

Testimony of

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STATEMENT BY
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HEARING: "CLOSING THE JUSTICE GAP: PROVIDING CIVIL LEGAL ASSISTANCE TO LOW-INCOME AMERICANS"

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Good afternoon, Mr. Chairman and distinguished members of the Committee on the Judiciary. My name is Ken Boehm and I serve as Chairman of the National Legal and Policy Center. From 1991 to 1994 I served as Assistant to the President and Counsel to the Board of the Legal Services Corporation. It is an honor to appear before you today and offer my views on providing civil legal assistance to low-income Americans.

I would like to focus on two observations.

First, any discussion of meeting the civil legal needs of the indigent that fails to consider any models of delivery other than just giving more funding to the Legal Services Corporation, fails to appreciate the fact that most help in providing for such legal needs does not come from LSC-funded lawyers and never has.

Second, there is ample evidence to suggest that the LSC model of delivering legal assistance is deeply flawed and dysfunctional. There have been decades of failed attempts by Congress to reform the program. The most recent negative GAO reports, calls for investigation by Congress, national media reports of mismanagement and wasted funds are hardly new. The fact that LSC's last reauthorization expired in 1980 and in the almost 28 years since no Congress has been able to reauthorize LSC speaks for itself.

In Washington, there is nothing surprising about federally funded programs producing studies showing the need for huge amounts of additional funding for the program producing the study. The legal needs study produced by the Legal Services Corporation, Documenting the Justice Gap in America, is no exception.

This "study" was hardly independent in any sense of the word in that it was produced by LSC with the active help of the programs funded by LSC. The conclusion was that more funding was needed for LSC with the helpful suggestion that an increase to \$1.6 billion annually - five times the current appropriation - might be a good start.

Aside from the very predictable conclusion and the obvious lack of independence, the study provides almost nothing in addressing what might be more cost-effective ways of assisting low-income individuals with legal needs.

Anyone reading the study might very well conclude that LSC-funded programs are virtually the only way the poor can get any access to justice. This is false and always has been. One 1995 study showed that the estimated number of hours of pro bono legal assistance to the poor was approximately five times greater than the hours worked by LSC-funded lawyers. See: "Private Alternatives to the Legal Services Corporation," Alternatives in Philanthropy, October 1995, page 5

LSC could have updated the same study but that would have undercut their position that the best way to solve the legal needs issue is simply a five-fold increase in their budget by Congress.

The real weakness in limiting any inquiry to addressing the civil legal needs of the poor to the LSC model is that certain legal reforms would far more efficiently provide justice in a more cost-effective way. Consider the assumption that legal needs are always best met by use of attorneys. Many of the legal needs of the poor involve relatively modest amounts in controversy yet all too often the LSC model calls for a lawsuit with attorneys on both sides. Reforms in recent years have been addressing just this problem.

Increasing the jurisdictional amount of cases allowed in small claims courts

The trend in recent years is to allow individuals to resolve disputes in small claims courts in cases involving increasing amounts in controversy. These small claims courts are fact-based and typically no lawyer is needed. Justice also comes swifter and with far less cost.

Increased mediation

Many jurisdictions - including Washington, D.C. - have instituted reforms calling for increased mediation of civil disputes. Mediation is far more cost-effective than a lawsuit and generally results in fast resolution of disputes.

Increased use of ombudsmen

In recent years states have initiated ombudsmen programs to resolve relatively minor disputes with state agencies and some regulated industries. Again, this method is far more cost-effective than a lawsuit and generally delivers results quicker.

More justice does not automatically mean more lawyers

So why doesn't LSC advocate more reforms that make justice for everyone less dependent on lawyers and lawsuits? The famous line from Bleak House by Charles Dickens may explain part of the reason:

"The one great principle of English law is to make business for itself."

A huge increase in LSC funding would not only decrease the perceived need by lawyers in private practice to provide pro bono assistance to the poor but it would generate a large increase in litigation. Those sued by LSC-funded lawyers would have to hire lawyers of their own, thus generating lots more business for the organized bar. All too often many of those on the receiving end of such lawsuits are middle class or working poor. The old saying that the average small business person is one lawsuit away from bankruptcy is true of many sued by legal services lawyers.

Over the years, numerous farmers have complained to Congress that they settled meritless or trumped up legal complaints by legal services lawyers for one reason: they could not afford to pay for a lawyer. In one case, a 70-year old Ohio vegetable farmer, Russell Garber, was sued by a program funded by LSC under a federal law that clearly did not apply to small family farmers. Mr. Garber decided to fight for his rights in federal court. Here's part of the news account of that fight:

"I didn't do anything wrong," Garber said. So he fought the case, on principle. And won. A lower court summarily dismissed the case, and last year a unanimous three-judge federal appeals court decision affirmed the dismissal, saying Garber is a family farmer not covered by the law cited in the suit.

The price tag of victory was more than \$100,000, he said.

"That's a chunk of change for an old farmer," he said. "I had to borrow money. I don't have that kind of money lying around." See: "Principled Planter; Venerable farmer's roots are set in hard work, fairness," Dayton Daily News, July 21, 2004, Page E1.

For anyone interested in promoting better access to justice, a more useful study might be based on the broader question: what are cost-effective ways to increase access to justice by decreasing the need for expensive lawyers and lawsuits? I would not expect the organized bar to support any such study nor would I expect LSC or its programs to advocate anything that expanded access to justice by eliminating the need for lawyers and lawsuits to solve everyday common legal problems for the poor.

While much has been written about how over-lawyered the United States has become, it is important to keep in mind that most of the developed world finds creative ways to address basic legal needs without resorting to anything near the number of lawyers and lawsuits found in our country.

My second observation is that the more than several decades LSC has been operating have provided plenty of evidence to suggest that the model of legal services delivery it promotes is prone to inefficiencies, abuses, lack of accountability and wasted funds.

In just the last two years, LSC has been the subject of two GAO inquiries which exposed serious management and accountability problems, calls for investigation and reform by Congress, national media allegations of funds wasted on limos, over-priced hospitality and travel, a poisonous relationship between LSC and its Inspector General, and other problems. Just the fact that Congress over almost the last 28 years, regardless of which party was in power in the White House or Congress, has failed to reauthorize LSC and made numerous attempts to reform its abuses underscores the institutional problems with the current model.

GAO Report: Legal Services Corporation: Governance and Accountability Practices Need to be Modernized and Strengthened, GAO-07-993, August 2007

The GAO found:

? LSC's "governance and accountability requirements are weaker than those of independent federal agencies and U.S. government corporations."

? The LSC board had no committees specifically targeted at "providing critical audit, ethics, or compensation functions..."

? LSC is "at increased risk of conflicts of interest," and "has not kept up with current management practices"

GAO Report: Legal Services Corporation: Improved Internal Controls Needed in Grants management and Oversight, GAO-08-37, December 2007

The GAO found:

? "weaknesses in LSC's internal controls over grants management and oversight of grantees that negatively affects LSC's ability to provide assurance that grant funds are being used for their intended purpose."

? "lack of clear definition in thee responsibilities of two of the three organizational units that oversee the work of the grantees."

? "monitoring of grantee internal control were insufficient in scope to achieve effective oversight."

? "Among the questionable expenditures GAO found were grantee use of funds for expenditures with insufficient supporting documentation, unusual contractor arrangements, alcohol purchases, employee interest-free loans, lobbying fees, late fees and earnest money."

Strained Relationships with Congress and LSC Inspector General

Over the years, LSC has frequently had strained relationships with both Congress and its own Inspector Generals. During the last two years, this has only worsened - with sometimes the two problems intertwining. A case in point was September 26, 2006 hearing before the House Judiciary subcommittee overseeing LSC. After LSC Inspector General had issued audits detailing excessive spending by LSC officials (including first-class airfares, lavish meals, pricey hotels, and other perks), Rep. Chris Cannon called for a hearing. LSC President Helaine Barnett failed to appear for the hearing leading Rep. Cannon to write her a letter threatening a subpoena if necessary to get her attendance.

An Associated Press story quoted LSC board transcripts of LSC directors critical of the LSC IG for investigating waste, fraud and abuse and hinting that the IG would be fired if he didn't "shape up."

Upon Congress learning that the LSC was considering firing the IG, a congressional aide hand-delivered a letter signed by Senators Grassley and Enzi as well as Rep Cannon warning the LSC Chairman that firing the LSC IG "would be an egregious act in light of the fact that Mr. West is investigating you, the LSC board as well as your president."

The overall picture is one of a highly dysfunctional federal program with a long history of failing to meet even minimal standards for management, accountability and ethics. This is hardly the type of program deserving a five-fold increase in appropriations.