U.S. COMMISSION ON CIVIL RIGHTS
BRIEFING ON LEGAL SERVICES CORPORATION
May 9, 1997

CHAIRPERSON BERRY: I welcome the panelists to this briefing. It's on the civil rights implications of issues related to the Legal Services Corporation, which is a private corporation set up by Congress back in 1974, designed to channel Federal support into programs giving legal assistance to the poor in non-criminal proceedings.

So we are interested in how all of the issues surrounding the legal services programs, and what has happened to them, relate to civil rights concerns. In particular, the Vice Chair, who asked for this briefing, expressed a special interest in learning what effect the class action restrictions on the Legal Services Corporation might have on the representation of the poor in civil rights matters where they have concerns.

I want to thank each of the panelists who came today. Some came from California. But those who are local, too, thank you for coming. We're eager to learn all we can about this important subject.

The first person that I'll call upon is Robert Evans, who is the Director of the Washington, DC office of the American Bar Association. He's also the ABA's Associate Executive Director of Governmental Affairs and Public Services Group. He has been the ABA's principal lobbyist on the Legal Services Corporation issue for 18 years, so he should know something about the legal services. He *is* one of the leading experts on the history and need for legal services.

Thank you very for coming, Mr. Evans. Could you make a brief opening statement?

MR. EVANS: Thank you very much, Madam Chairman, and members of the Commission. It's an honor to be here before you and I commend you for looking at this subject.

This has been consistently over the last many, many years, one of the highest priorities of the American Bar

Association in terms of its legislative program and support. We believe deeply in the importance of this program to the rendering of justice in this country.

I was asked if I might, as the introduction indicated, provide a little bit of history, and I will do that very briefly. I expect that your questions will be the more useful part of this session for you, but I will try to sketch out a brief history.

Before doing that, I would make four basic points.

First, access to lawyers is absolutely essential to the rendering of that most basic of civil rights -- justice -- to the Nation's poor people.

Second, despite concerted and intense efforts by the private bar, we have never been able to, I do not believe we ever will be able to, nor do I think we should be expected to, carry the major portion of the burden of providing justice to the poor in this country.

Third, the key component of a delivery system to provide justice is, and remains, a staffed attorney office which is primarily funded under our system by the Legal Services Corporation.

And fourth, sadly, the entire system remains on life support, these 28 years after the formation of the Corporation.

With that said, let me trace briefly a history of this program for you.

The first Legal Aid Society on an organized basis that we are aware of, was started in New York City in 1876 and addressed primarily problems of German American immigrants, perhaps reflective of the fact that these programs have typically looked out for groups in the population who were clearly underrepresented.

In 1920, the American Bar Association began its first formal involvement. Charles Evans Hughes, later a Justice of the Supreme Court, became the first Chair of what is now our Committee on Legal Aid and Indigent Defendants. He spoke at a symposium in 1920 about the need for organized legal aid programs around the

country to meet the legal needs of the poor, and I would like to quote briefly from those remarks.

> "Without opportunity on the part of the poor to secure expert legal aid, it is idle to talk of equality before the law. You may provide the machinery of courts but to have justice, according to law, save in a very limited class of cases where a judge may act as advisor, you must have the aid of lawyers."

Hughes went on to comment specifically about the difficulties of having the private bar exclusively try to provide those services.

> "The high minded practitioner moves in a world to which those most in need are utter strangers. The members of the bar who are most likely to recognize professional obligation to the poor are rarely so circumstanced that they can give aid without a waste of effort, which suitable organization would render unnecessary. And while their sporadic efforts would furnish relief here and there, as chance might offer, a multitude would continue to suffer without redress.
>
> "Moreover, the wrongs of the poor fall into well defined classes and the attorneys for the legal aid societies acquire a wide knowledge and an efficiency in dealing with these cases which enable them to give a service at an office of the organization which could not be duplicated by the best law firms in this city."

So the association for decades worked hard to encourage the spread and strengthening of legal aid societies around the country. In 1922, we were able to identify 33 such legal aid societies and bureaus in the country. By 1965, that number had grown to 248 legal aid offices.

It had become apparent, however, that those legal aid societies were meeting only a very, very small fraction of the legal needs of the poor. And indeed, there were whole areas of the country where there were no legal aid programs at all, particularly in the South and the Western States.

Working with the Administration at that time and in particular Sargeant Shriver in the OEO office, the ABA under the leadership of our then-President, Lewis F. Powell, Jr., unanimously passed a resolution in 1965 endorsing the concept of establishing a Federal program. And that program indeed was established.

The program found itself mired in controversy, as I suppose the program remains even to this day. In 1969, for example, there was a proposal to permit each of the 50 state governors to veto any funding for legal services, Federal money, in a governor's own state. Fortunately, that was rejected by Congress.

In the early '70s there was an effort to impound the congressionally authorized funding for this program, along with that of many other programs. Again, that effort was unsuccessful, but it prompted both public officials and those in the private sector to call for the restructuring of the Federal program and for the establishment of what was hoped to be a politically independent corporation.

Frank Carlucci, President Nixon's appointee as head of the Office of Economic Opportunity, testified before Congress: "It is also clear that the present structure of the legal services program can no longer provide the necessary independence and protection of the legal rights of the poor that is so important in our judicial system of governance."

And so in 1974, as one of his last acts in office, President Nixon did sign into law the act creating the Corporation. And it came into existence in 1975.

The program had $75 million in funding originally. That amount increased regularly until fiscal year 1981 when it reached a level of $321 million. That amount of money permitted the Corporation for the first time to expand the geographic coverage of the program to all parts of the United States and to achieve very briefly a goal they had set of a "minimum access" level of two attorneys for every 10,000 poor people.

I would note that in the population as a whole, you obviously have a much higher figure of practicing attorneys for every 10,000 people -- several multiples of that figure.

But the controversy surrounding the program resulted, in 1981, in a concerted effort to kill the program entirely. Compromises were made during the political process, and the result was a 25 percent cut in the funding of the program, a cut from which it has never recovered.

There have been increases over the years. Some years, flat funding; some years, increases. The program reached two years ago a funding level of $400 million. It was cut back in the last Congress to $283 million. And that is where it sits.

Adjusted simply for inflation, the $321 million from FY '81 would now have to be over $600 million in real dollars to provide the same level of service. Beyond that, the poverty population in this country has increased by one-third since 1980, adding an additional 10 million potential new clients for this program.

What has this meant in terms of the ability to deliver legal services? In FY '81, the program had 1,406 local field offices. There were 6,559 full-time attorneys employed by the program and 2,901 paralegals. The last figures available from the Corporation indicate those numbers are now 1,064 offices, 3,642 attorneys and 1,488 paralegals.

So the core staff program for the legal services movement in this country has been cut down to about half of what it was at its height.

There are, obviously, many other resources. There are roughly $200 million in the most recent fiscal year of non-LSC funds available to the programs around the country. The biggest chunk of those is the IOLTA programs, which is a new source of funding which we can talk about, if you're interested, which came into play in the '80s. It is dependent upon interest rates and it's been declining in the last few years as the interest rates have gone down. There are contributions by bar associations, by

law firms, by foundations, by United Ways in many areas.

In total, they provide about $200 million or roughly now about 40 percent of the total money available to legal services programs. The other 60 percent coming from the Federal Government.

There have been a number of studies of whether the legal needs of the poor are being met. And in the best years, the studies have consistently shown that only about 20 percent of the legal needs of the poor were being met by these combined resources. That figure will obviously be lower with the recent cutback in funding.

As I say, the key component of the legal services delivery system is the staff attorney offices, supplemented by the other sorts of resources that are available. We in the private bar simply would not be able to provide the level of pro bono services that is being provided to clients, absent this core mechanism, which provides the intake, the referral of cases, the training of lawyers unfamiliar with particular areas of practice that are common for the poor.

There are about 150,000 lawyers nationally who are signed up on lists with local legal services programs to do pro bono work. We're proud of that record. I think it is unmatched by any other profession or business or anyone else in this country. Sure, it could be higher. We work hard to try to make it higher. But there is a limit to the capacity of the private bar to assist in these areas.

We, as I say, are strong endorsers of this program. I think its impact, obviously, on minorities in this country is enormous, because, as you all too well know, the percentages of people who are in the poverty community in this country are heavily minority and so the cutbacks in this program directly impact all of those people.

I will leave it to others to talk about some of the restrictions that have been imposed in recent years which more directly affect the civil rights issues of concern to you.

Thank you.

CHAIRPERSON BERRY: Okay. Thank you very much.

Next we have Ms. Gail Laster, who is Director of Government Relations and Counsel for the Legal Services Corporation. Before that, she was counsel to the U.S. Senate Committee on the Judiciary and has been counsel to the Senate Labor and Human Resources Committee.

Ms. Laster will focus her remarks on coordinating legal services activities in support of the Federal appropriations and reauthorization processes.

Ms. Laster, welcome. Thank you very much.

MS. LASTER: Thank you. It's an honor to be here, as well.

Today, our Board of Directors is having a Board meeting -- we have Board meetings every two months, I would say. LSC's Chairman of the Board, the President of the Corporation, as well as the Vice President, are attending the Board meeting, and so they sent me in their place.

I always have to say whenever I speak publicly that, indeed, I am quite mindful of the congressional restriction on lobbying by Legal Services employees. As Director of Governmental Relations, I am allowed to lobby Congress on behalf of the Corporation for our reauthorization and our appropriations process. I'm also allowed to give the public information about LSC, but I am not allowed to do any type of grassroots lobbying or call to arms with Legal Services funds or on Legal Services time. And so I always state that up front.

CHAIRPERSON BERRY: So you're not here to lobby us. You're just to inform us.

All right. Thank you.

MS. LASTER: In case there is a Congressional inquiry about this, I like to make that clear.

CHAIRPERSON BERRY: Make the record clear.

VICE CHAIRPERSON REYNOSO: We'd like to stipulate that this isn't lobbying; right?

MS. LASTER: And having said that, in terms of my written remarks, I have given to the Commission the written remarks of our Chairman and Vice Chair at the House Appropriations subcommittee hearing. We have annual appropriations. The Appropriations subcommittees that have jurisdiction over LSC are the Commerce, Justice, State, Judiciary and Related Agency subcommittee, both in the House of Representatives and the United States Senate.

The committees that have jurisdiction over our reauthorization are different in the House and Senate from each other. In the House, it is the Judiciary Committee, chaired by Congressman Hyde, and it's the Subcommittee on Commercial Law, which is chaired by Congressman Gekas. And in the United States Senate, it is the Labor and Human Resources Committee, which is chaired by Jim Jeffords of Vermont. There's no subcommittee that has jurisdiction over us. It's the full committee.

So that's where we are.

And then, in terms of my remarks, I'd like to talk about what LSC is really all about. I hope I'm not repeating myself for those of you who know about it. But having worked at LSC for three years I find that I am still discovering the different things that our lawyers do with very little resources and with sometimes a lot of obstacles put in their way. But we do a lot and we don't often have the opportunity to really explain to people all that we do.

And we certainly do find that in Congress, whether or not members believe in a Federally funded legal services program, they still do respect the work that our lawyers do for their individual clients and their constituents. And it's very important work.

So if you don't mind, I'd like to just talk about what LSC and our grantees do. Then I'd like to get into the restrictions. And then finally, I would like to talk about the two lawsuits that challenge the restrictions, and just give you an update on those cases.

As you probably know, the Legal Services Corporation is a private not-for-profit corporation. And it's private now but it was once part of the Federal Government. But the Congress and then-President Nixon felt that LSC was subject to too much political influence that way. So LSC was taken out of the Federal Government scheme and is a private not-for-profit corporation organized in Washington, DC

We have 11 Directors on our Board. Five must be from one party; four must be from another party. And then we have two client representatives on the Board who are from our client community. The President appoints the Board of Directors, and they are confirmed by the Senate. The Board of Directors appoints a President, a Vice President and so on.

And we are headquartered here in Washington, DC at 750 First Street, NE, which is near Union Station.

LSC is a grant-making organization. We receive all of our funds from the Federal Government and then we, in turn, give out the funds to organizations who compete for these funds.

Back when the Corporation was first created, LSC divided the country into service areas. They don't correspond to congressional districts among the states. LSC looked at a map of the United States and divided service areas for funding. And these areas are the basis for funding. Organizations compete for funding for a basic service area.

LSC had to change those service areas dramatically when our funding was severely cut. In fiscal year 1995, at a high, we were funded at $415 million. For fiscal year 1996, our funding was cut to $278 million. So in order to best deal with that large a cut in funding, we had to redraw our service areas.

In the past, LSC's formula funding was based on several different factors. But our fiscal year 1996 appropriations bill required us to have strictly per capita funding. Now LSC looks at the poverty population determined by the 1990 census, and based on that, LSC determines how much to fund a service area and the grantees who successfully compete for the funds to serve a

particular area.

And you may have noted that I keep referring to our appropriations language. The reason is that LSC has never been reauthorized. LSC was created in 1974 but LSC has never, for whatever reasons, been able to get a reauthorization bill passed. And so our governing language is always placed on our appropriations bills and they're called riders on the appropriations.

Senator Byrd often comments about how you shouldn't legislate on appropriations bills but that's the way LSC survives. So whenever I talk, I'm not talking about authorization -- I'm talking about appropriations bills.

LSC currently funds about 280 local programs that serve every county in the Nation. And I think that's important when we consider eliminating the Legal Services Corporation. LSC does, despite our cut in funding, still provide service throughout the country. And there's no question that if there wasn't a Federally funded program, in certain areas of the country, particularly rural areas and Southern areas, there might not be the same type of presence in terms of legal services.

You might find that in the Northeast or here in Washington, DC you would have some level of coverage. But there would not be the ability to provide services throughout every county in the country.

In 1995 LSC resolved 1.7 million cases benefiting some five million individuals, the majority of them children living in poverty. One out of every five Americans is potentially eligible for legal services.

Now, the most common categories of cases handled by Legal Service grantees are family, housing, income maintenance, consumer and employment. Case types frequently encountered include evictions, foreclosures, divorces, child custody, support, spousal abuse, child abuse, neglect, wage claims, access to health care, and unemployment or disability claims.

And in terms of who our clients are, of course, our

clients are among the poverty population but many of our clients are not unemployed. We represent the working poor. And sometimes we have a larger client base than one might think.

For example, something that I didn't know until I came to work for the Corporation is that legal services programs play a great role whenever there's a disaster. We work with FEMA, the bar association and a variety of volunteer lawyer organizations, whenever there is a man-made or natural disaster, to provide services to people who, all of a sudden, find themselves among the ranks of the poor.

One day folks are middle class, but when the flood sweeps away all their belongings, their possessions, it's legal services attorneys and legal services programs who help them. Programs help FEMA get the brochures out about how to apply for state and Federal aid.

It's legal services programs that train local bar lawyers and train volunteer lawyers to represent people in terms of getting their benefits and making claims. And it's legal services attorneys who have the experience in this area. They are able to provide some consumer services and help individuals who might be the targets of unscrupulous contractors who, you know, say, "Pay now and I'll fix your house," but come time to fix it, they're not there.

So, LSC programs have a lot to do with disaster relief, and indeed, when additional appropriations are made for disaster victims and relief, some of the money goes to legal services programs in order to help provide that aid or relief.

So our clients are quite varied and sometimes they're middle class and sometimes they're poor.

In terms of the restrictions, again, the restrictions that have been placed on legal services programs were part of our appropriations legislation and these restrictions were part of the fiscal year 1996 appropriations legislation.

For fiscal year 1996 it was an omnibus appropriations bill and I'm sure you all remember it. That was the year of the

two Government shutdowns and all kinds of negotiations and legal services was right in the thick of it. And the result was an appropriations bill that had many new restrictions on the types of activities that legal services programs or grantees could engage in on behalf of their clients.

The main one, however, I would say, is for the first time Congress said that the restrictions on the use of Federal funds also extended to funds from any other source. And some of our programs are fortunate enough and work very hard to get funds from other sources -- I think you have representatives from two programs who do it quite well here today. They work very hard at getting other sources of funding. They get private donations. They get funding from IOLTA. They get funding from state and local governments. They have contracts. And they work hard at trying to leverage legal services funds for more funds.

And so for the first time, Congress said that the restrictions that they have placed on Federal funds also extends to the funds from private and other public sources.

The bill also was very different, in that for the first time it required competition for the awarding of grants. In the past, there had been presumptive refunding, which was done, I think, in order to have the continuity of legal services. And indeed, cases unfortunately don't always resolve themselves within calendar years or within fiscal years, and judges don't always make their rulings with such regularity.

So LSC had presumptive refunding for its programs. But for fiscal year 1996, that was not allowed. Congress required us to have competition and we implemented that requirement.

In terms of what the restrictions are -- I'll now speak to you about that. Under the new restrictions, legal services attorneys can no longer participate in class actions of any type. They may not communicate with local, state or Federal officials or regulators about proposed or current laws or regulations affecting their clients, except that they may use non-LSC funds to respond to written requests from officials.

They may not represent prisoners or certain categories of aliens. They may not collect attorneys fees to which they would otherwise be entitled by law. They may not challenge welfare reform measures as unconstitutional or otherwise illegal.

And with a few minor exceptions, these restrictions now apply to funds from state and local governments and private sources, as well.

Because of these new restrictions on funding, a few programs with significant fundings from other sources decided not to apply for legal services funds for fiscal year 1997. But most grantees, indeed, did reapply.

And that would lead me into the next item I wanted to talk to you about. Given this new congressional scheme and being that lawyers are involved there were two lawsuits that arose from it. The first one is *Legal Aid Society of Hawaii v. Legal Services Corporation.* That case was filed on January 9th, 1997 in the United States District Court in Hawaii and was brought by five legal services programs from Hawaii, California and Alaska, along with two private donors and individual staff attorneys to remove the restrictions on the representation of low income Americans with funds provided by non-LSC sources, such as states, municipal bodies, bar associations, charitable associations and private donors.

So basically, the lawsuit challenged the constitutionality of the Federal Government to, number one, impose these restrictions on non-LSC funds, and, number two, for LSC to carry them out. And in the Hawaii case, the judge's ruling was mixed. The judge said that indeed Congress had a right to impose restrictions on Federal funds and non-Federal funds. He also said Congress had a right to impose the specific restrictions in the bill.

However, then the judge looked at the cases of *Reagan v. Taxation with Representation, Federal Communications v. League of Women's Voters.* And the main one he relied on is *Rust v. Sullivan.* And in *Rust* -- I don't know if you're familiar with

that case. It's a case about abortion, and is not about legal services.

But the *Rust* case, if you remember, involved the Bush Administration. There was an Executive Order which affected employees of Title 10 clinics, or family planning clinics. And Title 10 funds are used for family planning. And the Executive Order said that in the course of providing information about family planning, employees could not mention the word abortion, refer somebody for an abortion or talk about that as an option. And this Executive Order was challenged in the courts.

And the case was challenged on the Federal level and it was heard by the Supreme Court. And the Supreme Court said, *yes, indeed, this restriction on referral for abortion is proper. Congress can do this. The President can do this. This doesn't violate First Amendment rights.* However, the Court also held that there must be an alternative outlet or sufficient outlet for a patient to receive information about abortion, that procedure, if the patient wanted to. And so there must be certain things in place to allow this alternative method.

In our case, the judge in Hawaii said that although Congress can impose these restrictions, has the power to do it, the restrictions are constitutional, the restrictions have constitutional implications. And then the judge looked to the *Rust* decision to see whether or not the Legal Services Corporation had provided sufficient alternative methods of expression. And he found that indeed Legal Services Corporation had not done that and that our regulations that pertained to transfer of funds and interrelated organizations were unconstitutional.

So, the judge enjoined the Corporation from enforcing certain restrictions that had constitutional implications. To anticipate your next question, I would add that class actions were not among those that he found had constitutional implications that required an alternative source of speech.

So, in light of the Court's ruling, the Corporation looked at its regulations and tried to understand where the judge

was coming from. LSC defended the restrictions in this action. We wanted to have the restrictions upheld. LSC was not in favor of them when they were first proposed but we have vigorously defended them and we have vigorously enforced them.

So when LSC got this opinion from the judge, LSC looked at its restrictions and his court decision and tried to figure out the best way to indeed preserve the restrictions that Congress intended. Because the support in Congress is for a restricted Legal Services Corporation.

So we amended our regulations to fit the model that the Supreme Court -- I believe it was Justice Rehnquist -- said was appropriate in the *Rust* case in terms of providing an alternative method of expression. And based on that, the judge in Hawaii has now issued an order to show cause why the case is now not moot and why his temporary order -- well, actually, preliminary injunction -- should not be vacated. Because indeed he believes the Corporation, on the face of it, may have actually mooted out the case and may in fact be complying with the Constitution. That's one case.

And the second case that we're facing is called *Valasquez v. Legal Services Corporation and Legal Services for New York City*. And that's a class action lawsuit filed on January 14, 1997 in the United States District Court for the Eastern District of New York by a welfare recipient who was formerly represented by legal services of New York in a welfare reform case, which was probably a class action, as well as varied client groups whose members are eligible for LSC funded services. And also plaintiffs are four New York City Council members, all of whom voted to appropriate public funds in support of legal services recipients. And that case also challenges the constitutionality of the restrictions imposed by Congress on LSC recipients. We are awaiting a decision on our motion in that case.

Again, LSC is defending the restrictions in that case. We are asking the judge to uphold the restrictions and to deny the motion for a preliminary injunction.

And I would note the Department of Justice, in light of the change in our regulations, has come in on the side of Legal Services, as well, and asked the judge to uphold the restrictions as constitutional.

So, I think that's all that I wanted to say and I think I've covered the basics. I appreciate the opportunity to be here today.

CHAIRPERSON BERRY: Thank you very much. That's just the kind of information we needed.

Does any Commissioner have any questions for either Mr. Evans or Ms. Laster?

Vice Chair?

VICE CHAIRPERSON REYNOSO: Madam Chair, we'll hear, I take it, from some of the specific programs later in terms of how it's affected them?

CHAIRPERSON BERRY: Next panel. Yes.

VICE CHAIRPERSON REYNOSO: But I wonder from the point of view of the Legal Services Corporation or the ABA what you hear from the programs in terms of the impact that this is having on civil rights of the poor?

In times past, class actions have been a very important part of protecting civil rights of the clients in the various programs. The representation of non-citizens has been very important. There are a whole series of areas in which legal services have provided Herculean efforts in protecting civil rights and those seem to be quite restricted now.

At least in terms of the formal restrictions, I just wonder what you've heard has been the practical effect in the regional offices.

CHAIRPERSON BERRY: Should we ask Mr. Evans and Ms. Laster that or just --

MS. LASTER: Go ahead. I'll do the second.

MR. EVANS: Let me just make a couple of general comments. One, on the issue of class actions, there seems to be among critics of class action suits an assumption that class

action suits are suits designed to achieve particular objectives, usually a liberal agenda.

Class actions are basically a tool of the legal profession which are used by corporations and private individuals and all kinds of people. It's really a tool for judicial efficiency. That is, if you can combine cases which have many, many people who have incurred the same problem into one action, then you do not need to have a series of the same actions over and over and over again.

So, our association is supportive of class actions as a useful tool for lawyers in whatever kind of practice they are in over the years. Obviously, the impact of requiring that individual suits be brought and that you not have available a class action tool is a very unfortunate development, I think, in terms of the ability to get justice done for many, many people. And also, it has a most undesirable effect on the court system, because then you tie the courts up with lots of individual cases.

We are only at the front end, I think, of seeing how these restrictions play out and so I don't know whether there is much in the way of information. I've heard a lot of concern about it, but Gail would perhaps better know about it. Or other witnesses.

MS. LASTER: I would just repeat what I said earlier. That indeed, because of the restrictions and other considerations, we had 10 programs not reapply for funds. And one of the major ones that did not reapply was New York City Legal Aid.

And they said that it was a painful and difficult decision because they received a lot of funding from the Legal Services Corporation. But the initial result was that some programs determined that they could not live with these restrictions. And that happened in about 10 cases.

VICE CHAIRPERSON REYNOSO: And why did they say they couldn't live with the restrictions? What was their rationale? What in terms of representing the poor, particularly in terms of civil rights, did they feel they could not do that caused them to

reject the Federal funding?

MS. LASTER: Specifically in the case of New York, I think their concerns were about the class action lawsuits. The programs wanted to be able to use that as a litigation tool. Programs also expressed concerns about the attorneys' fees provision. Some programs felt that indeed the award of attorneys' fees was the normal course of litigation. That it was an appropriate way to sanction inappropriate activity. They believed it wasn't hitting the Government twice in terms of paying. But that was also a major source of funding for more legal services to poor people.

But I would say the main concern was about the restriction on non-LSC funds. I think we might have had fewer people decline to compete for our funds if you'd had the same restrictions -- no class actions, no attorneys' fees -- but only on LSC funded activities.

In addition, some LSC programs -- our former programs that said we will not reapply -- said their main concern was that they couldn't -- for the first time -- use their non-LSC funds to represent certain aliens. This restriction was important to programs who received state and local funds for that purpose. Some programs also received private funds for that. There were also programs who had contracts with states to represent prisoners. Again, not in criminal matters, but in civil divorce cases, because the state felt that the legal services program was familiar with this type of case and would be the best organization to handle those matters. And so in some cases programs said, *well, I've already got this contract that's ongoing and if I can't get out of the contract, then indeed I can't take your LSC funds.*

But having said that, I would also say that Congress didn't say that LSC programs can't bring civil rights cases. And I'm not trying to put the idea in their minds. So, indeed, we can still bring civil rights cases. Some of those cases, I will admit, are controversial. One LSC program brought a case in Texas, a voting rights case, that has now become the source of

huge controversy.

So indeed, our programs can still litigate the individual civil rights matter -- and LSC is grateful for that. And indeed, our programs are. And I think that the programs that have competed for and accepted LSC funding don't complain because they have decided to be a part of the LSC structure. But the programs that have declined to compete for funding are the ones that have been the most vocal about the restrictions and the limits on representation of the poor.

VICE CHAIRPERSON REYNOSO: I guess on a civil rights case, what you do is file 100 individual cases, then you file a motion to consolidate them or something of that sort? I'm not quite sure how they would handle it. But as indicated by Mr. Evans, the whole notion -- much of the notion -- is one of judicial economy and that has been removed.

CHAIRPERSON BERRY: You shouldn't have mentioned that. Now there'll be a restriction on consolidation.

(Laughter.)

Only kidding.

MR. EVANS: I was taking notes.

(Laughter.)

VICE CHAIRPERSON REYNOSO: I don't have anything further. Thank you.

CHAIRPERSON BERRY: Commissioner Horner?

COMMISSIONER HORNER: Yes.

Mr. Evans, you suggested that the loss of the ability to engage in class action suits was primarily a problem because of the loss of ability to operate efficiently. But I would really ask you if in fact that might not be a bit disingenuous as an explanation for the primary change in what has happened with the loss of class action.

And the reason I ask that is that it's been my impression over the years, without being too close to this: That class action suits supported by the Legal Services Corporation have had as their goal the retention or expansion of entitlements

-- the retention or expansion of regulatory solutions or governmental solutions to social problems and the same for entitlements. That is, expansion, in effect, of dependency as a solution to poverty. And that the emphasis has been very much on an ACLU type individual rights focus rather than a more communitarian rights of the community, rights of the housing project, rights of people to be at liberty to walk the streets at night without fear of crime and so on. And that there has been a mighty, mighty antipathy that has developed against all of those stances, executed through class action lawsuits. And that it has been the content of the class action suits as much as the form of the class action that has caused the political hostility to it.

And I wonder if you could tell me if you think that's not true. Could you give me communitarian entitlement contracting, regulation contracting class action cases that the LSC has supported that would have had the effect of diagnosing a social problem as coming as a result of economic problems resulting from excessive regulation, for instance, or social problems from entitlement dependency?

MR. EVANS: First, I would not disagree with your comment that it is the content of those suits that has caused them to be controversial. My point was that the class action mechanism is a useful tool in achieving the result of dealing with a lot of similarly situated people. But I have no doubt that that's precisely why they've become so controversial and why people have blasted class actions as a mechanism and have wanted to get rid of them in the legal services context, which, as I say, I think is most unfortunate.

I will cite you a case which I am aware of, although I'm not sure it meets your needs. There may be others who can do this. But a member of the Board of the Legal Services Corporation, Nancy Rodgers, from Ohio, talks about her involvement with a case in Ohio, where there was a police department which refused to bring domestic violence complaints against husbands.

And only after they brought a class action suit on

behalf of a number of women who were in that situation was there a change in the policy.

Now, that does not get to getting against regulation, as you specifically have suggested. And I don't know whether Gail or some of the other witnesses can provide an example. But as I say, I think this is a tool that becomes appropriate to use where you have a common problem, widely repeated.

MS. LASTER: I will just add, if I could: The other thing that comes to mind is there was recently a piece on NPR about the Legal Services Corporation and I don't think Mr. Cole was in that one, but I think it was about the restrictions. I think David Molpus was the commentator. And the case cited there was a landlord-tenant dispute. The case involved lead in the paint and abatement of that problem. And the case was a class action brought on behalf of the tenants similarly situated.

So that case had nothing to do with social policy or those types of things. Well, it was a landlord-tenant dispute. It was not a welfare reform case.

And the only thing I would add is that indeed, Commissioner, your point is well taken. But Legal Services has been restricted in both areas. Arguably, what you're talking about is subject matter. LSC has been both restricted on the subject matter and on the procedure. And I think that some people would say, *well, if you've restricted the subject matter, why do you have to restrict the procedure, as well?* Indeed the procedure of class action doesn't necessarily only incorporate one type of subject matter.

The majority of our cases are restricted. We cannot do welfare reform cases. We cannot do the cases that -- the ones that send some people through the roof, as a matter of subject matter. We also cannot represent some types of client that we did in the past.

So we have restricted the types of clients we can represent. We've restricted the subject matter. And some people had concerns about restrictions on procedures, such as attorneys'

fees and class actions. Because those are procedural things. And if you've taken care of the subject matter and the client population, some question the need for these further procedural restrictions on lawyers.

COMMISSIONER HORNER: And I would like to ask you if the Board sets criteria for the grants which go beyond just how many poor people are there in a given geographic area.

In other words, does the Board decide each year, this year we're going to encourage grantmaking to people who are interested in domestic violence or some particular issue?

In other words, does the Board select the issues of focus for the grantees, or do the grantees simply take the money on the grounds that they're capable and willing to help the poor with legal problems and then the cases taken arise from the cases the poor bring?

MS. LASTER: Right. Right.

We are required in our fiscal year '96 legislation to set priorities, national priorities. The Corporation, that is. And the Board did set priorities. The priorities, however, are not mandatory. And the reason that they're not mandatory is because the structure of legal services programs are such that each entity that applies for a legal services grant is a separate entity with its own Board of Directors who set their priorities.

COMMISSIONER HORNER: But they tell you what the priorities are when they apply; right?

MS. LASTER: They have to tell you. And they have to abide by those. But we recognize, in terms of the system and the way it's set up with independence, we recognize that a program's priorities in Texas may not be the same priorities for a program in Connecticut.

So, indeed, the Board does not mandate priorities but we may be looking at that. Because indeed there was one legislative proposal for our reauthorization that would have just listed the types of cases that legal services attorneys can bring. So that has been a suggestion that we go beyond just having a

suggested list of priorities and that programs go beyond saying what their priorities are and actually having a list of types of cases you could bring.

COMMISSIONER HORNER: What are your priorities for the current grantmaking season?

MS. LASTER: The priorities are -- let's see. I have it right here.

(Pause.)

COMMISSIONER HORNER: If it's a problem finding it --

MS. LASTER: No. I think it's in the testimony.

Page 11 of the testimony submitted has suggested lists of requirements. Our Chairman's testimony indicated that as required by our fiscal year 1996 appropriation, at our meeting of May 20th the Corporation's Board of Directors adopted a suggested list of priorities to be considered by grantees in setting their local priorities. This suggested list of priorities was published in the Federal Register on May 29th, 1996. The suggested priorities focus on protecting the integrity, safety and well-being of the family.

And it's published in the Federal Register. However, I could fax to you, if you'd like, a copy of it. I have it handy.

COMMISSIONER HORNER: I would like that.

MS. LASTER: Okay.

COMMISSIONER HORNER: Does protecting the integrity of the family mean supporting the efforts of parents whose children are being taken away from them to keep those children or who are under threat of that? Is that what that means?

MS. LASTER: Yes.

COMMISSIONER HORNER: So it's a family preservation goal?

MS. LASTER: Right.

COMMISSIONER HORNER: Rather than a child -- I don't know what you call it. We don't have a conceptual word for child protection as independent from family protection.

MS. LASTER: Right. But it encompasses that. It also

encompasses keeping the family together, whether it be through housing matters. It also encompasses domestic abuse and violence. And as you well know, there are many components that go into preserving the family, but that's what the priorities emphasize.

COMMISSIONER HORNER: Thank you.

CHAIRPERSON BERRY: Commissioner Lee and then Commissioner Redenbaugh.

COMMISSIONER LEE: On those organizations who declined to apply for funding from you, had a majority of their funding been coming from LSC?

MS. LASTER: Probably not. Probably not.

COMMISSIONER LEE: So, it was just a small portion?

MS. LASTER: Not small, but - I want to be clear. In declining funding, some programs also reorganized. When we were facing such a drastic cut in our financing, LSC went to each state and said, *now what is the best way to deal with this cut?* And indeed, we had chief justices from local state courts, members of the bar and others come together and think about this issue -- how the structure was actually going to be changed, how best to continue to provide services.

So you had some states say, *well, this will be the legal services entity in this state, but another entity, totally separate, not receiving LSC funds, will do other things and will probably do things that are restricted.*

So, I wouldn't say that all those programs in states had a large amount of non-LSC funding that declined to compete for LSC funding. But I would say that programs that had other significant resources or were interested in doing other things were the ones who declined to compete.

COMMISSIONER LEE: And there were some who thought you suggested that you could rely on pro bono services to fill the gap. Is that a reality -- to rely on volunteer legal services to provide for the poor?

MS. LASTER: Well, by statute and by regulation our legal services programs and grantees must have private attorney

involvement. So that's something that they do and it certainly increases their productivity. But in terms of filling the gap, no. I don't think anybody thought it could fill the gap.

And when you talk about filling the gap, there's another thing to keep in mind. Pro bono programs are only as good as the person or organization that's directing it or giving guidance. And that's what Legal Services programs do very well. As our former President was found of saying -- he's a distinguished trust and estates lawyer -- "You really don't want to have a trust and estates lawyer doing a landlord-tenant dispute for the first time without some type of help or some type of guidance."

So, indeed, if you talk about replacing what the Legal Services programs provide with pro bono, that's both impractical on a quality of service level, as well as on a numbers level. But indeed, the private bar has tried to step up to the plate, and our programs facilitate it. But I don't think it can suffice for what was there with the Legal Services attorneys.

MR. EVANS: I would agree with your comments 100 percent and just add that when you get into these discussions about -- *well, why don't we just keep trimming the Federal funds and they will get picked up by the private sector,* the assumption is that you are operating from a full tank of gas. That is, you're meeting all the legal needs of the poor, and as we cut Federal funds, we could squeeze out a little more in these other areas to make up the difference.

Yes, there's a little bit more to be squeezed out there someplace; but we're operating in a situation where you're meeting only 20 percent of the legal needs of the poor, at best. And so any kind of cut in any component of the system is quite devastating.

COMMISSIONER LEE: Just one more question. When you decide the program priorities, do you also look at underserved communities? That they would be on a higher priority level?

MS. LASTER: What do you mean by underserved community?

COMMISSIONER LEE: Maybe there are certain groups, newcomer groups, for instance, who have not been served by some of your partners. Do you set priorities besides just programs? Do you have priorities on groups that have been underserved by you, maybe linguistically disadvantaged groups or other geographical areas?

MS. LASTER: Well, before the '96 legislation, Congress recognized that there were underserved populations such as the migrant population, not only because of the language issue, but also because of the work issue; and also the Native American populations. And after the '96 legislation, the special set-aside for serving minority migrant populations was eliminated; however, the set-aside for serving Native American populations was retained. So indeed, we do recognize that.

On a national level -- I found the list of priorities and I can give that to you.

COMMISSIONER HORNER: Oh, thank you.

MS. LASTER: On a national level, we do not necessarily prioritize a certain client population. We leave that for the independent programs to do. However, we also recognize on the national level that there may be the need for migrant -- that migrant legal services, that migrant clients, potential clients, have special needs.

So in each state, we have legal services programs that are specifically designed to serve the needs of the migrant population. So we recognize that.

CHAIRPERSON BERRY: Commissioner Redenbaugh?

COMMISSIONER REDENBAUGH: Yes.

Ms. Laster, do you have any types of cases -- I don't know quite how to characterize them but I guess maybe citizens against government. And what I mean by that is in every municipality there are many regulations. Often, one of the effects of those is to prevent people from acts of enterprise.

Another category I'm thinking about is the Federal restriction on not being allowed to save money if you're on

welfare. And/or I know in some localities, state and Federal OSHA regulations are not always enforced. Particularly, I am thinking in the case of the migrant workers, where there's been a history of violations.

Do you ever represent your clients in suits of that nature against these different levels of government?

MS. LASTER: Yes.

COMMISSIONER REDENBAUGH: Can you tell me a little bit about that?

MS. LASTER: Well, specifically, it depends -- we categorize our cases under consumer, education, employment, family, juvenile, health, housing, income maintenance, individual rights, miscellaneous. And we don't necessarily keep track of every single type of case, so I cannot tell you or recite to you the fact pattern of specific cases. But we do bring -- in a general sense, you're talking about suits against government, if I'm clear. And we certainly do bring those. And we do bring them in a variety of forms, whether it be a consumer case, an OSHA case, a public housing case -- we've done that in a variety of subject matters.

CHAIRPERSON BERRY: He's suggesting you ought to do more of that.

No.

(Laughter.)

COMMISSIONER REDENBAUGH: Well, actually, that is my opinion. What a surprise.

(Laughter.)

But we, too, are not allowed to lobby. Lobbying is not happening.

Thank you.

CHAIRPERSON BERRY: Any other questions?

Commissioner Anderson?

COMMISSIONER ANDERSON: Thank you.

During the last Congress, Representative Gekas introduced legislation which would, had it been enacted, have set

up an alternative way of providing legal services through a state, I guess, administered program.

Did the ABA have a position on that, Mr. Evans?

MR. EVANS: Yes. We opposed that proposal for a number of reasons. The Gekas proposal basically would have, in our view, set up an additional layer of bureaucracy beyond what currently exists. That is, you have a Federal legal services program now which spends about 3 percent of its budget at the home office and the rest of it goes out to the local programs.

The Gekas proposal was to set up -- in addition to a Federal mechanism, which was going to change from the Corporation, but not in a substantial financial way -- an office in each state that would administer funds. And they would be responsible for doling out the funds in the state.

His proposal, as originally drafted, said that up to 5 percent of the funds going to each state could be spent for that particular activity at the state level.

Further, his proposal did not require that any of the money that was available to a state be used. It was up to the state to decide to use it.

We felt that, in terms of assuring that money would be available nationally, it was a bad proposal. We felt, in terms of the structure, it was a bad proposal.

Our own view is that you basically have a revenue-sharing, local-control program under the current mechanism. That is, the money goes out from the national office. It goes to a local non-profit corporation. The statute requires that a majority of the members of the board be appointed by the local bar association or the dominant bar association in the area.

It has typically in a community, as we will hear I'm sure from the other witnesses, representatives of a variety community organizations. And they set their own local priorities, as Gail indicated.

But we think the model that he was trying to get at is already out there and his proposal was going in a bad direction on

the two particulars I mentioned.

COMMISSIONER ANDERSON: All right. Thank you.

Looking at the priorities established by the Corporation, they're very broad categories. A limited number of categories but very broad. So, really, you could look at that and say almost any legal problem that a poor person would have is covered within one of the categories. Then at the same time, we have these restrictions coming in in '96 and '95, earlier. And at the same time, Congress is cutting the funding drastically. What would you think of the idea if Congress said, *look, we're going to take these limited resources and we're going to address basically only one of those categories, and instead of doing a poor job in a broad level of services to a small part of the population in need, we're going to focus on one category of services and we're going to try to reach virtually everybody in need for that one service or for that one category -- access to health care, maintenance, family protection*?

What would you think about that?

MR. EVANS: We would not favor that. I think, again, the idea that the local programs ought to be setting the priorities and not Congress attempting to do that is a far preferable course.

I think it is a tempting subject to talk about because the program has been cut back and cut back and cut back that you get to a point where you could seriously talk about only having the poor represented in one specific areas. I think that would be a most unfortunate result. I think we ought to be headed back the other direction.

And I do not think that the level of service is poor. I think it is grossly underfunded. It is inadequate. But I think that by and large the services provided for the clients in the program on their particular matters are highly effective. And the won-loss ratio and so forth, if you look at it in terms of what the programs have done in representation, I think, would bear that out.

COMMISSIONER ANDERSON: Okay.

MS. LASTER: If I just might add -- I'm sorry. I misspoke or I learned something. I'm looking over the priorities. And indeed, we do state in our priorities that programs should pay particular attention to other similarly vulnerable individuals within their service area. So, in addition to being of marginal economic status, programs are to consider if the persons are less capable of fending for themselves by reason of difference in language, cultural, educational backgrounds, disability or other special problems, access to legal assistance or special needs.

And if I might add, I understand that, in terms of limiting the types of cases, there is the hope that the legal services program will be, quote, uncontroversial. And I must say, having done this for so long, that even if you further restrict the program, you still would have controversy because of the very nature of our adversarial legal system.

It would be hard to define or get people to agree on what those limited areas are and what cases you should take. I mean, you would think that, for example, family cases are something we could agree on. But people have said programs shouldn't do divorce cases. But if the divorce involves abuse, physical abuse, is that a different matter?

Some people might say that all we should handle is landlord-tenant cases. Then you'd have people saying perhaps that legal services shouldn't be involved in that either. If the program was limited to just income maintenance cases, I don't know if that would please most people because there's two sides to that matter, too.

Of course, you can -- and we do -- have some type of limit of the types of cases. We're not allowed to do all types of cases under the sun. But if you were to prioritize among them, you may not necessarily eliminate the controversy. What I'm trying to say is that it would be hard to get people to agree that these are the only problems, or that these are, quote, deserving or non-controversial cases.

You'd be surprised that family cases such as custody matters are sometimes the most acrimonious you can have. Because our job is to try to figure out the best way to provide legal services for the poor, we have to be open to all possibilities. And the Corporation has done that, to it's credit. But we don't find that we can get people to agree about what those cases are that would be non-controversial.

COMMISSIONER ANDERSON: Okay. Well, I'm not sure that the intention behind my question had to do just with controversy. It had more to do with trying to maximize service in a particular category rather than to have a variety of many categories which were underserved or under-provided-for. Setting a priority of access to health care as a priority and trying to maximize the service to that -- that was sort of what was behind my question.

MS. LASTER: Right. And I acknowledge that. I said that there are some -- not you -- who are suggesting that a limited number of types of cases would eliminate controversy.

VICE CHAIRPERSON REYNOSO: Robbie?

COMMISSIONER GEORGE: Yes. Thank you, Mr. Vice Chairman.

I didn't quite follow the exchange between Ms. Laster and -- I'm sorry; he's not here. But just to make sure I get it, I interpreted Commissioner Redenbaugh as asking what LSC funded litigation had done in the way of attempting to remove regulatory obstacles to enterprise. Regulation that gets in the way of capitalist acts between consenting adults and that sort of thing.

And I thought that your answer was, well, we sue government a lot.

MS. LASTER: No.

COMMISSIONER GEORGE: No? Okay.

MS. LASTER: My answer was that we're allowed to sue - LSC grantees are allowed to bring suits against government.

COMMISSIONER GEORGE: Okay. Then what's the answer to his question about trying to free poor people from the burden of regulation that makes it difficult for them to do business? Have

I understood Commissioner Redenbaugh's question?

COMMISSIONER HORNER: You did. He obscured it by using conflicting examples. But I think that was his intent. And he wanted to know, for instance, in cases such as in the District of Columbia you cannot get a license to cut people's hair unless you've had 2,000 hours of training, by regulation. It's a method of constricting economic competition and reducing entry into the field, into the job.

And the question is: Do your grantees ever go to court, or does your group ever instruct your grantees to go to court, to help somebody sue the government when the government is getting in the way of that person's getting a cheap taxi license or hair-braiding license?

COMMISSIONER GEORGE: Street vendors and all these examples.

MS. LASTER: Yes. I would assume that we do. I can't cite you a specific case at the moment, but we do do a lot of consumer cases and they'd fall under categories of bankruptcy, collection, contract, credit access, energy, loan, installment purposes, public utilities, unfair sale practices or other consumer finances. So that I would say that they would come under that.

We've been asked, for example, if we ever brought a case such as a home schooling case on behalf of people who wanted to do home schooling. And I believe the answer was perhaps.

(Laughter.)

I'm not sure.

COMMISSIONER GEORGE: This actually, interestingly, goes to the question of controversy or more to the nature of the controversy. As I understand the dispute about LSC -- and I've not followed it terribly closely -- conservatives are mad at LSC; liberals are defending it.

Are there cases in which you're getting flack from the liberal side rather than from the conservative side because you're representing home schoolers or you're attacking regulation and so

forth? That, I think, would be the question. The nature of the controversy. Or is the controversy always the same way? Conservatives get mad at you?

MS. LASTER: Well, I would beg to differ, first of all, because we do have strong conservative support. We wouldn't be here today if we didn't. One of our chief supporters is Senator Domenici, in terms of the Senate. And he has really been the person who has shepherded us through the Senate. And LSC is not necessarily an organization supported by liberals.

COMMISSIONER GEORGE: Is the converse true as well? Are there liberal critics of LSC?

MS. LASTER: Yes. I think we have one right here. Seriously.

COMMISSIONER GEORGE: I mean among Senators.

CHAIRPERSON BERRY: You will hear one in a minute.

MS. LASTER: Oh, yes. Certainly, we do. For example, I think Senator Wellstone was very concerned that the Corporation -- along with Mr. Cole's argument -- should have fought harder against the restrictions and that, indeed, he doesn't understand --

COMMISSIONER GEORGE: Well, no. I mean something different. Are they mad because of the kind of litigation that you're involved in, the way conservative critics are angry at litigation that they think has a political motive or political agenda that is left-leaning?

MS. LASTER: Well, one thing that comes to mind is that for a while we did fund a center called the Bopp Center. The Bopp Center -- that's its nickname -- was a support center. And by law now, support centers are no longer funded.

But the Bopp support center was the subject of a piece on, I believe, *20/20* or *Prime Time Live* with Sam Donaldson, or whoever. And according to the program the support center's main goal was to intervene in right-to-die cases or in -- I don't want to sound pro whatever, but I don't know what the neutral term is for right-to-die cases. And that center said that it would

intervene in those cases on behalf of whatever interested party to not allow the person to die.

And I would say, given what your parameters, you suggested conservative versus liberal, that might now have been a --

COMMISSIONER GEORGE: That's a very good example. That program got knocked out because of a general prohibition on support centers.

MS. LASTER: Right. But before that happened, the program -- the Corporation was looking into de-funding the program, as well.

COMMISSIONER GEORGE: Why was that?

MS. LASTER: Because that was not necessarily an appropriate use of LSC funds -- in terms of bringing cases of that nature.

COMMISSIONER GEORGE: And of course, that went to the restrictions. Yes.

CHAIRPERSON BERRY: And you don't know, but you gave a particularly good example for Commissioner George.

Okay. Does anyone have any other questions?

If not, I want to thank the panel very much for being with us. We appreciate it.

(Panel I excused.)

CHAIRPERSON BERRY: We would call the next panel to come forward, please.

Please have a seat. You don't have to be sworn.

Thank you very much for coming. We're going to begin with Mr. Michael Horowitz, who is a senior fellow with the Hudson Institute and Director of the Institute's Project on Civil Justice Reform.

I'm familiar with him from the days when he was General Counsel at the Office of Management and Budget, and before that, I knew about him at Ole Miss, law school and so on.

Mr. Horowitz is the author of many articles on the subject of legal reform, the future of the American welfare

system, federalism and the U.S. Congress. And he is going to provide some information to us on his perspective about how the Legal Services Corporation operates.

Thank you very much, Mr. Horowitz, for coming. And please proceed to give us some remarks.

MR. HOROWITZ: I hope to spend at least a part of my time not only speaking of the Legal Services Corporation but looking at what I think is a larger picture, contesting what I think is the implicit assumption of this hearing. Often the implicit assumption that the Legal Services Corporation and its fate is in some way central to how we care for the poor. And if one looks at the legal system and the poor, the conventional wisdom response is, *well, let's have a debate over the appropriation for the Legal Services Corporation.*

I think those debates are fair, but as an attorney who deeply believes in the right of poor people to have access to the legal system, my own view is that that debate is arid, meaningless and that the Legal Services Corporation, its fate -- more money/less money -- is marginal to the fate of the poor.

And I want to see if we can't expand our perspectives. But I do want to talk some about the Legal Services Corporation because during my days as General Counsel of the Office of Management and Budget, I think I came about as close as one is capable of coming to being the Darth Vader to the Legal Services Corporation movement.

I took up the debate over the Legal Services Corporation, not because anyone asked me to do so as a senior official at OMB, but because frankly I was tired and offended at people who called themselves conservatives defending the President's position on Legal Services Corporation in what I regarded as obscene racist terms.

I remember one of the great critics of Legal Services Corporation defending the President's action on the ground that gays shouldn't have a right to lawyer, only he didn't call them gays. And so I thought it was important for some of us to step

into the breach, and I did. And I did because of my own sense of commitment to social justice.

I believed then -- and I think that was the tenor of some of Commissioner Horner's questions -- and believe now that the Legal Services Corporation leadership left to its own devices has for the most part hurt the poor, damaged the poor in extraordinary sets of ways.

I objected to the big case theory of the Legal Services Corporation where the sense was that -- I remember Dan Bradley, then the Chairman of the Legal Services Corporation, saying it -- *if I only got more money, why, I'd put HHS out of business.* I heard him give a speech. And the sense that if the Legal Services Corporation had its way, there wouldn't be any barriers, even the modest barrier of HHS, to large entitlements to cash on the part of poor people.

The whole notion of an income redistribution theory was at the heart of what they were doing and I thought that approach could never succeed. And I was profoundly upset at LSC's value-neutral, value-indifferent, value-hostile character of its policies.

Commissioner Horner, again, raised some questions. The whole "success" of the Legal Services Corporation that made it difficult to impossible to evict obstreperous unlawful criminal tenants from public housing or to suspend obstreperous kids from public schools.

We middle-class people got warm feelings in our bellies as we established rights for the poor and through the Legal Services Corporation, but we sent our kids to private school where the head of the school suspended the kid if the kid looked at her cross-eyed. Our double standard, in my judgment, hurt the poor. And I thought that was at the heart of what the Legal Services Corporation was about, and, frankly, would still be about today but for the fact of a conservative Congress.

I objected. There was some mention earlier today of landlord-tenant cases. I remember dealing with the Pine Tree

Legal Foundation in Maine where legal services lawyers would tell clients to exploit a one-month gap between nonpayment of rent and the landlord's right of eviction. On advice of LSC counsel, people stopped paying rent. It was hard to evict them. The landlords couldn't even try for a month. Then legal services would come in, raise issues. People who had stopped paying rent couldn't get evicted for three, four months. What a triumph they thought it was for the poor, to have three-four free months' rent, except for this.

The working poor living in those neighborhoods had to pay higher rents and nobody built housing for the poor. That, I thought, was the LSC mindset. And I thought it hurt the poor. Indeed, devastated them.

I objected to and was tired of sweetheart lawsuits. I objected to and was tired of suits against cities. I heard many mayors, particularly those of smaller and medium-sized cities, make the point -- and they were right -- that for all of their whining about inadequate resources, particularly in the days of the backup centers, the Legal Services Corporation had far more money, far more resources to pursue cases, than did the cities LSC lawyers sued.

And with the fee-shifting provisions of the law, whatever the merits of a case, LSC lawyers could bludgeon small cities and small business into settling cases because they couldn't afford to risk losing lawsuits in many cases. I objected to that.

I objected to the dishonesty of the Legal Services Corporation proclaiming itself as the people who were just handling individual claims cases and divorce cases and health care cases by citing numbers of cases, when if you did anything like a serious look at budgetary allocations, it was clear that high proportions, half of the money spent by the Legal Services Corporation, was on the so-called big cases -- class actions and other similar cases.

I was tired of the American Bar Association responses

to this matter. I objected when -- and I mean nothing against the ABA representative here -- but when $300-$400 an hour lawyers, like I used to be for one time in my life, would come up and talk about our responsibility to the poor. I knew that we lawyers had an ethical obligation to do so, in exchange for the privilege of being licensed to practice law. We satisfied that obligation by coming to Washington and hustling for appropriations paid by taxpayers who earn $10,000 a year. All this nonsense about how the bar can't take care of the problem is nonsense.

I believe that lawyers should be required, as a condition of licensure, to handle those kinds of cases.

I objected, and now I hear this talk about how the bar is so deeply involved in pro bono cases -- I heard this today from the representative of the ABA. What he didn't tell you was that the American Bar Association hustles to make sure that in the so-called pro bono cases, if you win the case, as you often can do because the big firms have got far more resources than municipalities, you get fees, lodestar fees, $300-$400 an hour paid to non-busy partners and associates learning how to practice law after thousands of hours are put up.

I don't call that pro bono practice. When I practiced law, I never spent a year where I didn't spend 20 percent of my time representing pro bono and poor and middle-class clients, and I never asked for a dime for it. That's the spirit I'd like to see. And I object to the American Bar Association preening as if they care for the poor. It is a retrograde organization against the poor, a lobby for the worst smugness of the American bar with no real interest in the poor. And I objected to that.

I remember one time there was a -- I was before a group of ABA panjandrums where I was grilled on my position on the Legal Services Corporation and the man, later President of the ABA, said to me, "Young man," which I then was, he said, "do you see anything in the Constitution about a right to eat?"

"No, sir."

"Anything about a right to a home?"

"No, sir."

"Well," he said, "there is a right to due process of law, isn't there?"

And I asked him whether he thought the American poor needed a lawyer rather than three squares a day and a roof over their heads.

The bar association has been shameful in this regard. And the idea of having a heavily politicized Legal Services Corporation with all sort of skewed views as to how to help the poor didn't strike me as appropriate.

I must say, too, one of my regrets is that Caldwell Butler and I had worked out something that would have ended many LSC abuses years ago. I was attacked by the right as much as by the left in those solutions, because many conservatives on the right love the Legal Services Corporation as a whipping boy which they used to send out direct mail. And they wanted gridlock forever.

This was a case of ideologues on both sides who couldn't have cared a fig for the poor. They cared about abstractions. They cared about fundraising. They cared about big government. The poor were means to that end. And that's why I objected to it.

Now, I can continue that discussion and we can continue that debate, but the real point is -- and the real reason I want to be here is because -- I plead with you to move beyond these arid irrelevant categories in terms of what it is that you are as a Civil Rights Commission and what it is we can do through the legal system to really help the poor.

I'd love to see some of the kind of cases that Commissioner George was talking about. I'd love to see liberal oxen gored in all of their cases as much as conservative oxen are gored. That's not the case and we all know that. And as Commissioner Horner said, that's part of the problem of the Legal Services Corporation.

But I remember a day when, Commissioner Berry, I was a

civil rights law professor at the University of Mississippi teaching the first integrated classes. I'll brag to this degree. Having Byron De La Beckwith campaign for Lieutenant Governor of the state saying the first thing he would do would be to fire me as a professor at the University of Mississippi Law School.

I also remember a Civil Rights Commission in those days with Father Hesburgh and others who really gored the oxen of establishments and who were listened to and who made a difference. One of the reasons nobody cares what this Commission does - and I say it respectfully to the members -- is because everything you do is so predictable, so conventional. The world discounts everything you say.

And here again -- and that's why I wanted to come, because I believe in the need for a vigorous Civil Rights Commission. But as long as you have another Civil Rights Commission report on the Legal Services Corporation, ho hum. Your report will be -- your staff has probably drafted it already -- about how terrible it is that LSC only had $200 million and how it should have $700 million.

I say to you, for starters, that you won't get the $700 million. But I'm here to say that there are far more important things for the poor in its nexus to the legal system that I commend to you to look at. Let me give you one example, and it's one that I'm quite familiar with.

On April 18th of this year, a bipartisan coalition of Senators introduced -- hold onto your hats -- the Auto Choice Reform Act of 1997. Now, what has that got to do with civil rights, you ask? This was a bipartisan coalition of Senators, Gorton and McConnell and Grams, but also Senators Moynihan and Lieberman. Strong endorsement sent in for this reform legislation by Governor Dukakis and, for example, a strong editorial in the New York Times, pitched in terms of the interests of the poor.

Here's what the legal system really does to the poor, and it has nothing to do with any money for the Legal Services Corporation, nothing to do with anything the Legal Services

Corporation has ever done or hopes to do.

We now have millions of poor people in this country who have to drive as illegal, uninsured motorists - outlaws -- because the rate of automobile insurance has climbed so fast that most poor people can't afford it. I dare say more than 50 percent of the black communities of this country have to pay an automobile insurance bill for each year that is substantially greater than the value of their car. And they're forced into illegality.

It also means that if you or I get hit in DC, the chances are the person who hits us will have no insurance. But it's worse. There are some states in which people are forced to buy automobile insurance by the pressure of organized lawyers.

And what I have brought to today's hearing is something -- a report that in my judgment means more than all the reports in the cases brought by the Legal Services Corporation in the last 10 years. It's entitled "The Impact of Mandatory Insurance Upon Low Income Residents in Maricopa County, Arizona."

They tested, they looked at those people -- and Arizona is a state where you've got to buy auto insurance. That's part of the legal system, driven by the organized bar. They looked at people at 50 percent of the poverty level, the true working poor of this country. Do you know what these poor people spend to buy auto insurance? 31.6 percent of their disposable income.

Take every single income redistribution case of the Legal Services Corporation, no matter how wacky or hopeless the theory is, it wouldn't do half as much as saving poor people from having to pay a third of their income to buy auto insurance. People at twice the poverty level, making $27,000 a year, 50 percent of them had to defer major purchases of food, rent, health care needs and other important matters in order to buy auto insurance.

Now, there's also not a city in the Unites States unhurt by the system that contributes to declining economic viability of American cities. There's not a city in the United States where you can't put $500 to $1,000, sometimes more, in your

pocket by moving to an adjacent suburb. The same auto insurance that in Central Los Angeles costs $1,200, in Simi Valley costs $300.

But as Senator Lieberman, as Senator Moynihan, as the New York Times, as the Joint Economic Committee, as the Rand Corporation have pointed out, it's because the lawyers require, when you buy auto insurance, that you not only insure yourself for lost wages and for your medical bills but you've got to buy what consumer groups have called a lottery ticket for pain and suffering damages.

It's the reason why auto insurance rates have moved up way faster than the cost of living. It's an incentive for people to go to doctors when they're not sick and it drives up the cost of the rates with this impact on cities and poor people. But the lawyers say you've got to buy it.

You can't choose whether or not you want to be insured only for lost wages or for medical injuries caused by auto accidents. You've got to insure yourself to be able to sue for pain and suffering.

Now, consumer representatives, some with the courage to break away from the establishment, as I hope this Commission will do as it gets off irrelevant predictable debates about the Legal Services Corporation, consumer groups have made the obvious point that a pain and suffering damage is, quote, "a lottery ticket which, when won, mostly goes to the lawyers." Pain and suffering damages -- I quote now from the leading legal ethics case book -- is an inflated element of damages tolerated by the courts as a rough measure of the plaintiff's attorney's fee. Billions of dollars.

Now, the Joint Economic Committee Report points out that the savings for the poor from the Moynihan-Dukakis-New York Times-Wall Street Journal-supported bill that simply allows people not to buy pain and suffering insurance would be 48 percent of the cost of their auto insurance. It think that's a low ball estimate of the current insurance policies that low income drivers have to

have.

Want to talk civil rights? Let's talk of the civil rights impacts in our tort system.

CHAIRPERSON BERRY: Okay.

MR. HOROWITZ: I will finish now and I will just say I ask you to take on powerful voices. The American Bar Association will oppose this reform because it's their pocketbooks at stake. Yet they posture themselves at hearings like this as friends of the poor. They're not. Not the American Bar Association in its organized sense. Even through there are lots of well-meaning people in it.

But those are the targets you ought to look at, not the conservatives who have rescued the poor by ending the political agenda that animated the Legal Services Corporation that I think in the main hurt the poor.

Thank you very much.

CHAIRPERSON BERRY: Thank you very much for your testimony. We'll have some questions in a minute.

Mr. Padilla, thank you very much for coming. Mr. Jose Padilla has been the Executive Director of the California Rural Legal Assistance agency, CRLA, for the past 12 years. He's been a legal services attorney since 1978 and was legal advisor to the California Migrant Education Parent Advisory Council. One of his awards for community service is called the Cruz Reynoso Community Service Award. Just thought I'd point that out.

Welcome, Mr. Padilla.

MR. PADILLA: Madam Chair and distinguished Commissioners. Gandhi used to say that when you have doubts about decisions that you have to make, the expediency is to remember the face of the poorest and the most helpless person you have ever seen, and ask yourself if the step you contemplate is going to be of any use to him. Then you will find your doubts melt away.

I know the face of rural California. I was born and raised in a rural small town designed with a railroad track as a social and economic demarcation. I was raised by citizen parents

who came from immigrant families, and I was raised by a rural village, so to speak, surrounded by aliens whom I referred to *Abuelita, Tio, Tia,* meaning grandmother, aunt and uncle.

My father was a farm worker until his mid-20s and a man who gained his citizenship fighting for his country in World War II. He still believes in democracy. In his early 70s, he still serves on a rural school board that I sued as a legal aid lawyer some years ago, just as he was joining it.

(Laughter.)

I have given 18 years of a legal career to rural legal services because, first, I remember what it is to pick tomatoes in 100 degree weather. And second, because until I die, I will believe in certain things that brought me to rural legal aid. Among them, that working hard in employment that provides minimal social dignity should entitle you to some basic labor, civil and human rights.

And by human rights, I do not mean some esoteric notion of international implications. But something very basic like human respect and respect for human life.

But before I give you the client reasons why we do civil rights work, I want to make three points: 1) that traditional civil rights work is legal aid work but that it has come at a price; 2) that such work is a very small, very small aspect of the overall use of our resources; and 3) that the basic issue of legal aid access is itself a civil rights issue.

First, traditional civil rights work in rural legal aid has been significant. But one price for the existence of legal aid has been and continues to be the curtailment of civil rights remedies.

The mistake of many who judge the purpose for providing free civil legal aid to the poor is that they judge such a system's value through a political prism that believes that access to the law must be apolitical, non-controversial, colorblind and unworthy of being free in legal scope -- all criticisms because the funding source comes from governmental taxing power.

In truth, poverty is political. Through it's ability to create or undo policy, government can ameliorate or enhance the very nature of poverty as it beats on the lives of the poor. But for legal aid to exist, the political price has been for the civil rights remedies to be sacrificed.

And because most legal aid organizations have not aggressively used civil rights issues affirmatively, the minority who have, like CRLA, are vulnerable to the reforms. These reforms cut at the margins of our most effective service, and it is at the margins where the controversy lies.

The most recent example of such controversy -- and somebody mentioned it -- is Texas Rural Legal Aid. Recently, they brought a Latino voting rights case well within the regulations set by the Legal Services Corporation. Ironically, as legal as the case was, they abandoned it and a short time later, the plaintiffs were victorious.

That's about controversy and getting involved with Latino communities that seek to participate in local politics. But if I were to give you in one sentence my 18 years of experience regarding legal aid and civil rights protections, it would be that for the ethnic poor, legal aid lawyering has suffered a continual erosion of its ability to address the issues at the heart of civil rights work.

From the onset, with the Legal Services Act of 1974, school desegregation was excluded. Since then, electoral redistricting has fallen victim. And the most effective and symbolic procedural means for effectuating civil rights remedies, the class action, went that way last year.

There's a public misconception out there that legal aid is colorblind. Most persons who think about the practice of civil rights law will not relate such a practice to the legal aid system of this country. The traditional civil rights issues people think should be left to the civil rights groups. Now, that may be easy for urban-based legal aid programs who find strong civil rights networks addressing urban civil rights problems, but that is not

true for rural legal aid.

In rural California there is no civil rights infrastructure that brings the resources of the urban groups to bear on the civil rights of the rural poor, nor of the rural ethnic community. Although such civil rights groups may be approached to represent the rural ethnic poor on an ad hoc basis, their institutional focus, for reasons of history or reasons of resource, is urban.

These groups not only do not have the resources to reach out to these rural communities, they do not have the local presence to maintain ongoing day-to-day relationships that allow them to stay in touch with the changing needs that come from the changing demographics and the changing economic conditions.

CRLA is the NAACP, the MALDEF and the Lawyer's Committee in rural California. CRLA filled the void out of necessity. Rural California poverty is now majority ethnic, so that if a legal aid provider is in tune with the daily and real injustices these communities bear, you have to bring race-based or gender-based litigation.

Just to give you an idea of the demographics -- CRLA represents 310,000 rural poor. In the last 10 years, we saw an increase of 50 percent at a time when we lost a third of our resource. And if our case service statistics reflect the distribution of ethnic groups within our service area, this is what you would find: 150,000 Latino poor; 120,000 white poor; 20,000-25,000 Asian-Pacific Islander poor; 15,000-20,000 African-American poor.

And whereas the rural white poor need basic legal aid, ethnic rural poor need both civil rights protection, as well as representation in the traditional services that legal aids are known to provide.

In the 30 years of rich CRLA history, of which Justice Reynoso was a part, CRLA lawyers have brought every kind of civil rights case that could be found in a rural setting. The work addressed such things as English literacy in voting; voting rights

for non-landowners; school district at-large electoral challenges; police misconduct; prison conditions; employment discrimination on the basis of race, sex, national origin; sexual discrimination; sexual harassment in agriculture; environmental racism in Latino towns; affirmative action; and it goes on.

This came about not because we wanted to be called civil rights lawyers but because in small towns and not so small towns of California, Mexican and black folk of the east side never got the same life break as white folk. Rural racism was never and is not color blind.

I grew up with and was raised by victims of racism. In the Imperial Valley where my uncle, Ysidro Real, worked for the United States Government experimental agricultural station in the '50s and the '60s, the Imperial Irrigation District, the county's largest employer and the system that fed water to the crops my uncle tended, would not hire Mexican laborers like him. Yet as a young lawyer in rural California in 1980, I oversaw a consent decree that had corrected the injustice.

Whereas once in an 800-employee workforce less than 50 colored folk -- black and brown -- had served on the workforce, after the litigation, 400-plus Imperial Irrigation District minority workers were now employed. Four hundred families out of poverty. Four hundred families no longer eligible for our services.

There was no MALDEF, no NAACP lawyer, to bring that case. CRLA was the NAACP lawyer. We represented the NAACP and we represented the Mexican-American Political Association.

But let me not mischaracterize our work. In the overall thrust, legal services is not about civil rights litigation. This is my second major point. It's about remedying basic poverty conditions. Opponents to legal aid call our civil rights work "social engineering," but in reality, even *our* work is an individual, family-oriented service that goes to help maintain what you would consider basics of living -- a roof over somebody's head, food on the table, brief legal service and advice.

Sixty percent of our casework is in the form of brief service counsel and advice. In the National Legal Service statistics, less than 10 percent of the cases result in litigation that ends in court decision. CRLA litigates to court decision closer to 5 percent of our cases. Last year, 33 percent of our cases, more than 6,000 cases, were in housing. Eighteen percent, more than 3,000 cases, in labor. Seven percent in civil rights.

You know what kind of civil rights work we were doing? Citizenship education. Why? Because of the immigration fear out there. Immigrants are coming into our offices asking to know how they can become citizens. That's the civil rights work that we were doing last year.

And in that year (1996), talking about class actions, perhaps most relevant to you -- during the process in which we were forced to abandon all of our class actions, out of some 5,000 active cases we identified in that time period 40 class actions, one-half of one percent of our active caseload.

My third point is that I believe that minimum access to legal aid is a civil rights issue. Inaccessible legal assistance is rationing justice. In rural California, access to civil rights protections must itself be a civil rights issue. The poorest members of an ethnic community are the most vulnerable to civil rights violations for many reasons.

So therefore, to the extent that legal aid is unavailable for the rural ethnic community, both civil rights and basic legal rights go unprotected.

Let me give you an image of inaccessibility.

The Legal Services Corporation published a report in 1993 that indicated this. The general public averages one attorney for 305 persons. Three hundred and five. Poor people in 1993 had one attorney for 10,567 people. In dramatic contrast, last year in our service area, average, one attorney for 16,000. For farm workers, one attorney for 30,000. And last year we lost 15 lawyers. Now we have eight one-lawyer offices in rural California.

These are their averages. Santa Rosa, one lawyer for 29,000 poor people. San Luis Obispo, one lawyer for 26,370 people. El Centro, one lawyer for 25,500 poor people. Marysville, one lawyer for 22,890 people. Santa Maria, one lawyer for 20,790 people.

I can't speak to you here about the implications of civil rights on our poor communities without thinking that civil rights belong to people, people with helpless faces, like Gandhi talked about, with families, with children. People who carry with them esoteric beliefs such as hope and faith, not unlike any other American seeking to ensure and pursue democratic happiness.

But you ask if CRLA now has 15 fewer lawyers than it did one year ago, why do you need to do restricted work? If so much need is unmet, why do you do class actions? Why do you want to do welfare reform? Why do you want to serve aliens?

Why do a class action if you can do 50 evictions using the same time and resources? If people are not here legally, if they are so-called aliens, why represent them when there are so many legal people who need the service?

And I'm going to use the word *aliens*, as I end, because as much as I'm angered by the derisive way that people use that term, it is a choice of words used by our detractors. And I use it to remind me of the underlying insensitivity reflected there, despite the simple fact that these are fellow human beings.

So you ask why? If Gandhi were here, he would ask you to remember any helpless faces that you have run across in your life, because that's what's going to remove your doubts.

Welfare reform. If we could, we would challenge welfare reform because there are people named Ignacio Munoz, a 75-year-old worker in Stockton in the Central Valley of California who had labored for more than 40 years picking crops and doing other jobs. Fearing deportation and loss of his $400 SSI check, he took his fear to the illogical extreme, and seven weeks ago, the way the newspaper reported it, he, quote, hobbled over to a nearby bridge, slipped into a dry canal bed, end quote, and shot

the fear out of his head.

No legal aid litigation will bring back an aged, spent and lifeless brother. And we know that politicians looking for confirmation of such suicides will not find any unless they be judged. But fear and panic and heart attack is not a humane way to treat the elderly and the infirm, whether they are here as refugee transplants or retired workers who walk on spent arthritic legs because the strength was left in the furrows of fruit fields.

Class actions. Why do we do class actions? Because there are people named Lydia Hernandez. Until recently, she had the life role of bottling, quote, the world's supply of A-1 Steak Sauce and Grey Poupon Mustard. She had worked in that company for 25 years. In 1995, dozens of Latino workers on the line challenged the Nabisco management because it had, quote, unduly restricted their restroom privileges.

Latina working women may not have glamorous jobs, but respect, as a family and cultural value, stands for something. Many of these women began to develop urinary tract and bladder infections. Many of the women began to wear diapers on the line, like children, so that their bathroom needs would not interfere with the employer work expectation. Many of these women were in their 60s.

The settlement was confidential, but the Chicago law firm of Davis, Miner and Galland, who served as lead counsel with us, made it very clear that but for the fact that we had a local neighborhood office there, such litigation could not have been maintained, without the client support that our neighborhood office gave.

Aliens. Why do we represent aliens? We represent aliens because there are workers named Noel Juarez, a Zapotec Indian from Sierra Anna Yareni, Oaxaca, who came from the highlands of Southern Mexico, one of Mexico's poorest states, where the Indian culture, just as here with ethnic groups, is the subject of derision.

But like many of them who come prepared to bear

whatever personal sacrifice to be able to send money back home, few of them expect that in our modern democracy basic human rights mean little. CRLA, four years ago, closed the class action litigation where Mr. Juarez and 377 workers had not been paid back wages, about $1.25 million. They had been working six-day weeks, 16-hour days, below Federal minimum wage (at the time, $3.35 an hour). The dramatic impact of that case was the incarceration of the grower for criminal violations (e.g., racketeering, conspiracy, labor and immigration violations) that amounted to three years in prison.

For those of you who know flowers -- your *baby's breath* could have come from that farm. Ornamental flowers do not look quite as pretty when they're picked by workers who live in a 50-acre compound surrounded by high barbed fences, live behind locked gates secured by attack dogs. Some workers told stories of having their heads shaved so that the humiliation would keep them from escaping into surrounding communities to ask for help.

There was no MALDEF, because these folks were not Latino. They were Indian. There was no Amnesty International because this is the United States. There was only Rural Legal Aid.

And let me say something about communitarian cases.

CHAIRPERSON BERRY: And you need to sum up, Mr. Padilla.

MR. PADILLA: This is the way I sum up. Labor camp cases. I think labor camp living is as communitarian as you can come.

We have to do class actions because of the numerosity of the families that we represent. These people live in camps they call homes with funny names: *San Andreas, El Rio, El Pirul.* But when the conditions come to light at trial, this is what you hear from the clients.

And this is a client talking a year ago -- Antonio Rocha, talking about the living conditions that she and her fellow tenants face. She said, "When we were cooking, cockroaches would

fall from above us and into the food and we couldn't eat it any more. We'd get nauseous and throw it out."

But this is what I choose to end with. It's a very short letter. Because, as you might expect, we also do class actions because of children, children with alien names like Hilda, children who sometimes take 15 minutes from their busy lives and write to their lawyers. And we always need to be reminded, as lawyers, about the simple reasons why we do what we do.

And I would read it to you in Spanish, as she wrote it, but you wouldn't understand maybe, except Justice Reynoso. And this is what Hilda wrote:

> "I lived in El Pirul in the Ranch of Benech Farms, and it was very bad because we couldn't study. *Mi papá* worked very hard on this ranch, many hours, and they were paid very low. I was not very happy. We slept in rooms of wood and I think it was very good that lawyers brought us out of this ranch. Now we live a comfortable life in another place and I am grateful to you for taking us out of there. I now sleep in my own room.
>
> Hilda Vargas. Seven.

Thank you very much for your time.

CHAIRPERSON BERRY: Thank you, Mr. Padilla.

Ms. Phyllis Holmen is the Executive Director of the Georgia Legal Services Program, and she has been at Georgia Legal Services since 1974. She is going to discuss the program's work with low-income Georgians throughout the state.

Thank you very much for coming, Ms. Holmen.

MS. HOLMEN: Thank you very much, Madam Chair, and let me start by apologizing for addressing my written remarks as Mr. Chairman. I, of all people, should have been more alert to that. I'm very sorry.

Madam Chair and Commissioners, thank you very much for the opportunity and the honor to come here today and talk to you about legal services.

As was stated, I've spent my entire legal career

working for the local legal services program, most of that time in Georgia. I want to talk to you about how the funding cuts and the restrictions have affected what we do, and my belief that it is indeed a civil rights issue because of who the poor are and, in particular, in Georgia. I want to talk to you a little bit about who the poor are, what we do for them, and what has happened with what we can do for our clients over the last couple of years, in particular.

I believe that the cuts and the restrictions have caused a serious denial of access to the justice system which makes poor people unable to enforce their rights and gain the protection of the laws to which they're entitled. It has also led to greater frustration on the part of the courts, other litigants and other lawyers, who are finding more and more pro se litigants in their courtrooms and dramatically impacting the administration of justice. So I believe it's well within the statutory charge of the Commission.

Georgia Legal Services Program serves 154 counties in Georgia, all of the counties in Georgia outside the five metropolitan counties of Atlanta. There are approximately one million potentially eligible individuals in those counties. We have 77 lawyers and 30 paralegals who work in 13 offices to serve those individuals.

As Ms. Laster stated earlier, we serve each of those counties. We see clients in welfare offices, church basements, social service agencies, and sometimes in our cars, if necessary.

We receive 68 percent of our funding from the Legal Services Corporation and about another 10 percent through other Federal sources, such as the Older Americans Act, the Violence Against Women Act, the Ryan White Act to serve persons with AIDS, the McKinney Act to serve persons who are homeless.

We receive less than 20 percent of our funding from private contributions, the IOLTA program in Georgia and United Way. So the bottom line is without that source of stable and substantial Federal funding, we would not exist throughout the

state of Georgia.

In our state, 71 percent of the population is white and about 28 or 29 percent are people of color, but poverty disproportionately affects Georgians of color. Fifty-five percent of people below the poverty line are African American, and 30 percent of African Americans in Georgia are poor, in contrast with 8 percent of white Georgians.

Poverty also disproportionately affects women. One-third of the female heads of households in Georgia are poor. Poverty disproportionately affects the elderly. Ten percent of our population are senior citizens, but 20 percent of them are poor. Perhaps worst of all, one in four of our children under 6 are being raised in poor families.

The American Bar Association Legal Needs Study in 1994 found that in Georgia, as many as 39 percent of low income families have a new legal need each year. We struggle mightily to meet those needs, but the cuts in funding, in particular, have dramatically impacted our ability to do that.

We're spending more and more time on the telephone with people, screening them for financial eligibility, screening them for the severity of their legal problem, trying to give them a little bit of information over the telephone to help them solve their problem, but more and more often telling them, no, we don't have the resources to take their case.

We're offering more and more community education talks to groups of senior citizens, groups of people in homeless shelters, groups of people in public housing projects, in an effort to help them help themselves, in an effort to help them avoid their legal problems. Because I firmly believe most people would rather never see a lawyer than have to see a lawyer. So we try to help them do that.

Last year we started a landlord-tenant hotline that is answering calls from 400 to 700 people a month, but simply giving them a little bit of information over the telephone for them to go and handle their own cases. It's an important service but it

doesn't give them a lawyer to help them handle their case.

Each of our offices, as was stated earlier, as required of all legal services programs, works closely with a panel of lawyers to which we refer cases on a free or reduced fee basis. But in rural Georgia, some counties have no lawyers at all. And in counties where there are even a few lawyers, many of those are conflicted out from representing our clients, for one reason or another.

And in addition, in rural Georgia -- in most counties in Georgia, there are no paid public defender programs. So those same lawyers who are being asked to deliver civil legal services to the poor without cost or fee are also being asked to bear the Constitutional burden of indigent criminal defense. And many lawyers have said to us, as generous as they want to be, it's simply more than they can afford to do.

In 1996, we closed just under 18,000 cases for clients. About 900 of those cases were handled by private lawyers. But those volunteers rely heavily on our staff to screen the clients for financial eligibility, to screen the clients for meritorious case, and in many cases, for assistance with the substantive legal problem in the case. Those private lawyers are critical and we couldn't do without them, but they couldn't do without us either.

The matters we handle for our clients are the problems of everyday life, as Jose said to you. Perhaps writ larger because our clients have few, if any, discretionary resources to solve their problems. Over a third of our cases are family related matters, and most of those involve family violence.

The next most common type of case involves housing problems, and most of those involve threatened loss of housing, eviction, foreclosure, so forth, and homelessness.

The next most common problem involves various benefit programs: unemployment, food stamps, disability and the like.

Slightly over 60 percent of our cases, as Jose's, are resolved with counsel and advice, brief service or some other less than formal adversarial proceeding. I think while that's a useful

service, it's not getting real legal representation to clients and we're seeing more and more pressure to devote more and more time to advice and counsel. And it frustrates our lawyers, frankly, because they can't do more for their clients.

I've included graphics for you in my paper which depicts all these statistics so that you're not overwhelmed.

I think what I've described so far -- I *hope* what I've described so far -- shows to you that any impact that affects any service for the poor disproportionately affects people of color, women, people with disabilities and the elderly. The legislative actions affecting the appropriations for the Legal Services Corporation and the restrictions on our activity, therefore, are clearly a civil rights issue because of who the poor are.

As was stated earlier, in 1996 Congress cut the appropriation for LSC by 30 percent, and that cut was passed right along to us. That was on top of a 5 percent rollback in 1995, which was also passed right along to us. We lost 25 percent of our staff in 1996. We closed one office and resisted mightily closing two others, which exist but in very, very tiny forms. One of them is simply a part-time secretary who tries to make referrals to private attorneys.

In addition, I want to talk to you a little bit about the restrictions and the three that I feel impact what we can do for clients most.

The first is the restriction on legislative and administrative advocacy which we can undertake for our clients, except under very limited circumstances, with non-LSC funding. The second is the prohibition on filing or participating in class action lawsuits. And the third is the prohibition on litigation or legislative or administrative advocacy related to welfare reform.

Let me tell you of some specific examples of cases that we once did that we can no longer do.

In 1994, tropical storm Alberto rose up from the Gulf of Mexico and camped out over the state of Georgia for several days. As Ms. Laster stated earlier, legal services lawyers get

involved in disaster relief. This took us completely by surprise. We had never done disaster legal assistance before and had to spend the time to educate ourselves on all kinds of FEMA regulations. The Small Business Administration has disaster regulations. There are special state programs related to disaster assistance. We spent great amounts of time learning all that stuff so that we could help our clients.

The storm dumped enormous quantities of rain on Georgia, particularly Central and South Georgia. The south-flowing Flint River, which flows from around Atlanta south to the Gulf of Mexico, overflowed its banks dramatically. Not as bad as the Mississippi the year before, but dramatically.

In particular, in Albany, Georgia, in southwest Georgia, the river completely destroyed several African American neighborhoods in low-lying areas. In the ensuing 2-1/2 years, including to this day, Georgia Legal Services lawyers have been the principal advocates for the low income now former residents of those areas, dealing with issues related to FEMA emergency housing, redevelopment of public housing projects, consumer fraud by repair contractors -- as was mentioned earlier -- eligibility for repair money from FEMA and even relocation of neighborhood schools.

The restrictions that we now have in 1997 would have dramatically impaired our ability to help those individuals in 1996. And let me give you one example.

The City of Albany established a program with -- I believe it was -- HUD funds to help people repair their homes. One of the eligibility requirements for those funds was that you had title to your home. In south Georgia, in rural Georgia and other parts of the rural South, heir property is a particularly common situation where estates are not probated when family members die, and no formal title documents are prepared.

We went to the City of Albany and said to them, *This is a problem for many of the residents of this area, our clients, and can we work with you to develop some other ways these people might*

be able to establish title to their homes? They worked with us and dozens and dozens of families were able to get repair assistance because of that one small change in that policy.

I don't think we would be permitted today to initiate those discussions, even on behalf of clients whom it would benefit.

Another example. Five years ago -- and this is a welfare reform example and it's controversial, but I think the facts, in my mind, are not controversial -- five years go, Georgia enacted a family cap provision on recipients of AFDC. These are not uncommon any more. This denies additional benefits to a family which has additional children after a period of time of receiving benefits. In our case, it was after you got benefits for two years.

On behalf of a number of potentially affected clients, we submitted comments to the U.S. Department of Health and Human Services based on facts that in many parts of rural Georgia the county public health clinics could not provide timely family planning assistance to these families and they were headed for a trap.

HHS imposed a condition on Georgia's program that they in fact allocate more resources for family planning services so that families could get these. And in fact, more services were established. Just this year, more money was allocated to family planning services, although we didn't do that legislative advocacy.

Now we cannot have that kind of input into welfare reform. The people who are most affected by these programs have no voice in that process. What all good lawyers readily do for their clients when programs are changing we can no longer do for ours.

Georgia Legal Services has built a reputation over the 25 years of its existence as engaging in high quality representation for people with disabilities, all types of disabilities. We have brought a number of lawsuits, many of them

class actions. We have done a good bit of legislative and administrative advocacy. This has been an area that's been near and dear to my heart, personally.

For 20 years, we represented a class of children who had been institutionalized in state mental hospitals, either abandoned by their parents or in some cases abandoned by their state caretakers. It was not uncommon for children to spend years in state mental hospitals with no one advocating for their release.

As a result of a lawsuit we brought, which went to the United States Supreme Court, that situation has completely changed. Children are now admitted for acute care but rarely spend more than 30 to 40 days. And in fact, in the last couple of years, the state has dramatically changed its approach to treatment of these children and has essentially closed all the child and adolescent acute care beds in Georgia, focusing instead on putting these children in more normal community-based settings so that they can learn how to live in society instead of learning how to live in an institution.

Just three years ago, we filed a class action on behalf of people with tuberculosis who were subject in Georgia to involuntary commitment based on a process where you did not have the right to cross-examine the witnesses against you, where you did not have the right to have a lawyer appointed for you if you couldn't afford one. And if you were committed, you were committed for as much as six months at a time before you could challenge that commitment.

We brought a lawsuit challenging that statute on behalf of an individual and a class. The individual was a man who had a family and had a job and was picked up and hospitalized based on that statute.

The State Attorney General readily agreed that the statute was unconstitutional and in fact settled the case by going to the legislature and getting a new law passed, which now has procedural protections that everyone agrees are adequate. We

couldn't do that case today.

I believe that individual representation of persons with disabilities will never accomplish the kinds of changes that we have been able to accomplish in this area over the years in securing more dignity, fair treatment and improved conditions for these people. In rural Georgia, just as in rural California, there are precious few alternative advocacy groups that have the resources or the expertise to take on class actions, legislative advocacy for the groups of clients whom we are no longer committed to represent.

To the argument that the private bar can take care of the legal needs of these clients, I would say that the private bar tries. We work closely with the state bar of Georgia and local bar associations across the state. As I said, all of our offices have volunteer panels.

We received last year $228,000 in direct contributions from private lawyers. And while that's an important statement by those contributors about their commitment to equal access to justice, it's a drop in the bucket compared to what the need is.

Despite all the limitations and despite our extremely thinly stretched resources, we're still trying to do positive things for our clients to help them positively impact their lives. And I want to tell you about a couple of those things.

We are working with community groups across the state which are interested in a variety of self-help kinds of activities, including working to improve their children's schools, trying to start businesses cleaning apartments in public housing projects, and helping each other collect child support.

Those groups need lawyer counselors to help them with things. Not just the organizational kinds of things, incorporation and so forth, but also looking at the law surrounding the issues that they're interested in, helping them pursue grant opportunities, helping them deal with contract issues, even employment issues.

Most of those groups have little in the way of a budget

to hire a private lawyer to do those things.

We're also working to help private lawyers learn the intricacies of things like special education law, disability law, landlord-tenant law, so they can take on more of the cases in those very specialized areas when our resources stretch too thin.

Last year, welfare reform changes put in motion a process whereby children who became eligible for supplemental security income benefits since 1986 are going to have their eligibility for those benefits reexamined. In Georgia, it's estimated that there are 5,000 to 8,000 children who are going to be affected by that process.

We were very concerned that these children would not have lawyers to challenge adverse decisions and we are now working with a private law firm which has offices in South Carolina and Georgia. They're also doing this program in South Carolina. We are working to recruit volunteers throughout those states and help train them so that they can represent those children. They are very glad for the training that we've offered on the complexities of this new law as well as special childhood disability issues, which are unique and very important.

We're also working with judicial councils in the state bar and local bars across the state to try to deal with this issue I mentioned earlier of increased pro se litigants. Judges are frustrated. Lawyers are frustrated. And the litigants themselves are frustrated.

I'm on a committee which is trying to look at this and come up with some ways to help the courts deal with those issues better.

CHAIRPERSON BERRY: Would you sum up, please, Ms. Holmen?

MS. HOLMEN: All of those things could not be done, however, were there no Federal funding for Georgia Legal Services.

I want to end with a little personal note. A week ago I was up here for another purpose and I had the opportunity to walk over to the Supreme Court building, which I'd never had the

chance to do before. It was late in the day and I didn't have time to go in the building but I stood out in front and saw those words, *Equal Justice Under Law.* We've all seen that picture a million times, but it isn't the same when you're standing in front of it.

The words themselves, of course, mean a lot. But I was just swept away by the size and the scale and the beauty of that building. And I thought about how much that meant about how important this concept is in our country.

But then I started thinking about the calls that I get every day from people whose cases we can't take: The grandmother who fears she's not going to see her grandchildren if her son-in-law wins a custody case. The newly divorced 55-year-old woman who's going to lose her house and her medical insurance if her ex-husband can't be found and made to comply with the divorce decree. A woman and her disabled child who are going to be evicted from housing but she doesn't live in subsidized housing so we can't take her case.

No private lawyer will take these cases. So to me, all I could think about was that despite that promise etched up there on that building, for those people there's no equal justice under law.

Thank you very much.

CHAIRPERSON BERRY: Thank you, Ms. Holmen, for being with us.

And our last presenter is David Cole, whom we've heard about before. Your arrival has been predicted and praised, I guess, or hailed. All hail, Professor Cole, from Georgetown University Law Center -- *constitutional law, criminal procedure, Federal courts.* And he's also a columnist for Legal Times.

Please proceed.

MR. COLE: Thank you. And thank you for inviting me to testify.

I'm not sure what I can add after these very specific, I think, and eloquent statements about the effects of the

restrictions on legal services. And I understand the lateness of the hour, and so I want to be brief.

CHAIRPERSON BERRY: And we will have questions afterwards.

MR. COLE: So I may be brief. And I just want really to make two points.

One is, like Mr. Horowitz, to put this in a broader context. But I think the broader context is not about automobile insurance but rather about access to courts. I think legal services is the principal way that poor people in our country gain access to courts. Our judicial system is legitimate only to the extent that the poor, as well as the rich, have access to courts. And the real question is whether and how much we're going to pay for poor people to have that access, because it's obviously not free.

These restrictions are part of a very disturbing trend that we've seen in the last couple of years. And that is that Congress is now cutting off access to courts to the least powerful members of our community. These restrictions obviously affect the poor.

Other examples are the Prison Litigation Reform Act, which cuts off ability of prisoners to challenge conditions of their confinement -- unconstitutional conditions of their confinement.

Another example is the habeas corpus restrictions in the Effective Death Penalty Act and Anti-Terrorism Act of 1996, which cut off the ability of people convicted of crime to challenge constitutional errors in their proceedings.

A further example is last year's immigration bill, which cuts off access to courts for many, many immigrants, raising many legal challenges to the way that INS deals with them.

One of the court's central purposes in our society is precisely to represent those who can't get their claims heard in the political process, who don't have the money to give to make sure that their claims are heard. And yet they're the ones, who

need judicial access the most, whom Congress has been targeting. Not surprisingly, because many of them can't vote. Virtually all of them can't give any money. Their interests are not represented in the Congress. And now Congress is ensuring that their interests won't be represented in the courts either. And I think that's a very disturbing trend.

Now, the second point I want to make is simply that these restrictions are clearly undoubtedly unconstitutional under current Supreme Court law.

I won't go into the restrictions because Ms. Laster and Ms. Holmen have already talked about them, but what makes them unconstitutional is that they clearly restrict what recipients of Federal funds can do on their own time with their own resources. That is, with non-Federal funds.

The restricted activity, essentially lobbying and litigating, is all protected by the First Amendment. There's no dispute about that.

It is clear, for example, that if Congress said lawyers could not bring class actions on behalf of poor people period, it would be unconstitutional. Well, Congress hasn't said that. It has said that if a lawyer or legal agency receives LSC funds, it may not represent poor people using class actions. They have conditioned receipt of the Federal funds on the recipient giving up their right to do this work with non-Federal resources.

That, according to the Supreme Court, is the very definition of an unconstitutional on funding. The unconstitutional conditions doctrine essentially says that the Government cannot condition access to a Government benefit on the surrender of a constitutional right. The Government may define, within limits, how its own money is to be spent, but it can't use the fact that it is spending money to then try to expand its restrictions beyond the Government's own money to non-Government funds.

So the key issue in asking whether a condition on funding is an unconstitutional condition is to ask whether the

restrictions extend beyond the Government's money or whether they simply direct how the Government's money ought to be spent. And *Rust v. Sullivan,* which Ms. Laster described, is the principal case on this, although there is a whole jurisprudence of unconstitutional conditions.

And in that case the court drew a very clear line. It said it was okay for the Executive to limit what Title 10 family planning projects could tell women who used those projects for family planning. But the court said it would not be okay if the Executive had said that a Title 10 recipient is barred, for example, from talking about abortion or advocating abortion or advocating abortion rights with the recipient's own money on the recipient's own time. That would be an unconstitutional condition.

This is the language directly applicable to the restrictions at issue here. The unconstitutional conditions doctrine applies where the government has placed a condition on the recipient of the subsidy rather than on a particular program, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the Federally funded program.

So, what *Rust v. Sullivan* teaches is that Government can limit the use of its own funds but it may not use that as a way of restricting a recipient's activities with non-Federal funds. These restrictions plainly fall on the unconstitutional side of the line drawn in *Rust v. Sullivan.* They don't restrict merely what LSC groups can do with Federal funds. They restrict what LSC recipients can do even with non-Federal funds.

And there is not a case in the Supreme Court's unconstitutional conditions jurisprudence that would uphold these restrictions. And so I think it's unfortunate that the Legal Services Corporation has defended them in the courts, but I think it's more unfortunate that Congress has imposed them in the first place.

Thank you.

CHAIRPERSON BERRY: Thank you very much.

We're going to have some questions, but first I wanted to say that Mr. Horowitz has given me great comfort. The next time, we will tell Secretary Glickman, who is greatly concerned about our recommendations concerning civil rights enforcement in his Department and even has a task force which used all of our recommendations on Title 6 as a basis of its report, and all of the black farmers who are using that material in their campaign against the Department that no one cares what we think. That will give him comfort.

I will also tell the people who send complaints to us, and we process 700 and something every month, that no one cares what we think.

And I will also tell people who criticize me constantly for statements that I've made about X, Y, Z or recommendations that the Commission has made or recommendations they hope we will make that we have not made, that they should remember no one cares what we think.

And I'm only saying that because I realize that you were making an argument in friendly debate, but I just wanted to point that out. I'm very comforted by that.

COMMISSIONER GEORGE: But I think in fairness, though, we should report to them that we've heard Mr. Horowitz: We're changing our ways and people will care what we think.

MR. HOROWITZ: And may I comfort you, Madam Chair. Truth is often a comparative relative phenomenon. I remember days when the Civil Right Commission spoke the larger political community really did listen, as we don't.

You know that and I know that, Madam Chair. That this Commission, in terms of its impact on the public policy process, is a pale shadow of what it was years ago.

CHAIRPERSON BERRY: Oh, I would agree with that.

MR. HOROWITZ: And all I was trying to suggest is that by getting out of the old conventional boxes, the predictable responses from the Civil Rights Commission, people will listen perhaps to this Commission something like the way it used to years

ago. And isolated instances aside, I repeat, as an observer, it doesn't listen to this Commission today.

So I'd reiterate that comment and I feel sad about it because I think there is a role for serious advocates of civil rights for the poor by whatever agenda. My problem is that this Commission, by its choice of agenda, isn't such an advocate and isn't viewed as such an advocate too often.

And for all of the individual accomplishments you can tote up on an anecdotal basis, the reality is people don't care what this Commission does in general, and surely in contrast to the way they used to care about what this Commission said. That seems to me clearly a truth. It's inescapable.

CHAIRPERSON BERRY: Well, I don't want to get into a debate with you, but I think Father Ted Hesburgh would be the first to tell you and members of that Commission that there was something called a Civil Rights Movement, which you are very aware of, and a national movement, Southern-based reaction which is the context in which the kinds of remarks and so on that you're talking about took place.

But I don't want to argue with you. I'll just say that I'll just remember that next time something happens.

I will let my colleagues speak if anyone has any questions for any member of the panel. I had a couple, but does anybody else have any?

Yes, Commissioner Horner?

COMMISSIONER HORNER: I have a question for Mr. Cole.

The Federal Government over the last decades has been handling off more and more of its activity to third parties, state governments, local governments, non-profit organizations and for-profit organizations, and this phenomenon bids fair to pick up speed. It's going to increase, not diminish. And, therefore, the problem that you discuss of what is going to be the basis of the relationship between legislated appropriations and the decision-making of governments, outcomes of non-Federal organizations, is going to be a big issue, and it's one that I think is far from

sorted out.

Without getting into all the judicial decision-making that has occurred or is in process, which I can't entirely follow just orally like this, I'd like to ask you how you would feel about another case and whether there's an easy and obvious way to make distinctions, such that you can continue to defend the position you've stated, and even extend it.

Catholic Charities in San Francisco last year came under a great deal of pressure from the city government on the subject of whether it would conform to the city government's requirement for organizations which receive city funds to provide health insurance for domestic partners. And the church, not supporting the lifestyle of domestic partners morally, objected. It didn't want to.

Now, Catholic Charities nationally gets 66 percent of its funding from governmental sources, so this is the leading edge of a problem for a private organization with a point of view.

Do you think that a private organization with a point of view like Catholic Charities is restricting its recipients -- restricting the liberties of a recipient, such as a domestic partner who is not in the employ of Catholic Charities but who would use a Federally funded hospital? Would you, under the description you gave of your case, say that that person has or does not have a case that he is a recipient who is being denied his civil rights because he's being denied his right to access to a Federally funded health care provider?

MR. COLE: I'm not sure I follow the fact pattern. The recipient of funding is Catholic Charities, I understand.

COMMISSIONER HORNER: Well, you made a distinction between the right of the Government to restrict or condition funding to an organization, its own grantee. But you also said that the ultimate recipient of the service cannot have his constitutional right to access something conditioned.

MR. COLE: Let me clarify then. When I'm talking about recipient, I mean the institution that is receiving the grant. So

in this instance, if Catholic Charities is receiving a grant, it is the recipient.

COMMISSIONER HORNER: Okay.

MR. COLE: What the law says is that the Government wants to be able to condition its funds in the sense of saying spend this amount of money on this project. You know, if we want to have AIDS funding, we can say this has to be directed towards AIDS research and not towards automobile insurance research, for example. And that's perfectly legitimate.

What the court has said the Government cannot do is use the fact that it is giving a grant to restrict not only what is done with that Federal money but to restrict what the recipient, whether it's an individual, an institution or whatnot, does with non-Government money.

And I think it's out of the very concern that you're expressing. That because there is so much contracting out, so much public work done with Government dollars, that there's a concern that the Government can sort of do indirectly what it is forbidden from doing directly. And the doctrine is designed to do that -- to ensure that the Government cannot essentially undermine people's constitutional rights by sort of forcing them to surrender their rights in order to get access to a benefit.

Now, it may well be -- I don't know the facts of the case enough -- but it may well be that if Catholic Charities has a constitutional right not to provide that type of benefit that that would be an unconstitutional condition. The question would be whether they have a constitutional right not to provide that benefit. But it's an open question.

COMMISSIONER HORNER: Can the Government decide that it doesn't want to give money to organizations which, through their activities, support policies that are contrary to policy?

For instance, if the Federal Government were to decide that it's a good thing to fund health care for domestic partners and some organization simply chooses as a matter of policy not to do that, there's a policy conflict between the Federal policy and

the recipient organization's policy. May the government write a law that says we will give to organizations only if they conform to our generic Federal policy on this subject?

MR. COLE: A law that broad I don't think would be permissible. There generally has to be some kind of a nexus between the condition and the program being funded and the restriction has to be limited to the program being funded.

So, the whole problem is when the handing out of a Government benefit is used to try essentially to coerce people or institutions into doing something which it is their constitutional right not to do. Or, in this instance, to coerce institutions into not doing something that it is their constitutional right to do.

COMMISSIONER HORNER: This is very troubling to me because I heard Ms. Laster talk about a high priority of the Legal Services Corporation being family preservation and I think that family preservation, as a concept, has been carried out in such an extreme fashion that it is literally ending up killing kids. And I think it's bad policy now the way it's been implemented and the policy needs correction.

And so I'm very concerned at Federal funding being channeled to organizations that create such a bad outcome. So I think it's going to be very hard for the political sphere and the legal sphere to adjudicate these things. And that brings me to a question to -- not so much a question to Ms. Holmen as an observation, and then I'll just be quiet.

My observation is that many of the things that you described your organization as doing seem on the face of it helpful, or at least benign, and probably helpful to people in individual cases of suffering. But my question is why must such assistance be so fully legalized. For instance, why are your energies as an individual human being not being put into creating an environment in which mothers may demand that fathers assist children rather than courts assist children or public institutions assist children.

It seems to me that wherever we see a deficiency in our social arrangements, instead of having the courage to confront the wrongdoers directly, we try to create a regulation or a funding or an entitlement or something that will paper over the problem or, to put a better light on it, ameliorate it. And it allows us to go on avoiding laying blame where blame is harshly due.

And I'm concerned that the Federal Government is funding the -- what's the word? -- the facilitation of the abdication of responsibility by individuals.

MS. HOLMEN: I guess I want to say two things. First of all, I'm not certain that I said that. And if I implied that, I didn't mean that.

COMMISSIONER HORNER: You didn't say that. I'm extrapolating. In other words, part of what you did could be done by a strong editorial in a newspaper calling attention to a problem, by a voluntary association that says we're all going to kick in 1,000 bucks --

MS. HOLMEN: Possibly.

COMMISSIONER HORNER: -- or 10,000 bucks as an organization and hire a lawyer. Why must it be Federally funded with this huge legal apparatus?

MS. HOLMEN: I think one comment that I wanted to make earlier when we were talking about this issue is that we are lawyers. That's why we legalize things. That's how we are trained to approach problems.

And with respect to things like child support, the way to enforce a child support obligation in our country has become a legal way. You go to court; you get a contempt order; you put the --

COMMISSIONER HORNER: But isn't that because of your activities that it's become a legal --

MS. HOLMEN: I don't think it's because of our activities. That's the way the legislature has set it up and that's what courts are for.

And with respect to the family preservation versus

child protection issue and the other values kinds of issues, I mean, again we see ourselves as lawyers and it is my own personal belief that the system works if both parties to a dispute have representation because we've set up courts and that's how we resolve conflicts. It's actually a very conservative approach to handling conflicts within our society and that if both sides have lawyers, a better outcome results.

And when you're talking about child protection, state officials make mistakes. State officials don't do what they're required to do by law to assist families. There's a variety of reasons why children should be taken from their families or shouldn't be taken from their families.

We don't take a case just because it's a custody case or a termination of parental rights. We take a case if there is merit to it. We think there is a legal basis for the parent's position if the assistance that's required to be given her by Federal law has not been given.

I see the vast majority of what we do as law enforcement in a very conservative way, and protection of rights that are guaranteed to people by statute, by regulation or by the constitution.

CHAIRPERSON BERRY: If I may try to ask a question -- I didn't ask one of the other panel -- to sort of broaden the discussion a little bit and get the people in the middle here to address something Mr. Horowitz said and vice versa, which would interest me greatly. Unfortunately, I've not paid a lot of attention specifically to the Corporation recently.

But in teaching the history of American law, which is one of the things I teach, I'm of course very familiar with the historical roots of the idea that you ought to have paid legal services for poor people as a conservative remedy to keep poor people from marching in the streets and overthrowing the Government and doing all kinds of things, just as the legal defense funds and the Justice Department and Civil Rights Acts were designed to get people off the streets and into the suites,

as we say in the civil rights movement, or used to say.

And this Commission, in fact, was set up not as a liberal cutting-edge radical institution. Let's be clear about the history. This Commission was set up as a safety valve by President Eisenhower to defuse people fighting in the streets and to get us to put facts on top of the table and discuss civil rights issues in a polite forum.

Such is what many commissions are for.

Now, that being the case, the understanding on legal services then was the Federal Government ought to support legal services because there's not enough out there in the states and not enough that private people are doing and we want the poor to feel that they're represented and that will be a good thing. And if they complain, we can say, *you have a lawyer; go to court*, or, *Let your lawyer mediate,* or whatever. That's why it happened. And, then, lots and lots of lawyers, like you and other people whom we taught in law schools and some whom we went to the law schools with, got involved in this because they believed in that theory -- that they were being good lawyers, being conservative, helping the poor and doing good by doing well. I mean, that's basically is where it came from.

Now we have, of course, a taxing of that. In terms of what I understand, one argument is that the Federal Government doesn't need to pay for it because it could be done by lots of other folks. The history of it is that it wasn't done by a lot of other folks, which is why the Federal Government is doing it. It's like people who say you could repeal the civil rights laws because the states would do it or Joe Blow would do it. One of the reasons that we have civil rights laws is that Joe Blow didn't do it or he did something the opposite.

So the question is: one, do we still as a society believe that legal representation for the poor, and ensuring that it be provided, is something that we ought to do for the general health of the society and to reduce social conflict, which is what we used to think? And, the second part, is it that it somehow

just got out of line and is there some way to push it back into the earlier framework?

And then specifically, after that, how would you address questions -- not just you personally, but any of you -- like the one Mr. Horowitz posed? I mean, we heard some very appealing stories about poor people and things that are happening to them, but wouldn't it be better to instead of keeping poor people from being evicted on a case-by-case basis, which would then lead to people not building houses for poor people or homes for poor people, that you have to think of the social policy and the overall effect when you litigate, even though you're lawyers. And maybe with legal services, we wouldn't have conflict, which is what we used to think. Maybe what we would have is people being more innovative. And now, after all this experience, local people and volunteer groups and the like helping to mediate all these concerns and doing more for the poor.

And then finally, why don't the poor do more for themselves? I'm a lawyer, too, so I'm just being an advocate.

Like the folks you talked about, Mr. Padilla, with the cockroaches falling into their food. Why didn't they just like, you know, get rid of the cockroaches or hire an exterminator or go get some vinegar or something and put on the cockroaches, as opposed to complaining about the cockroaches being in their food.

VICE CHAIRPERSON REYNOSO: Use covers over the stove.

CHAIRPERSON BERRY: Right. Over the pots.

So maybe legal services has been a crutch creating some kind of dependency for the poor and that all of our assumptions were wrong.

So, I throw these out because I think these are the fundamental questions about all this stuff. So what indeed do you have to say about all this, any of you? And then we'll let Mr. Horowitz rebut, because we know what his position is.

(Laughter.)

MR. HOROWITZ: No, you don't.

CHAIRPERSON BERRY: Mr. Padilla? --Well, we think we

do; maybe we'll find out we don't.

Any of you?

MS. HOLMEN: If I can remember all the questions --

CHAIRPERSON BERRY: I said too much. I'm sorry.

COMMISSIONER GEORGE: You do two and Mr. Padilla can do two.

MS. HOLMEN: I think certainly we still do believe that having access to the system of justice, whether that means going to court or having someone explain your rights and your responsibilities to you is better than not. I think we still do believe in that.

My mother drilled into my head that fairness was a principal value and I still believe in that.

I think if there is a problem with dependence in large concept form on the part of people who are poor, it's not because of the legal services program. It is because of much larger social issues.

As Jose said, poverty is, at bottom, a political issue. And --

CHAIRPERSON BERRY: What does that mean? I heard that, but what does that mean?

Maybe everybody else knows. If everybody else knows, then I won't ask.

COMMISSIONER HORNER: No, I don't know.

CHAIRPERSON BERRY: What does it mean to say poverty is a political issue? Just what do those words mean?

MR. PADILLA: I can give you my point of view.

If government can pass a minimum wage law to go from $5.00 to $10.00 an hour, maybe you wouldn't need us. Now, I know in California, every time we tried to raise the minimum wage, everybody comes out from small business to large business to growers. They don't want to see that.

And that's set up by a governmental regulatory group of people. So that, to me, in a very simple way, maybe I would agree that if the money could be put elsewhere, such as to raise the

minimum wage to $10.00 an hour, then maybe people might be happier to do some of these jobs that they're doing right now at $4.00 and $2.00 an hour.

We were talking to a farm worker woman not too long ago at a get-together where her son had just become a Superior Court judge of this rural court. And she says, *Why do you fight growers? After all, picking crops is a dignified job because you work with your hands -- the only problem is they don't pay us enough.*

And to me, I mean, when I say it's political, it's because you can pass policy like that.

The other example -- the growers will tell you not to pass increases in certain wages because you will pay, as the consumer. You're going to pay, so therefore, don't raise the wage of the pickers.

I was looking at a New York Times article two months ago about farm worker wages going down 20 percent in the last 20 years. And the image there was you pay $1.00 for a head of lettuce. How much do you think goes to the farm worker? Eight cents. That's what the farm worker gets out of the $1.00.

You raise a farm worker's wage 20 percent, you give him two cents, to go from eight cents to 10 cents. What's it going to cost you to eat that lettuce? $1.02. I mean, you could do that. You could raise that wage 25 percent and it would pull many, many farm workers out of poverty.

So sometimes I think that government could do those kinds of things but government will never do those kinds of things. It hasn't done them. In California, all it would take is to raise the minimum wage.

So I think that that's when people then start criticizing: *You're into the leftist wage distribution.* They do not raise the minimum wage and people hire immigrants. Critics say, *let the domestic folks come in and do the jobs; don't bring those people from Mexico to do the job.*

There are some politicians I wish would have said we

could raise the wage to $8.00 and $10.00 an hour and maybe some of those legal Mexicans would do the work, legal African Americans would do it. But nobody said that. Nobody ever said that, when they were talking about domestic jobs, washing the dishes, cleaning the hotels; nobody ever said that in California, during the Prop 187 debate. If you up the wage, then maybe the domestic workers could have a *decent* wage.

So to me, poverty is political because all of those decisions that affect the way people live day-to-day -- and that's just talking about the wage -- can make poverty economically go away. It may not make poverty socially go away because there are also social conditions that result.

But anyway, that's why I said --

CHAIRPERSON BERRY: Well, what was the answer to my question? What was the answer to the question I asked about why wasn't Mr. Horowitz right that instead of trying to keep the family from being evicted, which was one example he gave, what you really should do is understand that if you let the persons wait three months and not pay their rent or whatever, what you're going to do is in fact disadvantage other working poor people who have to pay higher rents because those people aren't paying. And, moreover, no one is going to come in and build more low income housing.

So you'd be better off, instead of trying to keep them from being evicted, to say, *hey, you should evict people who don't pay their rent.* And this will create a greater supply, if I understood correctly, of housing - or it might. And it also doesn't disadvantage other working poor people who therefore have to pay higher rates. And that that is a more global way of looking at the problem.

Yes?

MS. HOLMEN: Well, I can't defend what another legal services program did, but I bet there's more to that story.

We advise people who come in with housing problems of what their rights are, what their responsibilities are, what the

law provides as far as how many days it will take before a court order is entered evicting them. And I think that's what any lawyer would do for that client.

If there's no defense to the eviction, we will not file papers in the court to defend an eviction. We would get sanctioned by the court if we did that.

So, I don't know what Pine Tree Legal Assistance is doing.

We are also working with groups that are trying to build affordable housing. We have worked with OSHA -- not OSHA -- the state, Georgia Department of Labor, on migrant housing conditions. We have talked with growers about migrant housing conditions. We are trying to do some more positive things.

Some of the private attorneys who've gotten involved with our work are transactions lawyers. We're frankly not schooled in that kind of work for clients. That's an expertise that we don't have that we're trying to get. You know, trading off expertise, poverty law, for business law.

But it's not easy for a low income group to develop a housing project.

CHAIRPERSON BERRY: Mr. Horowitz?

MR. HOROWITZ: I think a couple of the comments that Ms. Holmen and Mr. Padilla made here in terms that define their world view as to how to help the poor strikes me as being at the heart of the problem of the Legal Services Corporation and the reason why its appropriations will decline and the reason why, given that structure, I hope they decline in the interest of the poor.

Let me give some examples.

First, the litigation-oriented notion of Ms. Holmen. If both sides have lawyers, we have a better outcome, she said. I think it's arguable that if neither side has a lawyer, there would be a better outcome in many, many settings. And I want to comment on that point in a very particular way as we get to the statistics of the ratios of lawyers for poor people as against lawyers for

everybody else. These are very skewed numbers and very revealing.

But I want first to come to Mr. Padilla's point. His fantasy that if Congress waived a magic wand and raised the minimum wage to $10.00, the poor wouldn't need him any more. Mr. Padilla is somebody whose moral passion I admire. I'd like to think from time to time I even share his commitment to the poor.

I say, however, that his kind of rank economic illiteracy about the way the world works in a world of limited resources is just saddening. To hear a powerful advocate think that the problems of agricultural workers in California will be solved if we increase the minimum wage is very sad.

I think, for example, just to take California Rural Legal Assistance, you have this notion of income redistribution by government fiat.

Then on the other side of the coin, perhaps the most famous case in California Rural Legal Assistance was the effort to try to block any expenditure by the University of California-Davis to do agricultural research to mechanize agriculture that would have freed people from the burden of crop picking. I think that would be a blessing.

And I think the minimum wages are obviously -- it seems to me, particularly at preposterous levels, like $10.00 an hour, are utterly -- certain to drive jobs and opportunities from poor people. That's particularly important, because for poor people, the issue is often not the, quote, dignity of the job so much as learning a work ethic and learning about work habits. Because when you look at poverty in the United States, it's not a static snapshot. It's a very dynamic picture of people starting out at the poverty level, learning a work ethic, not being caught in the trap of dependency and then moving up the income cycle. That's what used to happen in this country and that's the critical problem of the underclass trapped in a world of AFDC's minimum wages, more lawyers --

CHAIRPERSON BERRY: Not any more. We reformed welfare. We just reformed welfare last year, didn't we? I know we did.

MR. HOROWITZ: Let me just say in that regard --

CHAIRPERSON BERRY: So you've got to get another line in that part of the speech.

MR. HOROWITZ: Madam Chairman, we can debate. I was perhaps as troubled by the welfare reform bill as you were.

CHAIRPERSON BERRY: You were?

MR. HOROWITZ: Yes. Because I didn't think it focused on the real target, which is the subsidization of illegitimacy. It had the sort of false mock notion of *make them work,* which I don't share any more than you do, I think.

But the question you asked was --

CHAIRPERSON BERRY: I believe in *make them work,* by the way, but go on.

MR. HOROWITZ: Well, not in terms of the kinds of programs that I see. But I really don't want to debate the welfare thing and I just have a few comments to make in response to your questions.

One, the notion that poverty is a political problem seems to me to suggest that lawyers ought to have a bit of modesty. We can do a darn sight less than we think to ameliorate poverty. We can, in a fixed pie, try to redistribute the income. But what a sad zero sum process of "helping" the poor that is. It will never ever, ever work, the notion of income redistribution rather than enhancing the dynamism of an economy so that the pie is bigger.

Lawyers are very good at slicing up the pie, the static pie, and very good as these comments have indicated at being economically illiterate in terms of the process by which the pie gets larger.

Now, you used the example of the Civil Rights Commission as the conservative force. I think it's an instructive example because the one thing about the Civil Rights Commission, which did a lot for civil rights and helped make the movement work in the days when it counted, was that you didn't have lawyers. You didn't have subpoena powers. You couldn't take people to

court. You exercised the moral force which reshaped the country.

Let's take civil rights matters. It used to be that when an employer was alleged to be a discriminator on racial grounds, there was a sort of moral gravity to that. People didn't want to be thought of as bigots. Then the lawyers took over the civil rights business and it became a game of numbers. And now you can accuse people of being discriminatory and nobody thinks it has any moral meaning because it's a lawyers' game of jobs and income redistribution and not the moral business civil rights was, in the days when you and I first dealt with it, Madam Chair.

And who suffers? The lawyers don't because there's a lot of income for lawyers in discrimination cases. It's the poor and the discriminated against who, in my judgment, suffer.

I want to come to the numbers thing because I think that's very important. The statistics constantly cited today about there being one lawyer per 300 for everybody and just one for 10,000 for the poor are very revealing. If these numbers meant anything, Washington, DC should be the most prosperous, happy community in the whole world. I mean, we've got a lot of lawyers here.

The reality is this. Lawyers mostly work on the commercial side and are involved in business transactions. If you took those per capita indices of lawyers per income cohort, guess who has the least access to lawyers. Not the poor; it's the middle class, the people who are above the cut for LSC eligibility. They're the people who almost never get lawyers.

And you know what? Their lives are better in the main for it. Which is not to say they don't occasionally need lawyers. Which is not to say injustice isn't at times done to them. Of course, this happens because they don't have lawyers. Injustice is with us. But the pursuit of utopian goals -- when lawyers in our arrogance think that we can solve all injustice -- often causes more problems than good, particularly for the poor, because we get paid and they're left holding the bag for many of the things we do.

So, I would say stop giving us these doctored statistics. Let's look -- because I used to represent middle-class people in my law practice after I left Mississippi. I didn't want to go to work on Wall Street, and I represented people above the cut for the Legal Services Corporation. And yes, I occasionally did some good.

But you know why they were strong and good, the middle class? They didn't have the likes of me, except very, very infrequently. I was proud of the work I did. But if you would multiply my numbers in the same proportion that the poor had them at the time, I think the middle class would have been hurt rather than helped.

We lawyers are part of the problem more often than the solution. And I want to give just a couple of examples.

Again, Ms. Holmen talked about AFDC expansion. I mean, the AFDC system is the system that has marginalized the black male, substituted the state for the male, and has caused harm in the way that Frances Perkins, the most liberal member of the Roosevelt Administration, understood. She didn't endorse the historical accident of illegitimate women being made eligible for AFDC. It was an accident when it happened in the New Deal and Frances Perkins was appalled by it.

She saw that it would be a trap. That it would generate family breakdown, illegitimacy.

And here we have a bunch of lawyers who think that they're on God's side by wanting to expand AFDC entitlement.

Or, to take another example Ms. Holmen cited -- God help us -- the deinstitutionalization of the mentally ill. If there's one thing that the class action bar ought to hang its head in shame about it is the sweetheart lawsuits of 10-15 years ago when the legal services lawyers sued the states, saying your state mental hospitals are terrible. The states didn't want the burden, the cost burden, of operating them. Mental hospitals used to be a high-cost item in state budgets.

The states said, gosh, you're right. And all of the

schizophrenic people, who -- God, I had worked and I know something about those state mental hospitals. They were terrible. They were close to snakepits in some cases. Let me tell you, nothing like the snakepits of the city streets that the mentally ill are now walking through thanks to lawyers who put the mentally ill on the streets who are at the core, often, of our homeless problem.

That's a lawyer-made, quote, solution for the poor, and I don't think it helped the mentally ill. And you ought to talk to the parents of schizophrenic people whose sons and daughters got kicked out of the hospitals because of the intervention of Ms. Holmen and her colleagues who deinstitutionalized mental hospitals and got warm feelings in their bellies to boot.

That, it seems to me, is the problem. I think lawyers can do much, but it's a lot less than we think. I'd like to see a lot more modesty on the part of lawyers, which is why I come back to my original point.

It's politics, not lawyers, that creates the poverty. It's economic problems. We lawyers at the margins can help a little bit, but far less than we think. We are more often part of the problem than the solution -- particularly when we get involved in income redistribution. And we often stand in the way of a more vibrant political and economic process that is the real hope of the poor.

So that's the kind of debate I'd like to see, and that's why I hope the Civil Rights Commission can get off the dime of thinking about law and the poor in terms of the budget of the Legal Services Corporation.

CHAIRPERSON BERRY: Unless someone has a point of personal privilege -- go ahead, Mr. Padilla.

MR. PADILLA: Just one comment about taking lawyers out of the equation, about moral force. I guess I would agree if I sensed a moral force out there. You were talking about the intervention of lawyers, that you don't need lawyers to come in.

I think if there was moral force in some growers to pay

even the minimum wage, I think something might work. We had a case three years go, huge grower. Huge growers are not -- they're corporate. There's no moral force in corporate agriculture.

But that grower owed our workers over a million dollars in back wages. And if that grower hadn't gotten a lawyer to bankrupt the corporation, maybe our clients could have gotten money. That grower was in business six months later with another shell. The workers knew it.

The bankruptcy court -- it's run by lawyers. Our workers, over 800,000 of them, were given 10 cents to the dollar that was taken. They lost $900,000. Somebody stole $900,000.

Now, there's no moral force when somebody does not pay $900,000 of minimum wage -- we saw it. There is no moral force out there when it comes to that. Somebody's going to make a quick buck. And if lawyers hadn't intervened, maybe the moral force of his fellow growers would have forced the man to pay $900,000 to workers who no longer have $900,000.

Maybe there is moral force somewhere out there. I don't see it.

CHAIRPERSON BERRY: I want to thank the lawyers for being with us. This was very illuminating and we learned a great deal.

Thank you very much for coming.

COMMISSIONER GEORGE: Can I enter just a final comment on that?

CHAIRPERSON BERRY: Oh, he's got a final comment. Okay.

COMMISSIONER GEORGE: I won't hold the panel up. I just wanted to express my regret that here we are with lawyers on trial and Russell Redenbaugh is not here to enjoy it.

CHAIRPERSON BERRY: That's right. He'd love it.

Thank you very much for coming.

Thank you, members of the Commission. That concludes our briefing.

(End of Briefing)