

Testimony of

Jo-Ann Wallace

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President & CEO
National Legal Aid & Defender Association

Senate Judiciary Committee

"Closing the Justice Gap: Providing Civil Legal Assistance
to Low-Income Americans"

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NLADA PRESENTATION TO THE SENATE JUDICIARY COMMITTEE

Good afternoon, Mr. Chairman. My name is Jo-Ann Wallace and I am President and CEO of the National Legal Aid & Defender Association. NLADA, founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal access to justice for all people. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members. I am proud to be here on their behalf.

FRAMEWORK FOR THE FEDERAL LEGAL SERVICES PROGRAM

In the Preamble to the Constitution, our forefathers stated clearly and forcefully the purpose of the government they were creating:

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense...

and so on. It is noteworthy that "establish justice" precedes and is the basis for "domestic tranquility" and that both come before "provide for the common defense." I think the sequence and those priorities are not accidental and we need to constantly bear them in mind.

Until passage and implementation of the Economic Opportunity Act of 1964, the federal government had not sought to "establish justice" for poor people by providing support for their representation in civil legal matters. With the passage of the OEO, the federal government began its efforts to fill this void. Ten years later, in 1974, Congress passed and the President signed the Legal Services Corporation Act, the comprehensive legislation to make permanent the vital legal services program started under the Economic Opportunity Act.

The findings and declaration of purpose to that Act set out the appropriate framework for considering how to once again move forward on establishing justice for poor people. Congress found that--

1. "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;
2. "there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel...[:]

3. "[there is a need] to continue the present vital legal services program;
4. "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of [the Act];
5. "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;
6. "to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and
7. "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the [Model Rules of Professional Responsibility] ...and the high standards of the legal profession."

As we examine the federal component of our civil legal aid system, it is important to keep in mind these critical principles, which are as salient today as they were when the LSC Act was first passed, and to evaluate where we are at present and where we should go in the future.

What we have today is a fundamentally sound legal services delivery system. Although it is woefully underfunded, unfairly restricted and continually besieged by its critics, the legal services delivery system continues to work extraordinarily well for those of our clients that it does serve. Of course, it can be made to work better. There is no enterprise, whether in government or in the private sector, that cannot benefit from efforts to enhance and improve it. That certainly includes the delivery of legal services to poor people in this country which has been evolving in form and in scope now for more than a century. Nevertheless, the basic system established by the LSC Act has served us well for almost 45 years; it should be improved and enhanced, not undermined or limited.

The civil legal aid system should be funded adequately and strengthened to provide meaningful access to our system of justice for low-income persons residing in the United States. Currently, the system is severely underfunded and LSC funding has remained relatively stagnant for more than a decade. As we show later in our testimony, LSC funding has gone down in real dollar terms 53% since its high water mark in 1980. Yet, civil legal aid is a federal responsibility. LSC continues to be the primary single funder for civil legal aid, provides the underpinning and sets the standards for the entire program. To achieve equal access to justice in our country, it is therefore essential to increase LSC funding to provide a firm foundation for the rest of the legal aid system.

Nevertheless, increasing LSC funding is not sufficient to guarantee equal access to justice. Equal access is not a reality when legal services attorneys are not able to use the same tools and strategies that other members of the legal profession are free to use on behalf of their clients. For example, the restriction on seeking attorneys' fees in those situations where other lawyers are permitted to seek them limits the leverage which legal aid attorneys can use in negotiations with defendants and undermines the fundamental policy goals of awarding attorneys' fees against losing parties which are to deter and punish illegal conduct. These and other similar restrictions on what legal services attorneys can do on behalf of eligible clients are inconsistent with the purposes of the LSC Act and limit the ability of LSC-funded programs to provide effective and efficient legal assistance to the disadvantaged residents of the United States.

Restricting what LSC programs can do with non-LSC funds is particularly troubling. Even if Congress believes it must impose restrictions on how the funds it provides to LSC are to be used, there is no justification whatsoever for also preventing LSC programs from receiving non-LSC funds that are provided for purposes that Congress does not want to fund with federal dollars. Other public funders and private donors should have the same opportunity as Congress to determine the purposes for which their funds will be used and to select the institutions that can best carry out those purposes. Congress should not interfere in decisions by other public funders, including state controlled IOLTA programs, on how to allocate their funds and with whom to contract, nor should it intrude unnecessarily into the funding decisions of the private sector. Moreover, Congress should encourage, rather than discourage, the creation of alternative funding sources for civil legal services and should encourage public-private collaboration to ensure the provision of effective legal services and efficient use of resources, rather than stimulate wasteful duplication of programs that occurs when funders are forced to put their resources elsewhere in order to accomplish their purposes.

PARAMETERS OF LEGAL NEED AMONG DISADVANTAGED

As the testimony from the Legal Services Corporation and the American Bar Association aptly demonstrates, low-income households experience large numbers of legal needs, and the resources that are available to meet those needs are wholly inadequate. Legal needs studies conducted by numerous states during the past several years found that the combined efforts of publicly-funded legal services providers and the private bar serve only a small portion of the legal needs reported by low-income households. The LSC Justice Gap report showed that 50% of the eligible applicants who actually found their way to an LSC-funded program were turned away for lack of resources. Since 2000 numerous legal needs studies have been completed, and they have found that in the states studied, only 9% to 29.4% of the legal needs of low-income households were being met by legal aid programs or members of the private bar.

New legal needs are constantly arising to challenge the ability of legal aid programs to serve the low-income community. The current foreclosure crisis facing many thousands of low-income homeowners and tenants clearly illustrates the need for a strong legal services program. Families of limited means across the United States have turned to LSC-funded providers in increasing numbers to protect their vital interests in remaining in safe and affordable housing.

The subprime lending market, where predatory lending primarily takes place, has exploded by 795 percent over the last decade, from a roughly \$43 billion market in 1994 to a \$385 billion market in 2003. Due in part to abusive terms and practices, the foreclosure rate for subprime loans is much higher than prime loans: 1 of every 12 subprime mortgages will go to foreclosure, compared to 1 in 100 for the prime market. According to a number of studies, predatory lending disproportionately affects minority and elderly homeowners and communities with high concentrations of these populations.

The recent congressional focus on predatory mortgage lending and the foreclosure crisis recognizes the need to protect unsophisticated borrowers from often unscrupulous efforts to strip them of the one asset they have to avoid sliding more deeply into poverty. Predatory mortgage lending is stripping billions of dollars in precious assets from low-income communities across the nation. Seeking to exploit vulnerable and unsophisticated borrowers, predatory lenders charge more in interest and fees than is required to cover the risk of making the loans. These schemes not only target borrowers making home purchases, but also look to strip home equity that low-income owners have built up over many years. Renters living in property whose owners are undergoing foreclosure have also been evicted from their homes at alarming rates.

LSC grantees in every region of the nation are reporting significant increases in the number of applicants needing legal assistance to prevent them from losing their homes to foreclosure. Many of these clients have defenses based upon lender overreaching that can only be raised by skilled and knowledgeable LSC attorneys. Otherwise, the legal system is hopelessly skewed in favor of lenders who failed to follow the law regarding interest rates, fees or other consumer protections.

The following stories from actual cases handled by legal services programs in the last several years amply underscore the fact that justice often turns on access to representation:

? A major subprime lender convinced an elderly man to refinance his loan four times in two years, raising his loan from \$70,000 to \$140,000. He was unable to pay back these loans and foreclosure was begun. As a result of legal services' intervention, the foreclosure was stayed. Renegotiation of loan terms was initiated only after the legal aid attorney confronted the lender with detailed allegations of a violation of the Truth in Lending notice requirements.

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? An 85-year-old woman who has lived in her home for 50 years defaulted on a \$25,000 home equity loan. A "Foreclosure Rescuer" offered to help her get the home equity loan repaid with a private loan, but in fact and without the owner's realization of the true nature of the transaction, engineered a conveyance of ownership of the property to him. As a result, the owner lost \$150,000 of equity in her home. Only through the intervention of a legal services attorney was the client able to have the house returned to her and the loan renegotiated under terms she can actually afford.

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? An elderly Vietnamese woman faced with foreclosure was tricked into deeding her house to a predatory lender. Only after a full jury trial handled by legal services was she able to get back \$55,000 of equity that had been stolen from her.

Along with growth in those low-income populations which have traditionally been served by legal aid programs, including low-wage workers, children, domestic violence victims and the elderly, a new group of returning veterans from Iraq and Afghanistan, many with limited income and severe physical and mental disabilities, including post traumatic stress disorder and traumatic brain injuries, have begun to further swell the ranks of the low-income population and strain existing legal aid resources. Nationally, 5.6% of all veterans are living below the poverty line and a disproportionately high number are among America's homeless population. In fact, the Department of Veterans Affairs estimates that one-third of all adult homeless men and nearly one-quarter of all homeless adults have served in the military. Many of these veterans have unique legal needs associated with their military service as well as the more typical legal problems experienced by low-income populations.

Collette

When Hurricane Katrina struck New Orleans in August 2005, "Collette" lost her house, and would have lost her son, "James," were it not for the critical intervention of Legal Services of Eastern Missouri.

Once the storm subsided and the extent of the devastation was clear, Collette and James packed up their meager belongings and went to live with relatives of Collette's boyfriend hundreds of miles away in Missouri. When that arrangement fell apart, Collette found herself completely homeless and without James, who was placed into Missouri's foster care program.

She moved back to New Orleans - the only place she could call home - to try to rebuild her house and regain custody of her son. Collette began making the arduous journey to and from St. Louis to attend custody hearings and to spend a few precious hours with James. At each hearing she was asked to report on the progress she had made to rebuild her home: a task which seemed almost impossible. She successfully applied for funds through the U.S. Department of Housing and Urban Development's Road Home program, which provides grants to Katrina victims trying to rebuild their homes, but her money was delayed for months and months. Not content to wait, Collette began rebuilding the home with her bare hands, paying for materials with wages earned from a few part-time jobs.

When staff from Legal Services of Eastern Missouri's (LSEM) Family Court Project learned of James's and Collette's plight, they immediately swung into action, working to secure custody for Collette and to connect her with valuable services back in New Orleans.

LSEM put her in contact with a faith-based organization that organized volunteers who completely renovated and refurbished Collette's home, and connected her with mental health services for trauma survivors. Finally, in October 2007, despite numerous roadblocks, LSEM was able to convince the court that James belonged with his mother, and that New Orleans offered services that Missouri did not. The judge agreed, dismissed the case, and awarded full legal and physical custody to Collette.

DC

Legal Services of Northwest Jersey received a referral from Colorado to represent a veteran of two tours of duty in Iraq. DC had lost his apartment after he was discharged from the army and couldn't pay his rent. Rather than bring his children to a shelter, he asked his estranged wife's parents in New Jersey to take them for the summer while he looked for a job and housing. Before he could pick his children up again, his in-laws filed an action seeking temporary custody of the children, alleging that he had abandoned them. The legal aid attorney representing DC was successful in helping restore custody to his children.

With the current recession deepening, the numbers of people living in poverty continues to increase, swelling the numbers of persons eligible for legal aid who are facing legal problems and further increasing legal needs.

HISTORICAL LSC FUNDING TRENDS

Since its inception in 1975, the Legal Services Corporation has been the principle source of financial support for legal aid programs across the country. In its early days, LSC set a "minimum access" goal for federal funding of its grantees that would have provided enough federal dollars to support two LSC-funded lawyers for every 10,000 eligible poor people. Congress responded to LSC's effort, and by 1980 LSC funding had reached \$300 million, the "minimum access" goal. By 1981, funding for LSC was \$321,300,000, but that success was short lived. In 1982, in response to efforts by the Reagan Administration to eliminate the program in its entirety, Congress cut LSC funding by 25 percent, to \$241 million.

Although the program survived, it was not until 1990 that LSC funding again surpassed, in actual dollars, the level it had reached in 1980, with an appropriation of \$316,525,000. However, when adjusted for inflation, that amount still represented a cut of one-third from LSC's 1980 funding level. During the early 1990s, funding for LSC rebounded

slowly, reaching its all-time high of \$400 million in 1995. However, when adjusted for inflation, even that amount still represented a 28 percent cut from its 1980 funding level.

In 1996, Congress again decided to slash LSC funding, this time by 30 percent, to \$278 million. When adjusted for inflation, this represented more than a 50 percent cut from LSC's 1980 funding level. Since 1996, LSC funding has remained relatively static with small cuts or modest increases in most years. In 2007, Congress provided LSC with \$348 million, an increase of \$22 million over the 2006 appropriation, its first significant increase in more than a decade. But each year, inflation has continued to eat away at the buying power of LSC grant funds. In 2008 Congress appropriated only \$350,490,000, despite bills in both the House and the Senate that would have provided substantial increases over the amount appropriated for 2007. After taking account of inflation, the 2008 appropriation represented a 53.2 percent cut from LSC's 1980 funding level. To keep up with inflation, 2008 LSC funding would have to have reached \$749,196,076.

INCREASES IN NON-LSC FUNDING

In part in response to the reductions in LSC funding in the early 1980s and mid 1990s, numerous legal aid programs have aggressively sought resources from non-LSC funding sources. Even though LSC remains the largest single source of legal aid funding, in many states around the country, the legal aid program today is primarily supported by funds from other sources. As a result, over the last twenty years, there has been a radical shift in funding from LSC and other federal programs to a more diversified funding base, including substantial increases from state sources, and the percentage of total legal aid funding provided by the federal government through LSC has shrunk significantly.

Since 1982, legal aid funding from state and local governments has increased from a few million dollars to over \$370 million. Most of this increase can be attributed to proceeds from Interest on Lawyer Trust Account (IOLTA) programs, which have now been implemented in every state. A number of new initiatives have resulted in expansions in IOLTA revenue in many states. These initiatives include changes from voluntary to mandatory IOLTA, or from opt-in to opt-out programs, changes in legislation or court rules regarding interest rates that must be paid on IOLTA accounts, and, in some states, aggressive and successful negotiations with financial institutions. In 2007 IOLTA resources rose to \$123,924,000. However, because of recent drops in interest rates, increases in bank fees and slowdowns in business activity, IOLTA revenues have dropped significantly in recent months from what programs had expected to earn. In addition, because IOLTA programs still vary significantly from state to state, available IOLTA funding for legal aid programs differ greatly, depending on the location.

Within the last several years, substantial new state funding for legal aid has come from general state or local governmental appropriations, filing fee surcharges and other state governmental initiatives. As of 2006 it appeared that significant state funds would likely continue to be available for legal aid programs because state revenue growth seemed to be strong enough to support spending demands. However, with the current fiscal downturn, states may begin to experience the kind of tight fiscal conditions that existed during the 2001-2003 economic recessions, and these conditions may have a substantial impact on the amount of funds appropriated for civil legal assistance programs. It is impossible to predict future state spending on civil legal aid, as well as on other areas that will have an impact on demands for legal assistance, because state fiscal conditions may change and the federal government may continue to shift more costs to state governments. With prospects for continued increases in state funding dimming, expanded federal funding becomes more and more important.

SIGNIFICANT GEOGRAPHIC FUNDING DISPARITIES

While LSC funds are distributed according to the 2000 census data on individuals living below the Federal Poverty Line, an amount currently equal to approximately \$9.00 per poor person, non-LSC funding sources are not distributed equally among states, and there are enormous disparities in the legal aid resources that are available in different parts of the country. In 2006, total dollars per low-income person (including LSC funding) ranged from a low of \$9.55 to a high of over \$76. The average was about \$28, and the median was about \$23. The lowest-funded states are in the South and Rocky Mountain states, and the highest-funded states are in the Northeast, Mid-Atlantic, Midwest, and West.

? 8 states have total funding exceeding \$50 per low-income person.

? 12 states have funding between \$30 and \$49 dollars per low-income person.

? 19 states have funding between \$20 and \$29 dollars per low-income person.

? 11 states have funding less than \$20 per low-income person.

LSC funding provides the critical foundation for legal aid programs across the country. Those LSC grantees in areas of the country where it is difficult to raise substantial amounts of non-LSC resources are almost wholly dependent on LSC funds for their continued existence. In other states, LSC funding provides the essential foundation to leverage and raise other resources. Regardless of where on the spectrum of non-LSC funding a program lies, increased federal funding is absolutely critical to expanding their ability to provide access to legal assistance for the low-income community and to close the justice gap.

But federal funding has not kept pace, and today the money programs receive from LSC purchases less than half of what it did in 1980, when LSC appropriations provided "minimum access," an amount that could support two lawyers for every 10,000 poor people in a geographic area. In order to secure the foundation of the civil legal aid program, federal funding must be increased and secured into the future.

PRO BONO AND JUDICARE

Pro bono efforts constitute a significant supplement to the staff attorney system for legal services delivery, and in many respects are an integral and integrated part of that system. Since the first LSC funding cuts in the early 1980s, pro bono efforts in the United States have continued to expand and engage more members of the legal profession in the delivery of legal services to the low-income community. Beginning in the early 1980s, each LSC-funded program has been required to spend a substantial amount of resources, currently an amount equal to 12.5% of its LSC grant, for private attorney involvement. In addition, there have been significant efforts by the American Bar Association and state and local bar associations to increase pro bono activity among all segments of the bar, including government attorneys, corporate counsel, law school faculties, as well as additional attorneys in private practice.

Pro bono efforts are provided through a wide variety of organizational structures. Some LSC-funded programs run their own pro bono projects, recruiting attorneys directly, referring cases through pro bono panels, running pro bono clinics, co-counseling with private attorneys or a variety of other efforts. Others work in collaboration with state and local bar associations that run pro bono projects, or with free standing pro bono programs that operate in local jurisdictions or on a statewide basis, generally through subgrants or through support activities provided by LSC program staff. The common denominator is that LSC funding provides the structure and underpinnings upon which all of these pro bono efforts operate.

Pro bono efforts can range from limited legal advice or brief service provided in one-time clinic settings to extended representation in major litigation or extensive transactional work on behalf of an individual or group client that goes on for many months or even years. Pro bono attorneys handle individual cases referred by LSC-funded programs or act as co-counsel in conjunction with program advocates. They undertake cases within their areas of expertise and they learn to handle poverty law or other types of cases unrelated to their every-day practices. Attorneys who engage in pro bono efforts come from every practice setting, from solo and small firm practitioners to government attorneys or corporate counsel, from academics and clinical law faculty to partners in major national and international law firms. Pro bono practice not only expands the availability of legal assistance to low-income clients, but also fulfills professional obligations and provides great personal and professional satisfaction for those lawyers who donate their services.

Although the majority of private attorney involvement is provided through pro bono efforts, numerous LSC-funded programs engage private attorneys to provide legal assistance on a low-fee basis. Programs pay private attorneys to provide legal assistance to eligible client either on a fee-for-service (judicare) or contract basis. Most judicare and contract attorneys provide services in rural areas where it is not possible to set up a legal services program office.

Despite significant efforts over the last 25 years to increase the involvement of the private bar and other members of the legal profession in the delivery of legal services, pro bono services and judicare remain only a supplement to the basic staff delivery system. The primary responsibility for providing civil legal assistance remains with staff attorneys, paralegals and other legal aid staff with particular expertise in the areas of the law that affect the low-income community and a full-time commitment to improving the lives of low-income clients, their families and their communities. Private attorneys are an essential component of the legal services delivery system, but their efforts can only complement the efforts of the staff attorney program as it works to close the justice gap.

ISSUES RELATED TO RECRUITMENT AND RETENTION OF LEGAL AID STAFF

Low funded legal aid programs throughout the country face additional obstacles to providing meaningful access to justice for the clients and communities they serve. With the reality of limited resources and growing needs, recruiting and retaining dedicated and talented lawyers is becoming increasingly challenging. Newer civil legal aid attorneys are leaving their employment with legal services programs at an alarming rate.

A survey, conducted in 2006 by NLADA, garnered 786 responses by civil legal aid attorneys 35 years old and younger. Forty percent of survey respondents reported that they expect to leave their current employment within three years. This finding is consistent with the results of other similar studies. A recent study in Florida looked back five years to the beginning of 2002 to determine how many attorneys are still with the same employer they were with at that point, finding only 39 percent remained. Even more startling is that half left before they had been with their programs for two years.

This level of turnover takes a toll on legal aid attorneys, their clients and the programs. The constant loss of attorneys means that those who remain have to pick up the open cases and try to provide assistance to more clients while positions are being filled. Many times these cases fall to supervisors who also bear the burden of training new attorneys who may leave after just a short time on the job. High turnover also takes a toll on the quality of the work as the positions are filled with new law school graduates without the experience and training of those who have left. Programs must expend additional financial resources on recruitment and training of new staff that could otherwise be used to serve program clients.

Low salaries

The primary cause for attorneys leaving and not applying for available positions is the low salaries paid by civil legal aid programs. The national median starting salary of \$36,000 is below what most new attorneys need to meet the cost of living and far below the salary one would expect for an educated professional. Also troubling is the glacial pace at which salaries increase. It takes ten years for a legal aid staff attorney to reach the national median salary of \$50,000.

In response to NLADA's survey, 540 respondents (69 percent) listed salary as one of the top five reasons they may leave their programs, with 350 (45 percent) listing it as the number one reason. In addition, 333 respondents (42 percent) listed long-term salary plans as one of the top five reasons they may leave their program.

Law school debt, loan repayment assistance programs and legislation

Ninety percent of respondents to NLADA's survey indicated they had educational debt when they graduated from law school, with 41 percent of those carrying at least \$90,000 in loans. Forty-five percent of respondents expect it will take 25 to 30 years to pay off their educational debt.

Between 1986 and 2006, the average law school tuition increased almost four fold at private institutions (\$8,225 to \$30,520), almost five fold at public institutions for non-resident students (\$5,160 to \$25,227), and over six fold at public institutions for resident students (\$2,206 to \$14,245). Consequently, the average amount borrowed for law school has spiraled upward reaching \$54,509 at public institutions and \$83,181 at private institutions for the 2005-2006 academic year.

Loan repayment assistance programs (LRAPs) have emerged as a means to assist with the debt burden of some law graduates who are interested in pursuing public service legal jobs. There is a patchwork of various types of LRAPs, administered by law schools, state bar associations and foundations, federal and state governments, and employers to provide some assistance with the extraordinary educational debt loads carried by law graduates.

The College Cost Reduction and Access Act (CCRAA), which became law in September 2007, will enable many more law graduates to pursue public interest jobs without their educational debt being such a burden. With the income-based repayment and the forgiveness provision enacted as part of the CCRAA, meaningful assistance with their education debt will become a reality for many legal aid attorneys. In addition, a bill, introduced by Senator Tom Harkin (D-IA) and included in the Higher Education Amendments Act, would authorize up to \$10,000,000 for loan repayment aid to "civil legal assistance" attorneys. Participants could receive up to \$6,000 per year up to a total amount of \$40,000 per participant.

These recent Congressional efforts will go a long way toward decreasing the difficulties that face law school graduates who wish to make a career serving the low-income community. But until sufficient resources are available to pay reasonable salaries to legal aid attorneys, programs will continue to face problems recruiting and retaining high quality staff attorneys who are willing to devote their professional lives to serving low-income clients. The only way to ensure that all legal aid programs have the human capital that is needed to fill the justice gap is to increase the federal funding that provides the foundation for the civil legal assistance program.

In conclusion, I would like to thank you for holding this hearing on Closing the Justice Gap: Providing Legal Assistance to Low-Income Americans. You have devoted much of your distinguished career to seeing that the least advantaged among us receive the help they need to build healthy, happy families and live constructive, fulfilling lives. Providing civil legal aid is an integral part of constructing the foundation for achieving these outcomes. A 53 percent reduction in funding for legal aid and turning away 50 percent of those who seek it is NOT living up to the constitutional promise of "establish[ing] justice" that we all embrace. The federal government can and should do more. It should enhance the goal of "justice for all," not erode it. Our clients and your constituents deserve no less.