal services organizations represent clients, attorneys' fees serve three related, and equally important, functions. First, fees provide leverage within a litigation and encourage settlement. Second, they act as a deterrent against the violation of laws that are designed to protect the public. Third, they enable legal aid programs to marshal additional revenue from non-LSC sources. n54

[*697] Fees play a critical role in consumer protection and mortgage fraud cases, in particular. In all but five states, consumer protection statutes that prohibit deceptive practices permit prevailing plaintiffs to recover attorneys' fees from defendants who have been found to have violated the law. n55 On the federal level, the Fair Housing Amendments Act ("FHAA"), a tool for combating the racially discriminatory bias in much subprime lending, also provides for attorneys' fee awards when a plaintiff has prevailed. n56 The Real Estate Settlement Procedures Act ("RESPA"), which prohibits kickbacks to mortgage brokers, authorizes prevailing parties to obtain attorneys' fees. n57 In addition, fees are authorized under the Truth in Lending Act ("TILA"), n58 which mandates certain disclosures in home equity lending, and the Home Ownership and Equity Protection Act, n59 an amendment to TILA that mandates additional disclosures for high-cost home loans and prohibits certain loan terms such as negative amortization and balloon payments.

The possibility of having to pay attorneys' fees provides critical leverage to ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the legal aid lawyer's resources. As the New York Court of Appeals has stated, the availability of attorneys' fees is "an incentive to resolve disputes quickly and without undue expense" on the part of the court and litigants. n60 Without the ability to level the litigation playing field, low-income litigants are placed at a disadvantage in the litigation and in settlement negotiations.

LSC-funded South Brooklyn Legal Services ("SBLS") has one of the nation's leading predatory lending practices. It reports that the inability to seek fee awards frequently results in predatory lenders dragging out cases that might otherwise settle if fees were available to serve as an incentive to resolve the case before the investment of substantial attorney time. n61 In one case against Ameriquest Mortgage Co., one of the nation's largest [*698] subprime lenders, SBLS represented an elderly African-American widow who alleged that she had been conned into an unaffordable mortgage when she needed to make repairs to her home of over twenty years. n62 After meeting with Ameriquest

representatives, this client received a 2/28 mortgage (a thirty-year mortgage with two years at a fixed rate and twenty-eight years at an adjustable rate) with initial monthly payments of $ 2,300, nearly three times her monthly income. n63 To make it appear as if she could afford the loan, Ameriquest allegedly created a fake set of financial documents to include in her loan file, including a 401(k) document, employment statement, lease agreement, and tax returns. n64 With SBLS's assistance, she brought a case alleging Fair Housing Act, Truth in Lending Act, Real Estate Settlement Procedures Act, New York Deceptive Practices Act and other violations. n65

In an attempt to prove that the company engaged in a pattern of extending unaffordable loans to borrowers, SBLS sought the lender's loan files for other borrowers around New York. n66 Ameriquest initially refused to turn over the documents and the company was able to draw out a lengthy court battle due to the severe mismatch in negotiating stances. n67 Eventually, Ameriquest was ordered to produce 50,000 pages of documents, which took two attorneys hundreds of hours to review and was an enormous drain on SBLS resources. n68 The case eventually settled. n69 Had SBLS been permitted to seek attorneys' fees, Ameriquest might have had an incentive to limit the amount of time the plaintiffs' attorneys had to spend on the case, thus, speeding up the litigation process. Fees might have also given the SBLS client more leverage in settlement negotiations.

The award of attorneys' fees also serves a deterrent purpose. For example, it ensures that wrongdoers suffer some additional financial penalty for violating a consumer protection or civil rights statute and cannot merely write off the costs incurred in the litigation as a cost of doing business. When low-income victims of such violations cannot seek fee awards, however, that purpose is frustrated. As new "foreclosure consultant" scams - in which unsavory "consultants" make money by falsely promising to help distressed homeowners refinance or otherwise reduce their mortgage [*699] debt - appear with alarming regularity, the fee restriction hampers efforts to shut them down.

LSC-funded Legal Aid Foundation of Los Angeles ("LAFLA") estimates that as many as 30% to 40% of homeowners contacting its office last year for foreclosure-related assistance had either already paid a foreclosure consultant or had been contacted by one. n70 To protect homeowners and ensure that they are informed of their rights, California law regulates the practices of mortgage foreclosure consultants. n71 Even with this law on the books, LAFLA reports that some consultants illegally provide little or no services and divert the homeowner from seeking legitimate assistance. In many cases against deceitful foreclosure consultants, actual damages would be in the range of $ 1,500 to $ 2,500, but this small amount limits the effectiveness and feasibility of litigation. n72 Despite the statutory provision for attorneys' fees in the California law, there are inadequate resources available among those entities that could pursue fees, including the private bar and criminal prosecutors, to fight these predatory consultants. If LAFLA could seek fees in these cases, they could raise the consultants' costs of continuing these illegal practices, perhaps high enough to put them out of business.

Attorneys' fees also deter wrongful conduct by individuals who flout court orders. In one aspect of LSC-funded Legal Aid of West Virginia's practice, staff attorneys and volunteer private attorneys represent victims of domestic violence who seek protective orders. n73 However, when an abuser repeatedly flouts court orders, the victim cannot seek attorneys' fees to deter such flagrant and dangerous violations of the law.

Finally, the attorneys' fee restriction cuts off a key fundraising mechanism that would permit programs to bring in added funds to serve more clients. The California Legal Services Commission has observed that in addition to impeding successful case resolutions, the attorneys' fee award restriction creates serious funding problems for LSC grantees. n74 Prior to the restriction's enactment, LSC-funded organizations in California recovered approximately $ 1.75 million annually in attorneys' fees, a revenue source no longer available to them. n75

[*700]

2. Class Action Restriction

Class actions provide courts and litigants with an efficient mechanism for adjudicating the similar claims of a group

and ensure that similarly situated persons obtain relief when a defendant violates the law. They also provide access to the courts for individuals who might not have the resources to bring an individual claim. In some cases, the availability of a class action ensures that broad discovery can take place as to a defendant's unlawful actions.

For low-income people in particular, the availability of class actions is critical for obtaining relief from widespread, illegal practices. n76 Historically, class actions by legal services programs ensured that poor children obtained medical coverage, n77 forced the Social Security Administration to abide by court rulings, n78 and challenged consumer fraud. n79 Access to justice and legal services commissions in Georgia, Hawaii, Missouri, New Hampshire, and North Carolina have concluded that the inability to use the class action mechanism hinders legal services offices from providing the best possible services to their clients. n80 As the North Carolina Legal Services Planning Council has concluded, challenging some "illegal but widespread practices" without a class action lawsuit is "impossible." n81

As with the attorneys' fee restriction, the class action limitation has a particularly harmful effect on efforts to combat consumer fraud that targets low-income communities. In predatory lending cases, for example, legal services programs must litigate against unscrupulous players piecemeal, helping one homeowner at a time instead of a broad class of victims. A recent suit by eight first-time homebuyers against United Homes, LLC, a self-titled "one-stop shop" of real estate companies, lenders, appraisers, and lawyers, illustrates the inability of the courts to fully enforce consumer protection [*701] laws without the option of a class action. n82 Represented by SBLS, the eight African-American homebuyers allege that United Homes conspired with appraisers, lenders, and attorneys to sell "over-valued, defective homes financed with predatory loans." n83 They allege that United Homes failed to disclose their properties' histories, inflated the homes' values with inaccurate appraisals, overstated the buyers' assets and incomes on loan applications, concealed information about loan terms, sold the homes in uninhabitable conditions, and refused to make agreed-upon repairs. n84 The homebuyers also allege that "United Homes exploited the racially segregated housing market to engage in "reverse redlining,' the practice of intentionally extending credit to members of minority communities on unfair terms." n85 The bulk of the plaintiffs' claims have survived a motion to dismiss and the case continues. n86 Given the alleged nature of this "one-stop shop," it is hard to imagine that these eight plaintiffs are the only low-income individuals in Brooklyn who have fallen victim. However, unable to file a class action against United Homes, SBLS cannot seek more widespread relief for other homebuyers potentially taken advantage of by United Homes.

3. Legislative and Administrative Advocacy Restriction

Low-income people are at a distinct disadvantage in raising their concerns before legislative and administrative bodies. They lack the lobbyists, trade associations, and monetary donations that provide corporate and other well-resourced interests access to the political process. At the same time, their daily lives are often inextricably linked with the operations of government and law. n87

Legal aid attorneys who see the legal problems faced by low-income communities on a daily basis can play a critical role in alerting legislatures and other government bodies to gaps in regulation and problems in the implementation of laws. The silencing of legal aid attorneys has had dire [*702] consequences in the current mortgage crisis. n88 Attorneys at Maryland Legal Aid Bureau ("MDLAB"), for example, have witnessed many of the lending abuses that have occurred over the last ten years, but restrictions on legislative and administrative advocacy have prevented them from actively pursuing reforms. n89 Under the restrictions, the only way that a legal aid office can participate in lobbying is in response to a written request from a lawmaker. n90 Because few lawmakers are aware of this limitation and rarely invite the participation of legal services lawyers in legislative discussions, this highly unusual requirement most often shuts down communication entirely. n91

In contrast, when MDLAB has been able to educate lawmakers about the problems faced by its clients - at a lawmaker's invitation, as required by the restrictions - it has lent a critical, non-mortgage-industry voice to the process. In 2008, the Maryland Legislature dramatically overhauled state laws regarding credit and lending processes. n92 Because of a lawmaker's invitation, a MDLAB attorney was able to participate in a state Senate Finance Committee workgroup on revising consumer protection safeguards that was otherwise composed of representatives from the

lending, mortgage, and banking industries. n93 The MDLAB attorney was the only person in the workgroup positioned to represent the interests of borrowers. n94 Input from this attorney ensured that the proposed consumer protections were not unduly limited to the most extreme types of loan products, as the industry representatives had proposed, and resulted in a more wide-ranging consumer protection bill being passed by the Legislature.

B. Restrictions on Unpopular Clients Render Courts Off-Limits for the Most Vulnerable.

Reflecting the political winds of the time, the 1996 restrictions prohibited legal services attorneys from representing many categories of immigrants [*703] and all prisoners. n95 These exclusions have further marginalized those with the least access to the civil justice system. n96

1. Immigrant Representation Restriction

For certain categories of immigrants, including many who are lawfully in the United States, the restriction places legal representation out of reach even when the stakes are high. In many parts of the country, there are no non-LSC-funded legal aid offices that can serve undocumented and other excluded immigrants. n97 As a result, they have no place to turn when they face unlawful eviction, consumer fraud, or an employer who has cheated them out of wages.

One of the groups hardest hit by the immigrant restriction are those migrant workers here in the United States at their employer's invitation on H-2B visas, a visa category for unskilled, non-agricultural workers performing seasonal or temporary jobs. H-2B visa holders were excluded from legal aid eligibility in 1996. n98 Last year, Congress eased the restriction slightly and made H-2B visa holders working in the forestry industry eligible for legal aid. n99 However, H-2B workers employed in other industries, such as construction, canning and tourism, remain ineligible. n100

H-2B workers often perform tasks that risk physical harm and frequently are mistreated by employers. n101 Many do not speak English and work in geographically isolated areas. n102 Without access to legal services, they are virtually without recourse when their rights are violated. Employers often take advantage of this fact by misclassifying agricultural workers as H-2B [*704] workers, when these workers should fall under the relatively more stringent protections of the H-2A visa program. n103

LSC-funded Texas RioGrande Legal Aid has described a number of cases in which it had to turn away exploited H-2B workers. n104 One case involved an "illegal guestworker importation scheme" in which a grower and two farm labor contractors used over 400 H-2B workers to harvest and pack onions and watermelons from 2001-2007 in south and west Texas to circumvent the protections and benefits of the H-2A program, including access to LSC-funded representation. n105 TRLA was unable to represent any of the H-2B visa holders, even though there was reason to believe that they had been abused at the hands of their employer. n106

2. Prisoner Representation Restriction

Legal services organizations are prohibited from representing anyone in prison. n107 This restriction has hampered efforts to resolve civil legal issues, such as those related to debt and child custody, that can help persons in prison prepare for reentry into their communities. In some parts of the country, the restriction has left those in prison with virtually no access to civil legal representation. n108

Michigan, for example, has a bold and innovative Prisoner Reentry Initiative that aims to help incarcerated people as they prepare to reenter society. n109 A team of community groups, faith-based organizations, and legal services providers stands ready to provide essential services. n110 An important component of this project is "in-reach"; going into prisons and jails to address the problems confronting these men and women prior to release. n111 [*705] But, even though this Michigan initiative is primarily funded with state and private money, legal services programs, such as the Reentry Law Project of LSC-funded Legal Aid of Western Michigan - a key legal player on the team - are barred from providing services to anyone in a prison. n112 The Reentry Law Project can only assist individuals once released,

even though many of the problems facing prisoners would be better addressed during incarceration, so that citizens can move immediately into employment and housing upon release. n113 For example, many prisoners face the loss of custody of their children while incarcerated and would benefit greatly from the help of an attorney as they struggle to maintain family relationships. n114

In states that lack other funding or organizations designed to assist those in prison, the restriction has meant that legal representation is effectively out of reach. For example, in Hawaii, where the incarcerated population grew 138% from 1990-2006, the ACLU of Hawaii is the "only legal service agency with the potential to assist the inmate population; however, due to their limited resources they only accept cases which would result in a larger impact on the overall corrections system." n115

C. The Restriction on Non-LSC Funds Wastes Precious Funds and Unfairly Burdens State and Local Efforts to Expand Access to Justice.

The most draconian aspect of the LSC restrictions is the application of this entire set of limits to all of the state, local, private and other non-LSC funds possessed by LSC recipients. This punitive measure subjects legal services offices to a more stringent regime than almost any other federal grantee. It has interfered with efforts at the state level to leverage resources for the efficient and effective provision of legal aid. Finally, in a field notoriously under-resourced, the restriction on non-LSC funds has wasted precious dollars and driven away private funding opportunities.

1. Non-LSC Funds Restriction Is out of Step with the Government's Approach to Public-Private Partnerships.

The restriction on non-LSC funds, and program integrity regulation that implements the restriction, are out of step with the traditional model for public-private partnerships. Non-profit organizations that receive part of [*706] their funding from LSC are treated more stringently than almost all other government-funded non-profits, including faith-based organizations. n116 Other non-profits must account strictly for their receipt of government funds, but are not forced to operate dual systems out of separate offices in order to use their private funds to engage in constitutionally protected activities. n117

LSC has defended this "physical separation" model in court by claiming that such stringent separation is necessary to ensure that it does not indirectly subsidize or appear to endorse the disfavored, restricted activities, such as representation of undocumented immigrants or class actions. n118 However, that claim is belied by the fact that faith-based organizations that receive government funds are subject to a much more relaxed separation regime. n119 The First Amendment's Establishment Clause bars the federal government from subsidizing or endorsing a religious grantee's religious activities. n120 Yet, under the current federal Faith-Based Initiative, the government allows religious organizations to rely on a single staff to run federally funded, non-religious programs in a single physical space in which the organizations conduct privately financed religious activities such as worship and proselytization. n121 The government has asserted that such a modest level of separation is good enough to avoid subsidization as well as the appearance of endorsing a privately funded religious message. n122 The disparity in treatment with legal services programs is particularly striking since the Constitution's Establishment Clause actually forbids governmental endorsement of a religious message, whereas the Constitution does not require the government to distance itself from the provision of legal representation [*707] and, indeed, in some cases may even require government to provide representation. n123

The punitive nature of LSC's physical separation regime is further underscored by contrasting it with the more reasonable rules applied in 2002 to federally funded stem cell research. Scientists using private funds to conduct research on federally proscribed stem cell lines were required, for years, to operate two entirely separate labs, one for their privately funded research, another for their publicly funded research. n124 In 2002, the National Institutes of Health found this restriction so expensive, inefficient, and contrary to principles of scientific research that it removed the restriction. n125 The NIH permitted government-funded scientists to conduct privately funded stem cell research alongside federally funded research, in a single lab, so long as they use rigorous bookkeeping methods to ensure that

any restricted stem cell experiments are financed exclusively with private dollars. n126 LSC-funded organizations should be placed on a level playing field with these and other federal grantees.

2. Restriction on Non-LSC Funds Interferes with Growing State and Local Efforts to Expand Access to Justice.

State and local governmental institutions and private charitable donors are essential partners in state justice systems designed to expand access to civil justice. For example, money for civil legal services is contributed by Interest on Lawyers' Trust Accounts ("IOLTA"), n127 state legislative appropriations, civil court filing fees, and a variety of other state and local contributions, all intended to enable low-income individuals, families, and [*708] communities to obtain civil legal assistance. n128 But, the federal government undercuts this important function, by effectively limiting how state and local contributions can be spent by local legal aid non-profits.

The restriction on state, local, and private money currently ties up approximately $ 490 million in non-LSC funding annually, much of it from these state and local government sources. n129 Real federal funding levels have declined from the high-water mark achieved in FY 1981. n130 Since that year, annual federal underfunding of LSC has meant that LSC finances less and less of legal services organizations' work while the restriction continues to apply federal control over the entirety of those organizations' activities. Nationally, 58.1% of the funds that go to LSC grantees came from non-LSC sources in 2007, up from 40% the year the restriction was enacted. n131

The proportion is much more skewed in some states. In New Jersey, for example, LSC funds amounted to only 13% of legal aid programs' total funding in 2007, yet the restriction encumbered the remaining 87%. n132 Overall, LSC grantees in twenty-seven states received less than half of their funds from LSC sources in 2006, n133 yet the restriction limited what these programs could do with all of their funds. Thus the restriction, coupled with funding trends in recent years, has given the federal government increasingly disproportionate control over legal services organizations' activities and over the money of state, local, and private contributors.

3. Restrictions Waste Precious Resources that Could Go Toward Serving More Clients.

In some states with significant non-LSC funding, justice planners have established entirely separate organizations and law offices, funded by state and local public funders and by private charitable sources, to carry out the [*709] activities that LSC-funded programs are prohibited from conducting. n134 Because LSC's program integrity regulation requires physical separation between LSC-funded and non-LSC-funded organizations, the costs associated with overhead, personnel, and administrative expenditures are duplicated. n135 Twin systems inevitably cost more to run. Thus, the restriction creates dramatic inefficiencies in a system that is already underfunded. The money contributed by state and local governmental funders and by private charitable donors could be used to finance basic legal services for families, but instead has to be spent on duplicate offices, equipment, executive directors, and the time spent coordinating their efforts.

In Oregon, for example, legal aid programs spend approximately $ 300,000 each year on duplicate costs to maintain physically separate offices throughout the state. n136 If the restriction on state and local governmental funds and private money were lifted, the redundant costs could be eliminated. The significant savings from ending dual operating systems would enable legal services organizations to cover more conventional legal services cases - such as evictions, domestic violence cases, and predatory lending disputes - in underserved rural parts of the state with limited access to legal assistance.

The restrictions also make LSC-funded organizations ineligible for certain private funding. Legal Services NYC has been unable to obtain additional funds from a local foundation due to the restrictions on its representation of immigrants. n137 Legal Services NYC partners with fourteen community-based organizations in an innovative "Single Stop Program" that provides legal assistance and social services together at outreach sites in community-based organizations around New York City. n138 This effort, which helps families keep their homes, obtain essential medical care, qualify for emergency food benefits, and more, has been funded by a local anti-poverty foundation. n139

Concerned about the needs of New York's large immigrant population, the foundation added funding to ensure that legal assistance would be provided to immigrants regardless of immigration [*710] status. n140 Because of the restriction on non-LSC money, however, Legal Services NYC could not seek this added funding from the foundation to expand this successful community-based outreach program. n141

Finally, as is described supra in Part III.A.1., the restrictions prohibit legal aid organizations from bringing in additional revenue through court-ordered attorneys' fee awards when they have proven their case. All of these limits are unjustifiable in a system desperate for funds.

Conclusion

A growing number of national, state, and local voices have called for reform of the legal services restrictions. Reports by Access to Justice and legal services commissions in eighteen states have identified the restrictions as substantial barriers to justice. n142 Others have spoken out about the harms of the restrictions, and particularly their application to non-LSC funds. Describing a lawsuit filed by Oregon against the "program integrity rule," Governor Ted Kulongoski said: "The important point is that for the first time a state is now party to a suit that attempts to free Legal Aid from restrictions that serve no purpose other than to close the courthouse door to plaintiffs who have no ability to hire private attorneys." n143

Calls for change have come from across the political spectrum. In 2005, the National Council of the Churches and thirty-one other faith groups wrote to House leaders requesting that the restriction on non-LSC funds be lifted. n144 The next year, the National Association of Evangelicals urged Congress to do the same. n145 The removal of restrictions has become a priority for the civil rights community as well. n146 The recently introduced [*711] Civil Access to Justice Act of 2009 would ease the most troubling restrictions put in place in 1996. n147 And the Obama Administration, in its fiscal year 2010 budget, recommended that Congress lift three of the major restrictions in the appropriations processes. Specifically, the President's budget seeks to remove the non-LSC funds restriction and the restrictions prohibiting programs from using their LSC funds to participate in class actions and receive court-awarded attorneys' fees. n148 National groups, alongside allies from the access to justice, faith, and civil rights communities, continue to urge Congress to heed the President's recommendations and remove the most onerous restrictions by fixing the rider language in the next LSC appropriation. n149

Finally, the national economic crisis makes correction of the LSC restrictions critically important. With homeowners facing foreclosure at alarming rates and thousands of people losing jobs each month, the need for legal services is more pressing than ever. n150 Correcting the LSC restrictions would bring in additional funds and ensure that cases could proceed as efficiently as possible. Revitalization of legal services advocacy would protect individuals, families and communities from ongoing harm, and would substantially improve the delivery of equal justice in American courts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresKickbacks & Prohibited FeesCivil ProcedureClass ActionsClass CounselFeesPublic Health & Welfare LawSocial ServicesLegal Aid

FOOTNOTES:

n1. See Amy Farmer & Jill Tiefenthaler, Explaining the Recent Decline in Domestic Violence, 21 Contemp. Econ. Pol'y 158, 169 (2003); Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment, *35 Law & Soc'y Rev. 419, 429 (2001);*

see also Rebecca L. Sandefur, Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes 3 (Mar. 26, 2008) (unpublished manuscript, on file with the Brennan Center) (concluding that "lawyer-represented cases are more than 5-times more likely to prevail in adjudication than cases with self-represented litigants.").

n2. What is LSC?, http://www.lsc.gov/about/lsc.php (last visited April 12, 2009) [hereinafter What is LSC?] (noting that LSC is "the single largest provider of civil legal aid for the poor in the nation").

n3. Legal Servs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 5 (2005) [hereinafter Justice Gap].

n4. Id. at 14.

n5. Id. at 17.

n6. Id.

n7. See Deborah L. Rhode, Access to Justice 104 (2004) (noting that the "current legal aid structure denies assistance to the politically unpopular groups who are least able to do without it and blocks the strategies most likely to address the root causes of economic deprivation").

n8. See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), *110 Stat. 1321, 1321-53* to 1321-56. Congress has carried forward these restrictions each year by incorporating them in the annual appropriations rider for LSC.

n9. See *id. at 1321-56.*

n10. See id. § 504(a) (prohibiting any "entity" that engages in enumerated restricted activities from receiving LSC funds).

n11. See, e.g., *Legal Aid Servs. of Or. v. Legal Servs. Corp., 561 F. Supp. 2d 1187 (D. Or. 2008);* J.J. Sullivan et al. An End to Redundancy? CLS and PLA Anxiously Await Federal Court Ruling on Working Together, Phila. Law., Fall 2005, at 18, 18 (describing dual system set up in Philadelphia).

n12. As Deborah L. Rhode has succinctly phrased it, "equal justice under law is one of America's most proudly proclaimed and widely violated legal principles." Rhode, supra note 7, at 3.

n13. See *42 U.S.C. § 2996* (1977).

n14. Id.

n15. See id. § 2996c.

n16. See id. § 2996e.

n17. What is LSC?, supra note 2.

n18. See *42 U.S.C. § 2996f*(a)(2)(C) (2006).

n19. What is LSC?, supra note 2.

n20. Legal Servs. Corp., Legal Services Corporation Fact Book 2007, at 8 (2008) [hereinafter Fact Book 2007], available at http://www.lsc.gov/pdfs/factbook2007.pdf.

n21. What is LSC?, supra note 2.

n22. Fact Book 2007, supra note 20, at 7.

n23. Compare id. at 6, with Legal Servs. Corp., 1996 LSC and Non-LSC Funding [hereinafter 1996 LSC] (on file with the Brennan Center).

n24. See Alan W. Houseman & Linda E. Perle, Ctr. for Law and Soc. Policy, Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States 21 (2007), available at http://www.clasp.org/publications/legal_aid_history _2007.pdf.

n25. *42 U.S.C. § 2996e*(d)(5) (1977). Congress also prohibited recipients from using LSC and private funds to engage in administrative and legislative lobbying, unless such representation was "necessary to the provision of legal advice and representation with respect to such client's legal rights." Recipients were free to engage in lobbying with other non-LSC government funds, such as funds from local and state governments, if the sources of those funds permitted such activities. See id. § 2996h.

n26. Id. § 2996f(b)

n27. Id. § 2996h.

n28. Id. § 2996(6).

n29. See, e.g., Robert Hornstein et al., The Politics of Equal Justice, *11 Am. U. J. Gender Soc. Pol'y & L. 1089, 1096 (2003);* Editorial, A Brazen Assault on Legal Services, N.Y. Times, June 23, 1990, at 22, available at http://www.nytimes.com/1990/06/23/opinion/a-brazen-assault-on-legal-services.html.

n30. Alfred S. Regnery, Action, Legal Services Corporation and Community Services Administration, in

Mandate For Leadership, Policy Management in a Conservative Administration 1057, 1061-62, 1068 (Charles L. Heatherly ed., 1981).

n31. Id. at 1061.

n32. Id.

n33. Fact Book 2007, supra note 20, at 7.

n34. See Houseman, supra note 24, at 36.

n35. See id.

n36. See id.

n37. See id. at 36-37.

n38. See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), *110 Stat. 1321, 1321-53-1321-56.*

n39. See id.

n40. See id.

n41. *42 U.S.C. § 2996i*(c) (1977).

n42. *Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Haw. 1997).*

n43. See *62 Fed. Reg. 27,695* (May 21, 1997) (to be codified at 45 C.F.R. § 1610) (describing history of the program integrity rule).

n44. See id.

n45. See *45 C.F.R. § 1610.8 (1997).*

n46. Closing the Justice Gap: Providing Civil Legal Assistance to Low-Income Americans: Hearing Before the S. Judiciary Comm., 110th Cong. (2008) (statement of Rebekah Diller), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3370&wit_id=7200.

n47. Velazquez v. Legal Servs. Corp., 97 CV 00182, and Dobbins v. Legal Servs. Corp., 01 CV 8371 are two combined cases currently pending in the U.S. District Court for the Eastern District of New York. The author is one of the attorneys representing the plaintiffs in these challenges. The current proceedings follow the issuance of a preliminary injunction on First Amendment grounds against the application of the physical separation requirement to three New York-based plaintiff legal aid organizations in 2004. *Velazquez v. Legal Services Corp., 349 F. Supp. 2d 566 (E.D.N.Y. 2004).* The U.S. Court of Appeals for the Second Circuit subsequently lifted the preliminary injunction and remanded the case to the district court. The Second Circuit ordered the district court to apply a different legal standard to determine whether the burdens imposed on the plaintiff legal services programs by the physical separation requirement effectively deny them adequate alternative channels through which to spend their non-LSC funds on the activities prohibited by the funding restrictions. See *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219 (2d Cir. 2005).*

n48. See, e.g., Raun J. Rassmussen, Affirmative Litigation Under the Legal Services Corporation Restrictions, *34 Clearinghouse Rev. 428 (2000).*

n49. See Brennan Ctr. for Justice, The Economy and Civil Legal Services (2009),

http://www.brennancenter.org/content/resource/the_economy _and_civil_legal_services.

n50. It is increasingly acknowledged that the subprime mortgage meltdown was not just the result of objective economic forces but also the product of fraud in the mortgage business. As Sen. Patrick Leahy recently stated when introducing a bill to help federal agencies crack down on mortgage and other financial fraud, law enforcement cannot keep pace with the number of complaints: "suspicious activity reports alleging mortgage fraud that have been filed with the Treasury Department have increased more than tenfold, from about 5,400 in 2002 to more than 60,000 in 2008." 155 Cong. Rec. S1679, S1682 (2009) (statement of Sen. Leahy).

n51. See Laura K. Abel, Lawyers for the Poor Muzzled in Subprime Mess, Nation, Jan. 16, 2008, http://www.thenation.com/doc/20080128/abel [hereinafter Abel, Lawyers].

n52. See id.

n53. See, e.g., Pamela S. Karlan, David C. Baum Memorial Lecture: Disarming the Private Attorney General, *2003 U. Ill. L. Rev. 183 (2003).*

n54. See, e.g., *Duell v. Condon, 84 N.Y.2d 773, 780 (1995); Maplewood Mgmt. v. Best, 533 N.Y.S.2d 612, 613-14 (App. Div. 1988);* Cal. Legal Servs. Coordinating Comm., California State Justice Plan 2001: Response to LSC Program Letter 2000-1, at 32 (2001) [hereinafter Cal. Legal Servs.].

n55. See Carolyn L. Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 21 (2009), available at http://www.nclc.org/issues/udap/content/UDAP_Report_Feb09.pdf.

n56. *42 U.S.C. § 3613*(c)(2) (2006) ("The court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee and costs.").

n57. *24 C.F.R. § 3500.21(f)(1)(iii) (2009).*

n58. *15 U.S.C. §§1601* et seq. (2006).

n59. *15 U.S.C. § 1639* (2006).

n60. *Duell v. Condon, 84 N.Y.2d 773, 780 (1995)* (describing New York's *Real Property Law § 234*, which permits tenants to obtain attorneys' fees when a residential lease term permits landlords to collect fees).

n61. Interview with Jessica Attie, Project Co-Dir., Foreclosure Prevention Project, S. Brooklyn Legal Servs. (Jan. 22, 2009).

n62. Complaint at 1, Overton v. Ameriquest Mortgage Co., No. 05-CV-4715 (E.D.N.Y. Oct. 6, 2005).

n63. Id. at 7.

n64. Id. at 9.

n65. Id. at 2.

n66. Interview with Jessica Attie, supra note 61.

n67. Id.

n68. Id.

n69. Id.

n70. Memorandum from Dorothy Herrera Settlage, Legal Aid Found. of L.A., to Dennis Rockway, Legal Aid Found. of L.A. (Jan. 26, 2009) (on file with the Brennan Center).

n71. *Cal. Civ. Code § 2945(c)(1)* (West 1980).

n72. Memorandum from Dorothy Herrera Settlage, supra note 70.

n73. Interview with Adrienne Worthy, Executive Dir. of Legal Aid of W. Va. (Apr. 15, 2009).

n74. *Cal. Legal Servs. Coordinating Comm., supra* note 54, at 32.

n75. Id.

n76. See Joshua D. Blank & Eric A. Zacks, Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation, *110 Penn St. L. Rev. 1, 10-14 (2005).*

n77. See *id. at 11* (describing case brought by the Tennessee Justice Center).

n78. See David S. Udell, The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon Describe the Costs, *17 Yale L. & Pol'y Rev. 337, 340-41 (1998).*

n79. See *id. at 347.*

n80. See Brennan Ctr. for Justice, Reports from Eighteen States Have Identified Federal Restrictions as a Barrier to Justice (2009), available at http://brennan.3cdn. net/f4c6618922cc8c403e_0hm6bns0j.pdf.

n81. N.C. Legal Servs. Planning Council, North Carolina Statewide Legal Needs Assessment 2003, at 49 (2003), available at https://www.legalaidnc.org/Public/Participate/Legal_Serv ices_Community/Planning_Council/NC%20Statewide%20 Needs%20Assessment%2003%2024%2003.pdf.

n82. *Barkley v. Olympia Mortgage Co., Nos. 04 CV 875, 2007 WL 2437810* (E.D.N.Y. Aug. 22, 2007).

n83. Id. at 1.

n84. Id.

n85. Id. at 2.

n86. Id. at 23.

n87. See generally Barbara Gault et al., Prospects for Low-Income Mothers' Economic Survival Under Welfare Reform, 28 Publius 175 (2008) (describingthe effects of welfare reform laws and policies on low-income mothers); Christopher Mazzeo et al., Work-First or Work-Only: Welfare Reform, State Policy, and Access to Postsecondary Education, 586 Annals Am. Acad. Pol. & Soc. Sci. 144 (2003) (describing the effects of welfare reform and state implementation on educational attainment of low-income people).

n88. Abel, Lawyers, supra note 51.

n89. Interview with Kathleen Skullney, Project Att'y, Foreclosure Legal Assistance Project, Legal Aid Bureau (Feb. 23, 2009).

n90. See *45 C.F.R. § 1612.6 (1997)*.

n91. Abel, Lawyers, supra note 51.

n92. See, e.g., Andy Rosen, Foreclosure Reform Bills Take Stage in Maryland Legislature, Daily Rec., Feb. 6, 2008, http://findarticles.com/p/articles/mi_qn4183/is_2 0080206/ai_n21226608.

n93. Interview with Kathleen Skullney, supra note 89.

n94. Id.

n95. See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), *110 Stat. 1321, 1321-53* to 1321-55.

n96. See Rhode, supra note 7, at 115-16.

n97. See, e.g., The Legal Aid Safety Net: A Report on the Legal Needs of Low-Income Illinoisans 170, 181 (2005), available at http://www.equaljusticeillinois.org/docs/ LegalNeeds.pdf (describing lack of non-LSC-funded legal aid organizations outside urban centers of the state).

n98. See § 504(a)(11).

n99. See Press Release, Legal Servs. Corp., Temporary Forestry Workers Now Eligible for LSC-Funded Services (Jan. 10, 2008), available at http://www.lsc.gov/press/updates_ 2008_detail_T220_R0.php.

n100. See id.

n101. See Hearing Before the Subcomm. On Immigration, Citizenship, Refugees, Border, Security, and International Law Membership of the H. Comm. on the Judiciary, 110th Cong. (2008) (statement of George Miller, Chairman of the Education and Labor Comm.), available at http://judiciary.house.gov/hearings/pdf/Miller080416.pdf.

n102. See Mary Bauer, S. Poverty Law Ctr., Close to Slavery: Guestworker Programs in the United States 31 (2007), available at http://www.splcenter.org/pdf/static/ Close_to_Slavery.pdf.

n103. See Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hired From Abroad?: Hearing Before the H. Comm. on Education and *Labor, 100*th Cong. 90 (2008) (statement of Javier Riojas, Branch Manager, Tex. RioGrande Legal Aid), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house _hearings&docid=f:41982.wais.

n104. See id.

n105. See id.

n106. See id.

n107. See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15).

n108. See, e.g., Rhode, supra note 7, at 116; The 2007 Assessment of Civil Legal Needs and Barriers of Low-and Moderate-Income People in Hawai'i II-24 (2007) [hereinafter The 2007 Assessment], available at http://www.hsba.org/resources/1/ Documents/Access%20to%20Justice.pdf.

n109. Mich. Prison Reentry Initiative, The Three-Phase, Decision-Point MPRI Model, http://www.michpri.com/index.php?page=how-it-works (last visited Apr. 12, 2009).

n110. Id.

n111. Id.

n112. See § 504(a)(15).

n113. Interview with Miriam Aukerman, Reentry Law Project Dir., Legal Aid of W. Mich. (Apr. 15, 2009).

n114. Id.

n115. The 2007 Assessment, supra note 108, at II-24.

n116. See Office of Mgmt. & Budget, Circular No. A-122: Cost Principles for Non-Profit Organizations, available at http://www.whitehouse.gov/omb/circulars/a122/a122.html (setting forth accounting requirements for recipients of federal grants).

n117. See id.

n118. See *Velazquez v. Legal Serv. Corp., 349 F. Supp. 2d 566, 607 (E.D.N.Y. 2004).*

n119. Exec. Order No. 13279, *67 Fed. Reg. 77,141* (Dec. 12, 2002); White House Office of Faith-Based & Cmty. Initiatives, Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government (2002) [hereinafter Faith-Based], available at

www.ethicsinstitute.com/pdf/Faith%20Based%20Federal%20 Grants.pdf. This Article takes no position on whether the Faith-Based Initiative enables the government to fulfill its constitutional obligations.

n120. See, e.g., *Lee v. Weisman, 505 U.S. 577, 609 (1992)* ("Our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.").

n121. Exec. Order No. 13,279, *67 Fed. Reg. 77,141;* Faith-Based, supra note 119.

n122. Exec. Order No. 13,279, *67 Fed. Reg. 77,141;* Faith-Based, supra note 119.

n123. See, e.g., *Gideon v. Wainwright, 372 U.S. 335 (1963).*

n124. Laura K. Abel, Drawing Lines for Dollar, Legal Times, Sept. 30, 2002, at 62, available at http://www.brennancenter.org/page/-/Justice/DrawingLinesforDollars.pdf.

n125. Id.

n126. See Federal Policy, [Stem Cell Information], http://stemcells.nih.gov/policy/ defaultpage.asp (last visited Oct. 9, 2008) (on file with author). The restrictions on federally funded stem cell research have since been further eased by the Obama Administration. See Exec. Order No. 13,505, *74 Fed. Reg. 10,667* (Mar. 9, 2009), available at http://www.white house.gov/the_press_office/Removing-Barriers-to-Responsible-Scientific-Research-Involving-Human-Stem-Cells/.

n127. When lawyers hold clients' funds that are either nominal in amount, or expected to be held only for a short term, they must place the funds in an interest-bearing "IOLTA account." Pursuant to state law, the interest from these accounts are pooled (note: such interest would not exist but for such pooling) and used to fund civil legal aid for low-income people and to fund improvements to the justice system. More information is available at IOLTA.org Leadership for Greater Justice, http://www.iolta.org/ (last visited Apr. 12 2009).

n128. See Legal Servs. Corp., Legal Services Corporation Fact Book 2006, at 14 (2007) [hereinafter Fact Book 2006], available at http://www.rin.lsc.gov/Rinboard/2006 FactBook.pdf.

n129. Fact Book 2007, supra note 20, at 6.

n130. Justice Gap, supra note 3, at 2.

n131. In 2007 dollars, non-LSC funding increased from $ 276 million in 1996 to $ 490 million in 2007, while LSC funding decreased from $ 408 million in 1996 to $ 354 million in 2007 (dollar amounts adjusted for inflation using CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl). See Fact Book 2007, supra note 20, at 6; 1996 LSC, supra note 23.

n132. See Fact Book 2006, supra note 128, at 9. The "legal aid programs" discussed here include only those programs that received some LSC funding.

n133. See id. at 13-14.

n134. See, e.g., *Legal Aid Servs. of Oregon v. Legal Servs. Corp., 561 F. Supp. 2d 1187 (D. Or. 2008);* Sullivan, supra note 11, at 19 (describing a dual system set up in Philadelphia).

n135. See *45 CFR § 1610.5(a) (1997).*

n136. See *Legal Aid Servs. of Oregon, 561 F. Supp. 2d at 1201.*

n137. E-mail from Andrew Scherer, Executive Dir., Legal Servs. N.Y.C., to Rebekah Diller (Feb. 14, 2007, 17:57 EST) (on file with author).

n138. Legal Servs. NYC, Single Stop, http://www.legalservicesnyc.org/index.php?option =com_content&task=view&id=37&Itemid=66 (last visited Apr. 19, 2009).

n139. Id.

n140. E-mail from Andrew Scherer, supra note 137.

n141. Id.

n142. See Brennan Ctr. for Justice, supra note 80.

n143. Governor Ted Kulongoski, Guardians of Democracy: Public Service and the Rule of Law, Robert Abrams Public Service Lecture at NYU Law School (Jan. 23, 2006), available at http://www.oregon.gov/Gov/speech/speech_012306.shtml.

n144. Letter from Nat'l Ass'n of Evangelicals, to U.S. Senators Richard C. Shelby and Barbara A. Mikulski (July 13, 2006), available at http://www.brennancenter.org/page/-/d/download_file_36360.pdf; Letter from Prison Fellowship, to U.S. Representatives Frank R. Wolf and Jose E. Serrano (June 7, 2004), available at http://www.brennan center.org/dynamic/subpages/letter%20to%20congress%20reentry%20 legal%20aid.pdf.

n145. See Letter from Reverend Richard Cizik, Vice President for Governmental Affairs, Nat'l Ass'n of Evangelicals, to U.S. Representatives Frank R. Wolf and Alan B. Mollohan (July 13, 2006) (on file with the Brennan Center for Justice).

n146. See Rebekah Diller, Ctr. for Am. Progress Action Fund, Restoring Legal Aid for the Poor: Our Nation Needs a Robust Legal Services Corporation (2008), available at http://www.americanprogressaction.org/issues/2008/changeforamer ica/pdf/legal_services.pdf.

n147. See S. 718, 111th Cong. (2009) (eliminating, inter alia, the restriction on non-LSC funds and attorneys' fees and casing limits on class actions, administrative and legislative advocacy, and representation of prisoners and documented immigrants).

n148. See Budget of the U.S. Government, Fiscal Year 2010 Appendix, at 1243 (May 8, 2009), available at http://www.whitehouse.gov/omb/budget/fy2010/assets/appendix.pdf

n149. See, e.g., Joint letter to Senators Mikulski and Shelby and Representatives Mollohan and Wolf (May 4, 2009), available at http://www.brennancenter.org/page/-/Justice/090508. LegalServicesSign-onLtr.pdf.

n150. See Press Release, RealtyTrac, Detroit, Stockton, Las Vegas Post Highest 2007 Metro Foreclosure Rates (Feb. 13, 2008), available at http://www.realtytrac.com/ ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4119 &acent=64847 (reporting a 79% increase in the percent of U.S. households filing for foreclosure between 2006 and 2007). The Bureau of Labor Statistics reports that, from March 2007 to March 2009, the unemployment rate has risen 4.1% to 8.5%. See Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutput Servlet?data_tool=latest_numbers&series_ id=LNS14000000 (last visited May 15, 2009). The U.S. Census Bureau reports a 0.2% increase in the number of Americans living at or below 125% of the federal poverty line in 2007 as compared to 2006 (not statistically significant). See Bureau of Labor Statistics & U.S. Census Bureau, Annual Social and Economic (ASEC) Supplement, http://pubdb3.census.gov/macro/032007/pov/new01_125_ 01.htm and http://pubdb3.census.gov/macro/032006/pov/new01_125_ 01.htm (last visited May 15, 2009).