The Heritage Foundation Backgrounder

No. 496 | The Heritage Foundation • 214 Massachusetts Avenue, N.E. • Washington, D.C. 20002-4999 • (202) 546-4400 • http://www.heritage.org

March 19, 1986

NEW WAYS TO PROVIDE LEGAL SERVICES TO THE POOR

INTRODUCTION

Americans rightly believe that access to justice is an essential element of a democratic system. It is generally agreed that every individual should be able to protect his or her rights, regardless of personal wealth. With this in mind, Congress in 1965 created a program for the provision of legal services to the poor. This later became the Legal Services Corporation (LSC).

The legal services program, however, quickly turned into one of the federal budget's most controversial items. Legal services outlays skyrocketed from just over $1 million in 1965 to $321 million in 1980. More important, the attorneys it funded often acted as political advocates of the causes they favored, rather than as representatives of the clients they served. The result is that the program often fails to fulfill the goals of its creators. It fails to provide access to justice to those who cannot afford it.

As such, it is now time to examine other means of providing the poor with legal help. A wide variety of alternatives has been proposed which would not just decrease the cost to the taxpayers, but--more important--would improve the quality of services available to the poor. These alternatives include:

o Providing legal services on a competitive basis, using vouchers, "judicare," or contracts with private law firms.

o Making greater use of such voluntary resources as pro bono services by lawyers in private practice and the services of law students who need actual work experience.

o Reducing the cost of the legal system by encouraging alternative dispute resolution systems using ombudsmen in government agencies, and streamlining rules governing the practice of law.

Legal service agencies also should begin seeking funding sources other than the federal government. Increased private support, contributions from clients according to the amount they are able to pay, interest on lawyer's trust accounts which can be put toward legal services, and stepped-up support from state and local governments should all be pursued.

In light of the Gramm-Rudman-Hollings budget balancing law, Congress will cut spending substantially this year, including outlays on LSC. This should be used to institute long-overdue reforms. While reducing federal expenditures, these reforms would improve the quality of legal service to the poor.

THE FEDERAL LEGAL SERVICES PROGRAM

While the federal Legal Services Corporation was created by Congress only eleven years ago, organizations to provide basic legal services to the poor have existed for over a century. Operated by bar associations, law schools, social agencies, and municipalities, these organizations offered free legal advice and representation to those unable to afford attorneys. Though often underfunded, these organizations operated in almost every major U.S. city.

In 1965, as part of Lyndon Johnson's War on Poverty, the federal government entered the field. A legal services program was established within the Office of Economic Opportunity, funding the activities of hundreds of "poverty lawyers" throughout the country. In 1974, this program was replaced by the Legal Services Corporation.

Organization of the Program

The LSC itself provides no legal services. It merely grants federal money to over 300 local legal services organizations throughout the country. These grantees are supposed to provide legal services to those in need.

The LSC has little actual control over how its funds are spent by these organizations. While the grantees are obliged to follow certain minimal federal rules, they for the most part are free to spend their funds as they see fit. Until very recently, in fact, the LSC rarely even audited the grantees' expenditures. Instead, the LSC is required by law to continue funding each of its grantees at the same level each year, unless it can show that the grantee actually has violated its contract. Predictably, this has resulted in a wide variance in the

cost of services provided by grantees. While the cost of the average LSC case has been calculated to be $182.50, the average for some grantees is as high as $725.[1]

Types of Legal Services Provided

The services provided to the poor by the LSC program are typically quite different from those imagined by most Americans. In fact, LSC services are neither offered nor required in two of the most common types of cases:

Criminal cases: The U.S. Constitution gives every defendant in a criminal case the right to be represented by an attorney. If he or she cannot afford to hire one, one will be appointed at no charge. This representation is provided through public defender services organized and financed by the state and federal courts, and by lawyers in private practice who have their fees paid by the government.

Fee-generating cases: In cases where defendants can reasonably expect to receive a significant amount in damages, including most tort cases, even a person with no resources of his own can hire a lawyer. Under the "contingent fee" system prevalent in the U.S. legal system, the attorney's fee in such cases can be set as a percentage of the expected court award in the case. If the client wins, the lawyer's fee is deducted from the cash award. If he loses, he pays no fee at all. Through this simple market mechanism, the interests of all potential plaintiffs are served, regardless of their income, with no taxpayer involvement at all.

The activities of the LSC are limited to non-criminal cases in which an award of money damages is not requested or expected. Generally, these cases fall into a limited number of categories. In 1984, for example, 29.2 percent of the cases completed by LSC attorneys involved family law, including divorces, adoption, and child custody cases. Another 19.1 percent involved housing matters--rent disputes and other landlord-tenant problems. Another 18.2 percent of cases actually involved disputes with other governmental units regarding claims for particular government benefits, such as welfare, Social Security, or disability payments. Some 12.4 percent concern consumer problems, while the remaining 18.4 percent of LSC cases are spread through a wide variety of categories, ranging from employment and health issues to cases involving education and discrimination.[2]

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1. Figures from LSC Board Member LeAnn Bernstein, Budget Dissent for Fiscal Year 1987 (unpublished), p. 6, n.2.

2. Figures from Legal Services Corporation, 1985 Field Program Data, p. 10.

PROBLEMS WITH THE LSC

From its inception, the legal services program has been controversial. One reason is its continuing increase in costs. They have ballooned seemingly uncontrollably during the 1960s and 1970s. In fiscal year 1969, $35.8 million was budgeted for federal legal service activities. Five years later, the LSC's first year, the budget was $90 million.[3] In 1980, the federal government was spending $321 million per year on the agency. This was nearly a ten-fold increase in eleven years. While the Reagan Administration cut this budget by 25 percent in 1982, it has begun to increase again. In the current fiscal year, the LSC plans to spend $305.5 million, and has requested the same amount for fiscal 1987.[4]

A second problem is that lawyers in federal legal service programs often see themselves mainly as social reformers. Handling the problems of the poor on a case by case basis is frequently viewed as a very time-consuming, and mundane, way of alleviating the ills of the poor. Attorneys would be much more effective, it is reasoned, as advocates of changes in the law and political processes.

LSC attorneys thus have brought a broad range of lawsuits to "reform" the law, including suits to establish rights to welfare, to block increases in transit fares by local governments, and even to encourage the use of "black English" in public schools.[5] The attorneys often act as federally funded lobbyists rather than the providers of the day-to-day legal assistance that they were intended to be. While they have concentrated so many resources on such "law reform" cases, attorneys often have neglected the needs of many poor Americans with serious, yet routine, problems.

A third problem with the program is simply the fact that it has failed to fulfill the legal needs of the poor as well as it could. Despite massive increases in funding, the program has been unable to adequately serve the legal needs of the poor. Worse, the assumption by the LSC of responsibility for these services has long hindered the

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3. Congressional Budget Office, The Legal Services Corporation--Budgetary Issues and Alternative Federal Approaches, July 1977, pp. 2-3.

4. The President has proposed that the agency be abolished, and therefore no funds for LSC were included in the budget he submitted to Congress. According to statute, however, the LSC independently submits to Congress it own budget.

5. James T. Bennett and Thomas J. DiLorenzo, "Poverty, Politics, and Jurisprudence: Illegalities at the Legal Services Corporation," Cato Institute Policy Analysis No. 49, February 26, 1985, p. 3. See also, Washington Legal Foundation, Legal Services Corporation: The Robber Barons of the Poor? 1985.

development of other possible resources, and of beneficial reforms in the legal system itself.[6]

REFORMING LEGAL SERVICES

To date, governmental efforts to provide the poor with access to justice system have centered upon only one model: the establishment of legal service agencies, primarily funded by the federal government, employing staffs of attorneys to represent the poor. These agencies have held a virtual monopoly, leaving the poor with few alternatives for obtaining legal help. The result has been a generally lower quality of service, and a tendency by the legal service attorneys to pursue their own social and political goals, rather than the needs of their particular client.

A wide range of alternative approaches exists. These include: 1) fostering competition among the providers of legal services; 2) making better use of the voluntary resources available in the bar and elsewhere; and, 3) reducing the complexity and cost of access to the legal system.

Increasing Competition in the Delivery of Legal Services

Many methods have been developed by which legal services could be delivered to the poor in a competitive manner. Among these are:

Legal service vouchers: Under this system, eligible clients, if deemed needy by a referral office, would receive a certificate, valid for the purchase of a certain amount of legal services. The client would then decide for himself which attorney to hire to handle his case, based on information provided by the referral office, word-of-mouth recommendations from friends, or personal experience. If he wished, he could pay his attorney more, or less, than the voucher amount. The result: the voucher would turn the recipient into an active consumer with a consumer's power to choose whom he wants to handle his problem.

Judicare: This is modelled on the the existing federal Medicare system. Eligible clients would be able to engage the services of attorneys, with the bill later paid by the federal government. As with Medicare, the government could establish limits on the compensation for particular types of legal services and on who provides them.

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6. See Stephen Chapman, "The Rich Get Rich and the Poor Get Lawyers: The Intellectual Poverty of Legal Services," The New Republic, September 24, 1977, pp. 9-15.

Contracts with private law firms: Here, the government would negotiate with individual law firms to provide legal services to eligible clients. The fee would be fixed in advance, either as a flat amount, or on a per case basis.

Each of these programs offers advantages and disadvantages. Judicare appears to be the least desirable of the three, raising serious cost control problems similar to those plaguing Medicare. By contrast, vouchers would provide clients with as much choice as does Judicare, but without the cost problems. Policymakers would have to take care, however, that a voucher program not be transformed into an entitlement for legal services, through which a "right," without limit, to a federally paid lawyer is created. The contracting out option would not provide as much choice to the poor; but since it would guarantee a high volume of business to the private law firms involved, it could be less costly.

The Legal Services Corporation currently is conducting several pilot projects testing the relative effectiveness and cost of the competitive delivery of legal services. While final results are not yet in, early reports indicate that these innovative approaches cost much less than originally expected and that clients are very satisfied with the levels of service being provided. If the pilot projects do prove to be as successful as these early results indicate, the systems should be put into more general use.

Adoption of a competitive model for the provision of legal services would not mean abolition of the existing legal service agencies. It merely means that they would have to compete for funding with those who believe they can perform a better job at a lower cost. Presumably, those agencies now performing quality legal services would prosper in a competitive system.

Better Use of Existing Voluntary Resources

In addition to finding better ways of expending governmental funds, the LSC should explore ways to use better the enormous amount of voluntary legal talent available to help the poor.

Pro Bono work: According to the American Bar Association's Code of Professional Responsibility, each attorney has a responsibility to spend some time each year providing free or pro bono legal help to those who cannot afford it.[7] This is not a legal requirement, nor should it be--not every attorney is in a position to provide such services, nor should the full burden of helping the poor be assigned

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7. Code of Professional Responsibility, Ethical Consideration 2-25.

to lawyers. Yet the tremendous resources which can be offered by the legal profession cannot be ignored.

According to a recent poll conducted by the ABA Journal, about 52 percent of U.S. attorneys, some 325,000, contributed pro bono services over the past year, averaging about 60 hours each. This is the equivalent of thousands of lawyers working full-time on pro bono activities.[8] Even more can be mobilized. The LSC should devote more resources toward encouraging pro bono activities. Example: LSC could be a national clearinghouse for information.

Law Schools: Another resource is the thousands of law students throughout the country. The needs of these students, in fact, dovetail very well with the needs of the poor. During their three years in law school, most students receive a good grounding in the principles of law, but get little experience in the actual practice of law. The talents of these students should be utilized better to provide services to the poor.

An increasing number of U.S. law schools have begun "clinical programs" for law students, to provide them with this vital hands-on experience. The LSC should foster these programs and encourage their expansion.[9] LSC support, however, should go only toward getting such programs started. Since clinical programs benefit the students as well as the poor, a permanent federal subsidy is neither necessary or desirable.

Reducing the Cost of the Legal System: "Delegalization"

The basic need of any person with a legal problem is not a lawyer, but a resolution of that problem. Therefore, any governmental policy regarding legal services must look not just at providing lawyers, but at better ways to resolve disputes.

Barriers have been erected making it difficult for the poor to benefit from the court system. Going to court is a complex and expensive matter. Even getting basic advice is costly, as only a state-licensed attorney, who has spent years in training, can provide it.

Among the ways these artificial barriers to the resolution of disputes can be reduced:

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8. Lauren Rubenstein Reskin, "Lawyers Fall Short of Self-Imposed Pro Bono Standards," ABA Journal, November 1985, p. 42.

9. See, Frederic R. Kellogg, Federal Involvement in Legal Services for the Poor: Encouraging Private Sector Fulfillment of a Public Responsibility, Ripon Society Policy Paper, November 1985, p. 12.

1) Alternative Dispute Resolution Systems.

Although "Alternative Dispute Resolution" (ADR) is a fairly new phrase, the concept has existed for centuries. It means resolving disputes between individuals through mechanisms other than the government court system. For many years, for instance, corporations have hired professional arbitration services, such as the American Arbitration Association, to settle contract disputes and other matters, where traditional litigation was seen as too costly or unpredictable. Recently, ADR systems increasingly have served the needs of individuals, including the poor.[10]

In San Francisco, for example, a system of Community Boards in 25 neighborhoods helps resolve disputes in a informal manner. Founded in 1977, the Community Boards train volunteers to serve on panels which mediate disputes. The cases handled by these Community Boards are remarkably similar to those handled by legal service attorneys: landlord-tenant disputes, merchant-consumer disputes, racial tensions. The disputes are resolved without the need for an attorney or litigation--and at no cost to the taxpayer.[11]

According to the Dispute Resolution Information Center, hundreds of such neighborhood-based programs now exist. They have been highly successful at reducing the cost of resolving disputes. In fact, the average cost of an ADR case during 1984 was $36--less than one-fifth the average cost of a Legal Services Corporation case.[12]

Some advantages of private dispute resolution systems can be delivered by the traditional court system. Most states already operate small claims courts, in which litigants can make claims for small amounts of damages, usually about $750. These courts are very accessible and are generally seen as very fair. Greater use of such courts could help resolve many common landlord-tenant, consumer, and other issues.

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10. See, Bill Richards, "Can We Talk? Mediation Gains in Law Disputes," The Wall Street Journal, May 14, 1985.

11. Paul Gorden, "Justice Goes Private", Reason Magazine, September 1985, pp. 23-30.

12. Bernstein, op. cit., p. 15. For a good summary of alternative dispute resolution systems, see Jonathan B. Marks, Earl Johnson, Jr., and Peter L. Szanton, Dispute Resolution in America: Processes in Evolution (National Institute of Dispute Resolution, 1984).

2) Ombudsmen to avoid disputes regarding government agencies.

Almost one-fifth of all Legal Services Corporation cases involve disputes with government agencies, usually regarding whether an individual is eligible for a particular benefit program. Thus the federal government ends up paying for two sets of attorneys--its own and those of the plaintiff.

This is unnecessary. The underlying issue in most of these cases is bureaucratic inertia. Many of the disputes now being handled by LSC attorneys could be settled easily through ombudsman offices within the agencies concerned. These ombudsmen, who need not be attorneys, could provide advice to dissatisfied applicants and resolve simple problems. When necessary, they could also represent the applicant's interests against the agency bureaucracy. The result would be quicker, less expensive, and more satisfactory for both the individuals and the government.

3) Greater Use of Non-Lawyers in Providing Legal Advice.

A key way by which the legal system raises the cost of legal services is through the monopoly which lawyers enjoy in even elementary legal functions. According to the law of most states, no one may provide legal advice to another without being licensed by the state as an attorney. These laws are vigorously enforced. In a recent Florida case, for instance, a stenographer who had been giving customers advice on how to fill out simple legal forms concerning divorces, wills, and other matters was given a 30-day jail sentence.[13]

Many simple disputes and problems do not require an attorney's services. In 1984, for example, 35.1 percent of the cases handled by the LSC were resolved by advice only; another 19.5 percent required only brief service to the client.[14] Many valuable resources would have been saved if more non-lawyers could have handled these cases.

ACHIEVING THE REFORMS

Many of the reforms proposed could be achieved by the states and local bar associations without waiting for action by Congress.

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13. See, Maxwell Glen and Cody Shearer, "Public May Gain From Legal Services Competition," Springfield Union, January 18, 1985. Due to a public outcry, the sentence was later set aside by the Governor.

14. Legal Services Corporation, Field Program Data, 1985, p.39

Nevertheless, assuming Congress is to continue to allocate federal funds for legal services, it should consider granting money directly to states, state courts systems, or to local bar associations. These institutions not only could tailor programs better to local needs, but would likely avoid the politicization which has plagued the LSC.

If the LSC itself is to take a lead in encouraging beneficial reform, it must be given more flexibility in its spending. Currently, the LSC is forced to continue to fund each of its grantees each year, unless an actual contract violation takes place. It is thus tied to the outdated and limited staff attorney model for the delivery of services, and is unable to shift resources to more promising areas. It is essential for Congress to change this restrictive funding rule, so that the LSC can change.

ALTERNATIVE SOURCES OF FUNDING

In addition to improving the availability of the legal system to the poor, reforms would reduce the overall cost of legal services. Some funds, of course, would still be needed. But given the public's determination to balance the federal budget, it is essential that the legal services providers begin to look to sources other than the federal government for revenue. Among such sources are:

Private donations: In 1985, Legal Services Corporation grantees received about $22.7 million in donations from foundations, bar associations, and other private groups such as the United Way.[15] While this amount is not insignificant, it represents less than one dollar in private resources for every fourteen dollars which come from the federal government. So far, however, grantees do not try very hard to raise private funds. Thus the total could be increased substantially. The federal government should make its own contributions contingent upon the receipt of a certain level of funding from the private sector, under a matching funds arrangement.

Client contributions: Currently no LSC client is charged for services, regardless of the individual's ability to pay. A fee system should be established, by which clients pay for legal services in accordance with their income level. In addition to increasing the LSC's funds, this would, explains Lorain Miller, the representative of the client population on the LSC Board of Directors,

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15. Legal Services Corporation, op. cit., p. 12.

help clients assert greater control over their case, ensuring that the needs of the client, rather than the attorney, are addressed.[16]

Interest on Lawyers' Trust Accounts (IOLTA): Lawyers are often asked to hold small amounts of money in trust for their clients. Individually, these funds are often too small to accrue much interest, but when combined, they can generate substantial amounts. Over the past three years, many states have established programs to donate these proceeds to legal services for the poor. In 1985, the 17 states with such programs accrued $27 million in extra funds. Potentially, IOLTA could provide well over $100 million for legal services. These programs should be voluntary on the part of lawyers and their clients, however, as they must have the ultimate say over how their funds are used.

State and local funds: State and local governments, which provided $20 million to LSC grantees in 1985, should shoulder more of the legal services load.[17] For the most part, it is state laws and state rules of court which have made the legal system inaccessible to many of the poor. Greater state responsibility for funding would provide the necessary incentives for states to reduce the costs of their legal systems.

CONCLUSION

The current method of providing the poor with access to the legal system, operating a single, government funded staff of attorneys in each local area, is outdated and ineffective. Alternatives exist which will 1) reduce the cost and 2) increase the quality of services. Greater competition in the delivery of services, greater use of voluntary resources, and delegalization should all be considered.

There is no need for a federally funded corporation to be involved in delivering these services. A reduction in legal costs due to reform would reduce steadily the need for any governmental involvement, and the states and the private sector could provide for any remaining needs. If the LSC is to continue to provide services, however, it must be given the flexibility needed to reform.

For too long, supporters of the Legal Services Corporation have portrayed any criticism of the program as an attack upon the principle

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16. Letter from Lorain Miller to Senate Labor and Human Resources Committee, April 26, 1985.

17. Legal Services Corporation, op. cit., p. 14.

of equal access to justice. This simply is not the case. It may even be LSC's supporters which are cheating the poor. By clinging to a single, ineffective method of providing legal services, and concentrating its efforts on political change, rather than the needs of its clients, the Legal Services Corporation has ignored reforms and innovations which would increase access to justice and help the taxpayer. It is time for those options to be explored.

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