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**THE DEMISE OF LAW REFORM AND THE TRIUMPH OF LEGAL
AID: CONGRESS AND THE LEGAL SERVICES CORPORATION
FROM THE 1960'S TO THE 1990'S**

WILLIAM P. QUIGLEY*

INTRODUCTION

Any program, however, which enables the poor to do battle with the forces that oppress them at government expense, has a high potential for conflict with the officials who make public policy affecting the poor. This is especially true where it is governmental action, often in programs designed to aid the poor, that is found to be oppressive. These conflicts have indeed arisen.¹

From the very inception of the legal services program up until today, the controversies which marked the program have been the same. In the name of helping the poor, program resources were used to promote political and ideological causes. Lobbying, congressional redistricting cases, abortion litigation and legal attacks on welfare reform and laws against welfare fraud all served to mark this program as being a far cry from the traditional legal aid offered to the poor by the legal profession over the years.²

In 1996 Congress gave in to long-time critics of the Legal Services Corporation and all but eliminated the ability of lawyers for poor people to use the law as an instrument for reform, legal work usually described as law reform. Congress also dramatically reduced the number of lawyers for poor people but allowed those who remained to continue a century-old tradition of providing legal assistance in individual legal matters, usually called legal aid. The 1996 restrictions had been sought for three decades by opponents of legal services. Since the 1960's, federally funded legal services for the poor has suffered a legislative identity crisis as Congress fought over the extent to which it would

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1. Sargent Shriver, *Law Reform and the Poor*, 17 AM. U. L. REV. 1, 5 (1967).

2. *Hearing Before the Subcomm. on Com. and Admin. Law of the House Comm. on the Judiciary*, 104th Cong., 2nd Sess. 36 (1996) (statement of Kenneth F. Boehm, Chairman, National Legal and Policy Center).

allow lawyers for the poor to engage in law reform. While law reform has been a key element of publicly funded legal services since its inception, opposition to law reform has also been a key element of legal services throughout its existence.³ In 1996, Congress chose to fund only legal aid, refusing to also fund law reform. This article traces the development of contemporary legal services in light of the struggle between the forces which sought to limit it to legal aid alone and those which sought a program that combined legal aid and law reform.⁴

LEGAL SERVICES PRIOR TO 1965

Legal services for the poor began in much earlier legislation in England. In the United States there were some early state and federal laws providing

3. For purposes of this article, legal aid and law reform will be defined as follows: Proponents of legal aid believe that the legal system works well but has a problem in that more people, usually poor people, need better access to it. As a consequence, the goal of legal aid is to provide individuals with improved access to lawyers to handle individual legal needs. Advocates of law reform do not agree that current systems, including the legal system, are fair. Thus law reform works to change legal, political, social, and economic system to the advantage of its clients by using the tools of the lawyer such as test case or class action litigation, lobbying, or legal support to organizations seeking change. JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 26 (1978).

4. Sources providing significant helpful information to the author include: EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951); Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317 (1964); Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 *VILL. L. REV.* 521 (1981); MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973* (1993); Jerome B. Falk, Jr., & Stuart R. Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 *HASTINGS L.J.* 599 (1973); Warren E. George, *Development of the Legal Services Corporation*, 61 *CORNELL L. REV.* 681 (1976); JOHN A. DOOLEY & ALAN W. HOUSEMAN, *LEGAL SERVICES HISTORY* (1985); Alan W. Houseman, *Political Lessons: Legal Services for the Poor: A Commentary*, 83 *GEORGETOWN L.J.* 1634 (1995); Alan W. Houseman, *Poverty Law: Past and Future*, in *CIVIL JUSTICE AN AGENDA FOR THE 1990S* 311 (Esther W. Lardent ed., 1991) [hereinafter Houseman, *Poverty Law*]; Alan W. Houseman, *A Short Review of Past Poverty Law Advocacy*, 23 *CLEARINGHOUSE REV.* 1514 (1990) [hereinafter Houseman, *Short Review*]; EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* (1978); SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL IMPACT OF EXPANDED ACCESS* (1985 Dissertation) [hereinafter LAWRENCE, *THE LEGAL IMPACT*]; SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* (1990) [hereinafter LAWRENCE, *THE LEGAL SERVICES PROGRAM*]; John Leubsdorf, *Class Actions at the Cloverleaf*, 39 *ARIZ. L. REV.* 453, 455 (1997); SAR LEVITAN, *THE GREAT SOCIETY'S POOR LAW* 186 (1969); Note, *The Legal Services Corporation: Curtailing Political Influence*, 81 *YALE L.J.* 231 (1971); CHARLES K. ROWLEY, *THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES* 364 (1992); REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1919).

free legal counsel but most legal assistance for the poor was provided by private or municipal legal aid organizations.⁵

England, from the time of the Magna Carta on through the twentieth century, made efforts to provide counsel to those who could not afford it. In 1215, the Magna Carta contained the pledge of King John: "To none will we sell, to none will we deny, to none will we delay right or justice."⁶ A 1494 English statute of King Henry VII promised that: "[T]he justices . . . shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same . . . and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons."⁷ By 1949 Britain created a comprehensive statutory right to counsel, supported by public expenditures.⁸ By that time a number of other countries already had some form of statutorily mandated form of legal aid for indigents.⁹

In the United States, for most of this nation's history, "the courts were open to all, but only the well to do could afford the lawyer who was necessary for the vindication of rights."¹⁰ During the nineteenth century, legal assistance for the poor was occasionally authorized on the state level as part of poor relief legislation.¹¹ After the civil war, the federal government briefly provided a limited form of legal aid when, in 1865, the Freedman's Bureau retained some private attorneys to represent indigent blacks in criminal and civil proceedings,

5. The best histories of the provision of legal services in the United States are: SMITH, *supra* note 4 (discussing the status at the beginning of the century); BROWNELL, *supra* note 4 (detailing the history of legal aid through the first half of the twentieth century); DOOLEY & HOUSEMAN, *supra* note 4, and JOHNSON, *supra* note 4 (detailing the beginnings of the OEO Legal Services Program and the earliest years of the Legal Services Corporation). *See also*, George, *supra* note 4; LAWRENCE *supra* note 4, at 6-26.

6. Magna Carta § 40 (1215). BOYD C. BARRINGTON, *THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND* 228, 239 (1900).

7. 2 Hen. 7, ch. 12.

8. ROWLEY, *supra* note 4, at 3. Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, ch. 51 (Eng. 1949).

9. Lawrence, *The Legal Impact*, dissertation, *supra* note 4, at 8 (listing Australia, Austria, Belgium, Canada, New South Wales, New Zealand, Northern Ireland, Queensland, Scotland, South Africa, Sweden, and Tasmania as countries which already had legal services for their poor).

10. Cramton, *supra* note 4, at 522.

11. In Indiana, poor people had access to the courts without payment of costs and could be assigned free counsel by the local court. "An Act for the relief of the poor." 1817 Ind. Acts, ch. 14, § 20-23. Kentucky provided for waiver of court costs and appointment of counsel for the poor in civil actions. 1798 Ky. Acts, ch. 14, § 1-2. *See also* 1851 Ky. Acts, ch. 5, § 1. Texas authorized district judges to appoint free counsel for those too poor to afford it in civil or criminal cases. 1846 Tx. Act, § 11, 203. State law provisions for counsel are still not widely known and their existence is contrary to the widely held belief of historians that "individual states had not adopted the principle of legal aid for indigents." LAWRENCE, *THE LEGAL IMPACT*, *supra* note 4, at 10.

but this was short-lived and ceased in 1868.¹² Once that experiment ended, the federal government did not reenter the field until almost a century later. While counsel for the poor remained largely unavailable, limited legal assistance for the poor was provided by local legal aid organizations which were first established after the Civil War.¹³

In the first half of the twentieth century, modest progress was made on the effort to secure lawyers for the poor.¹⁴ In nearly all the larger cities in the United States, legal aid societies had been established by 1917 with forty-one organizations providing a mix of civil and criminal representation to the indigent.¹⁵ The legal aid movement provided legal advice, counsel, and representation to individual poor people in individual cases, primarily in areas of domestic relations, wage, and contract disputes.¹⁶ The legal aid movement was premised on a belief that the legal system worked well, but poor people needed better access to it.¹⁷ Despite the fine work of these organizations, in his 1919 report to the Carnegie Foundation, *Justice and the Poor*, Reginald Heber Smith, concluded that

the administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, [and] the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.¹⁸

Smith advocated increasing the number of legal aid lawyers, and asked legal aid societies to use their expertise to work for broad legal reforms.¹⁹

As the nation entered the 1960s, legal aid was the norm. Legal aid remained small, local, restricted to the largest cities and, when available, usually provided by private or municipal organizations which served the immediate individual legal needs of the poor. At this time it was estimated that the

12. Howard C. Westwood, *Getting Justice for the Freedman*, 16 HOW. L.J. 492, 504-532 (1971). JOHNSON, *supra* note 4, at 4; LAWRENCE, THE LEGAL IMPACT, *supra* note 4, at 10.

13. DAVIS, *supra* note 4, at 10-21. The very first legal aid society was Der Deutsche Rechtsschutz-Verein, established in 1876 by the German Society of New York to render free legal services to German immigrants in landlord-tenant disputes. From 1889 onwards, the organization rendered free legal assistance to others as well. BROWNELL, *supra* note 4, at 7-8; ROWLEY, *supra* note 4, at 4. DAVIS, *supra* note 4, at 11.

14. BROWNELL, *supra* note 4, at 33. For a summary description of how legal aid functioned in the first half of the twentieth century, see JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 34-50 (1982).

15. SMITH, *supra* note 4, at 133-148. These organizations were funded by private sources as well as municipal and local grants. These forty-one organizations provided advice or assistance to 117,210 persons in 1916. *Id.* at 152.

16. *Id.* at 154.

17. HANDLER, *supra* note 3, at 26.

18. SMITH, *supra* note 4 at 8.

19. *Id.* at 241. See also DAVIS, *supra* note 4, at 16; BROWNELL, *supra* note 4, at 6-7.

equivalent of 400 full-time legal aid lawyers were available to serve nearly fifty million poor people.²⁰

LEGAL SERVICES PROGRAM OF THE OFFICE OF ECONOMIC OPPORTUNITY

The modest system of local legal aid in the United States was dramatically transformed by the efforts of the War on Poverty in the 1960s. In 1964, as a part of the War on Poverty launched by President Lyndon B. Johnson, Congress created the Office of Economic Opportunity (OEO) to directly operate some anti-poverty programs and coordinate other programs.²¹ As a result of OEO, legal services for the poor grew rapidly.²² By 1966, the OEO had allocated over twenty-five million dollars to over 150 legal services programs under the general authority for community action programs.²³

While the historical legal aid movement was primarily based on the widest possible provision of individual legal services to the poor, the LSP, while con-

20. JOHNSON, *supra* note 4, at 9. Johnson estimates that in 1965 the American population spent \$5.2 billion on lawyers. Before the infusion of OEO money, the 20% of the population that was poor received one-tenth of one percent of the nation's investment in legal services. *Id.* at 127.

21. Pub. L. No. 88-452, 78 Stat. 508. For a history of the beginnings of the OEO and the beginnings of the Legal Services Programs, see LEVITAN, *supra* note 4, at 177-189.

22. The OEO was authorized to undertake and fund a wide variety of community activities for the poor because its early legislative history included an express recognition that legal services for the poor were within the scope of its permitted activity. JOHNSON, *supra* note 4, at 307-308 (citing the 1965 Senate Report: "The listing of activities in section 205(a), of course, is not intended to exclude other types of activities related to the purpose of community action programs, such as legal services to the poor. . ." S. Rep., No. 599, 89th Cong., 1st Sess. (1965)). See also E. Clinton Bamberger, Jr., *The Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME L. REV. 847 (1966) for a brief discussion of these earliest years. Numerous leaders sought to use the OEO to establish a national legal services program. DOOLEY and HOUSEMAN, *supra*, note 4, at 4-7; JOHNSON, *supra* note 4, at 40-65; LAWRENCE, *supra* note 4, at 18-21.

23. JOHNSON, *supra* note 4, at 94-95; Note, *Legal Aid – for Lawyers*, *supra* note 4, at 236, n.14. Additional articles on the OEO legal services program can be found in Falk, *supra* note 4, at 601, n 4. See also HOUSEMAN, *supra* note 4, at 1672-1678. The very first criticisms of LSP were short-lived complaints by private bar associations more concerned about economic competition. DOOLEY and HOUSEMAN, *supra* note 4, at ch. 1 7-13, (detailing some of the economic-based criticisms of private bar associations who feared legal services might take paying clients away from them). This fear has nearly totally evaporated while the criticisms over law reform activity continue to this day. There was some criticism of LSP by bar associations in the 1960s. Bar associations in Tennessee and Florida condemned the new providers of legal services and the bar association in North Carolina threatened to disbar any attorney who worked for the LSP. JOHNSON, *supra* note 4, at 95. The American Trial Lawyers Association (ATLA) also nearly condemned LSP. The opposition of the southern bar associations and ATLA was based on several rumors: OEO lacked Congressional authority to fund LSP; LSP was about to be declared illegal in Philadelphia; and the LSP gave free legal services to any client earning less than \$5,500. When these rumors were shown to be false, the bar associations and ATLA ceased their opposition. *Id.* at 95-99. See also Houseman, *supra* note 4, at 1678-1681.

tinuing the service goal of legal aid, also placed a high priority on reform of the law to make it more responsive to the poor. This effort to change laws to make them more responsive and fair to the poor was called law reform.²⁴ Interest in law reform increased due to the war on poverty's goal of assisting the poor and changing the nature of society to make it possible for less people to be poor.²⁵

In early 1965, after consultation with the American Bar Association, the National Legal Aid and Defender Association and other bar associations, the OEO issued Guidelines for Legal Services Programs.²⁶ These guidelines made law reform an explicit part of the Legal Services Program's mission and included the following directive:

Advocacy of appropriate reforms in statutes, regulations, and administrative practices is a part of the traditional role of the lawyer and should be among the services afforded by the program. This may include judicial challenge to particular practices and regulations, research into conflicting or discriminating applications of laws or administrative rules, and proposals for administrative and legislative changes.²⁷

Later in 1965, the director of LSP, in a speech to the annual meeting of the National Legal Aid and Defender Association, stressed the law reform task of legal services:

Lawyers must be activists to leave a contribution to society. The law is more than a control; it is an instrument for social change. The role of [the] OEO program is to provide the means within the democratic process for law and lawyers to release the bonds which imprison people in poverty, to marshal the forces of law to combat the causes and effects of poverty.

Each day, I ask myself, How will lawyers representing poor people defeat the cycle of poverty? This is the purpose of the Office of Economic Opportunity, and, unless we can justify our contribution to that purpose, the program I direct is not properly a part of the War on Poverty.²⁸

Within the LSP, there was an ongoing dialogue about how to deal with the daily needs of clients and still confront the larger legal issues of the poor.²⁹

24. HANDLER, *supra* note 3, at 26.

25. LEVITAN, *supra* note 4, at 11-29.

26. Falk, *supra* note 4, at 603.

27. JOHNSON, *supra* note 4, at 114-116; Falk, *supra* note 4, at 603-604.

28. JOHNSON, *supra* note 4, at 75.

29. JOHNSON, *supra* note 4, at 126-137. Tellingly, law reform was found to be the most politically acceptable of at least four priorities for LSP. The four competing priorities were: social rescue-participating in a holistic approach with local social service organizations to "rescue" individual families from poverty; economic development-helping create and operate businesses in the low-income community for economic empowerment; community organization-organizing poor people into pressure groups to force economic and political change; and law reform-test cases, legislative advocacy and other efforts to change the laws and practices forming the legal, so-

There was concern that the demands of massive caseloads could overwhelm the resources needed to address fundamental community-wide issues. In response to those concerns, the director of LSP told a 1967 Harvard Conference on Law and Poverty:

My primary purpose in speaking with you this evening is to state that the primary goal of the Legal Services Program should be law reform, to bring about changes in the structure of the world in which poor people live in order to provide on the largest scale possible consistent with our limited resources a legal system in which the poor enjoy the same treatment as the rich I believe law reform is vital because it is the means by which we can provide more for the poor than in any other way with less expenditure of time and money. Law reform can provide the most bang for the buck, to use an OEO phrase.³⁰

Later in 1967, the Report of the Senate Committee on Labor and Public Welfare, in their consideration of amendments to the Economic Opportunity Act, recognized that LSP “encourages law reform through test cases and legislation” and endorsed the need for the LSP to engage in those law reform activities:

[T]he legal services program can scarcely keep up with the volume of cases in the communities where it is active, not to speak of places waiting for funds to start the program. The committee concludes, therefore, that more attention should be given to test cases and law reform.³¹

In 1967, the OEO was specifically authorized to create a LSP.³² This provision, Section 222(a)(3), provided Congressional approval for law reform. The authorized legal program is described as:

A ‘Legal Services’ program to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services.³³

cial, and economic structures of poverty. Social rescue was eliminated because it could only help a very limited number of families. Economic development was eliminated because of insufficient funding to get businesses started. Community organizing was a political threat to current elected officials. Therefore law reform was made the priority because it was the kind of work lawyers did for the non-poor and it was an intersection of the goals of the neighborhood legal services program and the historical commitment of legal aid organizations to equal justice. *Id.* at 128-132.

30. JOHNSON, *supra* note 4, at 133.

31. S. REP. NO. 563, 90th Cong., 1st Sess. 40 (1967). *See also* JOHNSON, *supra* note 4, at 133.

32. Pub. L. No. 90-222, 81 Stat. 672, 698 (1967).

33. *Id.* at 698-699.

With law reform as one of its goals, LSP continued to grow and by 1967, 300 legal services organizations received grants totaling over forty million dollars.³⁴

In order to support law reform efforts, the LSP created and funded a number of national law reform centers, affiliated with law schools, to bring test cases and to support the lawyers working in local legal services offices who took on the challenge of law reform.³⁵ Class actions were consciously used to try to bring about reforms in the law for large numbers of people.³⁶ Lobbying increased to impact the laws affecting poor people outside the judicial process.³⁷

Yet despite the proclamations from its leaders seeking to prioritize law reform, reform work was but a small part of the legal services offered in the initial years of LSP. Local lawyers, like their legal aid counterparts before them, remained overwhelmed with individual legal needs of the poor.³⁸

However, despite the fact that most LSP lawyers did not spend much time in law reform, it was the law reform efforts of LSP which provided the program with its first substantive challenge. As Sargent Shriver, the first director of the OEO, had predicted, the law reform efforts of the LSP did provoke conflict.³⁹

A defining moment in the conflict over providing legal services to the poor was the effort of California Governor Ronald Reagan, in the 1960s, to curtail the advocacy of the California Rural Legal Assistance (CRLA).⁴⁰ Despite being hailed as *the* outstanding legal services program of the year by the OEO in 1968, CRLA was opposed from its very inception because of its work with farm workers and the poor.⁴¹ CRLA lawyers forced the state to restore over

34. JOHNSON, *supra* note 4, at 99. Every state except North Dakota and Alabama had at least one Legal Services agency. The offices ranged in size from 1 lawyer to 40 and in budgets from \$30,000 to \$1.2 million. *Id.*

35. *Id.* at 180-182.

36. ROWLEY, *supra* note 4, at 364. The 1966 change in Rule 23 of the Federal Rules of Civil Procedure coincided with the beginning of the OEO Legal Services Program and the two events "proved to be pivotal in the use of the courts by attorneys to achieve law reform."

37. See Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L. J. 39 (1994).

38. LEVITAN, *supra* note 4. (noting that in the late 1960s the vast majority of legal services lawyers were too overwhelmed by the press of cases, often handling 50 to 100 new cases each month, to engage in any law reform.) See also discussion in LAWRENCE, *THE LEGAL SERVICES PROGRAM*, *supra* note 4, at 33 (discussing numerous scholars who concluded that the LSP "essentially failed in its attempt to engage local projects in law reform activities.").

39. Shriver, *supra* note 1.

40. For a detailed review of this matter see Falk, *supra* note 4. See also Anthony Lewis, *Conserving the Society*, N.Y. TIMES, April 16, 1981, at 31; MARK ARNOLD, JURIS DR. 3, 8 (1971); Wallace Turner, *Proposal by Reagan Opens an Old Wound*, N.Y. TIMES, March 15, 1981, at 25.

41. Falk, *supra* note 4, at 604-609.

\$200 million in funds incorrectly removed from the Medi-Cal program, which prevented Governor Reagan from fulfilling a campaign promise to balance the state budget.⁴² CRLA lawyers also forced the state to implement a minimum wage for farmworkers,⁴³ blocked the implementation of “braceros” cheap farm labor from Mexico,⁴⁴ and expanded the state’s food stamp and school lunch programs.⁴⁵

In response, Governor Reagan, through California’s U.S. Senator George Murphy, unsuccessfully attempted to prohibit legal services lawyers from bringing suits against federal, state, or local governments, and, also unsuccessfully, sought to give governors veto power over

the OEO programs in their states.⁴⁶ In 1967 an amendment proposed by Senator Murphy sought to prohibit appellate work and suits against government.⁴⁷ Senator Murphy explained his opposition:

[L]egal services attorneys are not only working as defense counsel, they will also bring a cause of action as well as defend an indigent in a suit. They will do one thing more. They will institute test cases. Recently, in this manner, they have begun to challenge our laws all too often . . . There are too many cases for legal service attorneys without involving themselves in these test cases.⁴⁸

In 1969, Murphy filed another unsuccessful amendment seeking to provide governors with veto power over funding local legal services projects, eliminating the power of the Director of OEO to override the veto.⁴⁹

In 1970, Governor Reagan vetoed the California OEO grant on the stated grounds that legal services funds had been diverted to an activist political agenda far-distant from the original legislative intent.⁵⁰ While an investigatory commission of the OEO concluded that in fact routine legal matters made up

42. *Morris v. Williams*, 433 P.2d 697 (1967); George, *supra* note 4, at 684.

43. *Rivera v. Div. of Ind. Welfare*, 71 Cal. Rptr. 739 (1968).

44. Falk, *supra* note 4, at 607.

45. *Id.*; George, *supra* note 4, at 684; ROWLEY, *supra* note 4, at 12.

46. ROWLEY, *supra* note 4, at 12. LAWRENCE, *THE LEGAL IMPACT*, *supra* note 4, at 43-44. Reagan characterized the CRLA attorneys as “ideological ambulance chasers.” George, *supra* note 4, at 685, n. 37.

47. 113 CONG. REC. 27,871 (1967).

48. *Id.* at 27,871, 27,872. The amendment was defeated 52-36. *Id.* at 27,873.

49. 115 CONG. REC. 29,894 (1969) The proposed amendment was opposed by the A.B.A. as “oppressive interference with the freedom of the lawyer and the citizen” which would “discourage actions that are politically unpopular.” N.Y. TIMES, October 29, 1969, at 46. The amendment was defeated. See Note, *Legal Aid-For Lawyers*, *supra* note 4, at 261, n. 105. By 1969 resolution, the ABA Board of Governors “reaffirms its position that the Legal Services Program should operate with full assurance of independence of lawyers. . . to render services . . . in cases which might involve action against government agencies seeking significant changes.” JOHNSON, *supra* note 4, at 339, n. 42.

50. ROWLEY, *supra* note 4, at 12.

over 95% of the caseload of CRLA,⁵¹ only after negotiations with the OEO was the California grant reinstated, conditioned on changes designed to prevent those complaints aired by the governor.⁵²

While the conflict over the CRLA was the most highly publicized of the LSP conflicts over law reform, Governor Reagan was not alone in his hostility to the reform agenda of legal services. Governors in Florida, Connecticut, Arizona and Missouri also vetoed LSP refunding and there were a number of additional examples of conflict between local LSP firms and elected officials.⁵³

Despite opposition to its law reform efforts to secure justice for the poor, the LSP continued to grow and provide a wider range of legal services to greater numbers of the poor.⁵⁴ By 1971, the OEO contribution to civil legal assistance reached \$56 million with 2,660 staff attorneys working in over 850 offices in 250 communities.⁵⁵

LSP now offered poor people access to more comprehensive legal services than the prior legal aid system. Despite the time and case limitations which prevented a large commitment to law reform efforts, LSP lawyers did manage to do significant law reform. While legal aid lawyers in the 1950s litigated only six percent of their cases and only rarely appealed, LSP lawyers took seventeen percent to court and appealed over 1,000 cases annually.⁵⁶ Most telling was the fact that no legal aid staff attorney ever took a case to the U. S. Supreme Court in its entire eighty-nine year history, while in five years of the LSP, from 1967 to 1972, LSP staff lawyers took 219 cases to the Court, had 136 decided on the merits, and won seventy-three of them.⁵⁷ Among the significant cases brought by legal services lawyers were those which eliminated

51. Falk, *supra* note 4, at 606.

52. ROWLEY, *supra* note 4, at 13.

The effects of the hostility of Governor Reagan towards legal services for the poor remained in evidence for years. Wallace Turner, *Proposal by Reagan Opens Old Wounds*, N.Y. TIMES, Mar. 15, 1981, at 25.

53. Note, *Legal Aid – for Lawyers* *supra* note 4, at 246-259 (detailing examples of political interference in Texas, North Carolina, Florida, Louisiana, California, Maryland, Illinois, and Mississippi). See also examples in DOOLEY & HOUSEMAN, *supra* note 4, at ch. 1 18-20 and in JOHNSON, *supra* note 4, at 193-194. Another example of the animosity over OEO legal services can be found in the decision of the University of Mississippi Law School not to allow two law professors, Michael Trister and George Strickler, now a noted civil rights authority, to work for the local Rural Legal Services Program. When the professors indicated they intended to continue to work with the local LSP, in a manner consistent with the outside employment of all other professors, they were advised to vacate their offices. The professors were granted injunctive and declaratory relief in *Trister v. Univ. of Mississippi*, 420 F. 2d 499 (5th Cir. 1969).

54. Houseman, *supra* note 4, at 1681-1687.

55. JOHNSON, *supra* note 4, at 188. By 1971, the budget for legal services in the OEO programs was \$56 million, almost twenty times the amount spent on legal assistance in 1964 before LSP began. LAWRENCE, *THE LEGAL IMPACT*, *supra* note 4, at 22.

56. JOHNSON, *supra* note 4, at 189.

57. *Id.*

welfare residency requirements and others that developed the law of due process in ways that gave more effective remedies to recipients of public assistance, residents of public housing, as well as debtors, mental patients and juveniles.⁵⁸

During the OEO days, legal services incorporated both the benefits of legal aid services to individual poor people as well as a commitment to engage in law reform.

LEGAL SERVICES CORPORATION

As early as 1968, supporters of the LSP were considering the establishment of a legal services corporation completely independent of OEO.⁵⁹ Critics of the OEO approach thought that the decentralized nature of the LSP, combined with local control, created a vacuum which allowed local professionals to seize control.⁶⁰ Many hoped that moving legal services programs from the executive branch to an independent corporation would insulate it from political

58. See Houseman, *supra* note 4, at 1685. Hundreds of constitutional, statutory and common law cases were brought by legal services lawyers to enforce the rights of the poor. See short discussion of some of these cases in Houseman, *supra* note 4, at 1515-1517. Notably, Thorpe v. Hous. Auth. of the City of Durham, 386 U.S. 670 (1967)(due process in eviction from public housing); Edwards v. Habib, 397 F. 2d 687 (D.C. Cir. 1968)(prohibiting retaliatory evictions for reports of housing code violations); King v. Smith 392 U.S. 309 (1968)(federal court remedies for state court welfare decisions); Shapiro v. Thompson, 394 U.S. 618 (1969)(welfare residency requirements invalid); Goldberg v. Kelly, 397 U.S. 254 (1970)(due process for public benefit terminations); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (1970)(implied warranty of habitability); Boddie v. Connecticut, 401 U.S. 371 (1971)(indigents can seek divorce without payment of costs); Fuentes v. Shevin, 407 U.S. 67 (1972)(due process required in seizures). While no legal aid program had ever taken a case to the U.S. Supreme Court prior to the establishment of the LSP in 1966, between 1966 and 1974 legal services programs sponsored by the LSP took 164 cases to the U.S. Supreme Court. LAWRENCE, THE LEGAL IMPACT, *supra* note 4 at 23. See LAWRENCE Appendix A, for a list of all cases. Of the 119 cases decided on the merits, 74 were victories for the poor. LAWRENCE, *supra* note 4, at 23. Written opinions in LSP cases represented seven percent of all opinions handed down by the Supreme Court in this time period. LAWRENCE, THE LEGAL IMPACT, *supra* note 4, at 3.

59. LAWRENCE, THE LEGAL IMPACT, *supra* note 4, at 24. Supporters of an independent federally funded non-profit looked at the Corporation for Public Broadcasting as a successful prototype. *Id.* at 25. George, *supra* note 4, at 690-692.

60. ROWLEY, *supra* note 4, at 13-14. As a result of decentralization and local control the LSP was more like hundreds of separate poverty law firms than a single national organization. Lawrence, *supra* note 5, at 52. The sentiments of those interested in a separate corporation were articulated in an article in the Yale law Journal entitled "The Legal Services Corporation: Curtailing Political Interference." Note, *Legal Aid - for Lawyers supra* note 4. ROWLEY, *supra* note 4, at 13 (pointing out the influence of the Yale Law Journal article).

control and interference like that which characterized the fight over the CRLA.⁶¹

In 1971, legislation was introduced into Congress to create a national Legal Services Corporation. This bill, called the Mondale-Steiger bill, limited the power of the President over the board by allowing him to name only a minority of the board members and provided broad authorization for legal services without restrictions on program discretion which would limit law reform activities.⁶² President Nixon countered with a 1971 bill that provided greater presidential control over the board and placed explicit restrictions on the LSC which barred group representation, representation in criminal cases, lobbying, and political activity.⁶³ Despite the restrictions contained in his bill, President Nixon, when submitting the bill to Congress, said: "The legal problems of the poor are of sufficient scope that we should not restrict the right of their attorneys to bring any type of civil suit. Only in this manner can we maintain the integrity of the adversary process and fully protect the attorney-client relationship so central to our judicial process."⁶⁴

Yet, when Congress authored a compromise, President Nixon vetoed the Economic Opportunity Amendments to which the LSC was attached indicating his displeasure at the lack of restrictions on law reform included in the compromise: "I urge the Congress to rewrite this bill, to create a new National Legal Services Corporation, truly independent of political influences, containing strict safeguards against the kinds of abuses certain to erode public support - a legal services corporation which places the needs of low income clients first, before the political concerns of either legal services attorneys or elected officials."⁶⁵

61. George, *supra* note 4, at 690-692. The American Bar Association, the National Legal Aid and Defender Association, and the National Advisory Committee all recommended moving LSP to a more independent agency or quasi-public corporation. *Id.* at 690.

62. *To Amend the Economic Opportunity Act of 1964 to Authorize a Legal Services Program By Establishing A National Legal Services Corporation. And For Other Purposes: Hearing Before the Subcomm. on Employment, Manpower, and Poverty of the Comm. on Labor and Public Welfare*, 92nd Cong., 1st Sess. 1305 (1971); ROWLEY, *supra* note 4, at 14. *Consideration of H.R. 6360: Hearing Before the Special Hearing Subcomm. No. 2 of the Comm. on Education and Labor*, 92nd Cong., 1st Sess. 1 (1971).

63. *Consideration of H.R. 8163: Hearing Before the Special Hearing Subcomm. No. 2 of the Comm. on Education and Labor*, 92nd Cong., 1st Sess. 1 (1971); *See* 117 CONG. REC. 13788-90 (1971). The bill refused funds to any "so-called public interest law firms which intended to expend at least 75 per centum of their resources and time litigating issues either in the broad interests of a majority of the public or in the collective interests of the poor, or both." *Id.* at 13789. ROWLEY, *supra* note 4, at 14.

64. *President's Message to Congress Proposing Establishment of the Independent Corporation*, 7 WEEKLY COMP. PRES. DOC. 726, 729 (May 10, 1971) as quoted in George, *supra* note 4, at 692.

65. ROWLEY, *supra* note 4, at 15. *See also* George, *supra* note 4, at 692-693.

Soon thereafter Vice President Spiro Agnew began to speak out against the LSP urging that, as Senator Murphy earlier demanded, it not be allowed to sue governments or other taxpayer-funded agencies, hyperbolically characterizing legal services as "tax-funded social activism."⁶⁶

In 1973, Nixon began to dismantle OEO and appointed Howard Phillips, a known critic of the war on poverty and legal services, to head OEO.⁶⁷ Phillips unilaterally canceled law reform as a goal of legal services and defunded the back up centers essential to law reform litigation.⁶⁸ This effort to eliminate law reform was stopped by federal court action which removed Phillips from office and continued funding.⁶⁹

Finally on July 25, 1974, on the eve of his resignation, President Nixon signed a compromise LSC bill that eliminated funding for independent back up centers, imposed some restrictions on the scope of authorized legal work, but did allow group representation.⁷⁰ The restrictions imposed included prohibition on litigation involving abortion, school desegregation, and selective service, and also placed some limitations on class actions and some types of juvenile representation.⁷¹ As created by Congress, the LSC would not itself provide any direct legal representation but would rather provide financial assistance to qualified local programs pursuant to annual congressional appropriation.⁷²

66. Spiro T. Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A. J. 930, 931 (1972). George, *supra* note 4, at 694, (detailing several Agnew criticisms in 1972).

67. ROWLEY, *supra* note 4, at 15.

68. George, *supra* note 5, at 695, 714-716. Mark Arnold, *The Knockdown, Drag-Out Battle Over Legal Services*, 3 JURIS DR., 4/5 (1973) (quoting Phillips as saying the LSP "has been run by lawyers who disagree with the President's policies on welfare, on busing, on abortion, on every major social issue, people who have concluded that the only way to serve the poor is by opposing the policies of Richard Nixon . . .").

69. *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.C. 1973)(ordering Phillips to continue funding OEO projects); *Williams v. Phillips*, 360 F. Supp. 1363 (D.C. 1973) (enjoining Phillips, by the same judge, from continuing as OEO Acting Director since his appointment was not confirmed by the Senate as was required by 42 U.S.C. § 2941(a) (1970)). See also ROWLEY, *supra* note 4, at 15.

70. Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. 2996). The 1974 Legal Services Corporation Act is reviewed in detail by George, *supra* note 4, at 700-722. For a contemporary overview, see *President Nixon Approves Legislation Creating a National Legal services Corporation*, 60 A.B.A. J. 1045-1049 (1974). DOOLEY & HOUSEMAN, *supra* note 4, at 27-31.

71. See Pub. L. No. 93-355, 88 Stat. 378. Political activity, including demonstrations, picketing, referenda, lobbying, or party work was prohibited. *Id.* at §§ 1001(5), 1006(b)(5), 1006(c)(2) & (e), 1007(a)(5) & (6), 1007(b)(5) & (6). Class actions were prohibited except with the express approval of a project director. *Id.* at § 1006(d)(5). Limitations on juvenile cases were imposed. § 1007(b)(4). Desegregation suits were prohibited. *Id.* at § 1007(b)(7). Abortion litigation was prohibited by § 1007(b)(8). George, *supra* note 4, at 696-698, 705-708, 709-722.

72. 42 U.S.C. § 2996e (1983). See also Cramton, *supra* note 4, at 528-531.

As LSC started out, legal services for the poor were designed to provide legal aid to large numbers of people while still allowing efforts for law reform. The hopes of those who labored for the creation of the LSC were tempered by the realization that Congress still held the authority to curtail the effectiveness and existence of legal services for the poor. As Professor George noted in his 1976 overview of the LSC act of 1974:

The Legal Services Corporation Act is a promising development for the legal services program. So long as the program is shielded from political interference and pressure, its attorneys will be able to focus their energies on providing clients with the best service possible. But the Act provides no guarantee that the program will not once again become embroiled in political controversy. The Corporation must approach Congress every year for renewed funding. As in the past, the annual appropriations battle may foster attempts to limit the scope of the program⁷³

Despite hopes that the move from the executive branch to an independent corporation would remove the new Legal Services Corporation from political controversy and attack, that removal was not forthcoming. Initial board nominees for LSC included several anti-legal services advocates, and only four of the original eleven nominated were actually confirmed by the Senate after months of controversy.⁷⁴ Funding problems due to inflation also reduced the number of legal service attorneys.⁷⁵

While the first half of the 1970s were fraught with political instability and challenge, change occurred in the years from 1975 to 1981. These years were later called the "heyday of legal services success."⁷⁶ During this time, legal aid and law reform coexisted as goals in LSC.

The LSC was reauthorized in 1977 with increased appropriations and a broader scope in a relatively noncontroversial legislative process.⁷⁷ Restrictions on legal services activity were relaxed.⁷⁸ Funding rose rapidly from ninety million dollars to \$321 million as LSC grew to serve more than a mil-

73. George, *supra* note 4, at 729.

74. George, *supra* note 4, at 698-699. George points out that the initial nominees included one person who criticized the idea of a corporation for legal services and was a vocal opponent of CRLA and another who authored an amendment restricting back up centers. *Id.* at n. 130. DOOLEY & HOUSEMAN, *supra* note 4, at 31-32.

75. George, *supra* note 4, at 699 (reporting that fixed funding was eaten by inflation to such a degree that there was a 13% reduction of legal services lawyers from 1972 to 1976).

76. Houseman, *supra* note 4, at 320 (1991). See also Cramton, *supra* note 4, at 528.

77. Pub. L. No. 95-222, 91 Stat. 1619. DOOLEY & HOUSEMAN, *supra* note 4, at 33; at 5-16.

78. DOOLEY & HOUSEMAN, *supra* note 4, at 5-6. For example, the restriction on representing juveniles were eliminated (42 U.S.C. 2996f(b) was repealed) and the Congressional statement of findings and declarations about LSC was expanded to include "improving opportunities for low-income persons." 42 U.S.C. § 2996(3). It is a signal to the staff that impact work was approved. DOOLEY & HOUSEMAN, *supra* note 4, ch. 3 at 5.

lion clients per year with more than 6,000 attorneys.⁷⁹ Legal services became even more of a national program with 323 local programs funded by LSC.⁸⁰ Poor people in every state in the country were to have access to legal services, and their lawyers were to have increased training and support.⁸¹ LSC enjoyed support in Congress, the organized bar, and the general public.⁸²

But, as the 1970s closed, political problems again began to develop as a result of the expansion of LSC.⁸³ There was controversy over the composition of the board and the Senate blocked confirmation of President Carter's appointees in the late 1970's.⁸⁴ The corporation was unable to muster congressional support for reauthorization and was forced to persevere based on continuing budget resolutions.⁸⁵ The 1981 appropriation of \$321 million was provided through a Continuing Resolution that included a new restriction which prohibits representation seeking to legalize homosexuality.⁸⁶ The 1981 appropriation would prove to be the highest annual funding of LSC over the next ten years.

With the election of Ronald Reagan as President in 1980, the political climate for LSC abruptly became more harsh, and the controversy over law reform flared anew.⁸⁷ The first shots of the war on LSC were fired by Howard Phillips, the same person who had been removed as acting OEO when he tried to stop all law reform. Phillips now called for a defunding of federal legal services because of its "radical" and "socialist" agenda of law reform.⁸⁸ The

79. MARK KESSLER, *LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATIONAL POLITICS* (1987). In 1979, LSC submitted to Congress a fact book on the Legal Services Corporation and the activities of its grantees. *Legal Services Corporation Reauthorization: Hearings before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary House of Representative*, 96th Cong., 1st Sess. 60 (1979). The fact book reported LSC: served 1.4 million poor people in 1979, up from .7 million in 1975. *Id.* at 285.

80. Cramton, *supra* note 4, at 528-529.

81. Houseman, *Poverty Law*, *supra* note 4, at 320-321. There was more emphasis on specialization, local priority setting, and coordination.

82. *Id.*

83. DOOLEY & HOUSEMAN, *supra* note 4, Ch. 3 8-16. Problems included national controversies such as legislative representation and representation of illegal aliens and local controversies attendant to the establishment of new programs (e.g., makeup of local boards, representation of ineligible or controversial clients, class actions and other suits against governmental bodies). See, for example, discussion of problems in Virginia. *Id.* at ch. 3 19-22.

84. *Id.* at 16.

85. *Id.* at 8.

86. Pub. L. No. 96-536, 94 Stat. 3166. The continuing resolution also continued prior prohibitions on minimum access, representing aliens, and publicity and propaganda. See DOOLEY & HOUSEMAN, *supra* note 4, Ch. 3 at 11.

87. Cramton, *supra* note 4, at 521-522, 543-551.

88. Justice John A. Dooley of the Supreme Court of Vermont characterized the Reagan years as an "eight year war on the Federal legal services program by the Executive Branch of the United States government." Justice John A. Dooley of the Supreme Court of Vermont, *Legal Services in the 1990's* in *CIVIL JUSTICE: AN AGENDA FOR THE 1990S* 221 (Esther F. Lardent ed.,

Reagan administration went along with Phillips and other critics, and the President's 1982 budget scheduled LSC for termination.⁸⁹ In place of LSC, Reagan sought to return to a local system of legal aid with greater reliance on pro bono assistance and judicare programs funded by state block grants, in an attempt to shift representation of the poor from salaried poverty law specialists to local private attorneys.⁹⁰

The effort to abolish LSC proved impossible, in part, because of support by a number of groups including fourteen past presidents of the ABA, 187 local bar groups, deans of 141 law schools, and hundreds of judges.⁹¹ But the fact that LSC survived did not end the crisis of how it would operate. Since they were unable to terminate the program, the Reagan administration used other strategies like reduced funding, increased restrictions, and unsympathetic leadership by the board to try to bring about a "slow, painful death" of LSC.⁹²

Negative action by the LSC board under President Reagan started slowly, because he waited until the end of 1981 to appoint any new directors in the hope that LSC could be eliminated.⁹³ When elimination proved impossible, the Administration began to create a board hostile to the prior vision of legal services, initially by recess appointment on December 30, 1981.⁹⁴ The first meeting of the Reagan board was held by telephone conference, and in it they sought to administratively terminate funding of a number programs for 1982.⁹⁵ While their action was ultimately determined to have no legal effect, it did, as Dooley and Houseman note, "set the tone for the new direction of LSC."⁹⁶ For

1989). Phillips sent out a letter eight days before President Reagan's first inauguration on behalf of a National Defeat Legal Services Committee. It referred to "avowed Marxists" who worked for LSC funded projects and described LSC as "one of the most radical Great Society programs." Phillips suggested, in an attached reply form, that the "radical leftist Legal Services Corporation (LSC) uses my tax dollars to promote higher taxes, bigger government, food stamps, abortions, homosexual rights, racial quotas and other liberal schemes . . . we must stop the Legal Services Corporation from promoting their socialist ideas with *our* money." DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 299 (1988).

89. KESSLER, *supra* note 79, at 9. Cramton, *supra* note 4, at 521-522, 543-551 (citing reports of the Reagan transition team and the Heritage Foundation which apparently persuaded the new Administration to defund LSC).

90. Cramton, *supra* note 4, at 544-551. The block grant proposal was to combine a number of human service projects, including legal services, into one pool of funds for each state, with an overall reduction of 25%. "Judicare, the legal analog to medicare, involves the provision of legal services to eligible clients by members of the private bar, who are then paid by the government for their services." *Id.* at 545.

91. For statement of support from ABA president, see *The Perils of L.S.C.*, 68 A.B.A. J. 236 (1982). See also LUBAN, *supra* note 88, at 299-300.

92. Kessler, *supra* note 80, at 9 quoting Cramton, *supra* note 5, at 521.

93. DOOLEY & HOUSEMAN, *supra* note 4, Ch. 4 at 15.

94. *Id.* at 16.

95. DOOLEY & HOUSEMAN, *supra* note 4, at 16.

96. *Id.*

years LSC was governed by short-term recess board appointments as the President continued to make recess appointments and the Senate continued to refuse to approve the President's nominees.⁹⁷ The board became so hostile that in 1987, the chair of the LSC Board even called for the abolition of his own agency.⁹⁸

LSC was also being starved financially, consistently being appropriated less than the 1981 LSC authorization of \$321 million.⁹⁹ LSC funding was reduced to \$241 million in 1982¹⁰⁰ and 1983,¹⁰¹ and received only \$275 million in 1984.¹⁰² For 1985, LSC was granted \$305 million with a directive from Congress to the Board not to promulgate any new regulations without giving

97. *Id.* at 19-22. From 1981 to 1984 the President "named 19 recess appointments to the LSC Board and has named, nominated or recess-appointed a total of 44 persons to direct the organization." *Id.* at 22. As of late 1984, not one nominee was confirmed by the Republican controlled Senate.

98. LUBAN, *supra* note 88, at 300.

99. The continuing resolution also continued prior prohibitions on minimum access, representing aliens, and publicity and propaganda. *See* DOOLEY & HOUSEMAN, *supra* note 4, at Ch. 3 11.

100. DOOLEY & HOUSEMAN, *supra* note 4, at Ch. 4 6-12 (detailing the legislative controversy over the survival of LSC).

101. Further Continuing Appropriations Act, of 1983, Pub. L. No. 97-377, 96 Stat. 1830, 1874-76 (1982). The Continuing Resolution which provided LSC with \$241 for 1983 imposed a modified restriction on class actions against the government, restrictions on lobbying, and a rider preventing the LSC board, not yet approved by the Senate, from taking adverse action against legal services programs. The class action restriction prohibits class actions against Federal, state, or local governments unless specifically approved by the project director, primarily benefits eligible clients, notice is given to the unit of government being sued, and settlement has either been tried or is not reasonable. The LSC Board was prohibited from defunding current grantees until its members were confirmed by the Senate. Restrictions were placed on compensation for the members of the Board that limited the amounts and flatly refused to pay for membership in private clubs. 96 Stat. 1876. *See also* DOOLEY & HOUSEMAN, *supra* note 4, at Ch. 4 12-13.

102. Department of Commerce, Justice and State, the Judiciary, & Related Agencies Appropriations Act, of 1984, Pub. L. No. 98-166, 97 Stat. 1071, 1088-92 (1983). PL 98-166, November 28, 1983, 97 Stat 1071, 1088-1092. The act which authorized \$275 million for LSC in 1984 also contained a number of restrictions. These restrictions barred representation of illegal aliens and imposed additional stringent requirements on filing class action suits against the government. Class actions could only be brought against Federal, state, or local governments with express approval of the project director, if the primary benefit sought in the action was for the benefit of eligible clients, and notice was given to the governmental entity and responsible efforts to settle were made or were not reasonable. Restrictions on lobbying were imposed. 97 Stat. At 1088-92, Congressional action in late 1983 confirmed the 1984 LSC appropriation of \$275 million and strengthened the protection of local legal services programs from action by the LSC Board. DOOLEY & HOUSEMAN, *supra* note 4, at Ch. 4 13-14. The legislation continued previous restrictions on representation of aliens, restrictions on class actions, and new restrictions on training policies.

Congress fifteen days notice of intent to use their funds for that purpose.¹⁰³ In 1986, the appropriation was \$305 million.¹⁰⁴ It remained \$305 million in 1987¹⁰⁵ and 1988.¹⁰⁶ In 1989 LSC was authorized to receive \$308 million.¹⁰⁷

In addition to budget cutbacks in the 1980's, LSC was subjected to increasingly restrictive regulations and interpretations which limited the types of advocacy available to the poor.¹⁰⁸ Efforts were made by the Reagan LSC Board to abolish the back up centers.¹⁰⁹ Opportunities for legislative advocacy, administrative representation and many forms of training were reduced.¹¹⁰

103. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985, Pub. L. No. 98-411, 98 Stat. 1545, 1563 (1984).

104. Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136, 1162 (1985).

105. H.J. Res. 738, Pub. L. No. 99-591, 100 Stat. 3341, 3341-69 (1986).

106. H.J. Res. 395, Pub. L. No. 100-202, 101 Stat. 1329, 1329-33 (1987).

107. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2218 (1988).

108. See *supra* note 101 (discussing funding for the 1980's). Howard S. Erlanger, *Lawyers and Neighborhood Legal Services: Social Background and the Impetus for Reform*, 12 LAW & SOC'Y REV. 253, 268 (1978). That law reform would provoke criticism was not a surprise to anyone. "A program like Legal Services is politically vulnerable. In American society the allocation of resources, including law, is based on the ability to pay for them; Legal Services, however, attempts to allocate resources according to need. As a result, it faces a dilemma recognized by early champions of legal aid like Reginald Heber Smith: if it does not take an aggressive approach to the legal problems of the poor, then it fails to provide equal justice; if it actively advocates on their behalf, then it may be seen as exceeding the willingness of its clients to pay. In the latter instance, the program becomes susceptible to the charge that the interests of the clients are subordinated to the political ideology of program staff. This dilemma has led to numerous attacks on the Legal services program at the national, state, and local levels." *Id.*

109. In 1985, fourteen national support centers sued to enjoin LSC from limiting their activities beyond what Congress legislated. *National Senior Citizens Law Center v. LSC*, 751 F.2d 1391 (D.C. Cir. 1985). This matter arose out of a 1983 announcement by LSC that the back up centers could not spend more than 10% of their time on direct representation of clients or written or oral legislative or administrative advocacy, despite the fact that these activities constituted three of the four principal functions set out for them by Congress. The federal courts agreed and the actions of the LSC were enjoined. At almost the same time, LSC refused to renew grants to four existing regional training centers for 1984 without giving the centers due process hearings. That action was also enjoined. *Massachusetts Law Reform Institute v. LSC*, 581 F. Supp. 1179 (D.D.C. 1984), *aff'd mem.*, 737 F.2d 1206 (D.C. Cir. 1984).

110. 45 C.F.R. § 1612 (1998), 52 Fed. Reg. 28,434 (1987). Regulations were passed which reduced legislative advocacy, administrative representation and training. Public laws 99-500 and 99-591 prohibited the expenditure of LSC funds for legislative or administrative lobbying, 45 C.F.R. § 1612.3 (1998); grassroots lobbying, 45 C.F.R. § 1612.4 (1998); public demonstrations, 45 C.F.R. § 1612.7 (1998); training to advocate particular public policies, 45 C.F.R. § 1612.8 (1998); organizing, 45 CFR 1612.9 (1998). In *Grassley, et al. v. LSC, et al.*, a group including five U.S. Senators sued the LSC board, including Hillary Rodham, Chairman of the Board, former Director of the Legal Aid Clinic at University of Arkansas, to enjoin alleged lobbying and political activities of defendants. The suit was dismissed before any factual hearing on the basis

Efforts of LSC lawyers in representing aliens, clients in fee-generating cases, and in redistricting matters were further cut back.¹¹¹ A number of auditing, funding and administrative changes, demanded by what some described as an LSC board hostile to the mission of legal services, further inhibited the effectiveness of legal services providers.¹¹²

Yet, despite the efforts of those who sought to undermine it, LSC in the 1980s remained an effective and productive program.¹¹³ Legal services lawyers were hobbled by the LSC restrictions but continued to provide essential legal advice and representation to poor people, if in a more limited fashion.¹¹⁴

In the 1990s, the financial health of LSC began to improve after the cut-backs of the 1980s. For the first four years of the 1990s, funding for LSC rose slowly from \$321 million in 1990,¹¹⁵ to \$327 million in 1991,¹¹⁶ \$350 million for 1992,¹¹⁷ and \$357 million for 1993.¹¹⁸ In 1994 LSC was appropriated \$400 million.¹¹⁹ Funding for 1995 was an all-time high of \$415 million,¹²⁰ only to have \$15 million rescinded in 1995.¹²¹

that there was no private cause of action for plaintiffs to enforce the alleged violations of LSC prohibitions. 535 F. Supp. 818 (S.D. Ia. 1982).

111. See Pub. L. No. 98-166, *supra* note 102, at 97 Stat. 1089-91 (providing . . . additional restrictions which bar representation of illegal aliens and impose additional stringent requirements on filing class-actions suits against government). Redistricting cases, 45 C.F.R. § 1632 (1989), 54 Fed. Reg. 31,954 (1989); Fee-generating cases, 45 C.F.R. § 1609 (1998), 53 Fed. Reg. 50,982 (1988).

112. Houseman, *Poverty Law*, *supra* note 4, at 324.

113. *Id.* at 326 (LSC grantees continued to provide essential legal advice and representation while facing "extraordinary external and internal pressures to focus resources on issues and on advocacy techniques that were the least controversial.").

See also Dooley *supra* note 88, at 221. Dooley, who characterized the Reagan years as "the eight year war on the Federal legal services program by the Executive Branch of the United States government" saw definite accomplishments during that time:

The Legal Services Corporation had many important successes during its formative period from 1974 to 1981. It had brought legal services to all parts of the country through its minimum access plan. It had broadened the issues receiving attention through expanded national support and the development of state support. It had greatly expanded the training available to local staffs. Specialized components and programs for farmworkers and Native Americans were established and functioned in all areas with significant Indian and farmworker populations. *Id.*

114. Houseman, *Short Review*, *supra* note 4, at 1519-1521.

115. Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1022 (1989).

116. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2101, 2138 (1990).

117. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782, 813 (1991).

118. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828, 1861 (1992).

119. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1153, 1184 (1993).

Some anti-law reform restrictions were contained in the appropriation for LSC funding in 1991. The usual restrictions against propaganda, political activities, boycotts, and picketing were joined by new limits on class actions.¹²² Class actions against the federal, state, or local governments were not allowed unless for the primary benefit of individually eligible clients, explicitly approved by the local director, and only after the governments were given notice and an opportunity to settle.¹²³ Though legal aid was the primary focus of the work of LSC, law reform still remained an option. However, in 1995, the Congressional forces which had opposed law reform in LSC gained enough legislative power to finally have their way.

The House Judiciary Committee passed a bill which sought to abolish LSC by phasing it out completely, replacing it with diminished state block grants to fund local legal services programs.¹²⁴ Substantively, the bill sought to curtail all law reform activity by prohibiting all constitutional challenges to all statutes and by prohibiting all class actions.¹²⁵ While that bill did not ultimately become law, its passage by the House Judiciary Committee signaled the dramatic changes coming for LSC.

Congress ultimately damaged the LSC by a combination of drastic funding cuts and the most severe restrictions on law reform activity. The 1996 LSC appropriation reduced its funding from \$400 million to \$278 million and se-

120. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1759 (1994).

121. Emergency Supplemental Appropriations and Recissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 84 (1995); Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Recissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 201 (1995) (providing details of rescission).

122. Pub. L. No. 101-515, *supra* note 116, at 104 Stat. 2148-49.

123. *Id.* (Section 601 propaganda prohibition; Section 607(1)-(3) restrictions on class actions).

124. See H.R. Rep. No. 255, 104th Cong., 1st Sess. (1995). House Report 255, containing the Legal Aid Act of 1995, H.R. 2277, sought to abolish the Legal Services Corporation and provide block grants to the States to fund qualified legal services. This bill attempted to phase out LSC over a four year period with appropriations of \$278 million for fiscal year 1996, \$250 million for fiscal year 1997, \$175 million for fiscal year 1998, and \$175 million for fiscal year 1999. H.R. Rep. No. 255 at 8. This bill passed the House Judiciary Committee on September 13, 1995 by a vote of 18 to 13. H.R. Rep. No. 255 at 12, 16-17.

125. H.R. Rep. No. 255, *supra* note 124, at 3. Substantively the bill prohibited all class actions and "any challenge to the constitutionality of any statute. The Report noted: "Considerably alarming is the frequent use of class actions, a time-consuming and labor intensive form of litigation which the Committee has learned displaces resources that could be brought to bear on the immediate needs of individual poor people. In 1989 alone, for instance, the Corporation's records indicate that its grantees were involved in 1,759 class actions." *Id.* at 9, n. 6. The Report noted that LSC had not been reauthorized since 1980 and over the period from 1982 to 1993 only one board member had been confirmed by the Senate. *Id.* at 9.

verely tightened the restrictions on the activities of legal services programs.¹²⁶ The 1996 appropriation amounted to a thirty percent cut in federal funding for LSC, which, when adjusted for inflation, resulted in the lowest amount of federal funding since 1977, the third year LSC was in existence.¹²⁷ The cuts resulted in LSC programs closing over 100 offices, laying off fourteen percent of their legal services lawyers and sixteen percent of the paralegals; Mississippi alone shut down twelve of the state's twenty-five offices.¹²⁸

Equally damaging to LSC were the new Congressional restrictions on the law reform activities permitted. While many of these restrictions are a continuation of prior restrictions, several are newer and tougher restrictions on the legal activities afforded to poor people. The 1996 law prohibited the use of LSC funds for programs which engaged in redistricting,¹²⁹ lobbying,¹³⁰ class action suits,¹³¹ legal assistance for many aliens,¹³² training for political activities, including picketing, boycotts, strikes or demonstrations,¹³³ attorney fee claims,¹³⁴ abortion litigation,¹³⁵ prisoner litigation,¹³⁶ any activities to reform federal or state welfare systems, except for individual assistance to obtain benefits as long as the assistance does not seek to change the rule or law involved,¹³⁷ or defending persons facing eviction from public housing because they were charged with the sale or distribution drugs.¹³⁸

The restrictions on class actions are the toughest ever imposed on the LSC. Section 504(a)(7) of the new law prohibits funds of the Legal Services Corporation to be used to provide financial assistance to any person or entity "[t]hat initiates or participates in a class action suit."¹³⁹

126. Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134; 501-508, 110 Stat. 1321, 1321-50 - 1321-59 (1996). The appropriations for LSC were part of a larger bill, the Omnibus Consolidated Recissions and Appropriations Act of 1996, simply called OCRAA. The law took effect October 1, 1996. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

127. *Legal Services Corporation: Hearing Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary House of Rep.*, 104th Cong., 2nd Sess. 85, at 2-3 (1996) (statement of Representative Reed).

128. *Legal Services Corporation*, *supra* note 127, at 3.

129. OCRAA, *supra* note 126, at § 504(a)(1), 110 Stat. 1321-53.

130. *Id.*

131. *Id.*

132. *Id.* at Stat. 1321-54—1321-55.

133. OCRAA, *supra* note 126, at Stat. 1321-55.

134. *Id.*

135. *Id.*

136. *Id.*

137. OCRAA, *supra* note 126, at Stat. 1321-55—1321-56.

138. OCRAA, *supra* note 126, at Stat. 1321-56.

139. *Id.* at Stat. 1321-53 - 1321-54.

The LSC board moved quickly to implement the prohibition on class actions.¹⁴⁰ Their final rule clearly attempts to bar all types of involvement in any class action, federal or state, at any stage.¹⁴¹ The LSC Board, in its comments, contemplates only very limited exceptions to the bar on class actions, essentially only allowing withdrawal from class actions and advice.¹⁴²

Likewise, almost all legal action involving welfare, other than individual representation of an individual client in an effort that does not challenge the validity of the underlying welfare regulation, is barred.¹⁴³ The statutory restrictions in other areas of the Act were also quickly enacted into federal regu-

140. An interim rule was adopted by the LSC board on July 20, 1996, effective as of publication, *see* 45 C.F.R. § 1617.3, 61 Fed. Reg. 41,963 (1996)(prohibiting involvement of LSC recipients in class actions).

141. 45 C.F.R. § 1617.1-1617.3. Final Rule on Legal Services Corporation, Class Actions, 61 Fed. Reg. 63,754 (1996). The board adopted the final rule on September 30, 1996. The final rule was issued December 2, 1996 and effective January 1, 1997.

Section 1617.1 Purpose

This rule is intended to ensure that LSC recipients do not initiate or participate in class actions.

Section 1617.2 Definitions

(a) *Class action* means a lawsuit filed as, or otherwise declared by the court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable state statute or rule of civil procedure applicable in the court in which the action is filed.

(b)(1) *Initiating or participating in any class action* means any involvement at any stage of a class action prior to or after an order granting relief. "Involvement" includes acting as an amicus curiae, co-counsel or otherwise providing representation relating to a class action.

(2) *Initiating or participating in any class action* does not include representation of an individual client seeking to withdraw from or opt out of a class or obtain the benefit of relief ordered by the court, or non-adversarial activities, including efforts to remain informed about, or to explain, clarify, educate or advise others about the terms of an order granting relief.

Section 1617.3 Prohibition

Recipients are prohibited from initiating or participating in any class action.

142. Final Rule on Legal Services Corporation, Class Actions, 61 Fed. Reg. at 63,755. Certain situations are not within the definition and are thus not prohibited by this rule. For example, recipients may advise clients about the pendency of a class action or its effect on the client and what the client would need to do to benefit from the case. Recipients may represent an eligible client in withdrawing from or opting out of a class action. Furthermore, the definition of a class action would not include a mandamus action or injunctive or declaratory relief actions, unless such actions are filed or certified as class actions. *Id.*

143. Final Rule on Welfare Reform, 62 Fed. Reg. 30,763 (to be codified at part 45 C.F.R. § 1639.1-1639.6)(restricting LSC recipients from initiating legal representation or challenging or participating in litigation, lobbying, or rulemaking involving an effort to reform a federal or state welfare system). LSC recipients may represent individual eligible clients who are seeking specific relief from a welfare agency as long as "such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." *Id.* at 30,766 (to be codified at 45 C.F.R. § 1639.4).

lation.¹⁴⁴ While one regulation was overturned as a result of federal court litigation,¹⁴⁵ the others, despite challenge, have so far survived.¹⁴⁶

Despite efforts to further phase out LSC, the appropriation for 1998 remained at \$283 million with the restrictive regulations remaining in effect, joined by new accounting requirements.¹⁴⁷

As a result of the 1996 Congressional actions, LSC has withdrawn from all class action litigation, ceased challenging the changes in the welfare program and has returned to a docket overwhelmingly consisting of direct legal services

144. 45 C.F.R. § 1610 (1998), 61 Fed. Reg. 63,749 (1996)(ruling on use of non-LSC funds); 45 C.F.R. § 1617 (1998), 61 Fed. Reg. 63,754 (ruling on class actions); 45 C.F.R. § 1632 (1998), 61 Fed. Reg. 63,755 (ruling on redistricting); 45 C.F.R. § 1633 (1998), 61 Fed. Reg. 63,756 (ruling on restriction on representation in certain eviction proceedings). The rulings were issued on December 2, 1992 and made effective on January 1, 1997. See also Final Rule on Legal Services Corporation, 62 Fed. Reg. 19,398-19,427 (1997). This rule contains provisions regarding: fee generating cases, 62 Fed. Reg. 19,398 (1997)(to be codified at 45 C.F.R. § 1609); restrictions on lobbying and certain other activities, 62 Fed. Reg. 19,400 (1997)(to be codified at 45 C.F.R. § 1612); priorities in use of resources, 62 Fed. Reg. 19,406 (1997)(to be codified at 45 C.F.R. § 1620); restrictions on assistance to illegal aliens, 62 Fed. Reg. 19,409 (1997) (to be codified at 45 C.F.R. § 1626); subgrants and membership fees or dues, 62 Fed. Reg. 19,417 (1997)(to be codified at 45 C.F.R. § 1627); client identity and statement of facts, 62 Fed. Reg. 19,418 (1997)(to be codified at 45 C.F.R. § 1636); representation of prisoners, 62 Fed. Reg. 19,421 (1997)(to be codified at 45 C.F.R. § 1637); restriction on solicitation, 62 Fed. Reg. 19,422 (1997) (to be codified at 45 C.F.R. § 1638); application of federal law to LSC recipients, 62 Fed. Reg. 19,424 (1997)(to be codified at 45 C.F.R. § 1640).

145. Originally these restrictions were to apply to non-LSC funds used by LSC grantees but due to the Hawaii case they were lifted. *Legal Aid Society of Hawaii (LASH) v. Legal Services Corp.*, 961 F. Supp. 1402 (D. Ha., 1997). U. S. District Judge Alan Kay of Honolulu granted a preliminary injunction on February 14, 1997 prohibiting LSC from enforcing new restrictions on non-LSC funds used for lobbying, political advocacy, litigation on behalf of prisoners with respect to abortion, and representation of those accused of drug dealing in public housing eviction proceedings. Mark Hansen, *Loosening Congress' Purse Strings*, Vol. # A.B.A. J. 28 (1997). Kay was not troubled by the ban on class actions. *Id.* at 28-29. The rules were changed to allow lobbying with non-LSC funds. Final Rule on Legal Services Corporation, Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27,695 (1997)(to be codified at 45 C.F.R. § 1610). May 21, 1997 Final rule on Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity. Revision in response to *LASH*. Final Rule issued May 21, 1997, effective June 20, 1997. 62 Fed. Reg. 27,695, at 27,695-27,697. This deleted a prior provision that ordered non-LSC Funds that are transferred by an LSC entity are not subject to congressional restrictions. 62 Fed. Reg. 27,695, at 27,697 (discussing transfers of LSC funds, § 1610.7).

146. A New York state trial judge found that the prohibition on LSC grantees engaging in class action suits unconstitutional, "a blatant attempt to inhibit the First Amendment rights of LSC lawyers, their clients, and anyone who agrees with them." However, the order applies only to one lawyer in one long-standing class action case. Hansen, *supra* note 145, at 28. *Velazquez v. Legal Services Corporation*, 985 F. Supp. 323 (E.D.N.Y. 1997). This second federal suit was filed in U.S. District Court in Brooklyn but no substantive action has been taken as of the writing of this article.

147. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2510-2512 (1997).

to individual people. Law reform by poor people's lawyers has all but ceased and LSC has been returned to the legal aid model of the first half of this century.

CONCLUSION

It is usually the government which pays a poverty lawyer; it is also often the government that a poverty lawyer will oppose in his client's interests. Thus, the more effective a poor people's lawyer, the more problems he poses for those who pay him. Even the few poverty lawyers who do decide to make a career of poor people's law face the threat that the decision is not entirely in their hands; the better they are at their jobs, the more likely it becomes that the government will eliminate their jobs.¹⁴⁸

The 1996 actions of Congress represent the absolute low point in the thirty year effort in trying to give poor people access to lawyers who will help them engage in efforts to reform the laws that burden them. Since federally funded legal services began in the 1960s, it has always been a struggle to spend adequate time and resources on law reform because of the overwhelming case-loads weighing down poverty lawyers. Yet until 1996, law reform remained a viable goal for LSC along with its more traditional efforts to provide direct legal services to the poor in a manner similar to that provided by legal aid organizations over the last century. In 1996, most of the possible methods to achieve law reform in LSC have ceased to be authorized for poor people's lawyers.

Congress has decided that legal aid alone and not legal aid and law reform will be available to the poor. As a consequence, poor people's lawyers will not be allowed access to all the tools available to the lawyers for the rest of the population.

In 1951, Emery Brownell suggested that, "[i]t cannot seriously be argued that in a democracy there should be one kind of system for the poor and another for those who are better off."¹⁴⁹ Apparently he was wrong.

148. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1051 (1970).

149. BROWNELL, *supra* note 4, at 46.