

Thwarting the Will of Congress: How the Legal Services Corporation Evaded, Diluted, and Ignored Reform

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Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify.

My name is Ken Boehm, and I'm Chairman of the National Legal and Policy Center (NLPC), a group that promotes open, ethical government through research, education, and legal action. Since 1994, NLPC has sponsored the Legal Services Accountability Project to document abuses within the legal services program. From 1989 to 1994, I served in senior management positions at the Legal Services Corporation. From 1991 to 1994, I was Counsel to the LSC Board of Directors.

I welcome the opportunity to testify today because Congress deserves to know why the reforms it enacted for the Legal Services Corporation have not been carried out.

The history of the Legal Services Corporation (LSC) is a history of failed attempts at reform.

Much of the debate in the U.S. House of Representatives in 1973 over pending legislation to establish the Legal Services Corporation dealt with restrictions to prevent a repeat of the political and ideological activities associated with the legal services program which existed under the Office of Economic Opportunity.

The controversies that have plagued the federal legal services program remain the same. The central criticism has been that activist lawyers have used the program to advance a political and ideological agenda.

The pattern of failed attempts to reform LSC continues to repeat itself. Legal services lawyers get involved in a number of controversial political or ideological activities. Following a public outcry, Congress enacts reforms. Legal services lawyers find ways to evade the reforms. There's a further outcry followed by more reforms. Legal services lawyers have always responded by finding new ways to block, dilute, and frustrate the reforms.

The core of the debate has always been two starkly different views of the mission of legal services. The activist view is that legal services is meant to push a more ideological agenda: fight welfare reform, support the expansion of welfare programs, and essentially run a politically motivated litigation effort using tax dollars to underwrite the operation. The other view is that legal services should steer clear of using government resources for political or ideological crusades and instead focus on providing traditional legal aid to help the poor with their day-to-day legal needs.

Sociologist Dr. Rael Jean Isaac noted this duality in her book examining how ideologues within legal services targeted farmers for harsh litigation tactics, Harvest of Injustice: Legal Services vs. the Farmer. She explained a pattern that exists to this day:

"When they come to Congress for appropriations, they insist that their mission is that of traditional legal aid: to provide the poor with equal access to justice. This has proved a successful tack in preserving the Congressional funding spigot

and in disarming critics, but leaves many in Congress feeling betrayed and misled when the program continues to behave like a political movement."

1996: Congress Enacts Reforms and Restrictions

In the House of Representatives FY1996 budget resolution, a 3-year phase out of LSC was proposed. Appropriations of \$276 million in FY1996, \$141 million in FY1997, and elimination in FY1998 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 poor Americans 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)

The FY1996 appropriations law for LSC, Public Law 104-134, contained restrictions on activities. These restrictions were incorporated by reference in subsequent appropriations laws. While the LSC Act itself and previous appropriations laws had contained restrictions of various activities, the reforms enacted in 1996 were considered to be the most ambitious attempt in some time to reform the legal services program.

Under the current appropriations law, LSC grantees may not:

- engage in partisan litigation related to redistricting
- 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 suit
- represent certain categories of aliens, except that nonfederal funds may be used to represent aliens who have been victims of domestic violence or child abuse
- 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

Appropriations law also included reforms requiring that LSC set up a program of competition for LSC grants as a way to end the practice of presumptive refunding.

Thwarting Reform

The reforms were largely opposed by legal services lawyers and supporters.

John McKay, a private lawyer who would later become LSC President, called the proposed reforms "so troubling" because they would "...micro-manage Legal Services to the point of being absurd." (The Seattle Times, Oct. 7, 1995, page A1 1)

Despite - or perhaps because of - his fervent opposition to the restrictions, the LSC Board selected McKay to succeed Alexander Forger as LSC President. Also, McKay had nominal Republican credentials deemed useful in working with the new Republican Congress. Equally important, McKay was to devote full time to the job of LSC President. Despite an LSC rule that its President not hold outside employment, Forger had drawn criticism for getting the LSC board, in closed session, to allow him to work on the multimillion dollar Jacqueline Onassis estate and the billion dollar Doris Duke estate while supposedly working full time as LSC President.

Radical activist lawyers were especially upset at the prospect of losing taxpayer-funded lawyers for their ideological efforts. David Cole, affiliated with the far left Center for Constitutional Rights, the group founded by William Kunstler, wrote a blistering attack on the reforms. ("A Shackling Compromise: How the LSC Sold Out the Poor; LSC Board Should Call Congress' Bluff," Legal Times, Jan. 27, 1997, page 27) Cole urged the LSC Board to take on Congress by strongly opposing the restrictions.

The problem with a frontal assault on Congress at that time was that funding for LSC was very much in jeopardy.

For the most part, Congressional supporters of LSC embraced the reforms, arguing that LSC should be given a chance to reform. In fact, no Congressman took any legislative action to strike the reforms and each annual debate on LSC funding featured supporters arguing that the reforms should be given time to work.

The House floor debate of July 23, 1996 on LSC funding showed strong support for the reforms by a bipartisan group of LSC supporters.

Rep. Alan Mollohan (D-WV) acknowledged past problems with LSC-funded lawyers in his own state, but called the reforms bipartisan.

Rep. Charles Stenholm (D-TX), an early supporter of the restrictions, called them "tough, smart." He cited the restrictions as essential to LSC serving its original purpose.

One critic of LSC, Rep. George Radanovich (R-CA), used the debate to focus on a key aspect of the restrictions:

"Today's proponents of increasing funding for the Legal Services Corporation have spoken about restrictions placed upon the LSC in last year's appropriations bill. They claim that these restrictions have placed new limits upon the LSC and have forced it to act more responsibly. But these proponents have failed to note that the LSC is not a federal agency of the Federal Government, so Congress has no way of enforcing these restrictions. So, in effect, Congress is providing funding for the LSC, but we have no real control

over this organization."

In light of LSC's numerous subsequent efforts to dilute or ignore the reforms enacted by Congress, Rep. Radanovich's analysis proved prophetic.

Thwarting Reform: The Role of the LSC Board

While LSC is a private corporation and not a federal agency, it conducts itself in ways similar to an agency. When Congress enacted the restrictions and reforms as part of the LSC appropriations legislation, it was up to the LSC Board to promulgate regulations. All eleven of the LSC Board members in office at the time the restrictions took effect were nominated by President Clinton. First Lady Hillary Rodham Clinton had a special interest in LSC, having served as LSC Chairman under President Jimmy Carter.

Under the LSC Act, the LSC Board has the ultimate authority for the management of the Corporation. The Board selects the LSC President as well as the Inspector General. The LSC President has hiring authority over LSC staff and plays a key role in how enforcement actions are conducted.

The record is clear that the LSC Board ought to undermine the Congressionally-mandated reforms by:

using its regulatory authority to pass regulations weaker than Congress intended or with loopholes allowing activities which Congress sought to ban

weakening the authority of the LSC Inspector General to have access to information from grantees in order to perform his duties under the IG Act

using a "special commission" to recommend a major reinterpretation of federal law to allow representation of aliens who are not physically in the United States

taking no action to ensure that LSC management enforced certain restrictions or administered reforms properly

Thwarting Reform: The Role of LSC Management

Under the LSC Act, Congress gave LSC the sole authority "to insure the compliance of recipients and their employees with the provisions of the [Act] and the rules, regulations, and guidelines promulgated pursuant to [the Act]..." 42 U.S.C. 2996e(b)(1)(A).

By their terms, the statutory enforcement provisions permit, but do not compel, the Corporation to sanction violations of the Act or the Corporation's regulations. See 42 U.S.C. 2996e(b)(5); see also 45 C.F.R. 1618.5(b) (giving Corporation discretion to suspend or terminate funding after "attempts at informal resolution have been unsuccessful").

As the *Regional Management Corporation vs. LSC* federal case, discussed below, shows, a third party which is financially damaged by a violation of federal LSC restrictions by a lawyer or program funded by LSC has no judicial recourse if LSC fails to properly investigate or take proper administrative action. In the case cited, a company reported improper legislative lobbying by a legal services lawyer and complained to LSC. The investigation by LSC was so shoddy that it never even determined whether the legal services lawyer had a client for the lobbying, a clear requirement - one of several - for lobbying to be legal. The federal judge in the case cited the fact that the purported client of legal services had never asked the legal services lawyer to lobby the South Carolina General Assembly, and the lawyer admitted that she never spoke with the client about the lobbying.

LSC failed to even mention the client in its cursory decision to dismiss the complaint by Regional Management Corporation against the legal services program.

Even though the federal judge found "...the lobbying of the South Carolina General Assembly transgressed the clear language of federal law and LSC guidelines" and remanded the matter to LSC with instructions to fashion a proper remedy, LSC refused to sanction those who clearly broke the lobbying restriction.

Instead, LSC appealed the case, ignored the question as to whether the lobbying restriction was violated and argued that as a private corporation LSC was not subject to judicial review. LSC won on appeal because it is not subject to judicial review. In fact, this is yet another reason why LSC's critics have cited it as among the most unaccountable of federal programs.

The illegal lobbying incident is hardly isolated. Many individuals and groups which have complained to LSC about the conduct of legal services have found their complaints to be delayed and then dismissed with little apparent attention to the merits.

Because only LSC can enforce the LSC Act and regulations and because it is not subject to the judicial review which applies to virtually all federal agencies, LSC's failure to properly investigate or enforce the restrictions enacted by Congress means the restrictions are largely unenforceable.

But the situation is actually worse than that.

LSC has an Inspector General with limited powers to conduct fact finding investigations regarding alleged abuses. According to LSC Inspector General Edouard Quatrevaux, in a letter to Rep. Hal Rogers (R-KY), Chairman of the Appropriations Subcommittee with jurisdiction over LSC, on September 14, 2000:

"Grant recipients have repeatedly denied the Office of Inspector General (OIG) access to information. Moreover, the actions of the LSC President and the Board of Directors have undermined the OIG by encouraging grantees to refuse to provide information to the OIG. Waiving its own statutory right of access, LSC management also has accepted denials of access to records when attempting to conduct its own compliance inspections, and acceded to ineffective inspection procedures suggested by the grantees being inspected."

Put simply, not only does LSC refuse to properly investigate complaints or enforce restrictions, but it has actively refused to conduct its own proper compliance investigations and took the steps noted in the letter above to frustrate any attempt by the Inspector General to get access to information needed to ensure proper compliance by programs.

Shortly after the Inspector General complained to Congress that "...it is no longer possible to conduct oversight activities efficiently and effectively..." in the letter just cited, it was announced that the Inspector General was no longer working for LSC. (Legal Times, Dec. 4, 2000)

The hasty departure of the LSC Inspector General so soon after he told Congress that the LSC President and Board of Directors had undermined his access to information by encouraging legal services programs to refuse him access to records underscores yet another reason. LSC has been so unaccountable: the Inspector General serves at the pleasure of the Board that runs the program he is supposed to oversee.

Thwarting Reform: The Role of LSC-Funded Programs

Many of the lawyers funded by LSC at the time Congress enacted the restrictions made it clear immediately that they were strongly opposed to the reforms.

A legal challenge to the reforms came in a lawsuit filed in federal court in Hawaii in January 1997 by five legal services programs. (*Legal Aid Society of Hawaii, et al. v. LSC*, 981 F. Supp. 1288 (1997)) The challenge to the reforms was defeated, appealed and defeated on appeal.

Opponents to the reforms also filed a broad challenge to the restrictions in federal court in New York. (*Velazquez v. Legal Services Corporation*, No. 97 00182 (E.D.N.Y. filed Jan. 14, 1997). While the challenge to most of the Congressional reforms failed, the Velazquez case went to the Supreme Court of the United States where the restriction against challenges to welfare reform was struck down in a 5-4 decision.

Activist lawyers opposed to the restrictions continue to mount legal challenges. In a case filed in late 2001 (*Dobbins v. LSC*) in New York, legal services programs and others are challenging the restriction against the use of non-LSC funds for restricted activities. While this same challenge was made in the LASH and Velazquez cases and defeated both times, the Dobbins case shows the determination of legal services activists to defeat reform.

The case underscores the attitude of legal services lawyers who view providing traditional day-to-day legal services to the poor as a waste of their time. These lawyers see the mission of LSC as funding a political and ideological agenda. Former legal services lawyer Mike Daniel spoke out against the attempts by Congress to redirect LSC back to traditional legal aid:

"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)

While critics of legal services have long contended the program has a political

agenda, many legal services lawyers have candidly admitted the same thing. War correspondent and former legal services lawyer Geraldo Rivera acknowledged the political mission of legal services lawyers in his autobiography when he recalled that the New York program he worked for undertook "mountains of ideologically-motivated litigation." (Exposing Myself, by Geraldo Rivera, page 55, 1992)

Opposition to the reforms enacted by Congress by legal services lawyers is not limited to lawsuits. Cases such as the illegal lobbying of the South Carolina General Assembly by legal services lawyers illustrates another form of opposition: simply ignoring the restrictions.

Legal services lawyers know that only LSC can sanction them for breaking the rules and LSC has no interest in finding violations let alone punishing them. As previously noted, LSC's President and Board took the side of programs denying access to LSC's Inspector General when he was conducting his own oversight efforts.

Legal services lawyers also know that the Inspector General is principally a fact finder and that only LSC has the authority to sanction them for violation of the LSC Act and regulations.

Indeed, several of the major instances in which a program was caught violating the rules came from efforts of individuals in the Inspector General's office. The strategy of those who oppose the reforms is clear: prevent the Inspector General access to information and, if that fails, get a more compliant Inspector General.

LSC Refuses To Enforce Lobbying Restriction - Despite Ruling of Federal Judge

The *Regional Management Corporation v. LSC* case cited earlier demonstrates the brazenness with which LSC has sought to undermine the restrictions imposed by Congress in four important ways.

1. Complaints to LSC about programs violating restrictions can be ignored because there is no appeal and no judicial review.

As U.S. District Judge Herlong pointed out when he ruled that there was no rational basis for LSC's dismissal of RMC's complaint:

"This short history of Polite's case, combined with the stern language in the LSC guidelines, demanded a more thorough investigation of this matter by LSC. Due to this failure to fully develop the factual record, LSC's decision that Berkowitz did not improperly lobby the General Assembly is without rational basis."

2. While LSC is legally correct that it is not subject to judicial review, the fact remains that Judge Herlong was correct that the lobbying of the General Assembly by a legal services lawyer in this case involves "... serious allegations that cut to the heart of the continuing controversy over the public funding of legal services for the poor."

Judge Herlong put it bluntly, "Berkowitz's lobbying of the South Carolina

General Assembly transgressed the clear language of federal law and LSC guidelines."

The question is: why did LSC not enforce the restriction against lobbying?

- 3. If LSC believes it can ignore a clear violation of the lobbying restriction because it is not subject to judicial review, does this view extend to all other restrictions? This concern validates the view by Rep. Radanovich that LSC is not a federal agency "so Congress has no way of enforcing these restrictions."**
- 4. If LSC can ignore the plain meaning of the restriction against lobbying and it can ignore the decision of a federal judge that there was no rational basis for the dismissal of the complaint about the illegal lobbying, what recourse is available for an individual citizen harmed by LSC's refusal to sanction legal services lawyers when they violate the restrictions?**

**Representing Aliens Outside the United States:
LSC Appoints a "Special Commission"
to Rewrite Federal Law Behind Closed Doors;**

LSC Determines "Is" Really Means "Was"

Did Congress ever intend for LSC-funded lawyers to represent aliens who are not present in the United States?

Of all the efforts by LSC and legal services lawyers to subvert reforms enacted by Congress, the effort by LSC to evade the longstanding requirement that no alien be eligible for legal assistance "unless the alien is present in the United States" - the exact language of the law - and meet certain additional requirements, has to be the most brazen.

The controversy began in early 1998 when a group of lawyers from Farmworkers Legal Services of North Carolina, an affiliate of Legal Services of North Carolina, took an illegal trip to Mexico to recruit clients to sue North Carolina farmers. A candidly shot video of the lawyers in action in a public square in Mexico led to criticism of LSC at their February 1998 appropriations hearing, a call for an investigation by Rep. Charles Taylor (R-NC), and critical commentary on the editorial page of the Wall Street Journal.

LSC investigated and reported back to Congress that it was fining the farmworkers legal unit \$17,000 (the cost of the trip) and defunding it. Superficially, it looked like LSC was taking appropriately strong steps to deal with a group of law-breaking lawyers. It later turned out that all of the lawyers and staffers from the illegal trip simply joined a newly formed farmworker law unit which continued to receive LSC funds. A closer look at LSC's letter to the legal services group, obtained through a Freedom of Information Act request filed by the National Legal and Policy Center, revealed that the focus of the sanctions was for legal services rendered to Mexicans in Mexico who had never been to the United States.

Shortly thereafter, LSC announced that it would select a "special commission" to help the LSC board determine what Congress meant when it mandated that no alien could receive legal assistance "unless the alien is present in the United States." Legal services programs had been violating that provision for years by representing aliens who had come

to the United States as agricultural guest workers under the heavily regulated H-2A program. It was well known that legal services lawyers would travel to Mexico to recruit such clients to sue growers who used the H-2A program.

Despite the fact that the H-2A program was very popular with foreign workers and had provisions for housing, transportation, mandated wages, and was subject to inspection by a number of state and federal agencies, legal services lawyers had long viewed the program with disdain. It was felt that foreign workers who came to the U.S. for harvests, making many times what they would for similar work in their home country, were bad prospects for joining agricultural unions and the unions were longtime allies of the legal services lawyers.

The activist lawyers had a simple solution: sue as many farmers using the H-2A program as possible, making the already expensive program cost prohibitive. As it was, farmers had to pay a wage rate set by the government to equal or exceed the wages paid an American citizen for similar work plus the housing, transportation and other benefits. In addition to the inspections and oversight of the program at both the federal and state level, any farmer violating the rules ran the risk of being banned from the program - a financial death sentence for farms with labor intensive crops.

As might be expected, foreign workers competed to be accepted in the program, sometimes paying recruiters to be accepted. As a result, H-2A guest workers were poor prospects for joining unions or joining trumped up lawsuits. While legal services are quick to cite their overcrowded waiting rooms, there was a real shortage of H-2A clients. So the activist lawyers decided to go to Mexico to recruit past H-2A workers.

The tactic of undercutting the H-2A program by recruiting clients in Mexico among workers who had previously worked in the H-2A program seemed to work. Until the videotape.

The "special commission" appointed by the LSC Board to struggle with the best way to change the plain meaning of the legislative language was handpicked to exclude anyone representing agriculture or, for that matter, anyone who might dissent from the effort to provide window dressing for the LSC Board's intention of finding a way to justify the representation of aliens outside the United States.

The group had two public hearings then went into secret session despite the fact that LSC has always been subject to the Government in the Sunshine Act. Predictably, the commission issued a report which argued that Congress could not possibly have meant that there be no legal assistance for any alien "unless the alien is present in the United States." They, in effect, argued that "is" really must have meant "was" and therefore any alien who was previously in the United States as a guest worker is eligible for legal assistance.

Just as predictably, the LSC Board agreed to this absurd construction. Left unsaid is just where in the Constitution did the LSC Board find their authority to change the plain meaning of a federal law.

The relevant language of the LSC appropriations law, as set forth in Section 504(a)(11) of Public Law 104-134 is quite clear:

"Sec. 504

(a) 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 (which may be referred to in this section as "recipient")-

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is-

(E) an alien to whom section 305 of the Immigrant Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section;

The physical presence of the alien in the United States is the necessary precondition for any legal assistance.

The phrase "is present in the United States" was meant to condition eligibility for legal assistance to aliens present in the United States when legal assistance is being rendered. "Canons of statutory construction dictate that if the language of the statute is clear, we need look no further than the language in determining the statute's meaning." *United States v. Lewis*, 67 F.3d 225, 228 (9th Cir. 1995) (citing *Sullivan v Stroop*, 496 U.S. 478, 482 (1990))

Nothing presented by the LSC "special commission" came even close to providing any evidence that the presence requirement contained within the appropriations law was meant by its authors to allow legal assistance when the alien is not present in the United States.

First, LSC's own briefing paper contained in the materials presented at the February 2, 1999 meeting of the LSC commission, Restrictions on Legal Assistance to Aliens: Legal Background, stated:

"Under current law, LSC recipients may provide legal assistance to an alien if the alien is present in the United States and falls within one of several designated categories. See Pub. L. 104-134; and 45 C.F.R. Part 1626"

The same LSC briefing paper goes on to admit that:

"...nor is there any indication in relevant legislative history to indicate that the term should not be given its plain meaning which is actually be physically in the United States,"

Well stated and totally correct.

But very inconvenient for those who wanted to provide legal assistance at taxpayers' expense to aliens not physically in the United States.

Even Texas Rural Legal Aid (TRLA), one of the programs caught providing legal assistance to aliens outside the United States, was hardpressed to find any legislative history supporting the "is really means was" school of thought at LSC. The TRLA statement contained in the the public record of the commission, before it went into secret session, states:

"There appears to be no instructive legislative history on the meaning of "is present" as used in the legislative rider in 1986 nor in any of the other years in which it has appeared in the appropriations acts (1984 to present)."

Finding nothing whatsoever in the legislative history of the appropriations rider to support the view that Congress meant "is present in the United States" to mean "is or was present in the United States," TRLA's statement went on to attempt to argue that the 1986 Immigration Reform and Control Act (IRCA) somehow dictates that the plain meaning of the subsequent appropriations rider should not be followed. This view of statutory construction is based on the absurd and insupportable notion that Congressional appropriations riders do not have the legal authority to curtail an interpretation of prior statutory law. In reality, riders to appropriations laws routinely curtail activities which in prior fiscal years may have been permissible. To find examples of this, one need look no further than the restrictions of legal services activities which were first set forth in Public Law 104-134.

Despite the novel view, implicit in TRLA's analysis, that appropriations riders passed by Congress may not restrict activities that may have been previously allowed by a program that receives federal funds, no legal analysis whatsoever was provided by TRLA or any other participant to support this view.

Even if the language in IRCA explicitly allowed legal services lawyers to provide legal assistance to aliens who are not present in the United States at the time of that assistance, and IRCA clearly does not contain such language, nothing would prevent Congress from exercising its appropriations authority under Article I of the Constitution from withholding funding for activities which had previously been allowed.

For LSC to take the view that Congress does not possess the authority to use appropriations riders to restrict activities by legal services lawyers is tantamount to LSC endorsing the view that it has the authority to pick and choose which of the restrictions imposed by Congress it will enforce.

The argument that Congress may not amend substantive law in an appropriations statute is flatly contradicted by a 1992 Supreme Court decision which explicitly found that Congress "...may amend substantive law in an appropriations statute..." *Roberts v. Seattle Audobon Society*, 112 S. Ct. 1407, 1414 (1992).

The results of LSC's decision to allow representation of aliens outside the United States has been predictable. Programs which have long had reputations for political activism embraced the opportunity instead of addressing traditional day-to-day legal needs.

It should come as no surprise that the two programs which have paid the largest fines for violating LSC rules in the recent past, Texas Rural Legal Aid and Legal Services of North Carolina, have both decided to use their scarce resources to represent aliens outside the United States. The result is that the deserving poor within their own service areas are short-changed.

Anyone who thinks that these more expensive foreign cases are serving the interests of justice should take a closer look at the cases. Despite the fact that many farmers

who cannot afford to pay the expense of defending a lawsuit and are forced to settle when legal services file trumped up or bogus claims, farmers in North Carolina, fed up with the shakedown brand of justice practiced by legal services lawyers, decided to go to trial on one of the cases decided since LSC decided it could pretend it was Congress and rewrite federal appropriations law:

Franco-Favela v. Leonard Wester and Wester Farms

This case was heard in Franklin County District Court on July 30, 2001. This was a contract case brought by one of the LSC-funded lawyers involved in the illegal Mexican recruiting trip. The client was a Mexican citizen currently in Durango, Mexico. The client signed a voluntary resignation form in Spanish and English in August 1996 but the case was not filed until July 1999. The claim that the client was fired for not meeting a production quota in bell peppers was inconsistent with the fact that bell peppers were a minor crop and all employees picking them were paid an hourly wage. The plaintiff admitted the signature on the voluntary resignation form was his but he had forgotten the circumstances under which he had signed it. There was no evidence that Wester farms coerced or intimidated the client into signing the form. The judge hearing the case ruled that "plaintiffs claims against defendants lack merit." The claims were dismissed in their entirety with prejudice and the judge further ruled that plaintiff shall recover nothing from defendants.

Ironically, Legal Services of North Carolina, while pursuing meritless claims like the one above on behalf of an alien client living in Mexico five years after the client left North Carolina, recently argued to the North Carolina legislature that it needed more funds to meet the unmet legal needs of poor North Carolinians. Perhaps if the program was recruiting clients in Mexico for meritless cases, it might have been able to meet more legal needs of the deserving poor in North Carolina.

**Congress Requires Competition for LSC Grants But
LSC Sets Up System to Frustrate Competition**

One of the most important reforms enacted by Congress through the 1996 LSC appropriations law was the requirement that LSC implement a system of competition for the award of all grants to field programs.

For years, LSC grantees received their grants through a system of presumptive refunding. The funds were simply awarded to the incumbent program in almost every instance without any regard to whether the program was doing an excellent job or a miserable job.

Quality did not count. Being the incumbent program was all that mattered.

Law Professor Douglas Besharov studied the quality and quantity of legal services provided with LSC funding in his 1990 book, Legal Services for the Poor: Time for Reform. He concluded that efficiency among grantees varied widely and LSC's own data suggested "a substantial decline in productivity." (Id. at vx)

Dr. Besharov identified one of the sources of the mediocre levels of efficiency as the automatic refunding process:

"Unlike most federal programs, LSC grantees are all but guaranteed refunding. Unfortunately, ensured refunding removes an important incentive for greater efficiency and responsiveness."

Congress mandated that LSC set up the program of competitive bidding for grants with the clear understanding that it did not want a sham process that merely mimicked the failed policy of automatically granting money to existing programs.

To reinforce this view, Section 503(a)(3)(e) of Public Law 104-134 stated:

"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."

Despite this language, the LSC set up a competition program that did just the opposite of what Congress intended.

The facts speak for themselves.

Ronald Sutherland, Adjunct Professor of Law at the George Mason University School of Law, has produced an excellent study examining LSC grant competition ([The Government Provision of Legal Services for the Poor: Competition or Monopoly](#)). While the study also addresses broader issues regarding the ineffectiveness of delivery of legal services for the poor, his analysis of six years of purported competition at LSC shows beyond all argument a system that thwarts competition.

Sutherland's analysis of LSC's competition found that, with few exceptions, grants are awarded in competitions which feature just one bid - the incumbent program.

The LSC board, management, and field programs were all opposed to competition but there was a political necessity to set up a facade of competitive bidding. LSC set up the program, made the necessary announcements in the federal register, and ran the program for six years in a way that virtually guaranteed that incumbent programs almost always won in the very few cases there was even a competitor.

Any law firm, legal group, faith-based group or charity which entertained an idea of competing for a LSC grant quickly learned what happens when you challenge an incumbent legal services program.

The very first successful challenge to legal services programs for a LSC grant was by the Philadelphia area law firm of Dessen, Moses & Sheinoff. This firm successfully competed for grants held by two LSC-funded programs: Montgomery County Legal Aid and Delaware County Legal Assistance. ("Law firm awarded federal legal aid grant," *The Legal Intelligencer*, Feb. 25, 1997, page 1)

Then the situation turned ugly.

The new group, which won the competition despite the tremendous bias of the competition process for existing programs, soon found itself picketed by legal services

lawyers from the losing programs.

One of those lawyers, Roger Ashodian, President of the Delaware County Legal Assistance, called on Dessen, Moses to withdraw its winning bid. This is the same attorney who in 1992 had been sanctioned by a judge for engaging in unethical tactics to increase litigation costs in a lawsuit that had been filed against a non-profit group that had provided affordable housing to the poor. (*Cottman v. Flower Manor*, Civ. A No. 91-4890, 1992 WL 368457 (E.D. Pa. 1992))

The losing programs mounted a campaign of political pressure to force the winning firm to withdraw its bid. The losing programs convinced their Congressman to attend a LSC board meeting in January 1997 to try to overturn the award.

Then the winning firm found that one of its biggest clients, the Philadelphia Federation of Teachers, did not support the action. The legal service program's unionized staff had apparently persuaded the teachers' union to throw its weight against the winning bid.

The Legal Intelligencer (Mar. 19, 1997) summed up the firm's decision in a story entitled "Concern Over Client Led to Dropping Legal Aid Grant."

"A desire not to 'embarrass' a major client, combined with a public protest by legal service union members, led the center city-based firm Dessen, Moses & Sheinoff to withdraw from a grant to take over legal aid services in Montgomery and Delaware Counties."

The lesson was that any attempt to allow true competition based on quality legal services would be met with political pressure, demonstrations, and economic pressure.

Today, there is nothing even remotely resembling the competition that Congress mandated.

LSC Vice President Admits Another of LSC's "Dirty Little Secrets"- Poor Quality Legal Services

Congress mandated competition for LSC grants in an attempt to promote incentives for better quality legal assistance. As just noted, six years of pseudo-competition where almost every program, no matter how mediocre, gets its grant renewed has produced exactly what existed before: many low quality programs - the "deadwood" described by Dr. Besharov in Legal Services for the Poor: Time for Reform.

This lack of quality manifests itself everywhere, even in candid assessments by current LSC officials. Randi Youells, LSC Vice President for Programs addressed the quality issue directly in a paper presented to the International Legal Aid Group which convened in Melbourne, Australia, July 13-16, 2001:

"Unfortunately, at the same time we have held ourselves out as the champions of quality, 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." It has also been our "Achilles"

heel in that it has allowed our adversaries - the people who oppose the very idea of federally funded legal services - to chip away at our financial and political support."
(international Legal Aid Group paper, page 13)

Congress Strictly Forbids Class Actions; LSC Allows Class Actions

When Congress banned legal services lawyers from class actions as part of the FY1996 LSC appropriations law, the restriction was short, unambiguous and without exception:

"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 (which may be referred to in this section as a "recipient")-

(7) that initiates or participates in a class action
(Public law 104-134, section 504(a)(7))

Congress enacted the ban after years of abuses by legal services lawyers using class actions to advance political and ideological agendas. Not only were such class action lawsuits among the most controversial but they were also costly and diverted resources from the day-to-day legal problems of the poor.

Prior to the restriction, legal services lawyers used class action lawsuits to:

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

sue Pennsylvania when Governor 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).

participate in an unsuccessful lawsuit against Michigan for failing to provide free lawyers to prisoners for child custody cases (*Glover v. Johnson*, 75 F.3d 264, 6th Cir. 1996).

Moreover, many types of class actions which might truly benefit the poor did not require legal services lawyers because private law firms were eager to take such cases because of the attorneys' fees involved.

Despite the plain language of the restriction against class action lawsuits by LSC-funded lawyers and the lack of any exceptions to that restriction, legal services lawyers have filed class actions against farmers in both Georgia and California.

In the Georgia case, Georgia Legal Services filed a lawsuit against the Georgia Growers Association, Southern Valley Fruit and Vegetable, Inc., and Hamilton Growers, Inc. The clients were five Mexican citizens living in Michoacan, Mexico, who had traveled to Georgia as part of the H-2A temporary agricultural worker program in April 1998, more than

a year prior to the filing of the complaint by Georgia Legal Services.

Georgia Legal Services asked the court to grant judgment not only for the five named clients but for a large unidentified number of "others similarly situated." Throughout the complaint, the legal services lawyers asserted claims for the unidentified large group of "others similarly situated."

The legal services lawyers also requested that the court let the action proceed with Georgia Legal Services representing the large unidentified group. From the motion it was apparent that they wanted to represent as many as 335 aliens in a class action.

The lawyers for the growers submitted a memorandum to the court in opposition to the attempt to proceed as a class action. The memorandum addressed the appropriations law restriction against class action as follows:

"Congressional Restrictions on this Litigation

As reflected in the proposed notice, plaintiffs are represented by Legal Services attorneys. Congress prohibits Legal Services Corporation (LSC), and those organizations taking their funding from from LSC, from undertaking a class action, directly or through others. 42 U.S.C. § 2996e. Public Law 104-134 made this a strict prohibition and LSC recognized the "clear prohibition" on this activity in the preamble to 45 C.F.R. Part 1617. 45 C.F.R. 1617.3 now prohibits Legal Services from initiating or participating in a class action with no exceptions. While "class action" is defined by LSC with reference to Rule 23, it also extends to class actions pursuant to "rule of civil procedure applicable in the court in which the action is filed." While this class action is not brought pursuant to Rule 23, it remains a federal court class action. See, e.g. Grayson, *supra* (repeatedly referring to such cases as class actions). Thus, as held in *Brooks v. Bellsouth Tel. Co., supra*, while these "class actions ... do not proceed under Fed. R. Civ. P 23 ... section 16(b) of the Fair Labor Standards Act... provides procedures for representative or class actions." The bottom line is that LSC attorneys seek to represent 335 persons in a class action, despite a Congressional prohibition."

The class action lawsuit being pursued by Georgia Legal Services had other important violations of the Congressional restrictions.

Congress had sought to eliminate a longstanding pattern of abuses in which legal services lawyers would fail to identify their clients. The 1996 reforms contained in Public Law 104-134 set forth this requirement as follows:

"Sec. 504

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 (which may be referred to in this section as a "recipient")-

(8) that files a complaint or otherwise initiates or participates in litigation against a defendant, or engages in a precomplaint settlement negotiation with a prospective defendant, unless-

(A) each plaintiff has been specifically identified, by name, in a complaint filed for the purposes of such litigation or prior to the precomplaint negotiation; and

(B) a statement or statements of facts written in English and, if necessary, in a language that the plaintiffs understand, that enumerate the particular facts known to the plaintiffs on which the complaint is based, have been signed by the plaintiffs, are kept on file by the recipient, and are made available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any auditor or monitor receiving federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation...

In the Georgia case, not only were the identities of each plaintiff not provided, it's abundantly clear that Georgia Legal Services didn't even know the identities of those "similarly situated" who it was purporting to represent.

As such, Georgia Legal Services violated this federal appropriations law restriction by both failing to identify all plaintiffs and by failing to have gotten from this large group of unknown plaintiffs a statement of facts. Moreover, the time for such disclosure is at the filing of the complaint or prior to precomplaint negotiation, not halfway through the case.

The tactics of Georgia Legal Services in this case fit the controversial *modus operandi* which has all too often accompanied legal service lawsuits against farmers. This approach has been documented in Dr. Rael Jean Isaac's Harvest of Injustice: Legal Services v. the Farmer published by the National Legal and Policy Center as well as in hearings ably led by Representatives George Gekas (R-PA) and Roscoe Bartlett (R-MD) in recent years. The chief tactic is to force farmers to settle flimsy and even non-existent claims by simply running up the legal bill to fight the lawsuit.

Filing class action lawsuits and failing to identify hundreds of plaintiffs clearly violates Public Law 103-134, but it is a tactic designed to force farmers to settle trumped up claims or face financial ruin through legal bills.

Among the trumped up claims was the claim that farmers were somehow responsible for reimbursing workers for passports purchased by workers in their own country long before a contract even existed. The claim was totally without merit. In the world of legal services litigation, it doesn't matter that the allegations are nonsense. What matters is that the case is so expensive to litigate that farmers will settle just to avoid the costs of litigation.

In the case of Georgia Growers Association, abusive litigation has cost it hundreds of thousands in legal bills.

On a bipartisan basis Georgia's House delegation and Senators spoke out against the abuses. Rep. Saxby Chambliss (R-GA) and the late Senator Paul Coverdell (R-GA)

wrote to LSC to complain about the tactics of Georgia Legal Services. Senator Zell Miller (D-GA) in a statement entitled "Agriculture: Georgia's Top Industry; My Top Priority," specifically identified the Legal Services Corporation as challenging Georgia farmers. He added, "I have learned that Washington has not always been a great friend to our farmers."

Despite an outcry from the growers, a complaint against Georgia Legal Services by the National Legal and Policy Center citing multiple violations of the restrictions enacted by Congress, and protests by Congressmen and Senators, LSC did nothing to rein in the rogue program.

LSC knew that only LSC had standing to enforce the restrictions and that any administrative decision they made dismissing complaints was not subject to judicial review. In short, LSC and its grantees were above the law. For an institution which never tires of instructing Congress that the court house door should not be shut to the lawyers for the poor, they were in a situation where they were routinely shutting the door to justice for anyone who wanted the reforms enforced.

Class actions by legal services lawyers were not limited to Georgia. In California, farmers faced a series of class actions by legal services lawyers. In a case filed by California Rural Legal Assistance (CRLA) before the Ventura County Superior Court in February 2000 (*Lilia Tello, et al. v. Agricultural Innovation and Trade, Inc., et al.*), CRLA asserted claims for not just the named plaintiffs, but also a class of unidentified "members of the general public." CRLA subsequently described this class in the complaint as "each similarly employed member of the general public." The size of the class was not given and none of its members were identified by name, despite the explicit requirement of federal appropriations law cited above for naming all plaintiffs in any complaint brought by lawyers funded by LSC.

As noted, both the federal law and LSC's own regulation on class actions, 45 C.F.R. § 1617 have no exceptions to the restriction against initiating or participating in a class action.

Nor is there any dilution of the broadness of the restriction in the definition of class action at 45 C.F.R. § 1617.2, which covers not only class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure, but also "comparable State statute or rule of civil procedure applicable in the court in which the action is filed."

Legal services lawyers undertaking the California class actions and their defenders at LSC have tried to argue that the California actions were representative actions and not class actions.

Should there be any doubt as to whether a representative action in which legal services attempts to represent a class of unnamed individuals is a violation of the broad restriction against class actions found in both the law and the regulations, one can turn to [Ballentine's Law Dictionary](#) to review what that authoritative law dictionary has to say on the subject. The definition is remarkably unambiguous:

representative action. same as class action.

That definition does not allow any discernible wiggle room for an attempt to argue that a representative action is not a class action.

Similarly, [Black's Law Dictionary](#) provides no grounds for claiming a representative

action is not a class action:

CLASS or REPRESENTATIVE ACTION. One in which one or more members of a class sue either for themselves or for themselves and other members of the class. *Hueter v. Gilmour*, D.C. Pa, 13 F. Supp. 630, 631; *City of Dallas v. Armour & Co.*, Tex. Civ. App., 216 S.W. 222, 224

Nothing could be clearer. A representative action is a class action. Congress restricted such actions.

When the above case brought by CRLA was brought to the attention of LSC through a complaint filed by the National Legal and Policy Center, Underwood Ranches and Tierra Linda Corp., LSC simply dismissed the complaint. They also dismissed a second complaint involving another class action by CRLA. LSC knew from the *Regional Management Corporation v. LSC* case that it didn't matter if there was no rational basis for LSC's dismissal of a complaint.

The lesson of *Regional Management Corporation v. LSC* for LSC has been that complaints about legal services lawyers violating restrictions imposed by Congress can be summarily dismissed by LSC and the complainants have no right to seek judicial review of the dismissal.

After all, if LSC could ignore a federal judge who found a clear transgression of the federal law against lobbying, it could ignore anyone.

Congress Warns LSC to Enforce Class Action Ban; LSC Ignores Congress

In 2000, as reports of legal services lawyers again violating Congressional restrictions - and LSC again failing to take any action - reached Congress, members of the Committee on Appropriations 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 ensure its grantees comply."

LSC totally ignored the reminder from Congress and took no action to stop class action lawsuits.

Using Mirror Corporations to Evade Congressional Restrictions - An Old Legal Services Trick with a New Spin

The new restrictions imposed by Congress in 1996 left the political activist element within the legal services community looking for ways to continue the more ideological activities that were so ingrained in the program. The restrictions were not part of the LSC Act, just appropriations riders effective only for the fiscal year involved, so the hope was they were a temporary impediment to activism as usual.

Using a version of a strategy set up in the 1980's to evade the relatively minor restrictions enacted in the Reagan years, grantees sought to evade the restrictions by

setting up closely affiliated but legally distinct entities. In 1985, a General Accounting Office investigation determined that closely affiliated groups engaged in activities prohibited to LSC grantees and that the relationships between the two sets of groups were so close that LSC should consider them one group for purposes of complying with the restrictions. (See: "The Establishment of Alternative Corporations By Selected Legal Services Corporation Grant Recipients," U.S. General Accounting Office, B-202116, Aug. 22, 1985)

While the earlier version of setting up closely affiliated alternative corporations, sometimes called "mirror corporations," typically began with a legal services program providing a subgrant to the new group, that option was not available in the 1990's because LSC regulations interpreted subgrantees as having to comply with LSC restrictions imposed by Congress.

The new, post-1996 methodology was for an existing LSC-funded program with a history of activities of the type newly restricted to renounce its LSC grant while keeping as much of the non-LSC funding as possible. Some attorneys from the LSC program would then set up a new group close by - sometimes in the same building or on the same block.

The new group received the LSC grant while the old group used the funds from bar support, Interest on Lawyers Trust Accounts, state support, and other sources to continue the cases now forbidden by Congress.

The iron rule is supposed to be that no LSC resources fund restricted activities or groups conducting restricted activities. The key LSC regulation, known as the program integrity regulation, is set forth at 45 C.F.R. §1610. LSC will find that a recipient of their funds has objective integrity and independence from a group if:

- (1) The other organization is a legally separate entity;
 - (2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and
 - (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of facts. The presence or absence of any one or more factors will not be determinative. factors relevant to this determination shall include, but not be limited to:
 - (i) The existence of separate personnel;
 - (ii) The existence of separate accounting and timekeeping records;
 - (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
 - (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.
- (45 C. F. R. 1610.8 (a))

The discretion given LSC to enforce the regulation is a giant loophole: regardless of whether a LSC recipient shares a building, personnel, or financial arrangements, every case is determined on the "totality of facts" as interpreted by LSC. This arrangement has been viewed as a green light for programs to work closely with their mirror corporations which are engaged in a wide range of restricted activities.

Immediately after the restriction took place, mirror corporations began to spring up from coast to coast. According to an article in the November 21, 1996 Los Angeles Daily Journal, "About 100 federally [LSC] funded programs set up new legal services agencies in late 1995 or early 1996, either to take cases no longer allowed under federal [LSC] funding or to take the federal [LSC] funding itself."

And the closeness of LSC-funded groups and the groups doing restricted activities was immediately apparent.

The Philadelphia Legal Assistance Center was formed by 12 lawyers from Community Legal Services to assume CLS's non-prohibited cases, setting up shop in the same building as CLS. (Legal Intelligencer, Jan. 30, 1996)

Legal Services of North Carolina rented out part of their building, purchased with LSC funds, to the North Carolina Justice and Community Development Center - a group which engages in grass roots political projects, lobbying and other restricted activities.

In New York, the LSC-funded farmworker program and Farmworker Legal Services of New York, a group doing restricted activities, work out of the same address with no separate suite numbers. The LSC group co-counseled on at least 5 cases with the group doing restricted activities. LSC-funded groups are discouraged from using scarce resources to take cases when there is other counsel available.

Some programs became so careless at the dividing line between groups doing restricted activities and LSC groups that the obvious apparent use of LSC funds for restricted activities surfaced publicly.

The Legal Aid Society of Alameda, a program funded by LSC with a long history of using legal services funds to support activism, was removed from LSC funding when an investigation by the LSC Inspector General's office found numerous problems. One published report called the program's case management and timekeeping systems unreliable and stated that it appeared attorneys continued working on restricted cases after the restrictions went into effect. The LSC Inspector General was quoted as saying, "We could not determine that LASAC divested of class action, prisoner litigation and restricted alien cases by the July 31, 1996 deadline." (The Recorder, June 29, 1998)

The problems persist to this day but are rarely, if ever, discovered by LSC.

In a very recent case, Lane County Legal Aid Service, Inc. (LCLAS) of Michigan was cited by the LSC Inspector General's office for multiple violations of the LSC Program Integrity regulation.

In an Audit Report dated October 2001 (available at www.oig.lsc.gov), the Inspector general's office determined:

LCLAS did not maintain objective integrity and independence from a legal organization that engaged in prohibited activities;

LCLAS allowed a full-time attorney to work on a class action lawsuit for

the other organization while in the LSC grantee's office; and

LCLAS certified compliance with LSC regulation without required supporting document.

The LSC Inspector General's audit report came out in October 2001 but to date there has been no public indication that LSC has done anything whatsoever to sanction the program for its violations of federal law.

Nor is this the only case in which LSC has learned of mirror corporations working hand-in-glove with LSC programs in ways that make a mockery of the requirement that LSC groups and groups doing restricted activities be physically and financially separate.

Legal Services of North Carolina (LSNC) and its tenant, the politically active North Carolina Justice and Community Development Center (NCJCDC), have developed close legal and financial ties that parallel their close physical ties. Both work out of 224 S. Dawson Street, Raleigh, NC. No separate suite or room numbers are listed differentiating the groups on a number of public documents. Property records list the building as owned by LSNC and having a market value of \$1,184,871.

In a complaint filed with LSC against Legal Services of North Carolina on May 18, 2000, by National Legal and Policy Center and the North Carolina Growers Association, the complainants pointed out that LSNC and NCJCDC were co-counseling on a case in which attorneys' fees were being sought. The LSC-program asked that any attorneys' fees go to its co-counsel, NCJCDC.

The complaint pointed out that:

The LSC Act and regulations prohibit this type of fee-generating case

LSC-funded attorneys are banned from taking attorneys' fees and the request to the court that any attorneys' fees in the case go to the mirror corporation certainly looks nothing like the financial separation mandated by federal law and LSC's program integrity regulation.

LSC took no action on the complaint.

The meaning is clear: in LSC's view of the physical and financial separation requirement, a program doing numerous restricted activities can operate out of a office paid for with LSC funds while co-counseling on cases in which any attorneys' fees go directly to the group conducting the restricted activities.

Taxpayer-Subsidized Political Activism

In December 1996, lawyers from the LSC-funded Texas Rural Legal Aid (TRLA) filed a lawsuit in federal court to overturn the election of two Republicans to county offices. The lawyers challenged the absentee ballots of about 800 active duty military personnel and their families, claiming their votes improperly diluted the vote of their client.

Despite a clear Congressional restriction against legal services lawyers seeking attorneys' fees, the lawsuit asked for attorneys' fees.

The legal services lawyers' challenge to the voting rights of active duty military personnel met with an immediate and broadly based, bipartisan opposition:

Texas Attorney General Dan Morales, a Democrat, filed a brief challenging the legal service lawyers' interpretation of Texas election law.

58 U.S. Senators signed a letter to Attorney General Reno asking her to intervene on behalf of the voting rights of the military voters

LSC wrote to TRLA on January 8, 1997, stating that their request for attorneys' fees was an apparent violation of the law. TRLA pulled out of the lawsuit as counsel but a legal services lawyer stayed in the lawsuit as an expert witness.

A major problem with LSC's handling of the case was the fact that LSC never challenged TRLA for getting involved in a partisan effort to overturn an election.

The major beneficiary of the legal action would be the two losing Democrat candidates, not the lone client who TRLA claimed had her vote diluted by allowing military voters to vote by absentee ballot.

Coincidentally, earlier in the election year, TRLA lawyer Jorge Ramirez became Executive Director of Texas Democratic Party and later served as acting general counsel.

LSC's January 8, 1997, letter to TRLA did not make an issue of involvement in overturning a partisan election nor did it find anything wrong with the effort to strip voting rights from military personnel, a number of which were on active duty in Bosnia at the time.

If there was any doubt that LSC would refuse to discipline TRLA over the political lawsuit, aside from the illegal request for attorneys' fees, it was removed when LSC spokesperson Nikki Mitchell stated:

"In terms of the program's priorities and in terms of the restrictions placed on Legal Services by Congress, the suit was perfectly valid."

The Legal Services Act explicitly prohibits legal services from involvement in any political activity. What is more inherently political than challenging an election?

Section 1007(a)(6) of the LSC Act states that LSC shall:

"(6) insure that all attorneys engaged in legal assistance activities supported in whole or in part by the Corporation refrain, while so engaged, from-

(A) any political activity

Lest there be any doubt as to the meaning of the prohibition against involvement in "any political activity," this section of the LSC Act was interpreted by Judge Abner Mikva in *Texas Rural Legal Aid v. Legal Services Corporation*, the case lost in 1990 before the U.S. Court of Appeals for the District of Columbia Circuit, by TRLA when they challenged the restriction against involvement in Congressional redistricting cases.

U.S. Circuit Judge Abner J. Mikva, for years a Democratic Congressman from Illinois, hammered home two points in rejecting TRLA's arguments:

"...the [LSC] Act charges LSC with a duty to ensure that the legal services program remains free of partisan political influence and involvement."

"Significantly, subpart (A) of section 1007(a)(6), which prohibits 'any political activity' by attorneys of recipient programs, does not contain an exception for legal advice and representation"

Despite Judge Mikva's decision in a case involving the very same two parties to the voting case controversy and the interpretation of the very same section of the LSC Act, the Legal Services Corporation decided that TRLA's involvement in challenging the election was "perfectly valid."

Judge Mikva's comment from the 1990 case supports an opposite view. He stated, "...we cannot conclude that LSC has no right to prohibit its grantees from engaging in partisan politics."

In short, LSC ignored the law and gave a green light to partisan political activity.

Legal services lawyers, especially from TRLA, know a green light when they see one and continued:

A class action lawsuit conducted by a lawyer on her "free time" while working part time for TRLA was the basis for a stridently anti-George W. Bush commercial during the 2000 presidential election campaign.

- An activist web page urging individuals to use their tax rebate to "Fund the Fight Against Bush and his Agenda" by pledging their rebate check to "Organizations Fighting Against Bush's Agenda" urged contributions to a number of left leaning advocacy groups including TRLA. For good measure, viewers can link directly to the TRLA web page to facilitate donations.**

Despite the reforms, its partisan politics as usual with LSC's funds and its blessing.

Congress Forbids Attorney Fees With No Exceptions - LSC Crafts a Loophole to Allow Attorney's Fees From the Disabled; Congress Scolds LSC and the Loophole is Closed

One of the reforms enacted by Congress as part of the FY1996 LSC appropriations law was a ban on claiming, collecting or retaining attorneys' fees. (Pub. L. 104-134, 110 Stat. 1321, § 504(a)(13)).

Among the reasons for this reform was the fact that legal services lawyers salaries were already paid by the taxpayer so the usual rationale for allowing such fees to compensate an attorney did not exist.

Also, Congress did not want legal services lawyers to abuse their discretion in taking cases which allowed attorneys' fees and ignoring the poor whose cases which did not allow such fees.

Finally, cases allowing attorneys' fees are much more likely to be pursued by private counsel so using tax-funded lawyers in such cases was considered a unnecessary use of public funds.

Despite the crystal clear intent of Congress that such attorneys' fees be banned, LSC's Board wrote a proposed regulation which allowed attorneys' fees to go to legal services lawyers in certain cases involving arguably the most deserving of its clients - the disabled poor in Social Security disability cases.

The intent of Congress that no fees be charged by legal services lawyers ended up being "interpreted" by the LSC Board to mean that disabled poor clients had to give up part of their recovery in attorneys' fees.

Fortunately, Congress intervened. At a February 26, 1997 hearing before the House Commerce, Justice, and State, the Judiciary and Related Agencies Subcommittee, Chairman Hal Rogers (R-KY) strongly criticized LSC for its attempt to dilute the attorneys' fee restriction enacted by Congress.

When LSC Vice Chairman John Erlenborn attempted to defend LSC's proposed regulation allowing attorneys' fees to be claimed in cases involving poor, disabled clients, Chairman 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, page 1)

When Mr. Erlenborn insisted on defending the controversial regulation, Chairman Rogers pointedly responded:

"You can't seem to help yourself. You do not grasp reality. Some of us are losing patience."
(New Jersey Lawyer, Mar. 10, 1997, page 3)

LSC finally got the message. The regulation language was changed so that cases involving the poor and disabled could not be used to claim attorneys' fees.

Nevertheless, the LSC board continued to use its authority to draft regulations to carve loopholes into or water down the restrictions Congress enacted.

What Can Be Done?

Trying to reform the Legal Services Corporation is difficult. Congress has been trying for more than 25 years with mixed results.

As events since the 1996 reforms has shown, LSC is difficult to reform because it does not want to be reformed.

As Rep. Radanovich pointed out, Congress has very little control over LSC.

As the *Regional Management Corporation v. LSC* case showed, LSC is not subject to judicial review. It can and does use its discretionary authority to ignore repeated violations of reforms enacted by Congress.

As the former LSC Inspector General pointed out in his September 2000 letter to Chairman Hal Rogers, LSC waives its own access to information from grantees and encourages grantees to deny the Inspector General access to information.

As the LSC's record on competition shows, it took a requirement to promote competition and turned it into a system in which competition for grants is all but non-existent.

As LSC showed with its farcical special commission, it has no problem taking a clear Congressional requirement that no alien receive legal assistance "unless the alien is present in the United States" and interpret the word "is" to mean "was."

As LSC has demonstrated, its interpretation of the reform mandating that grantees be physically and financially separate from groups doing restricted activities means the two groups can share offices and staffs and co-counsel in lawsuits in which the politically active group is seeking attorneys' fees.

As LSC showed in the Texas Rural Legal Aid case, LSC interprets the restriction against political activity to allow legal services lawyers to challenge the election of Republicans by challenging the rights of military personnel to vote by absentee ballot.

Caught red-handed by Congress, the GAO, and Associated press in passing on wildly inflated case numbers to Congress to justify increased funding, LSC falsely assured Congress the problem was fixed yet a second GAO investigation showed that the problem had not been corrected.

Claiming its grantees are providing top quality legal services, LSC's own Vice President acknowledges the "dirty little secret" that quality is "below appropriate levels."

For the most part, band aid approaches will do little to reform this fundamentally flawed program.

The best that Congress can hope for is that President Bush will appoint a LSC Board committed to following the reforms, not undermining them.

LSC also needs an Inspector General whose access to documents is not being frustrated by an LSC Board and President.

And unfortunately, LSC needs almost continuous oversight because few of the oversight tools available for federal agencies apply to this private corporation with its long history of ignoring the will of Congress.

In the absence of continuous oversight, a major reduction in LSC funding will undeniably cut down on the abuses and perhaps convince the activists that thwarting the will of Congress has a price.

Kenneth F. Boehm
Chairman
National Legal and Policy Center
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Education

Pennsylvania State University, B.A., 1971
Widener School of Law, J.D., 1976

Positions

Chairman, National Legal and Policy Center, 1994-Present

with two co-plaintiff groups, successfully sued Hillary Clinton's Health Care Task Force for violating the Federal Advisory Committee Act

published fortnightly *Union Corruption Update* newsletter and oversaw Organized Labor Accountability Project

testified before House and Senate committees on union corruption and *Beck* case issues

organized the Legal Services Accountability Project, documenting hundreds of questionable cases brought by legal services lawyers

testified before House and Senate committees on abuses within the federal legal services program

Assistant to the President and Counsel to the Board
Legal Services Corporation, 1991-1994

served under the board appointed by President George H. W. Bush

Director, Office of Policy Development and Communications
Legal Services Corporation, 1989-1991

responsible for policy, governmental affairs and media relations

Chairman, Citizens for Bush, 1989-1991

- chaired national advocacy group supporting President George H. W. Bush's legislative policies

Chairman, Citizens for Reagan, 1984-1989

- chaired national advocacy group supporting President Reagan's policies

Administrative Assistant, U. S. Representative Chris Smith (N.J.-4), 1981-1984

- served as chief of staff for Rep. Smith

Treasurer, The Fund for a Conservative Majority, 1979-1981

raised over \$3 million for conservative candidates and helped develop FCM into the third largest political action committee during the 1980 cycle

organized a successful independent expenditure campaign for Reagan and assisted in the legal work that led ultimately to two cases before the Supreme Court of the United States confirming the constitutionality of independent expenditure campaigns on First Amendment grounds

Radio Talk Show Host, WWDB, Philadelphia, Pa., 1975-1980

- **awaru-winning talk show host on a 50,000 watt Philadelphia station**

Assistant District Attorney, Chester County, Pa., 1976-1977

Awards, Directorships & Memberships

Pennsylvania Intercollegiate Chess Co-champion, 1970
Delegate, Republican National Convention, 1976
Vice President, Northern Virginia Law School, 1978-1996
Mensa, 1968-Present
Political staff, Republican National Convention, 1996
McLean Presbyterian Church
Federalist Society

Publications

"The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform, and Unnecessary," *Saint Louis University Public Law Review*, Volume XVII, Number Two, 1998