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LEGAL SERVICES CORPORATION

MEETING OF THE

COMMITTEE ON OPERATIONS AND REGULATIONS

AUGUST 6, 1982

9:00 A.M. - 5:00 P.M.

HENNEPIN COUNTY GOVERNMENT CENTER

MEETING ROOM "A"

4TH AVENUE & 5TH STREET SOUTH

MINNEAPOLIS, MINNESOTA

AGENDA

TENTATIVE AGENDA

MEETING OF THE COMMITTEE

ON

OPERATIONS AND REGULATIONS

AUGUST 6, 1982

9:00 A.M. - 5:00 P.M.

Hennepin County Government Center
Meeting Room "A"
4th Avenue and 5th Street, South
Minneapolis, Minnesota

Open Meeting (Portion of the meeting may be closed to discuss matters under 45 C.F.R. Sections 1622.5 (a) through (h))

MINUTES

Legal Services Corporation Board of Directors
Minutes of the Operations and Regulations Committee
May 14, 1982 Atlanta Biltmore Hotel

Present: Chairman, Robert Stubbs, II
Clarence McKee
Josephine Worthy
Gerald Caplan, Acting President

Chairman Stubbs opened the meeting by recognizing the presence of several guests including John Cromartie, Director of the Georgia Legal Services Program; Eric Kocher, with the Georgia Legal Services Program; Steve Gottlieb, Director of the Atlanta Legal Aid Society, Inc.; Carolyn Weeks, staff attorney with the Atlanta Legal Aid Society, Inc.; Brian Stone, Director of the Atlanta Volunteer Lawyers Foundation; Former LSC Board member Glenn Stophall of Chattanooga, Tennessee; and Clint Lyons, Dennis Daugherty, Joshua Brooks and Victor Geminiani of the LSC Staff.

Appointment of Subcommittees

The Chairman suggested the creation of four subcommittees on Project Development; Internal Organization and Operations; Regional and State Activities; and Regulations Review. Mr. McKee and Mrs. Worthy indicated their satisfaction with this subcommittee structure. Mrs. Worthy and Mr. Stubbs noted difficulty in defining the proper role of the Subcommittee on Internal Organization and Operations vis-a-vis the managerial responsibility vested in the President of the Corporation. Mrs. Worthy noted that past boards' primary concern with internal organization has been the implementation of the Board's affirmative action policies.

Mr. McKee moved for the creation of the four subcommittees suggested above and the committee voted unanimously for their creation. The Chairman then made the following appointments:

Project Development -- Slaughter, Chairwoman; Worthy.

Internal Organization and Operations -- Worthy, Chairwoman; McKee.

Regional and State Activities -- McKee, Chairman; Paras, Slaughter.

Regulations Review -- Paras, Chairman; McKee.

Revision of Regulations on Board Meetings

The Chairman noted that 45 C.F.R. 1601.15 listed four dates for regular meetings of the Board of Directors, one of them being the first Friday of October. The Chairman moved that the Committee recommend to the Board an amendment to 1601.15 substituting the first Friday of September for the current reference to the first Friday in October. Chairman Stubbs explained that he felt that the Board should meet before October to adopt a budget, but that Congress would not have taken adequately definitive action by July to permit Board action at its July meeting. The committee approved and requested the President to have the General Counsel draft a regulation for consideration by the Board at its next meeting.

Review of Existing Regulations

The Chairman stated that the Corporation's General Counsel, Mary Wieseman, had circulated to the committee members an analysis of the compatability of outstanding opinions of the Office of General Counsel with the Corporation's statute and regulations following the Chairman's identification of problem areas for analysis. He indicated that he felt it was premature for the Committee to act in any of those areas, but noted that he would ask the General Counsel to continue her review with particular emphasis on regulations concerning lobbying and eligibility for services. President Caplan agreed with the priorities identified by Chairman Stubbs and indicated that the General Counsel should have recommendations regarding the "alien rider" and the "Moorhead amendment" to offer within a month or so.

The Chairman said that he had also asked the General Counsel to analyze what modifications to the LSC regulations would be needed should H.R. 3480 be enacted. He stated that he would ask the General Counsel to continue to work in this area, so that the Board would be able to consider options just as soon as necessary after any such legislation is adopted.

MINUTES:
LSC Board of Directors
Operations and Regulations Committee
May 14, 1982

Litigation Audits

The Chairman asked for discussion of the need for a procedure to ascertain that litigation by legal services attorneys, particularly against governmental units, was preceded by all "lawyerlike" steps to resolve complaints without litigation. He said that a recurring criticism of the LSC program is that LSC attorneys too often succumb to the "urge to litigate". He said that a record of the steps preceding the decision to litigate would be helpful to the Corporation in responding to complaints, as well as provide some guidance to individual attorneys considering litigation. Mr. McKee cautioned that such a procedure would intrude into the area of attorney-client relations, but pointed to the existing regulations concerning decisions to accept fee-generating cases as an example of a regulation of this type.

Mrs. Worthy invited comments from the guests of the committee on this subject. Mr. Gottlieb and Willie Cook of Neighborhood Legal Services Program (District of Columbia) both stated that well-managed legal services programs already had in place systems to review decisions to litigate, so that no such decision is made by an individual attorney without the input of his managing attorney and other senior attorneys. Cook suggested that a Corporation audit procedure might have a chilling effect on the independent professional judgment of staff attorneys. Gottlieb said that any such procedure should recognize exceptions for emergencies. Bernard Veney of the National Clients Council noted his organization's concern about quality control in the program and urged that the Board of Directors pay close attention to the quality control issues involved in assigning cases to members of the private bar.

President Caplan suggested that the committee defer action on this proposal pending the development of stronger compliance mechanisms to implement existing regulations. He also reported that he had appointed a staff level task force to review establishment of a unit separate from the line organization to deal with compliance issues. The President said that his staff was reviewing the Inspector General structures in several federal agencies and he would have a report to make in this regard by the end of the summer.

Vice-Chairman of the Board

The Chairman moved that the Committee recommend to the Board the creation of the post of Vice-Chairman of the Board. President Caplan agreed there was a need for a board spokesman when the Chairman is unavailable. Mr. McKee moved to instruct the General Counsel to draft such a regulation for

Future Meeting

The Committee discussed holding its next meeting July 29 in Boston.

President's Report

The President reported that he had asked the staff to prepare a compendium of statutory provisions, regulations, opinions of the general counsel, etc., governing the Corporation and its grantees.

General Discussion and Announcements

It was noted that the CBS Morning News of May 18 would include a segment on the Legal Services Corporation, including coverage of the rural program of Georgia Legal Services. Rosita Stanley of the Georgia Clients Council urged that groups such as the Minority Caucus, the Project Advisory Group and the National Clients Council be given an opportunity to participate in the selection of a new Corporation President. Mr. Veney urged that the Corporation's leadership take an active part in the American Bar Association annual meeting, and that it formulate and articulate positions on the provisions of H.R. 3480.

There being no further business to come before the Committee, the meeting was adjourned.

OFFICE OF THE GENERAL COUNSEL

H.R. 3480

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: July 30, 1982

TO: Committee on Operations and Regulations

FROM: Gerald M. Caplan, Acting President

SUBJECT: Section-By-Section Analysis of H.R. 3480

Attached for your Committee's review and consideration is a section-by-section analysis of the provisions of H.R. 3480.

Section 2 - State Advisory Councils

Section Amended: 1004(f).

Makes the establishment of state advisory councils mandatory. Should a Governor not appoint a council within a state within 90 days, the Corporation's Board of Directors is required to appoint such a council.

Increases the membership of each council from nine to ten and mandates that each such council include two eligible clients, and two members of the general public.

Present law charges such councils with the responsibility for notifying the Corporation of apparent violations of the LSC Act and regulations. H.R. 3480 requires the Corporation and recipients to notify the relevant councils promptly of any alleged violations.

In addition, H.R. 3480 requires the Corporation to notify and request comments and recommendations from councils at least 60 days in advance of approving grant applications, entering into contracts, or initiating any other projects to provide legal assistance.

Councils are to be given a reasonable opportunity to review and comment on alleged violations and proposed grants, contracts, and projects.

Legislative History

This provision was adopted in subcommittee and was not amended further in committee or on the floor. It was adopted in response to testimony by Rep. Huckaby (D-Lousiana).

Discussion

Section 2 would mandate the establishment of state advisory councils in every state and would expand their oversight functions

with respect to allegations of violations of the Act and approval of grants and contracts for the provision of legal assistance in the state.

Section 2, in effect, limits the attorney members of the council to six by requiring that each council include two eligible clients and two members of the general public.

The language of Section 2 is ambiguous with respect to the kinds of grants, contracts, and projects subject to the notice requirement. Is notice required only for those grants, contracts, or projects resulting in the initiation of legal assistance; e.g., the creation of new programs or expansion of existing programs into new service areas?

Secondly, it is not clear whether the 60 day advance notice of grants and contracts is to run concurrently with the 30 day notice period afforded to governors and bar associations pursuant to Section 1007(f) of the current Act, which is not affected by H.R. 3480.

Recommendation

The staff recommends support of Section 2, with possible clarification as to the kinds of grants, contracts, and projects subject to the notice requirement.

Section 3 - Qualified Recipients/Recipient Board of Directors

Section Amended: 1006(a)(1).

The amendment limits eligible recipients of Corporation funds to: private attorneys (for the sole purpose of furnishing legal assistance to eligible clients); and nonprofit organizations chartered by a state for the sole purpose of furnishing legal assistance to eligible clients.

It also requires that a majority of the board of directors of recipient nonprofit organizations be attorneys appointed by State, county or municipal bar associations whose membership includes a majority of the lawyers admitted to practice in the locality in which the organization is to provide legal assistance. The current LSC Act requires 60 percent of board membership be composed of attorneys, but does not specify the appointing authorities. LSC regulations now prohibit the "domination" of a category of board membership by representatives of a single organization.

Finally, the amendment eliminates entirely the Corporation's current authority under Section 1006(a)(1)(B) to "make such other grants and contracts as are necessary to carry out the purposes and provisions of this title."

Legislative History

This provision was adopted in the full House Judiciary Committee on an amendment by Rep. McCollum (R-Florida).

Subcommittee Chairman Kastenmeier tried unsuccessfully in committee and on the floor of the House to amend the provision to give bar associations appointive power only over a majority of the

attorney members of recipient boards, or 30% of the whole. He also proposed to strike the proposed limitations on the categories of recipients, arguing that the provision would eliminate assistance to such organizations as bar associations and could affect the receipt of funds received from other sources, e.g., law schools and the Older Americans Act. There was a great deal of discussion on the floor on the problems inherent in determining the appropriate bar association in multi-county service areas or localities without a single majority bar association, but no clear resolution of the matter was reached.

Discussion

The current law authorizes the Corporation to provide financial assistance "to qualified programs furnishing legal assistance to eligible clients."

If Section 3 is enacted, the Corporation would be limited to funding only private attorneys and nonprofit organizations chartered by a state for the sole purpose of furnishing legal assistance to eligible clients. This would preclude the Corporation from continuing to provide funds to bar associations, law schools, and the Reginald Heber Smith Community Lawyer Fellowship Program. Also affected would be local programs' ability to receive other federal funds, such as Title III of the Older Americans Act and Title XX block grants, to provide legal assistance to persons who may be financially ineligible for assistance under Corporation guidelines. Enactment of Section 3 would also preclude programs from receiving

state and county funds to provide representation in criminal matters, as some legal services programs also have a public defender component. Receipt of OAA, Title XX, and local government funds for these purposes is explicitly authorized by Section 1010(c) of the Act.

Section 3 also eliminates the Corporation's general authority to make grants and contracts necessary to carry out the purposes of the Act. The Corporation would be precluded from funding activity that is not expressly authorized by another section of the Act. In the past the Corporation has funded demonstration projects, quality improvement projects, recruitment efforts, and delivery systems research under this section of the Act. In effect, enactment of Section 3 would limit the Corporation's ability to experiment and fund alternative delivery models.

It is possible that this result was inadvertent. Section 3 seems to amend the wrong section of the Act. It would be more appropriate for Section 3 to amend Section 1007 governing the content of Corporation grants and contracts, rather than Section 1006(a)(1) dealing with the authority of the Corporation to make grants and contracts. The more logical approach would be to restrict the use of Corporation funds under Section 1007 instead of limiting the Board's flexibility in the selection of recipients. Even if Section 3 were changed to amend Section 1007, however, its "sole purpose" language would still substantially restrict the Corporation's authority to make grants and contracts.

Section 3 would also require that a majority of a nonprofit recipient's board be comprised of attorneys appointed by State, county, or municipal bar associations "the membership of which represents a majority of attorneys practicing law in the locality in which the organization is to provide legal assistance." This requirement is superimposed on the current requirement under Section 1007(c) that 60% of a board be composed of attorneys licensed in the state in which the legal assistance is to be provided.

The primary problem in implementing this requirement would be to determine which bar association or combination of associations represent a majority of local attorneys. This would be an especially difficult task in multi-county service areas or localities without a majority membership bar association. The legislative history indicates that where no single bar association represents the majority of attorneys in a locality, several bar associations could collectively appoint the board members or the state bar could make the appointments. It is not clear what role a unified state bar would have in making appointments. The committee report states that the Corporation is expected to develop regulations governing the appointment and selection of board members.

With respect to the requirement that recipients be chartered for the sole purpose of furnishing legal assistance to eligible clients, it would be necessary to afford current recipients the opportunity to amend their charters of incorporation in order to qualify for future assistance, since corporate charters generally confer broader powers than provided for in the amended statute.

Recommendation

The staff recommends that the Board oppose Section 3 to the extent that it restricts the Corporation's authority to make grants and contracts to certain types of recipients or for certain types of activities. The staff recommends support of Section 3 to the extent that it requires program boards to be composed mainly of attorneys appointed by local bar associations. Section 3 should be revised to show that it amends Section 1007c instead of Section 1006 of the Act. In addition, there should be a clearer statement of legislative intent regarding the procedures to be followed in selecting the majority membership bar association.

Sections 4(a)(b)(c) (and Section 19) - Enforcement and Sanctions

Sections Amended: 1006(b)(5)
1007(a)(9)
1011 (repealed)
1006(b)(1)(A)
1006(b)(2)

These amendments relate to the sanctions available to the Corporation to deal with violations of the Act and regulations, and to the rights of recipients to continued funding from the Corporation.

Section 4(a) requires the Corporation to issue regulations to provide for enforcement of the Act within 30 days of enactment of the amendment. The regulations must include, among available remedies provisions for immediate suspension of financial assistance, suspension or termination of Corporation employees by the Corporation, suspension or termination of recipient employees by the recipient, and reduction or termination of financial assistance, as deemed appropriate for the violations involved. Section 4(a), together with Sections 19(a) and (b), provide that before financial assistance may be terminated or suspended for more than 30 days and before a recipient may discipline an employee for a violation of the Act, rules, regulations or guidelines such recipient or employee must be afforded reasonable notice and an opportunity for a fair hearing under regulations promulgated by the Corporation.

Section 4(b)(1) repeals Section 1011 of the Act, removing the right of recipients (1) to notice and an opportunity to show cause why financial assistance should not be suspended for less than 30 days, (2) to notice and an opportunity for a "timely, full and fair hearing" prior to the denial of a refunding application, and (3) to request an independent hearing examiner in those instances where there is the right to a fair hearing. Section 4(b)(2) provides, however, that the repeal of Section 1011 will not affect those proceedings pending on the date of enactment of the amendments.

Section 4(c) amends the provision of the Act providing for interim funding while a refunding application is pending. Under current law, Section 1007(a)(9), the Corporation is required to provide interim funding "necessary to maintain its current activities." The Corporation's regulation, Section 1606.18, clarifies that the recipient is entitled only to "interim funding necessary to maintain its current level of legal assistance activities under the Act." The new section provides for interim funding "sufficient to allow for the continuation of representation of clients on whose behalf litigation, negotiation or other forms of representation have been initiated."

Legislative History

Sections 4(a)(b) & (c) were adopted in subcommittee. An amendment by Rep. Moffett (D-Conn.) was adopted on the floor by voice vote removing the provision of the committee- reported bill which authorized the LSC president to suspend or terminate employees of recipients. An amendment by Rep. Sensenbrenner (R-Wis.) to insure that interim funding would not be used to support new cases was rejected in full committee.

On the floor of the House Rep. Sensenbrenner offered an amendment to delete the provision affording hearings to grantees in the event of terminations or suspensions, as well as the proviso for continuing Section 1011 hearings pending on the date of enactment. The amendment was defeated 152-251. During the debate on this amendment Rep. Sensenbrenner suggested that the consideration of refunding applications would be a proceeding under Section 1011 and that if the amendments were enacted while refunding applications were pending, the presumptive right to refunding would be protected by Section 4(b).

Section 19 was adopted as part of a series of technical amendments to the bill.

Discussion

A number of legal issues would arise in attempting to interpret these amendments. In addition, implicit in the changes are a range of policy issues that the Board would have to consider in deciding whether or not to support the amendments and, if passed, how to implement them.

Section 4(a) requires the Corporation to issue regulations for the enforcement of the Act within 30 days of enactment of the amendments. It is unclear whether this provision was intended to require the Corporation to promulgate regulations to cover all provisions of the Act where regulations would be appropriate, or whether it was intended simply to require the Corporation to amend its current enforcement and sanctions regulations (1606 - procedures governing termination of financial assistance and denial of refunding; 1608.8 - enforcement of prohibited political activities regulations; 1612.5 - enforcement of restrictions on certain activities; 1618 - general enforcement procedures; 1623 - procedures governing suspension of financial assistance) to take into account the amendments.

If the former was intended, thirty days is not a reasonable time frame for Corporation action. It is premature to attempt to develop final regulations for a whole range of restrictions that may or may not become law in their present

form and once it is clear what provisions are enacted, it will take substantially more time to decide where regulations are appropriate, to draft the provisions, to carry them through the Board's procedures for adoption, and to publish them for comment.

It is more reasonable to assume that Congress intended to require only that the Corporation issue enforcement and sanction regulations taking into account the changes required by H.R. 3480. Nevertheless, 30 days is still an extremely short time to issue even these changes. (The original Act gave the Corporation 90 days to issue enforcement regulations.) At most, it is likely that temporary regulations could be issued, giving the Corporation additional time to thoughtfully address all of the policy considerations and legal problems before issuing final regulations.

Another series of questions deals with what Congress intended by replacing the requirement for "timely, full and fair hearing" and an independent hearing examiner with a "fair hearing." Clearly, Congress wanted to simplify the procedures; however, the case law on due process requirements mandates certain minimal protections and includes a notion that the finder of fact must have some independence from the proceedings. Once the minimum requirements of due process are

delineated, the Corporation must then make a policy decision as to what additional protections it wishes to afford recipients in order to assure the minimal disruption of client services.

Section 4(c) changes the present law with respect to the level of interim funding available to recipients during the refunding process. That change is consistent with the notion that programs no longer have a presumptive right to refunding, but by effectively limiting the Corporation's funding responsibility to cover only pending cases, with no funds for new intake, it goes substantially further than necessary, since it assumes that programs will not be refunded and should always be preparing at the end of a grant year to close up operations. Such a presumption would have an extremely destabilizing impact on recipients. It would severely limit their ability to plan, to develop priorities, to recruit staff, to undertake complex litigation that is likely to extend beyond the end of the grant and, generally to provide quality legal assistance. The Board may minimize this threat of disruption by proposing regulations that would insure continued funding at the regular grant level for the majority of programs that are likely to be refunded, but gives the Corporation flexibility to reduce funding for those programs where there has been a preliminary determination to deny refunding. The repeal of the section providing for presumptive refunding enables the Board to set its own goals

and funding policies. However, the Board must adopt clear criteria and policies governing denials of refunding if the Corporation is to minimize the destructive effect of uncertainty and avoid the appearance of politically motivated or arbitrary action.

In any discussion of denial of refunding, suspension or termination of funding, the Board must keep in mind (1) that under a current rider to the Corporation's appropriation, the Corporation is under an obligation to maintain the geographic coverage required by minimum access and (2) that legal services programs are under an ethical obligation to make provisions for completing pending cases. Therefore, precipitous termination of funding for basic field programs, without an adequate substitute program that is capable of providing service to the area and to current clients, would be very problematic.

Recommendation

The staff recommends that the Board support the provisions of this section.

Section 4(d) "Strikes by Employees"

Section Amended: 1006(b)(5)

Section 1006(b)(5) of the Legal Services Corporation Act currently prohibits legal services employees from engaging in or encouraging others to engage in picketing, boycotts, or strikes while carrying out legal assistance activities, with one exception, when the action is in connection with an employee's own employment situation. Section 4(d) of H.R. 3480 removes this exception.

Legislative History

Section 4(d) was adopted in the Committee on the Judiciary on the motion of Rep. Butler (R-Va.). This amendment appears to have been drafted in response to a "trend towards unionization of programs" which may result in a "disruption of services to the poor." The committee stated that "strikes within the legal services program tend to polarize the people involved, with the loser oftentimes being the poor." House Rep. No. 97-97, 97th Cong., 1st Sess., 14 (1981).

This amendment was the subject of a great deal of debate in Congress. Rep. Frank (D-Mass.) prepared an amendment restoring to employees a limited right to strike. The amendment provided that notice of a dispute had to be given to the Federal Mediation and Conciliation Service, and 60 days after such notice was given, if the dispute had not been resolved voluntarily, then there would be a right to strike. 127 Cong. Rec. H3015 (daily ed. June 17, 1981) (remarks of Rep. Frank). This proposed amendment was rejected by

the House because of a concern for "what the poor persons whose cases were in process.... were going to do during the course of the strike ..." Id. at H3016 (remarks of Rep. Fiedler) (R-Cal.), that the amendment "would have the effect of denying aid to the poor just at the discretion of employees of recipients ..." id. at H3016 (remarks of Rep. McClory) (R-Ill.), and that "the purpose of the bill is not giving people the right to strike; the purpose of the bill is to give these people who can't afford it legal representation." Id. at 3017 (remarks of Rep. Lungren) (R-Cal.).

A proposed amendment by Rep. Railsback (R-Ill.) to require arbitration was withdrawn and the Butler amendment was adopted.

Discussion

Section 4(d) is intended to eliminate the right of LSC and recipient employees to strike. The principal concern expressed is that strikes lead to a disruption of services to the poor.

While the goal may be desirable, the effect of the National Labor Relations Act on this provision is far from clear. The National Labor Relations Board (NLRB) asserted jurisdiction over non-profit legal services agencies in Wayne County Neighborhood Legal Services, Inc. and Organized Workers of Legal Services, Local One, cases nos. 7-CA-16, 311 and 7-CA-16, 699 (February 20, 1980). LSC employees and recipient employees are considered to be private employees and are governed by the provisions of the National Labor Relations Act (NLRA). Section 7 of the NLRA states "Employees have the right to engage in other concerted activities for the purposes

of collective bargaining or other mutual aid protection." The right to strike is included among those activities. Section 13 reads "Nothing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." There is, therefore, a serious question as to whether or not Congress can effectively prohibit strikes without explicitly amending the NLRA.

The conflict between Section 4(d) and the NRLA is clearly presented. In addition, some constitutional issues may also arise. An unqualified constitutional right to strike has not been recognized. See Darcy v. Kansas, 272 U.S. 306 (1976) and International Union, U.A.W. AFL v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949). However, singling out legal services workers for "anti-strike" legislation may constitute a denial of equal protection. If the section is passed, legal services employees will be the only privately-employed persons without the right to strike in their own employment situation.

Moreover, enactment of Section 4(d) will significantly change LSC's relationship with its recipients. The Corporation currently maintains a hands-off posture towards labor relations activities of local programs. BNA special Rep. OLR No. 152, "Unionization in the Legal Profession" (August 7, 1981). However, this might no longer be possible if Section 4(d) is enacted. If the Corporation issues regulations to prohibit strikes and imposes sanctions for violation of the restriction such as defunding, our status could change from

an independent entity to that of a "joint employer" with our recipients. See Rossum v. Sears, Roebuck & Co., 94 LRRM 2882, 2884 (D. Mo. 1976) enforced as LRRM 2914 (8th Cir. 1977). In Wayne County, supra, the court stated that our "hands-off" policy in labor problem of recipients has made us immune to liability as a joint employer. The increased involvement with and control over local programs that would result from LSC enforcing the 4(d) provision may change our status.

Recommendations

The staff recommends that the Board oppose the enactment of Section 4(d).

Section 5 - Legislative and Administrative Advocacy

Sections Amended: 1006(c)
1007(a)(5)

Section 5(a) repeals the language of Section 1006(c)(2) of the LSC Act and substitutes the provisions of 18 U.S.C. Section 1913. Section 1913 prohibits using appropriated funds, in the absence of express authorization by Congress, for activities intended or designed to influence any Member of Congress to favor or oppose any Congressional legislation or appropriation except that communications to Members on request, or to Congress through the "proper official channels," are permitted. There are criminal penalties for violations (fines up to $500 and imprisonment up to a year), and a violator may be removed from office after notice and hearing.

Current law prohibits the Corporation from lobbying except (1) on request of a legislative body or member thereof; (2) or in connection with legislation or appropriations directly affecting the activities of the Corporation.

Section 5(a) removes the prohibition in current law against Corporation lobbying at the state and local levels. Moreover, it permits Corporation officials to communicate to Congress, "through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business." Under current law, unsolicited communications are limited to self-defense matters, that is legislative matters directly affecting the activities of the Corporation.

Section 5(b) repeals Section 1007(a)(5) of the LSC Act and substitutes new language which substantially reduces the scope of permissible legislative and administrative advocacy by recipients. Under the section, Corporation funds may not be used for any communication intended or designed to influence any federal, state or local agency decision (administrative advocacy), except where legal assistance is provided to an eligible client "on a particular application, claim, or case, which directly involves the client's legal rights or responsibilities." It eliminates the specific exceptions in current law which permit administrative advocacy at the request of an agency or on matters affecting the activities of the recipient or the Corporation under the LSC Act. Advocacy on behalf of a client is restricted to a particular "application, claim or case."

Communications to elected officials (legislative advocacy) may be made only in response to a request from a legislator made through "official channels" and only on matters "pertaining to the authorization or appropriations of funds or oversight measures directly affecting the operation of the program involved." Thus, legislative advocacy on behalf of a client, and unsolicited communications on measures directly affecting the operations of the recipient or the Corporation, authorized under current law, are prohibited under H.R. 3480.

Legislative History

The Committee bill made 18 U.S.C. Section 1913 applicable to the Corporation and incorporated the anti-publicity and

propaganda provisions of the Moorhead rider to the Corporation's appropriation. The bill also removed the explicit exception in current law allowing recipients to lobby on their own behalf. In addition, legislative and administrative representation on behalf of a client was limited to a "particular application, claim, or case directly affecting the client's legal rights."

The legislative history indicates that this language was intended to specifically prohibit representation on matters of general concern to a broad class of persons as distinguished from acting on behalf of any particular eligible client, and to permit administrative advocacy "only where such representation is necessary to effectuate a client's legal rights or responsibilities or in situations in which the client would be directly affected by administrative rules, policies, or provisions which were proposed or already pending." H. Rep. No. 97-97, 97th Cong., 1st Sess., 15 (1981).

A floor amendment offered by Rep. Kramer (R-Colorado), now the language of Section 5, removed authority to conduct legislative advocacy activities on behalf of clients and limited legislative advocacy to responses to legislators' requests made through "official channels" on measures "directly affecting the operation of the program involved." Floor debate centered on whether the amendment unduly restricted a legislator's right to request testimony on a particular subject from a legal services program. 127 Cong. Rec. H 3020-3032, (daily ed. June 17, 1981). The legislative history indicates that a legislator may request communications concerning the

substantive expertise of a recipient, (e.g., housing law) in addition to matters affecting the program itself, i.e., appropriations and authorization legislation. The legislative history also indicates that "official channels" refers to the recipient's bureaucracy, that is, the recipient official having authority to approve an employee's agreeing to provide the requested communication.

Discussion

Section 5 would broaden the scope of permissible Corporation lobbying, and substantially narrow the scope of recipient lobbying. Although 18 U.S.C. Section 1913 provides for criminal penalties, there apparently has never been a prosecution under it since it was enacted into law in 1919. Thus, the Corporation would probably continue to rely on its own disciplinary procedures for enforcement. The Kramer amendment prohibits legislative activity on behalf of a client on even the narrowest private interest type bill, and constitutes a substantial limitation on the client's access to service that was not contemplated in the committee bill.

Recommendation

The staff takes no position with respect to the provisions of this section except in two particulars. The staff recommends that the Board oppose the imposition of criminal sanctions because they are inappropriate. The staff opposes a total prohibition on legislative activity, but is not prepared with specific recommendations to amend this provision at this time.

Section 6 - Limitation on Class Actions

Section Amended: 1006 (d)(5).

Prohibits class actions against the Federal government, or any State or local government. Under the present law, class actions are allowed if expressly approved by the project director in accordance with policies established by the recipient's Board of Directors.

Legislative History

Amendment by Rep. Wilson (D-Texas) adopted in the full House of Representatives by a vote of 241-167. The subcommittee had amended the Act to prohibit class actions against governments "except in accordance with policies or regulations adopted by the Board." In the full committee, an amendment by Rep. McCollum (R-Florida) to ban all class actions by LSC recipients was defeated 6-19 while Rep. Sensenbrenner's (R-Wis.) amendment to require each such class action suit be approved by the LSC Board lost 5-20.

The original provision reported by the committee was intended to guard against the misuse of class actions while continuing their availability in appropriate cases. There was considerable floor debate on the Wilson amendment which would prohibit all class actions against governmental units. Supporters claimed the amendment would substantially reduce the number of grievances against the Corporation, would concentrate legal services efforts on handling individual problems, and would help to stem the trend toward judicial activism. Opponents cited the statistic that only .2% of all legal services cases in 1980 were class actions. Several members argued that restricting class actions would waste judicial

resources as well as increase costs to both the Corporation and government defendants by encouraging repetitious litigation of common issues of law and fact. Still others argued that the amendment would discriminatorily deny poor people a legal remedy available to other persons.

Discussion

There are a number of policy considerations underlying Section 6 of H.R. 3480. It is argued that the proper function of legal services programs is to handle individual clients' legal problems and that class actions divert resources from this function. Only a small number of legal services cases, however, are class actions. Moreover, class actions often are the most economical means of resolving routine legal problems common to a number of legal services clients.

A second argument in favor of Section 6 is that public opposition to legal services would be minimized by the elimination of controversial class actions against governmental bodies. In addition, there is the notion that class actions brought by legal services programs promote judicial activism which usurps the function of the legislative branch. These concerns led the House subcommittee and committee to prohibit class actions against governments "except in accordance with policies or regulations adopted by the Board." Such a restriction would allow the Corporation's Board to establish guidelines which would prevent the misuse of class actions while preserving their availability in appropriate cases.

Recommendation

The staff takes no position on this section as it is a policy matter for the Board's determination.

Section 7 - Liability for Attorneys' Fees

Section Amended: 1006(f)

Amends Section 1006(f) of the Act under which prevailing defendants in actions commenced by the Corporation or a recipient may obtain attorneys' fees from the Corporation. The amendment changes the standard under current law for awarding fees from a finding that the action was brought "for the sole purpose of harassment" or that the plaintiff "maliciously abused legal process" to a finding that "the action had no reasonable basis in law or fact."

Legislative History

The amendment was adopted in subcommittee, apparently in response to concerns raised by Rep. Butler (R-Virginia). There is no real discussion of its purpose, other than a comment in the Committee Report and statements on the floor that the amendment makes the Corporation "more liable" to opponents for costs and fees.

Discussion

Under existing law, the Corporation is directly liable for attorneys' fees awarded against recipients which violate the statutory standard. Two courts have awarded attorneys' fees against the Corporation in awards totalling $28,000 (although one was for only $360.00), and there are two claims currently in litigation totalling $25,600. A number of courts, however, have dismissed fee petitions on the grounds that the actions complained of did not meet the standard. The more liberal standard in the amendment could result in a substantial drain

on Corporation funds, particularly if judges apply it aggressively. By the nature of their practice, legal services lawyers frequently litigate in areas of the law that are not well settled. The standard for awarding fees in the amendment is very close to the standard for awarding fees against a losing party in any case. It is not uncommon for a court to state that a claim has no basis in law simply as part of its decision where there has been no hint of impropriety on the part of the moving party. Under the amendment, legal services programs could be faced with a motion for fees, for which the Corporation would be liable, in virtually any lost case. Moreover, neither existing law nor the amendment requires a defendant to provide any notice to the Corporation even though it is liable for the fees under the statute. (Notice and opportunity to be heard are probably required under the Constitution, although this issue has never been tested.) In addition, the question of whether the Corporation can shift ultimate liability for the fees to the program via some form of grant action is not resolved.

Recommendation

The staff recommends that the Board oppose this section, or, in the alternative, that the Board propose language to require a party moving for attorneys' fees to serve notice on the Corporation so that the Corporation can participate as a party in the adjudication of the fee issue, and which explicitly recognizes the Corporation's right to obtain indemnification from the recipient.

Section 8 - Negotiation Requirement

Section Amended: 1007(a)

Unless circumstances require immediate filing of suit to protect the interests of a client (as determined by the local program director), recipients are to be required by the Corporation to attempt negotiated settlements before filing suit.

Legislative History

Adopted in subcommittee. It was designed to discourage unnecessary litigation, but would not preclude an attorney from filing suit immediately when such an action is required to protect the interests of a client.

Discussion

The requirement that negotiation precede litigation is not a burdensome one, and is probably the norm in most law offices. The Corporation would be required to provide the program with guidelines on the nature and extent of the requirement, and may require the program to document the negotiations in each case.

Recommendation

The staff recommends support of Section 8.

Section 9 - Private Bar Involvement

Section Amended: Section 1007(a)

The amendment provides that, to the extent feasible and consistent with the requirement to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas, the Corporation is to make available substantial amounts of funds to provide the opportunity for legal assistance to be rendered to eligible clients by private attorneys.

The Corporation is to issue regulations to provide that compensation to private attorneys shall not exceed reasonable costs and expenses and develop criteria for determining the amount of such reasonable costs and expenses.

Legislative History

This section was adopted in subcommittee. In explaining the intent of the provision Rep. Kastenmeier stated that it "is designed to encourage the full range of private delivery methods, including pro bono and compensated services at less-than-customary fees." Cong. Rec. H 2969 (June 16, 1981). The requirement that the Corporation develop regulations on fees was ". . . to prevent excessive compensation of participating attorneys." Cong. Rec. H 2970 (June 16, 1981).

Discussion

H.R. 3480 passed the House on June 18, 1981. On October 2, 1981, the Board of Directors of LSC adopted a resolution on private bar involvement providing that a substantial amount of funds (defined as 10% of the annualized award) be allocated by existing grantees to provide an opportunity for legal

assistance to be provided by private attorneys. An instruction implementing the Board Resolution was published in the Federal Register on December 14, 1981, and a special grant condition was placed on each 1982 grant award requiring the commitment of approximately 10% of the annualized basic field grant to activities designed to provide the opportunity for the involvement of private attorneys in the delivery of legal assistance to the poor. Therefore, at least a partial response to the concern expressed in H.R. 3480 for encouraging private bar involvement has been implemented under the current legislation. The definition of "substantial amount of funds" and the question of whether such funds should be administered by existing grantees are policy issues for the Board.

The legislation also requires that the Corporation issue regulations to provide that compensation to private attorneys "shall not exceed reasonable costs and expenses and develop criteria for determining such reasonable costs and expenses." In light of the legislative history quoted above, it seems that "reasonable cost" was intended to mean a reduced fee, and was not intended to limit such a fee to only actual out-of-pocket costs and expenses. The Board may wish, however, to seek clarification of the language of the legislation to insure that this provision, which is to enlarge private bar involvement, is not frustrated by a reading that would jeopardize programs such as judicare which provide for reasonable, albeit reduced, fees for services by attorneys. The Corporation is given the

authority to issue regulations to provide for attorney fees and to develop criteria for determining the amount of such fees. This grant of authority clearly vests the Corporation with discretion to develop criteria which will encourage private bar involvement.

Recommendation

The staff recommends support of Section 9.

Section 10 - Award of Attorneys' Fees

Section Amended: 1007(a)

Requires recipients who receive an award of attorneys' fees to transfer such fees to the Corporation unless the fees were received as a result of a mandated court appointment. The provision is effective only with respect to actions commenced after the enactment of H.R. 3480 and does not preclude the recipient from "retaining reasonable costs customarily allowed in litigation against an unsuccessful party."

Legislative History

Section 10 was adopted in a subcommittee of the Committee on the Judiciary. During Senate consideration of LSC authorization in 1980, an amendment was adopted providing for the transfer of attorneys' fees to the U.S. Treasury. The subcommittee voted that they be transferred to the Corporation instead. There is very little discussion of this amendment in the Committee on the Judiciary's Report of May 19, 1981 or in the House debate on H.R. 3480. The only policy reason stated was to insure that fee awards would not dictate program priorities. 97 Cong. Rec. H2970 (June 17, 1981).

Discussion

The Legal Services Corporation has in the past maintained a policy of encouraging recipients to accept awards of attorney's fees where appropriate. See 45 C.F.R. Section 1604. While the positive benefits of attorneys' fees awards have been recognized, there have been some concerns raised as to the propriety of recipient programs retaining such fees. The main concerns are that the possibility of obtaining such awards (1) may dictate program priorities, and also (2) that they are outside of the legislative appropriations process and therefore outside of congressional (and perhaps LSC) control although regulation Part 1609.5 requires programs to use fees for purposes authorized under the Act and to account for them as directed by the Corporation. Because of these concerns, Section 10 was drafted providing for a transfer of such awards to the Corporation. The rationale for this procedure is that it would allow for greater control over the use of the funds without diminishing the positive effects of allowing awards to be accepted.

Congress has expressed concern that the possibility of obtaining attorneys' fees awards may provide an incentive for recipients to direct their attention from routine types of cases and focus on those cases in which an award would be possible.

Presently, there are restrictions on accepting such cases listed in 45 C.F.R. Section 1604. Also broad policies regarding the types of cases to be filed by legal services projects are fixed by the recipients' Boards of Directors and are subject to the priority setting process mandated in the Corporation's regulations. 45 C.F.R. Section 1620. While the transfer requirement may not, therefore, be necessary to address this concern, it would further ensure that recipients are motivated to take on cases because clients are poor and in need of free legal advice, not because fee awards would boost their treasures. It should be noted that approximately 14% of recipient programs received awards of attorneys fees in 1978 and 1979. These awards constituted less than .25% of the total of funds awarded by the Corporation. (Report to Senator Dale Bumpers by LSC (1980)).

Under current practice, programs which are adequately funded may receive numerous awards while programs which are operating on minimal or insufficient funds do not receive any. The transfer requirement would mandate that all awards be remitted to the Corporation. The Corporation would presumably have the authority to redistribute the funds to needy programs. If a situation arose where a particular program that received an award experienced a severe depletion of funds due to protracted,

costly litigation, the Corporation could redirect the award back to the program.

The Corporation would be required to adopt procedures and regulations governing the portion of the fees to be retained by the program.

Recommendations

The staff recommends support of Section 10.

Section 11 Allocation of Funding

Section Amended: Adds a new subsection to Section 1007(a)

Unless minimum access to legal assistance is available or provided in all parts of the country, the Corporation is required to allocate basic field grants so as to insure that no greater level of access to Corporation funded legal assistance is available or provided to any part or area of the country than is available or provided to all parts of the country, consistent with available funding and other provisions of the Act and regulations.

Legislative History

The concept of minimum access was first developed by the Corporation as part of its FY 1977 appropriations request to Congress. It was designed as a funding goal -- to have enough funds, at a minimum, that every area of the country would have resources to provide the equivalent of two lawyers per 10,000 poor people ($7.00 per poor person in 1977 dollars) according to 1970 census figures. That goal was ostensibly reached in 1981

when the Corporation's funding level reached $321 million. (A cost of service adjustment has been added each year to the $7.00 per poor person base).

Minimum access was repeatedly referred to in the legislative reports and debates on the Corporation's appropriations, and in the FY 1980 appropriations bill a proviso was added which prohibited the Corporation from increasing funds to those programs that already had minimum access or to those activities directly administered by the Corporation unless minimum access was available in all parts of the country. This same proviso was continued in the 1981 appropriations bill that was vetoed by President Carter. The requirement was continued, however, by the 1981 (when minimum access was reached) and 1982 (when funds were cut below minimum access) continuing resolutions.

The provision in H.R. 3480 was offered by subcommittee Chairman Kastenmeier at the request of Rep. Smith (D-Iowa), the author of the minimum access appropriations rider who chairs the appropriations subcommittee that considers the Corporation's appropriations requests. It differs from the rider in several respects. First Section 11 applies only to basic field grants; second, it is not concerned only with increases of funds over minimum access, but deals with basic allocation of funds; third,

it seems to require some kind of equalization of available funds although it is not clear whether this would mean a specific dollar funding level or could include adjustments for cost of service differentials. When asked in debate by Rep. Frank (D-Mass.) whether the provision would impose a numerical formula, Rep. Smith replied, "Not a rigid one; it does not discriminate against any area." Rep. Smith also indicated:

> There would continue to be under the regulations some special funding for some special missions such as, for example, on some Indian reservations. There would not, however, be a continuation of the grandfathering in of more than minimum access in some areas that do not have a special mission, as long as there is not enough money so that everybody has minimum access.

Discussion

It is by no means clear from either the language of Section 11 or the legislative debate exactly what this provision is intended to accomplish. At the very least it does seem to require the Corporation to maintain the geographic coverage that it has achieved at some minimum level of funding which is as close as possible to the level of funding contemplated under the original minimum access formula, i.e., $7.00 per poor person.

The provision also recognizes that other provisions of the Corporation Act or appropriations now or may in the future require that the Corporation spend additional funds for "special missions" (e.g. rural access, Indians or migrants, competitive salary adjustments, experimental programs, etc.) that may result in some areas of the country receiving more "access" (or at least a higher per person funding level) than others and that the Corporation should have the authority to make rational funding adjustments that are required by circumstances and established by regulation (i.e., "consistent with other provisions of the Legal Services Corporation Act and regulations.")

In addition, Section 11 suggests that some kind of reallocation of the resources that have gone into basic field grants should be made to remove from the funding base the perceived inequities that discriminate in favor of some of the higher funded programs. While such a reallocation may be desirable from a policy point of view, Section 11 would present enormous problems for the Corporation if it meant that any such reallocation had to be done before the results of the 1980

census were available. Any reallocation will be a tremendous administrative burden for the Corporation and may precipitate a series of political battles over how the reallocation would affect current funding levels. To require the Corporation to endure that process twice would be unreasonable.

The goal of minimum access (i.e., full geographic coverage at some base level of funding) has been part of the Corporation's lexicon almost since its creation and it has been the mainstay of our funding approach to Congress. The Corporation should decide, as a matter of policy whether it wants to continue to support the concept of minimum access, and should seek to clarify what Congress intended to require by this specific provision. If the Corporation decides to support the concept of Section 11, it should request Congress to clarify that any reallocation can await the results of the 1980 census.

Recommendation

The staff takes no position on Section 1007(a) as it is a policy matter.

Section 12 - Private Bar Involvement

Section amended: Adds a new subsection to Section 1007(a)

Unless it is clearly demonstrated that the private bar in a particular state refuses or is unable to provide legal assistance to the poor through a private bar component, the Corporation is to fund at least one open panel private bar component in each state.

Each such private bar component is to be made available to every interested local bar association in its service area. Funds, including funds for administrative support services, are to be made available to any such program.

The requirement of Section 1007(a)(3) that the Corporation choose delivery mechanisms to provide the most economical and effective delivery of legal assistance is to be interpreted consistently with this requirement of at least one private bar component per state.

Legislative History

A floor amendment by Rep. Stangeland (R-Minn.) as amended by Rep. Frank (D-Mass.) to eliminate an additional provision that the study of access problems of special population groups mandated in Section 1007(h) be updated yearly was adopted on voice vote. The Frank amendment also changed a requirement that one recipient in each state be a private bar program to the requirement that at least one recipient provide legal assistance through a private bar component.

The purpose of this section, as stated by Rep. Stangeland, was "to assure greater use of judicare in private bar programs"

by mandating that the Corporation set up at least one private bar program or judicare program in each State. Cong. Rec. H 3044 (June 17, 1981). This provision was designed to make the bill stronger by not only encouraging private bar involvement (as provided in Section 9), but by mandating it.

The legislative interest in mandating private bar participation through open panels preceded H.R. 3480. In 1980, Senator Helms had offered an amendment to Section 1007 of the Act to have the Corporation set up a demonstration project in one State providing that, in counties within the State with a population of 150,000 or less, 65% of the funds would be used for legal assistance that was provided by the private bar with open participation rights. In counties with a population of more than 150,000 not less than 15% of the funds would be so committed. This proposal was never brought to a vote. Cong. Rec. S 6860 (June 13, 1980).

Discussion

The discussion contained in the Section 9 analysis is pertinent here. This section expands and focuses on the nature of private bar involvement by mandating the use of open panels and by requiring that each private bar component be available to every local bar association desiring to participate. Therefore, the extent of participation by the local bar in the private bar component set up under this section is limited only by the local bar association's desire to participate.

On the issue of compensation, Rep. Stangeland cites the "modest fee of $30.00 an hour," utilized by the judicare

program in his state to describe successful private bar involvement, which supports the position taken in Section 9 with regard to fee schedules.

Recommendation

The staff recommends support of Section 12 of H.R. 3480.

Sections 13 and 14(a)(6) - Litigation Involving Question of Homosexuality

Section Amended: 1006(g)
1007(b)

Amends Section 1006 and 1007 of the Act by adding new sections relating to homosexuality. Section 13 prohibits the use of Corporation funds "to provide legal assistance to promote, defend, or protect homosexuality," or to promulgate or enforce any Corporation rule or regulation which would prohibit discrimination in employment or in the provision of legal services on the basis of sexual orientation. Section 14(a)(6) restates the language in the current appropriations rider prohibiting the use of Corporation funds "to provide legal assistance for any litigation which seeks to adjudicate the legalization of homosexuality."

Legislative History

Section 13, prohibiting legal assistance to "promote, defend, or protect homosexuality" was adopted as a floor amendment offered by Rep. McDonald (R-Georgia). The legislative history is ambiguous and does not clearly indicate what representation legal services attorneys can provide to homosexuals. It appears the amendment is not intended to bar the representation of homosexuals per se. 127 Cong. Rec. H 3080, (daily ed. June 18, 1981). At one point in the debate, Rep. McDonald agreed that the amendment would not prohibit representing a homosexual who was discriminated against in employment, housing, etc., and that he only wanted to prohibit using Corporation "resources and assets to promote the

cause of homosexuality as a legitimate legal lifestyle by class action suits or by lobbying or that sort of thing." 127 Cong. Rec. H 3083 (daily ed. June 18, 1981). Later in the debate, however, he broadened the definition of "promoting homosexuality as a life style" from class actions and lobbying to "bringing into issue homosexual conduct." 127 Cong. Rec. H 3084 (daily ed. June 18, 1981).

Section 14(a)(6), concerning litigation "to adjudicate the legalization of homosexuality," was adopted in committee, and the Committee Report does not address its substance.

Discussion

Section 13 contains restrictions which go beyond those contained in the current appropriations rider. As indicated, the legislative history is ambiguous. Under the amendment, homosexuals apparently can be represented as long as homosexuality is not an issue. Where it is an issue, such as a discrimination claim, the last word in the legislative history suggests that the client cannot be represented because to do so would "promote homosexuality." In a jurisdiction which has a statute prohibiting discrimination against homosexuals it could be argued that representation is permitted because it does not promote homosexuality but merely enforces an existing local law.

Section 13 also prohibits the Corporation from promulgating or enforcing regulations which prevent recipients from discriminating in the provision of services or in employment on the basis of sexual orientation. The Corporation must

continue to comply with the District of Columbia law forbidding discrimination on the basis of sexual orientation, as must recipients operating in jurisdictions with similar statutes.

Section 14(a)(6) has little meaning even under existing law. Homosexuality is not a status offense, and the only statutes relating to the "legalization of homosexuality" are criminal statutes in various states. Legal services attorneys do not represent clients in criminal matters where issues concerning the "legality" of homosexuality would normally be raised. In addition, this section is superfluous if Section 13, or similar restrictions, are enacted.

Recommendation

The staff takes no position on Section 13 as it is a policy matter for the Board's determination. The staff does recommend that the Board oppose Section 14(a)(6) because it is surplusage.

Section 14(a)(1) Advocacy in Training Programs

Section Amended: 1007(b)(6)

This amendment repeals the distinction in the present Section 1007(b)(6) between (a) prohibited training for purposes of advocating political activities, labor or antilabor activities, boycotts, picketing, strikes and demonstrations and (b) permitted dissemination of information about such policies or activities, thereby prohibiting both kinds of activity. It retains the exemption for training of attorneys and paralegals as necessary to prepare them to provide adequate legal assistance to eligible clients.

Legislative History

Section 14(a)(1) was proposed by Rep. Lott (R-Miss.), and was adopted in the subcommittee of the committee on the Judiciary.

Discussion

This section restricts recipients from using Corporation funds to provide training and to disseminate information about certain areas. It is designed to close a perceived loophole in the current legislation.

Recommendations

The staff recommends that the Board support this section.

Section 14(a)(2) - Abortion

Section Amended: 1007(b)(8)

This amendment prohibits LSC funds from being used to provide legal assistance to clients or support for legal assistance activity of any attorney with respect to any proceeding or litigation relating to abortion unless such abortion is necessary to save the life of the mother, except that nothing in the paragraph prohibits the provision of legal advice to an eligible client with respect to such client's legal rights and responsibilities.

This replaces the present prohibition on legal assistance with respect to proceedings seeking to procure a nontherapeutic abortion, or to compel any individual or institution to perform an abortion, assist in performing, or provide facilities for performing an abortion contrary to religious beliefs or moral convictions.

Legislative History

Adopted in subcommittee. Language first offered in 1980 by Rep. Mazzoli (D-Ky). Rep. Sensenbrenner (R-Wis.) offered amendments in committee and on the floor of the House to delete the exception for advice. He was defeated in committee by a vote of 11-16 and on the floor of the House 160-242.

The committee report and floor debate emphasized that the legal advice exception did not extend to litigation or other proceedings. The exception merely provided that legal services attorneys could advise clients on the state of the law and their legal rights and responsibilities with respect to abortion.

Discussion

The present law prohibits the use of Corporation funds to provide legal assistance with respect to two kinds of proceedings: proceedings seeking to procure a nontherapeutic abortion and those seeking to compel persons to perform an abortion contrary to their religious beliefs or moral convictions. The prohibition in Section 14(a)(2) was expanded to preclude legal assistance in any proceeding or litigation relating to abortion unless the abortion is necessary to save the life of the mother. This restriction cuts both ways; not only does it prohibit representation of clients in proceedings in which abortion related benefits are sought, but also representation in proceedings to prohibit the performance or public funding of abortions.

Accordingly, legal services programs could not bring actions on behalf of low income parents seeking to restrain their minor daughters from obtaining abortions. Nor could programs represent eligible clients in proceedings challenging public funding or abortions or seeking parental notification and consent requirements.

There may be questions with respect to the proper interpretation of the term "unless such abortion is necessary to save the life of the mother."

Recommendation

The staff takes no position on this section as it is a policy matter for the Board's determination.

Section 14(a)(6) and 14(b) - Representation of Aliens

Section Amended: 1007(b)(11)

These sections add a new restriction on the use of Corporation funds prohibiting their use to provide legal assistance for or on behalf of an alien unless the alien is a resident of the United States and:

1) is lawfully admitted for permanent residence as an "immigrant" as that term is defined under the Immigration and Nationality Act;

2) is either the spouse, parent, or the unmarried minor child of a U.S. citizen and who has filed an application for adjustment of status to permanent resident which has not be rejected;

3) is lawfully present in the United States as a refugee or by grant of asylum; or

4) is lawfully present in the United States as a result of the Attorney General's withholding deportation.

5) was granted conditional entry prior to April 1, 1980, because of persecution on account of race, religion, or political opinion, or displacement due to natural calamity.

Legislative History

The Committee bill contained the language of the current appropriations rider prohibiting the use of funds to represent aliens known to be in the United States in violation of the immigration laws. Floor amendments were offered to narrow the categories of aliens to whom representation can be provided on the grounds that scarce funds for legal services should be spent only on citizens and certain aliens legally present in

the United States. The floor debate consisted of attempts to agree on which aliens should be entitled to legal services. Cong. Rec. H 3098-3105 (June 18, 1981.) The approach that finally prevailed, which is the language of Section 14(a)(6) and 14(b) as enacted, was an amendment offered by Rep. McCollum (R-Florida) which essentially lists the categories of aliens who may be represented instead of attempting to define "illegal alien." The amendment was adopted despite objections that it would deny services to groups of aliens who are lawfully in the United States. An amendment which would have expanded eligibility to aliens in the United States "under color of law" was defeated.

Discussion

The amendment restricts the representation of aliens to a substantially greater degree than the current appropriations rider which as interpreted currently by the Corporation, only prohibits representation of aliens under a final order of deportation. Persons legitimately in the United States, such as aliens paroled from outside the United States, aliens who have received assurance they will not be deported pending action on petitions, relatives of permanent residents, and others such as H-2 contract workers, students, visitors, etc., are excluded from service under the amendment.

The requirement that eligible alien clients fall within specified categories recognized under immigration laws could be very difficult to administer because immigration laws are

complex and attorneys and intake workers not knowledgeable in the field may have difficulty determining whether an alien comes within the provisions of the Act. In addition, it will be necessary to take steps to avoid selective and discriminatory application of eligibility guidelines. Potential clients who are Asian, hispanic, or black, particularly those who have no or limited ability to speak English, may be asked for proof of citizenship where others are not. Moreover, birth and nationality records of elderly and/or rural persons may be difficult to obtain.

Recommendation

The staff takes no position on this section as it is a policy matter for the Board's determination.

Section 14(a)(3) - Desegregation

Section Amended: 1007(b)(9)

Deletes the exception in the current prohibition against providing legal assistance in proceedings relating to school desegregation that permits legal advice to eligible clients with respect to their legal rights and responsibilities.

Legislative History

Floor amendment by Rep. Ashbrook (R-Ohio) adopted by voice vote. A second Ashbrook amendment to forbid any suit against a school board was rejected 176-219. In Rep. Ashbrook's view, the advice exception in the present law constitutes a loophole which needs to be closed in order to prohibit legal services programs from promoting a practice opposed by the vast majority of Americans. In opposition, it was argued that adoption of this provision would be inconsistent with the House's rejection of the amendment to prohibit legal advice regarding abortion. Rep. Rodino (D-N.J.) stated that the amendment would deprive eligible clients of their right to seek preliminary advice in cases involving the denial of fundamental rights where desegregation might be at issue.

Discussion

The existing law bans legal services programs from providing legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school or school system, but allows the provision of legal advice to eligible clients with respect to their legal rights and responsibilities. The legal advice exception in the present law, which would be deleted by Section 14(a)(3), is identical to the

exception in Section 14(a)(2) which would permit legal advice relating to abortion. The committee report made it clear that the advice exception would not extend to litigation or other proceeding relating to abortion. It is unlikely that the desegregation advice exception would operate any differently. Accordingly, Section 14(a)(3) cannot be viewed as a necessary measure for precluding involvement by legal services programs in desegregation proceedings.

Section 14(a)(3), if enacted, would prevent legal services attorneys from advising eligible clients about the state of the law and their legal rights and responsibilities with respect to desegregation. Parents who objected to desegregation and busing plans involving their children's schools could not be advised as to the legal issues involved and remedies available to them.

Recommendation

The staff takes no position on this section as it is a policy matter for the Board's determination.

Section 15 Documentation of Eligibility

Section Amended: New subsection (f) added to Section 1008

Requires that recipients maintain documentation demonstrating the eligibility of each person provided legal assistance and of any legislative or administrative advocacy undertaken. The Corporation is directed to periodically review such documentation in a manner that protects confidential client information, and include in its annual report its findings with respect to compliance with the documentation requirement. In addition, representation of any person, group or entity is to be limited to eligible clients.

Legislative History

The documentation provision was adopted in subcommittee. The limitation on group representation was adopted by a voice vote on the floor of the House. Rep. Crane (R-Ill.), the author of the amendment, stated that the amendment would permit representation of groups only when those groups were comprised exclusively of individually eligible clients.

Discussion

Although this amendment would be the first legislative requirement for the maintenance of documentation for eligibility, the Corporation has, by regulation, imposed such requirements on its grantees. Section 1611.6(b) requires programs to "... adopt a simple form and procedure to obtain information to determine eligibility..." and to preserve that information "... in a manner that protects the identity of the client, for audit by the Corporation." With respect to legislative advocacy, Section 1612.4 requires recipients to "adopt appropriate procedures and forms to document that legislative activities in which they engage fall within the activities permitted in [the regulations]." The only additional documentation requirements that would be imposed by Section 15 would be that (1) the documentation requirements would be extended to administrative as well as legislative advocacy; (2) the Corporation would be required to review periodically the documentation to assure that it is being maintained; and (3) the annual report would have to include findings with respect to compliance with the documentation requirement. Section 15 supports the current position of the Corporation that client confidentiality must be maintained.

Neither Section 15 nor the Corporation's current regulations require that specific kinds of documentation be maintained by programs and neither require that clients provide any particular kind of information to support their eligibility. The Corporation could, conceivably, augment its regulations to suggest the kinds of documentation that would be appropriate under Section 15.*

Section 15 would also restrict representation of groups to those persons who were financially eligible clients. The Board may wish to collect additional factual information on the kinds of groups that programs actually represent now under the current regulation which permits representation of groups that are (1) "primarily composed of persons eligible for legal assistance under the act" or (2) have as their "... primary purpose furtherance of the interests of persons in the community unable to afford legal assistance..."

Recommendation

The staff recommends that the Board support the documentation requirements of Section 15. The staff takes no position on the restriction on group representation as it is a policy matter for the Board's determination.

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*For example, when the Corporation amended 1612.4 to require documentation for legislative advocacy, it sent out sample retainer forms that programs could use as models for the appropriate kinds of documentation.

Section 16 - Suits to Enforce Act or Recipient Contracts

Section Amended: New Section 1013 (present Section renumbered 1014)

This provision authorizes the Corporation to bring an action in United States District Court to compel specific performance of agreements between the Corporation and any recipient.

It also authorizes both the United States and the Corporation to bring an action for a temporary or permanent injunction or other appropriate relief to compel recipient compliance with the LSC Act or any rules, regulations, or guidelines promulgated under the Act.

The amendment prohibits judgment or orders in the above actions which would interrupt client services, unless a court explicitly states that such interruption is required. In such an event the court is directed to "attempt to make equitable arrangements for the provision of legal services to any eligible client affected thereby."

Legislative History

Floor amendment by Rep. Gilman (R-N. Y.) adopted on a voice vote. A similar amendment by Rep. Sensenbrenner (R-Wis.), which would have additionally permitted a State attorney general to seek injunctions against recipients in each state, was defeated on a voice vote in the full Judiciary Committee.

In support of the floor amendment, Rep. Gilman stated that such power was needed because "currently, if a grantee decides that it would rather not obey a lawful request by the central Corporation, it can simply resign--or simply threaten to

resign--thus, presenting the Corporation with a dilemma--whether or not to call grantee's bluff." Cong. Rec. H 3107 (June 18, 1981). Rep. Railsback (R-Illinois), in supporting the amendment, viewed it as strengthening the enforcement power of the Corporation.

Discussion

One issue raised by Section 16 is whether or not the Corporation has the power to sue for specific performance in the absence of the legislation. A memorandum of July 15, 1980, prepared for the Corporation's General Counsel by a consultant law firm, reached the conclusion that LSC does have the statutory authority to seek specific performance of regulatory and grant conditions. The author of the memorandum, a copy of which is attached, also concluded that the Corporation "probably has authority to require a recipient to participate in the program, and provide the free legal services included in the grant or contract instruments, at least for the duration of the grant or contract period for which LSC funding was approved."

Assuming that the Corporation already possesses authority to seek specific performance, and to obtain an injunction to enforce the Act, regulations, and grant and contract provisions, Section 16 would change existing law by authorizing the United States to exercise the same authority. Although this type of authority has been granted to the United States in other legislation, namely, the Communications Satellite Corporation Act, 47 U.S.C. Section 743, and the U.S. Synthetic

Fuels Corporation Act, 42 U.S.C. Section 8767, the purposes of these entities and their relationship to the U.S. Government are very different from those of the Corporation. A serious problem would arise if the Corporation and the United States disagreed on any interpretation of the Act or on a question of whether a recipient was complying with the Act. This would give rise to a crucial issue of policy--who should have the ultimate authority to interpret and enforce the Legal Services Corporation Act, the Corporation and its Board or the Attorney General. Presumably, if this legislation were to pass, the Corporation and the Department of Justice would need to set up a system for resolving any disputes.

Recommendation

The staff recommends that the Board support the provisions which codify the Corporation's authority to bring enforcement actions, but oppose the granting of authority to the United States to bring any such actions.

Section 17 - Audits

Section Amended: Adds a new subsection (d) to Section 1009

Grants the Comptroller General and the ~~General Accounting~~ GAO Office the same authorities with respect to LSC audits as those offices have with respect to audits of "all departments and agencies of the United States, including the authority to settle and adjust the accounts of the Corporation."

Legislative History

This amendment was rejected in the full Judiciary Committee, but was offered on the House floor by Rep. James Sensenbrenner (R-Wis.) and adopted on a voice vote. In offering the amendment, Rep. Sensenbrenner stated that under current law the Comptroller General has no authority to recover for the U.S. Treasury funds expended by the Corporation in violation of the authorization or appropriations statutes. He indicated that the Corporation should be placed under the same authority "as the other departments and agencies of the Government." Cong. Rec. H3108 (June 18, 1981). The legislative history does not elaborate further on exactly what other aspects of their authorities Congress would expect GAO and the Comptroller General to exercise with respect to the Corporation.

Discussion

Under current law, GAO is authorized to audit the Corporation's financial transactions, but GAO has no authority to change the practices of the Corporation or to order any modifications of its operations. The Comptroller General currently does, however, have specific authority to report to Congress and the President on the results of GAO's audits and to make recommendations regarding the findings of those audits. In the past the Corporation has modified its practices and regulations and Congress has proposed amendments to the Act as a result of GAO's recommendations. It is, however, not entirely clear how far GAO's authority over the Corporation would be expanded by the provision added by Section 17.

In the first place, various statutes grant GAO differing authorities with respect to different departments and agencies of government. For example the provisions of 31 U.S.C. 65-67 are applicable only to "executive agencies." Other provisions apply only to corporations or agencies subject to the Government Corporation Control Act which does not now cover the Legal Services Corporation. Some provisions apply only to the armed forces or to specific bureaus. It is not clear whether Section 17 intends to subject the Corporation (1) to all of these provisions, many of which are probably inconsistent, (2) only to those provisions that are applicable to all departments and agencies, or (3) only to the account settlement authority.

Some of the issues that are unsettled include the following: whether the Corporation would be required to designate certifying and disbursing officers who would be personally liable for disbursements not made in accordance with GAO's interpretation of the law, including the LSC Act.

Whether the Corporation would be required to render monthly (or other periodical) accounts to GAO for settlement (required of every "officer or agent of the United States who receives public money" which is not salary or similar payment) before payment can be made.

Whether GAO would be permitted to block the advance of funds to the Corporation if the above accounts were delinquent.

Whether the Corporation would become subject to the Anti-Deficiency Act.

Whether GAO could force the Corporation to change its accounting system or render reports in a different manner than it does now.

The settlement authority clearly seems to give GAO the authority to adjudicate claims brought against the Corporation and protests from unsuccessful bidders for contracts with the Corporation. It may also give the Corporation the right to request GAO to collect our claims against third parties. And it may give GAO the authority that Rep. Sensenbrenner sought

to provide, i.e., to interpret the Legal Services Corporation Act and to recover (either for LSC or for the U.S. Treasury) funds that GAO considers were spent illegally by the Corporation or by its grantees even if the Corporation disagrees with GAO's legal interpretation. If this latter authority is included, GAO would have effectively usurped the Corporation's authority to interpret and enforce its own Act, severely undercutting the Corporation's independence and undermining its institutional integrity..

Recommendation:

The staff recommends that the Board oppose this section.

S. 2393

MEMORANDUM

LEGAL SERVICES CORPORATION

DATE: July 30, 1982

TO: Legal Services Corporation
Operations and Regulations Committee

FROM: Gerald M. Caplan
Acting President

SUBJ: Staff Recommendations on S. 2393

Attached is a background memorandum from the Office of General Counsel on S. 2393, currently pending in the Senate. S. 2393, if enacted, would create a private right of action under the Legal Services Corporation Act by allowing any person to bring a civil action against the Corporation or any recipient, grantee, or contractor for a violation of any provision of the Act or regulations. Enactment of S. 2393 would allow any person to sue to enforce the Act. Litigants could include individuals denied legal assistance by recipients, disgruntled legal services clients, disappointed grant applicants, unhappy defendants, and public interest groups displeased with Corporation policies. S. 2393 would not require these litigants to exhaust their administrative remedies or to bring their complaints to the attention of the Corporation prior to filing suit.

It is my recommendation, and that of the Office of General Counsel, that the Corporation should oppose S. 2393 as presently drafted. Creation of a private right of action could entail substantial costs and delays in resolving allegations of abuses by the Corporation or recipients.

If a statute creating a private right of action is deemed necessary, such legislation should provide that private actions could be brought only to enforce the prohibitions, as opposed to the provisions, of the Act and/or that litigants should be required to demonstrate some injury resulting from the Corporation's or recipients' actions.

Another alternative: legislation could provide for judicial review of final Corporation determinations; this would at least afford the Corporation, in the first instance, the opportunity to investigate complaints and take appropriate remedial action.

I recommend, therefore, that the Board oppose S. 2393 as drafted.

LEGAL SERVICES CORPORATION

MEMORANDUM

DATE: July 30, 1982

TO: Gerald Caplan

FROM: Mary Wiseman MFW and Carol Roberts CR

SUBJECT: Staff Recommendations on S. 2393

INTRODUCTION

We have been requested to advise you on the issues raised by S. 2393 which would create a private right of action by allowing any person to bring a civil action against the Corporation or any direct or indirect recipient, grantee, or contractor thereof, for a violation of any provision of the Legal Services Corporation Act. The bill provides that, upon a finding that the Act has been violated, the district court may award equitable relief, punitive (treble) damages, and attorneys' fees and costs.

This pending legislation raises a number of issues. The primary task for the Corporation is to evaluate the policy considerations involved in the creation of a private right of action. We have reviewed the Corporation's legislative history as well as briefs filed in the Moity and Grassley cases for background on this issue. We also have explored such secondary issues raised by S. 2393 as standing, judicial review of Corporation determinations, exhaustion, and primary jurisdiction. As a result of our review and analysis, we recommend that the Corporation not support the adoption of S.

2393, but that it support and adopt other measures to increase our capacity to enforce compliance with the Act and regulations.

LEGISLATIVE HISTORY

1. 1974 Act

In enacting the original legislation creating the Legal Services Corporation, Congress considered and rejected a provision creating a private right of action to enforce the Act. Instead, Congress chose to enact the nonjudicial enforcement procedures contained in the existing Act. A strong concern for establishing safeguards against violations of the Act runs throughout the legislative history and considerable discussion is focused on the various procedures for enforcement.

President Nixon submitted a bill to Congress on May 15, 1973, which contained a provision expressly creating a private right of action to enforce the prohibitions of the Act:

> Any interested person may bring an action in a federal district court to enforce compliance with prohibitions under this Act by the Corporation or any recipient or any officer or employee of the Corporation or of any recipient.

S. 1815, Section 1006(b)(6)(A), 93d Cong., 1st Sess., 119 Cong. Rec. 15589 (1973); H.R. 7824 Section 6(c), 119 Cong. Rec. 20685 (1973).

The Administration bill was considered by the House Committee on Education and Labor which reported out an amended version. The Committee report explained the bill's provisions dealing with accountability but the private right of action provision was deleted without comment. This deletion was

criticized by dissenting committee member Rep. Landgrebe.[1/] H.R. Rept. No. 93-247, supra, at 27 (minority views of Rep. Landgrebe).

During general floor debate on the committee bill, Rep. Biester emphasized the need for an accountable legal services program. He enumerated the provisions of the bill intended to protect against excesses and abuses:

> The President appoints every member of the Corporation's Board of Directors;
> The Senate must approve each of the appointments;
> The President and Congress oversee operations through the budgetary and appropriations processes;
> The Corporations is required to submit a yearly report to the President and Congress;
> The General Accounting Office will audit the Corporation and each of its programs;
> Each Governor may submit comments and recommendations on the awarding of contracts within his State:
> Each Governor may appoint an advisory council to oversee Legal Services operations within his State;
> Attorneys must be included as at least one-half the membership of the various National, State and local governing boards which are organized to deliver services;
> Program attorneys are bound by the professional code of the American Bar Association;
> Program attorneys must be licensed to practice in the State in which they are serving; and
> Local bar associations can offer recommendations on filing staff attorney positions.

1/ According to Rep. Landgrebe, the provision assuring the rights of interested persons to bring actions to enforce compliance was an important safeguard "because of the limited ability of a centralized, unitary national corporation, based in Washington, to be fully responsive in taking prompt action to correct abuses by legal services attorneys."

Cong. Rec. H 5071 (June 21, 1973) (remarks of Rep. Biester). He also discussed the bill's specific restrictions, including voter registration and political activity, and indicated that "the Corporation is authorized to insure compliance with these regulations and is empowered to terminate financial support to those recipients who fail to comply." He concluded:

> the prohibitions and safeguards contained in the bill before us can adequately answer the legitimate concerns many of us have that Legal Services sticks to doing the job intended of it--assuring equal justice to the poor. Ibid. See also id. at H 5076 (remarks of Rep. Steiger).

Similarly, Rep. Hawkins stated that the committee had introduced safeguards that would reach potential abuses without contravening the Code of Professional Responsibility. These safeguards included strong supervision and monitoring by the Corporation as well as Congress' power to appoint, amend, and, through the appropriations process, control the legal services program. Id. at H 5074 (remarks of Rep. Hawkins).

On the other hand, opponents of the bill expressed concern that the above-mentioned safeguards were inadequate and that the Corporation would not be accountable to anyone. See Cong. Rec. H 5074 (June 21, 1973)(remarks of Rep. Langrebe); id. at H 5080 (remarks of Rep. Huber); id. at H 5086 (remarks of Rep. Rousselot). In the view of Rep. Rousselot, the most significant safeguard eliminated from the Administration bill was the private right of action. Ibid.

During floor debate, Rep. Dennis offered an amendment reinstating the private right of action provision contained in

the Administration's proposal. Cong. Rec. H 5104 (June 21, 1973). In support of his amendment, Rep. Dennis stated:

> This amendment provides that if, as a citizen, one feels and believes that the Corporation is violating the restrictions placed upon it by the law, and is bringing actions which it is not authorized to bring, or doing things which it is not authorized to do, that one can go into the Federal court and seek to prevent that illegal action and to enforce the statue, (sic), and to make the Corporation live up to the restrictions imposed upon it by law.

Id. at H 5105 (remarks of Rep. Dennis). Opposition to the Dennis amendment focused on the fear that the courts would be flooded with frivolous litigation.2/

> Why should we load up the already overburdened calendars of the Federal courts with litigation by every person who is dissatisfied, and this includes the poor people themselves who may be just dissatisfied with the way their case is being handled? Should everyone of them have standing to turn around and sue the Corporation because of that dissatisfaction? I think we should have some reasonable guidelines for standing to sue. I do not think we ought to create corporations and let everybody in the world sue them.

Id. at H 5105 (remarks of Rep. Meeds); See also id. at 5106 (remarks of Rep. Ford); id. at 5105 (remarks of Rep. Erlenborn).

2/ An additional argument was that the Dennis amendment was an impermissible grant of standing in view of the Supreme Court's holdings that a citizen's general interest in the proper administration of government does not grant him standing to contest the legality of government action. Cong. Rec. H 5106 (June 21, 1973) (remarks of Rep. Conyers). Nevertheless, a litigant proceeding under a private right of action expressly granted by statute must still meet the constitutional requirements for standing. See discussion of standing at page 21 of this memorandum.

It was felt that the establishment of state advisory councils provided sufficient oversight.

> In other words, we set up in 50 police departments appointed by the 50 Governors from among lawyers in 50 states to ride herd over and watch the activities of all these legal service lawyers.
>
> I do not think we ought to superimpose on top of that a wide-open invitation to every kook who wants to run in and start a lawsuit against the Legal Services Corporation.
>
> I think we can trust the Governors to appoint to these watchdog committees competent lawyers who are going to have the power, and will exercise that power in a way to protect the citizens of that State.
>
> My goodness, we have to start having confidence in someone. If we cannot have confidence in anyone else, now we are down to asking Members to trust the Governors to appoint their panels of "watchdogs."
>
> I believe that ought to be sufficient.

Id. at H 5105-06 (remarks of Rep. Ford); See also id. at H 5105 (remarks of Rep. Meeds).

Rep. Treen, however, disagreed that the state advisory councils would provide adequate supervision. He dismissed concerns about burdening the courts with an explanation that judges have the power to dismiss or to impose sanctions for frivolous lawsuits. He felt that the creation of a private right of action was necessary to prevent the kinds of abuses which had occurred in the past and had not been remedied by OEO. Cong. Rec. H 5106-07 (June 21, 1973) (remarks of Rep. Treen); see also id. at 5106 (remarks of Rep. Rousselot).

Rep. Erlenborn offered an amendment to the Dennis amendment which provided that any person could bring an action to enforce compliance with the provisions of the Act. His

amendment was intended to grant a more equitable right of action by allowing suits to enforce compliance with the entire law and not just its prohibitions. Cong. Rec. H 5105 (June 21, 1973) (remarks of Rep. Erlenborn); see also id. at H 5106 (remarks of Rep. Quie). Rep. Dennis strongly opposed the Erlenborn proposal as antithetical to the intent and result of his own amendment.

> Mr. ERLENBORN's amendment, on the contrary, is designed to see to it that the Corporation goes around suing everybody in sight who might be said to be in violation, because what he does is provide what we might call a Ralph Nader type of suit in which any citizen can look around and say to himself, "Here, this corporation is not going after that fellow over here or going after that fellow over there." Then he can sue the corporation if it does not do something.
>
> I am not in favor of opening the courts to that sort of thing. I will admit, giving anybody standing to sue here at all is unique, but giving them that kind of standing is chaos.
>
> The only reason for the type of amendment such as I have offered is that there has been trouble with these corporations. They have been harassing people, or so the complaint is, and therefor in order to discourage them from doing that, along the lines of Mrs. GREEN's amendment, we give citizens a chance to sue them and hold them down to the law.
>
> But, to turn it around and say that every Tom, Dick and Harry can decide this corporation is not working hard enough in suing people and taking them to court at public expense is something else again.

Id. at H 5105 (remarks of Rep. Dennis). Both the Erlenborn amendment to the amendment and the Dennis amendment, itself, were defeated by the House. Id. at H 5106-08.

The Administration bill was considered by the Senate Subcommittee on Employment, Poverty, and Migratory Labor and the full Labor and Public Welfare Committee. As in the House, the bill reported by the Senate Committee, S. 2686, did not contain a private right of action provision. Rather, the Committee Report emphasized that the Corporation would remain accountable to the public through the Congressional appropriations process, the appointment of the Board of Directors by the President with the advice and consent of the Senate and the safeguards and structure of the program. S. Rept. No. 93-495, 93d Cong., 1st Sess. 6 (1973); id. at 46 (additional views of Rep. Taft).

Debate on the Senate floor emphasized the need for accountability. As in the House, supporters felt that accountability was ensured by the monitoring system and restrictions written into the Act. See Cong. Rec. S 22404 (December 10, 1973) (remarks of Sen. Nelson); id. at S 22411-14 (remarks of Sen. Javits); Cong. Rec. S 535 (January 28, 1974) (remarks of Sen. Nelson).

Opponents, on the other hand, argued that S. 2686 created an unaccountable Corporation free of governmental restraints. It was felt that the exceptions to the Act's prohibitions rendered them meaningless. See Cong. Rec. S 546 (January 28, 1974) (remarks of Sen. Allen); Cong. Rec. S 827 (January 30, 1974) (remarks of Sen. Brock); id. at S 829-30 (remarks of Sen. Fannin); Cong. Rec. S 990-91 (January 31, 1974) (remarks of Sen. Buckley). Sen. Goldwater expressed concern that the bill

contained no criminal penalties for violation of its provisions, Cong. Rec. 5919 (January 31, 1974) (remarks of Sen. Goldwater), and his fears were not allayed by assurances that attorneys would be subject to discipline by state bar associations, Id. at 5919-20 (remarks of Sen. Taft). In enumerating the bill's shortcomings, however, opponents made no mention of the deletion of a private right of action.

Debate in both houses on the Conference Report, S. Rept. No. 93-845, H. Rept. No. 93-1039, 93d Cong. 2d Sess. (1974), focused on the delicate balance achieved between accountability and the provision of quality legal services.3/

Opponents continued to maintain that the Conference Report created a Corporation which was not accountable to Congress, the taxpayers or clients. See Cong. Rec. H 3959-60 (May 16, 1974) (remarks of Rep. Rousselot); Cong. Rec. S 12135-36 (July 10, 1974) (remarks of Sen. Helms). Their criticisms, however, did not include the fact that the private right of action provision had been deleted from the Administration's proposal.

3/ The following controls were viewed as particularly important: representation of local bar associations on the governing bodies of recipients; monitoring by state advisory councils; the Corporation's power to promulgate regulations, monitor local recipients and suspend or terminate financial assistance; Presidential appointment of the Corporation's Board of Directors with the advice and consent of the Senate; and the Congressional authorization and appropriations processes. See Cong. Rec. H 3951 (May 16, 1974) (remarks of Rep. Perkins); Cong. Rec. S 12920 (July 18, 1974) (remarks of Sen. Taft); id. at S 12923-24 (remarks of Sen. Nelson); id. at S 12932 (remarks of Sen. Abourezk and Sen Cranston).

2. 1977 Amendments

Bills to amend the Legal Services Corporation Act were considered by committees of both houses in 1977. The House Report indicated that the Committee on the Judiciary, responsible for oversight of the Corporation, had held hearings and monitored the Corporation's regulations and Board meetings. The Committee expressly found that the Corporation had "performed efficiently and effectively in meeting its Congressional mandates." H. Rept. No. 95-310, 95th Cong., 1st Sess. 16 (1977). The House bill, H.R. 6666, contained an amendment to Section 1006(b)(1) of the Act which provided that compliance with the Act, rules, regulations, and guidelines shall be conclusively presumed in lawsuits in which a party is represented by a local recipient. The House Report explained that this amendment was declaratory of existing case law and was added to discourage frivolous litigation. The report noted that the Corporation is charged with ensuring compliance with the Act and that an internal mechanism exists for handling complaints about program activities. Id. at 8-9.

The bill reported by the Senate Committee on Human Resources, S 1303, also contained an amendment to Section 1006(b)(1). But rather than providing for a conclusive presumption of compliance, the amendment prohibited collateral challenges to represention by a recipient and specified that questions regarding representation may be referred to the Corporation for disposition. S. 1303 as amended, Section 1006(b)(1), 95th Cong., 1st Sess., S. Rept. No. 75-172 (1977).

As in the House Report, the Senate Report stated that this amendment was declaratory of existing case law and designed to deter repetitive litigation. Unlike the House Report, the Senate Report expressly specified the procedures to be followed under this amendment.

> Under this amendment, persons or entities feeling aggrieved by alleged non-compliance of legal services programs or their employees with the Act's rules, regulations, or guidelines, will be required first to complain directly to the Corporation. Following such complaint and exhaustion of administrative remedies, an aggrieved person or entity may seek judicial review of any provision of the Act or regulations, or of a Corporation ruling. The amendment does not change existing law with respect to judicial review of Corporation action: but it does help to ensure that any legal challenge, to the maximum extent possible, is resolved on its merits rather than delaying the provision of legal assistance to eligible poor people under the Act.

S. Rept. No. 75-172, 95th Cong., 1st Sess. 10 (1977).

On the Senate floor, Section 1006(b)(1) was further amended to provide that judicial review of Corporation decision would not be precluded. The amendment was offered to codify the Committee Report's explanation that, following exhaustion of administrative remedies, judicial review could be sought. Cong. Rec. S 17017-18 (October 12, 1977) (remarks of Sen. McClure and Sen. Nelson).

The Conference Report further changed the language of Section 1006(b)(1)(B) to its final form:

> "(1)(B) No question of whether representation is authorized under this title, or the rules, regulations or

> guidelines promulgated pursuant to this title, shall be considered in, or affect the final disposition of, any proceeding in which a person is represented by a recipient or an employee of a recipient. A litigant in such a proceeding may refer any such question to the Corporation which shall review and dispose of the question promptly, and take appropriate action. This subparagraph shall not preclude judicial review available under applicable law.

H. Rept. No. 95-825, 95th Cong., 1st Sess. 2 (1977). The report explained that the Senate amendment, but not the House bill, required that collateral challenges to representation by a recipient be referred to the Corporation and clarified that judicial review of the Corporation's decision was not precluded. The report states that under substitute language adopted by the Committee of Conference, "judicial review of the Corporation's action or inaction is not precluded where available under applicable law." Id. at 10-11.

This substitute language was not mentioned in the debate preceding House approval of the Conference Report. Members of the Senate, however, did discuss this issue. Sen. Javits explained that Sen. McClure had feared that the effect of prohibiting collateral attacks on representation would be to foreclose judicial review. According to Sen. Javits, the committee's intent was not to "cut off any existing avenues of judicial review; . . ." but only to prevent collateral challenges from delaying proceedings on the principal issue being litigated. Cong. Rec. S 19692 (December 15, 1977) (remarks of Sen. Javits). Sen. McClure stated his understanding that Congress intended that "determinations made by the Corporation on