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THE LEGAL SERVICES CORPORATION: NEW FUNDING, NEW LOOPHOLES, OLD GAMES

(Updating *Backgrounder* No. 1057, "Why the Legal Services Corporation Must Be Abolished," October 18, 1995.)

During the 1980s, supporters and employees of Legal Services Corporation (LSC) grantees fought efforts to reform federal subsidies to the Corporation, both by mounting a massive lobbying campaign—paid for in part by federal funds—and by devising loopholes to avoid the few restrictions that eventually were imposed. Faced with renewed pressure to reform and cut spending in 1995, the LSC responded with a new set of subterfuges and strategies designed to assure business as usual.

The LSC's actions during the past year prove that the legal services network is fundamentally unreformable. In addition, the efforts of LSC grantees to secure new funding sources indicate that subsidized legal services for the poor would continue to be available even without federal aid. It is therefore time to abolish all federal funding for legal services.

During the FY 1996 appropriations process, congressional leaders struck a compromise which included reduced, though still significant, funding for the LSC coupled with a promise to end the federal subsidy by 1998. In light of the past year's events, Congress should reaffirm its decision to phase out federal subsidies by 1998 in the FY 1997 Commerce, Justice, State, Judiciary, and Related Agencies appropriations bill.

Background

Federally funded civil legal assistance to the poor, first offered under Lyndon Johnson's War on Poverty, was institutionalized in the Legal Services Corporation Act of 1974. From its inception, the Legal Services Corporation, with its 323 local affiliates and 17 support centers, has been viewed as one of the most politicized of federal programs. Liberals have cheered LSC as a force for "social justice," but conservatives have criticized it as offering taxpayer funding for radical activism and expansion of the welfare state.

Though President Ronald Reagan's attempts to abolish the LSC—the first full-scale effort by conservatives to end the program—failed in the face of congressional opposition, in the 1980s abuses uncovered by the U.S. General Accounting Office (GAO) and a Senate committee led to some restriction of political activity by grantees. Predictably, legal services programs fought even the most modest attempts to rein in their political activities. Grant recipients, for instance, fought a protracted battle in the federal courts over a regulation forbidding the use of federal funds for congressional redistricting litigation and lobbying.[1]

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

With the seating of the 104th Congress in January 1995, the legal services program found itself for the first time under the jurisdiction of a largely conservative Congress. Given the LSC's history, conflict was inevitable. Conservatives sought to eliminate federal funding for both policy and budgetary reasons. LSC grantees are among the leading opponents of welfare reform and chief litigators for left-of-center causes; moreover, the LSC budget, as part of discretionary domestic spending, offered a prime target for almost every plan to balance the federal budget.

Despite a full-scale lobbying effort launched by LSC grantees and their allies, Congress approved a phased elimination of all federal LSC funding. The omnibus spending bill approved by Congress and signed into law by President Clinton in late April 1996 reduced LSC's budget from $400 million in FY 1995 to $278 million in FY 1996. Further reductions are planned for next year, with an end to federal funding in 1998.

Additionally, the 104th Congress imposed numerous restrictions on the types of cases in which LSC grantees could be involved. The Clinton-appointed Corporation and its grantees responded by returning to the strategy LSC had used effectively in the Reagan years: exploiting all possible legal loopholes. The efforts of legal services lawyers to avoid compliance with new restrictions have reinforced the conviction of many congressional critics that the politicized legal services fund must be eliminated from the federal budget.

The 104th Congress: Phased Elimination and New Restrictions

Intent on cutting the deficit in early 1995, the new Congress proposed a recission of $17.1 billion in federal spending, including $15 million from the LSC. Legal services supporters responded with vitriol. In February 1995, for example, American Bar Association President George Bushnell attacked conservative critics of legal services as "reptilian bastards."[2] Congress and President Clinton eventually agreed to rescind $15 million of the $415 million FY 1995 LSC budget.

The general commitment to achieving a balanced budget placed heavy pressure on moderate Members of the 104th Congress, who otherwise might have spared the LSC, to go along with significant cuts. The May 1995 budget resolution, which passed along party lines, therefore endorsed a phased elimination of LSC spending in which the adjusted funding level of $400 million for 1995 would be reduced to $278 million for FY 1996, $141 million for FY 1997, and zero for FY 1998.

Although the budget resolution sets forth the general budget plan for LSC, actual appropriations are made through a separate process. The House Appropriations Commerce, Justice, State, and Judiciary Subcommittee, chaired by Representative Harold Rogers (R-KY), recommended an FY 1996 funding level of $278 million—the amount specified by the House budget resolution. House conservatives, however, mindful of how legal services groups might thwart welfare reform and other key elements of their agenda, advocated an immediate end to all LSC funding. The fact that the Legal Services Corporation Act had not been reauthorized since its expiration in 1980 gave LSC's foes an opportunity to use House rules to challenge funding for an unauthorized program.

Within this framework, the House Republican leadership met with the interested parties and struck an agreement to protect legal services appropriations from a floor challenge with the further understanding that the terms of a planned reauthorization bill would be added as an amendment, or rider, to LSC appropriations. The reauthorization legislation then under consideration included elimination of the LSC coupled

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1 *Texas Rural Legal Aid, Inc., et al. v. Legal Services Corporation*, 940 F. 2d 685, 291 U.S. App. D.C. 254.

2 Al Kamen, "Reptilian Reference Riles Republicans," *The Washington Post*, February 20, 1995.

with block grant funding to the states, to be used to provide legal services, and far stricter prohibitions on political activities than in prior legal services legislation.

In mid-1995, the House Judiciary Subcommittee on Commercial and Administrative Law, chaired by Representative George W. Gekas (R-PA), held hearings and voted out a bill containing many of the needed reforms, including elimination of the LSC and the block granting of legal services funds. However, the full House Judiciary Committee—reflecting both its more liberal membership and the influence of the organized bar—narrowly passed a number of amendments extending the life of the program and increasing its spending levels. This new bill, unacceptable to House conservatives as well as to the Republican leadership, was never brought to the floor for a vote.

In the Senate, Phil Gramm (R-TX), a longtime critic of the LSC, chaired the Appropriations subcommittee that reported out an even lower funding level for LSC than had been reported by the comparable subcommittee in the House: $210 million. That figure survived a vote by the full committee, but an effort on the Senate floor—led by Senator Pete Domenici (R-NM), aided by the votes of 15 other Republican Senators and most Democrats—narrowly defeated the Gramm proposal, replacing it with a much higher funding level of $340 million.[3]

A House-Senate conference committee agreed to $278 million for LSC along with restrictions on lobbying, prison litigation, class action suits, illegal alien representation, and lawsuits against welfare reform, but President Clinton vetoed the appropriations bill on December 19, 1995. The LSC appropriations thus became part of a long series of continuing resolutions which contained none of the proposed new restrictions, leaving legal services programs free to continue many of the same ideological and political activities that had motivated the 104th Congress to cut the program.

On April 24, 1996, the President signed a new appropriations bill which reduced LSC funding to $278 million, the figure reported out by the original House-Senate conference committee. This bill also eliminates all funding for LSC's 17 support centers, some of which have engaged in litigation supporting the provision of government services to illegal aliens and opposing parental consent requirements for adolescents seeking abortions. These major cuts in the LSC budget are clear victories for congressional conservatives.

Nearly as significant as the cuts in LSC funding are the restrictions placed on the types of cases LSC grantees may pursue. Grantees no longer may file challenges to welfare reform, for example, and class action lawsuits—traditionally a major weapon in the grantee arsenal—now may be filed only with the approval of the Corporation. Moreover, legal services lawyers are barred from representing prisoners, illegal aliens, and public housing residents being evicted for drug-related crimes.

Replacing Federal Funds and Avoiding New Restrictions

During the fight over the future of legal services, the LSC empire's 4,000-plus attorneys, many with activist backgrounds, organized rallies, lobbied Congress, wrote op-eds, held demonstrations, and undertook direct-mail campaigns. A similar lobbying effort to counteract the Reagan Administration's effort to eliminate the LSC in the 1980s was investigated by the GAO, which found that federal funds intended for the provision of legal services to the poor were diverted to the LSC's political "survival campaign."[4] Perhaps even more significant than their lobbying efforts was the fact that grantees sought additional non-federal funding and sought to create new loopholes by which to avoid federal restrictions.

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3 Naftali Ben-David, "LSC Wins Senate Battle But War Looms," *Legal Times*, October 2, 1995.

4 Hearing, *Oversight of the Legal Services Corporation, 1984*, Committee on Labor and Human Resources, U.S. Senate, 98th Cong., 2nd Sess., April 11, 1984, p. 63.

Federal budget numbers do not begin to reflect the actual funding available for legal services programs. The 323 programs funded by LSC also receive in excess of $250 million a year from other sources, including foundations, state governments, legal fee awards, and the organized bar's Interest on Lawyers Trust Account programs. Without exception, in each of the last ten years, combined funding for legal services grantees from non-LSC sources has increased.

Efforts to raise non-federal revenues have increased significantly over the past year. According to the LSC, at least 27 states are studying ways to provide additional funding for legal services programs.[5] Typically, most proposals seek an increase in filing fees for civil cases, with the proceeds earmarked for legal services:

- ✗ In May 1995, Tennessee increased the filing fee for civil cases by $1 and designated the increased revenue for legal services programs.
- ✗ In February 1996, a bill was introduced in the Maryland legislature to raise $4.5 million for programs, including legal services, by adding a surcharge to civil case filing fees.[6]
- ✗ In New Jersey, a proposal to increase fees for filing civil motions from $135 to $160 was endorsed by the New Jersey Bar Association and the head of Legal Services of New Jersey. The entire $25 increase in filing fees is slated to be turned over to Legal Services of New Jersey. If the proposal is enacted, legal services will receive a projected $8 million increase in funding.[7]

New Loopholes

Because President Clinton has signed the appropriations bill, the new restrictions on legal services are now in effect. Many of the activist lawyers who lead legal services programs resent these regulations, which will bar a wide range of controversial activities undertaken by LSC-funded lawyers in the past, including lobbying, class action suits, and the representation of illegal aliens, drug dealers, and other criminals.

Even more upsetting to opponents of reform, the new prohibitions would close the largest loophole in the legal services program by forbidding the use of non-LSC funds to support activities for which LSC funds also may not be used. In the past, legal services lawyers could evade virtually any congressionally imposed restriction by using, or claiming to use, non-LSC funds which are not subject to this limitation. Critics of legal services note that money is fungible, as is a lawyer's time. The absence of mandatory timekeeping, along with the fact that case files are closed to outside monitoring, made it easy for legal services programs to use federal funds for restricted activities.

The new restrictions have left legal services activists looking for new ways to continue their controversial activities. Using a variation of a strategy tried in the 1980s, grantees are seeking to evade the restrictions by setting up new closely affiliated but legally separate entities. A 1985 GAO investigation determined that such affiliated groups often engaged in activities prohibited to LSC grantees and that the relationships between these two sets of groups were so close that LSC should consider them one group for purposes of complying with restrictions.[8]

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5 Mark Curriden, "LSC Grantees Plot Ways to Stay Alive," *ABA Journal*, December 1995.

6 Mark Hyman, "Court Surcharge Proposed to Fund Legal Services," *The Baltimore Sun*, February 2, 1986.

7 Andy Newman, "Legal Services Seeks Ways to Make Up Lost Money," *The New York Times*, December 24, 1995.

8 U.S. General Accounting Office, "The Establishment of Alternative Corporations by Selected Legal Services Corporation Grant Recipients," B-202116, August 22, 1985.

Growing numbers of legal services groups have announced they will refuse LSC funds because of pending restrictions. Foremost among these are Community Legal Services (CLS) of Philadelphia; the Legal Aid Society of Santa Clara, California; three Washington State grantees; and Greater Boston, Massachusetts, Legal Services. The strategy is simple: Such "former" grantees will continue to receive bar support, private funds, and state support for soon-to-be-restricted activities; meanwhile, new organizations will apply for and receive LSC funds to use in non-prohibited cases. Many of the new organizations have been created by attorneys affiliated with the "former" grantees, which would be free to handle political and ideological cases.

The possibility that former LSC grantees and new grantees will share office space and even staff means that, once again, it will be difficult to ascertain whether federal funds are being misused. Early signs of close ties between former and current grantees, however, are already apparent:

- ✗ The Philadelphia Legal Assistance Center, for example, was formed by 12 lawyers from Community Legal Services to assume CLS's non-prohibited cases, setting up shop in the same building as CLS.[9]
- ✗ Members of the Legal Aid Society of Santa Clara's executive committee opted to refuse LSC funds and set up a new organization to take LSC funds. LAS Vice President Elizabeth Shivell explained the tactic in an unguarded moment: "If [Congress] can screw people with technicalities, we can unscrew them with technicalities. That's why we're lawyers and not social workers. Two can play this game." A bar publication reported that many poverty lawyers worried that her remarks could cause trouble with Congress.[10]

A top LSC staff member, Robert Echols, was quoted as describing the rash of new groups as a perfectly appropriate approach.[11]

The Legal Services Corporation—run by a Clinton-appointed board and run by senior-level staff with strong ties to the groups they are charged with regulating—has provided guidance to its programs on this issue. In a December 1995 memo to its 323 field programs on "Applicability of Restrictions to Interrelated Organizations," LSC set forth the factors to be considered in determining whether one group controls another, thereby subjecting both groups to the new restrictions. Among the eight criteria used to determine control are:

- ✗ Any overlap of officers, directors, or managers;
- ✗ Contractual and financial relationships;
- ✗ A close identity of interest; and
- ✗ A history of relationships among organizations.

The LSC memo pointed out that any determination as to whether two groups are subject to common control would consider the "totality of circumstances," with the "presence or absence of any one or more of these factors" not necessarily determinative. Translation: LSC staff, with close ties to LSC grantees, will be the sole judges of whether two groups sharing office space, staff, and other resources are subject to common control, and therefore to the new restrictions.

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9 *The Legal Intelligencer*, January 30, 1996.

10 Carolyn Newburgh, "Legal Aid Divides to Conquer," *California Lawyer*, February 1996.

11 *Ibid.*, p. 24.

Other New Loopholes: "Restriction" of Drug Cases and the Cohen Amendment

Legal services lawyers have incurred the bipartisan wrath of Congress by representing public housing tenants in drug-related eviction cases. LSC-funded lawyers, for example, thwarted attempts by then-Housing and Urban Development Secretary Jack Kemp in 1991 to expedite evictions to clean up the serious drug problem in public housing.[12]

Moreover, the poor—those whom these programs ostensibly are designed to help—have lined up almost uniformly in opposition to legal services and in favor of expediting drug evictions. In a major case now pending in New York City, representatives of New York's 500,000 public housing tenants have entered a court case on the side of their landlord, the New York Housing Authority, to support expedited drug evictions. On the other side is the Legal Aid Society, an LSC grantee once chaired by the Corporation's current President, Alex Forger.[13]

Faced with the likelihood of tough new restrictions imposed by Congress, the LSC board made a virtue out of necessity: It promulgated a new regulation purporting to restrict representation in drug-related eviction cases. This regulation appeared in the *Federal Register* on April 1, 1996. While appearing to crack down on one of the most indefensible of legal services activities, however, the new regulation actually is filled with loopholes.

- ✗ It allows family members who knew about and benefited financially from drug activity to be represented, provided they are not charged with a crime.
- ✗ It specifically allows legal services lawyers to use non-LSC funds to represent the drug dealer.
- ✗ But nothing in the regulation prohibits legal services lawyers from filing actions to challenge attempts by federal, state, and local governments to expedite drug-related evictions from public housing.

Proponents of legal services have tried to minimize this issue by claiming that such cases are rare; critics, on the other hand, point to the action against Secretary Kemp and the case pending in New York City to show that legal services' involvement delays drug-related evictions, thereby harming hundreds of thousands of low-income tenants.[14] In short, the new regulation offers the perfect metaphor for the claim that the legal services program finally is reforming itself: While doing nothing to deter a legal services lawyer from continued involvement in drug-related evictions, it gives LSC a pretext for telling Congress that it has cracked down on such representation.

Despite the LSC's obvious failure to follow the new restrictions, the legal services empire scored a major victory in 1996 with the inclusion of the Cohen amendment in the omnibus spending bill. This amendment, sponsored by Senator William Cohen (R-ME), allows grantees to comment on legislation and participate in legislative rulemaking. The effect of the Cohen amendment is to provide a major loophole for legal services lawyers disposed to engage in lobbying activities.

Conclusion: Looking to the 105th Congress

Although LSC escaped total defunding in 1995, it lost nearly one-third of its federal appropriation. Fearing that Congress would impose several important limits on grantee activities, the LSC, its grantees, and their affiliates worked to devise new strategies to avoid complying with such restrictions. As a result, conservatives in Congress remain determined to push for phased elimination of all federal LSC funding.

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12 *Richmond Tenants Organization, et al., v. Jack Kemp, Secretary of Housing and Urban Development, et al.*, 956 F. 2nd 1300.

13 Shawn G. Kennedy, "Tenants Press for Earlier Eviction of Drug Dealers," *The New York Times*, August 15, 1994.

14 See also *Yesler Terrace Community Council, et al., v. Henry Cisneros, Secretary of Housing and Urban Development*, 37 F. 3d 442; Evergreen Legal Services challenged Washington State eviction procedures regarding evictions for criminal activities.

The House Republican leadership, in accordance with the agreement reached last summer, is expected to ensure that the Rules Committee will not protect LSC from a point of order when the full House considers the FY 1997 appropriations bill containing LSC funding. This could open the opportunity for the House to "zero out" LSC. So far, there is no reliable head count, but it should be remembered that whatever happens, the Senate—given last year's performance—is not likely to go along.

The major battle in Congress therefore will be over whether the budget resolution's FY 1997 figure of $141 million for LSC will be followed. This would represent a sharp cut from the $278 million voted for FY 1996. If Congress approves $141 million, the stage will be set for the final showdown on legal services. The 105th Congress, to be elected this November, will decide whether it has the political will to vote for the final installment of the budget resolution plan for LSC: zero support from the American taxpayer by FY 1998.

In reducing LSC's appropriation by one-third while placing significant restrictions on the allowable activities of LSC grantees, the 104th Congress took major steps to reduce the tendency of grantees to pursue frivolous and politically charged lawsuits at taxpayer's expense. LSC grantees responded by attempting to blunt the impact of congressional efforts, primarily by seeking new, non-federal revenue sources or by restructuring their organizations to circumvent the new regulations. Through these actions, grantees have shown once again that legal services cannot be reformed. It is past time for Congress to eliminate all federal funding for this program.

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