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BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

REGARDING:
OVERSIGHT HEARING ON THE LEGAL SERVICES CORPORATION

FEBRUARY 28, 2002

Good morning Mr. Chairman and Members of the Subcommittee and thank you for inviting me to testify at this oversight hearing on the Legal Services Corporation (LSC). For the record, I served as the United States Attorney General from 1985-1988; I am currently the Chairman of the Center for Legal and Judicial Studies at The Heritage Foundation.

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At the outset, let me make it clear that I believe in serving the legal needs of the poor, and the responsibility of the legal profession to ensure that no one goes without necessary legal representation because of the inability to pay. I have stood as a firm advocate for this position and have sought to promote public interest law throughout my professional career.

The issues before the subcommittee this morning, as I understand, relate to safeguarding the taxpayer-provided funding that has been made available to the Legal Services Corporation through congressional appropriations, and to make sure that such funds are properly used for the legitimate purpose of providing legal assistance to low-income individuals in civil matters.

The Legal Services Corporation, formed by the 1974 Legal Services Corporation Act to provide publicly-funded, non-political legal services to poor Americans, has been a source of controversy since its inception. Over the years, evidence mounted that the Corporation was pursuing a political agenda at the expense of its original mission. In 1996, Congress attempted to refocus and reform LSC by adding specific statutory restrictions on political activities as a condition of further LSC funding.

More than five years later, it is now clear that the LSC Board of Directors, in spite of repeated assurances to Congress of its commitment to implement and enforce these reforms, has been either grossly negligent in its supervision or has chosen to obstruct them. A few examples are instructive, but by no means exhaustive, of the lack of proper controls.

In 1996, one of the primary targets of congressional reform was the use of legal services funds for lobbying instead of representation. That same year, Regional Management Corporation (RMC) filed an administrative complaint with LSC accusing legal services lawyers of improperly lobbying the South Carolina state legislature in violation of federal law and LSC guidelines. After LSC dismissed the complaint, RMC sought judicial review of the decision.

Judge Henry Herlong ruled that "LSC failed to fully investigate RMC's charges" and that "LSC did not have a rational basis for determining that [the LSC lawyers] did

not violate federal law.”¹ The judge pointed out that the alleged client had never requested such lobbying, that the legal services lawyer acknowledged that she had never spoken with the client about her lobbying efforts and was not familiar with any of the client’s specific legal problems, and finally, that the alleged client was not even a current client of the legal services association when the lobbying occurred.²

LSC appealed the decision on the grounds that, as a private corporation, it is not subject to judicial review. The appeals court agreed and ruled that the protection of individuals harmed by illegal, LSC-funded lobbying depends entirely upon oversight by the LSC Board and “ultimately, congressional oversight.”³ Given the district court’s findings, however, it appears that oversight by the current LSC Board amounted to no protection at all in this case.

The extent of misfeasance and failure to render accurate reports by LSC grantees has been documented by investigations conducted by the General Accounting Office. The credibility and integrity of the legal services program has been jeopardized by this failure of supervision and accountability, which is the direct responsibility of the LSC Board of Directors. The Board has an obligation to follow legislative mandates and to conduct the legal services program in accordance with the requirements that Congress has imposed.

In some cases, statutory controls have been effective only after initial attempts by the LSC to evade congressional mandates. For example, the 1996 statute prohibits recipients of LSC funds from charging attorneys’ fees. The LSC Board implemented this restriction by drafting an interim regulation that *allowed* lawyers to charge attorneys’ fees in cases involving poor, disabled clients in some SSDI cases. Only when they were chastised by their appropriations committee did the Board change the regulation and prevent legal services attorneys from keeping a portion of their poor clients’ SSDI awards.

The requirements enacted by Congress have not always been so successful. In an attempt to reform the old system of grants that automatically refunded the same network of groups regardless of the quality or quantity of services provided to the poor, Congress required that grants and contracts for all basic field programs be subject to competition. The LSC Board responded to this requirement by setting up a competition administration that virtually guaranteed that there would be little or no competition for grants. A good measure of their success is that, since 1996, when competition was supposedly introduced, the vast majority of “competitions” have had only one applicant—the original program.⁴

¹ Regional Management Corporation, et al. v. Legal Services Corporation, 10 F. Supp. 2d 565, 571 (D.S.C. 1998).

² Id. at 571-572.

³ Regional Management Corporation, et al. v. Legal Services Corporation, 186 F. 3d 457 (4th Cir. 1999).

⁴ Ron Sutherland, “The Government Provision of Legal Services For the Poor: Competition or Monopoly?” (unpublished paper).

Another blatant example of the LSC Board evading the clear intention of Congress has been in the representation of aliens who are not physically present in the United States. In spite of Congress's prohibition, an LSC recipient sent letters to a number of farmworkers in Mexico in 1998 and traveled there to recruit potential clients for lawsuits against American farmers who had participated in the U.S. Government's Agricultural Guestworker Program. When this illegal activity was uncovered by a watchdog group and congressional and media pressure were brought to bear, LSC cut off funding to the offending group. But the group merely reopened under a different name and were immediately refunded by the major LSC program in the state.

Following this public relations debacle, the LSC convened a special commission to determine the meaning of the phrase "is present in the United States." Incredibly, after a number of meetings behind closed doors, the commission determined that "is present" really means "is now or once was present" and allowed legal services grantees to continue representing aliens who live in foreign countries. Growers in Georgia, North Carolina, Kentucky, and elsewhere have been sued by aliens living in Mexico a year or more after those foreign nationals left employment in the states. Given the scarce resources that Congress mandated were to be provided for poor Americans, how can the LSC continue to squander taxpayer money on such illegal litigation? By pursuing such improper lawsuits, the LSC victimizes many farmers and other citizens who must incur major expenses in defending against litigation that should never have been initiated.

Another example of the LSC's Orwellian interpretation of its own restrictions involves Congress's prohibition of any LSC funds going to any individual or group that "initiates or participates in a class action." Despite this clear prohibition against class-action litigation, LSC grantees have filed class action suits in Georgia and California and LSC has taken no action to stop them. In dismissing complaints from Members of Congress and watchdog organizations, LSC maintained that the California action was not a class action but a "representative action" and, as such, did not fall under the congressional restrictions. As this Subcommittee knows, "representative actions" are the functional equivalent of class actions in several states. Indeed, both *Black's Law Dictionary* and *Ballentine's Law Dictionary* agree that "representative action" and "class action" are interchangeable terms. Apparently, Bill Clinton's artful definitions live on in the LSC Board members he appointed.

From these and numerous other examples, it has become clear that Legal Services Corporation remains uncommitted to reform, unaccountable to the courts, and unresponsive to Congress. It seems to me that the only remedy for the current situation, short of ending the entire funding, is for the President to nominate LSC Board members who are committed to the necessary reforms that will return the Legal Services Corporation to its original mission of serving the poor.

Thank you for your time and attention. I look forward to any questions you may have for me.