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**ALMOST THE LAST WORD ON LEGAL SERVICES: CONGRESS  
CAN DO PRETTY MUCH WHAT IT LIKES**

BY JAMES D. LORENZ, JR.\*

For more than thirty years, the federal government has funded legal services for the poor. In its present format, one, and usually only one, legal services program is funded in each of some 250 geographical areas established by the Legal Services Corporation, the federal government's funding agent for legal services. During much of this time, the debate over federally-funded legal services has focused on the cases legal services attorneys handle. Certain members of Congress find these cases objectionable and Congress ends up prohibiting the attorneys from handling them. A lesser-discussed issue arises when legal services attorneys decline the taking of certain types of cases or clients, sometimes for ideological reasons which are not publicly disclosed. Although the preamble to the Legal Services Act of 1974 speaks of providing "equal access to the system of justice in our Nation,"<sup>1</sup> this is a goal which has

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1. The full preamble to the Legal Services Act of 1974, 42 U.S.C. § 2996 (1994), reads as follows:

The Congress finds and declares 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 and to continue the present vital legal services program;
- (3) 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 this chapter;
- (4) for many of our citizens, the availability of legal services had reaffirmed faith in our government of laws;
- (5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and

been difficult to achieve, not so much because of limitations in funding, which will always be present, but rather because of basic disagreements as to what kinds of cases the indigent should have federally-funded “equal access” for. While it would be easy to blame this somewhat dysfunctional discourse on vulgar materialism, namely on the irreconcilability of persons and groups with contrary economic interests, this might not be the right thing to do, as it also appears to be the case that there is a fundamental communication problem between the legal services program and Congress which, until resolved, will insure that the dispute will never be resolved.

This article attempts to shed more light than heat on the ongoing conflict between Congress and the legal services program. There are seven parts and a conclusion.

Part I states the problem in a nutshell. There are two components of the legal services program, the service component, with which the Congress has had no problems, and the impact case (or ideological) component, with which Congress has had lots of problems. Because a separation has never been made between the two components when the appropriation for legal services has been voted on, the two components have been confused, both legislatively and conceptually. Congress has been left with no choice but to vote them up-or-down together, which has proved to be something of a Hobson’s Choice.

Part II begins the more detailed analysis of the legal services program by examining the situation where legal services lawyers have taken on cases which the Congress doesn’t wish them to handle and Congress then prohibits them from handling these types of cases.

Part III continues the analysis by considering the situation where it is the legal services programs themselves which veto the representation of certain types of clients or cases, a situation which Congress hasn’t addressed yet.

Part IV considers the situation which arose in 1996 and afterwards, where Congress tried to get the Legal Services Corporation, which funds legal services throughout the United States, to adopt competitive bidding and equal allocation of funding as part of its funding procedures – and largely failed to get the LSC to take meaningful action.

Part V turns to an examination of the IOLTA programs instituted in 49 states around the country, where state bar associations pool the interest earned from trust accounts set up by lawyers with the monies their clients give them and then give the money to local legal services programs to supplement their services. IOLTA programs have proved to be significant for legal services in two respects: first, they have largely made up for the cuts which Republicans, Congresses and/or Presidents have made in the legal services program; and

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(6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

second, they have enabled legal services attorneys to fund types of litigation which they are forbidden by Congress to undertake with federal monies.

Part VI asks the question why legal services attorneys have so long held on to the hope of doing impact litigation despite continuing congressional directives to the contrary.

And finally, in the Conclusion, the author concludes that after 35 years of controversy, a consensus has finally been reached about legal services and legal services is here to stay. The author points out that the dispute has essentially been resolved in that legal services has become largely a legal aid program except that it is free to raise money from non-governmental services to finance impact litigation. But until there is a more formal acknowledgment of this, Congress may be unwilling to increase funding for legal services work.

#### I. THE PROBLEM IN A NUTSHELL: LEGAL SERVICES HAS A SERVICE COMPONENT AND AN IMPACT COMPONENT BUT BOTH ARE FUNDED TOGETHER.

There are two components to the legal services program, the service component, with which Congress has had few problems, and the impact case (or ideological) component, with which Congress has had lots of problems.

The services component of legal services goes back to legal aid, a form of charity to the poor which was financed by local bar associations,<sup>2</sup> beginning with the New York Legal Aid Society, the predecessor of which was commenced in 1876 by German-American non-lawyers concerned about protecting German immigrants from being preyed upon by “sharps.”<sup>3</sup> A statement of purposes revealed the narrow objectives of the new organization, to wit, “to render legal aid and assistance, gratuitously, to those of German birth, who may appear worthy thereof, but who from poverty are unable to procure it.” Out of this statement would come one theme which would characterize legal aid for the next seventy-five years, namely help for the “worthy poor.” In 1901, at the 25th anniversary dinner of the New York Legal Aid Society, . . . Vice-President Theodore Roosevelt described legal aid as a necessary bulwark against “chaos” and “violent revolution.”<sup>4</sup> Meanwhile in Chicago, a second legal aid had been formed, this one to protect young women who were lured into seduction under the guise of employment offers.<sup>5</sup>

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2. The history of legal aid is ably recounted in JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 53-62, 268-269 (Oxford U. Press, 1976).

3. “Sharp” is an American slang word from the 19<sup>th</sup> Century. “One skilled in forms of cheating, . . . one who seeks to take, or habitually takes, advantage of others.” HAROLD WENTWORTH & STUART B. FLEXNER, *DICTIONARY OF AMERICAN SLANG* (1960).

4. AUERBACH, *supra* note 2, at 55.

5. *Id.* at 53.

The theme of protecting young women against seduction—and even being forced into prostitution in Chicago—was a theme which another Theodore, Theodore Dreiser, would pick up in his novel *Sister Carrie*,<sup>6</sup> first published in 1901.

Poor Sister Carrie. In the novel, she had no Chicago Legal Aid Society to protect her.

By adopting self-imposed restrictions on its activities, legal aid prevented it or its clients from becoming controversial. As Jerome Auerbach noted in his excellent history of the American legal profession:

“Not only did legal aid confine its energies to the deserving poor but, fearful lest it be accused of competing with the bar, it restricted itself to claims so small that no practicing lawyer would consider handling them.”<sup>7</sup>

Receiving little or no government funding also helped legal aid avoid controversy.

Jump cut to 1964. The winds of change are blowing. Edgar and Jean Cahn wrote an article in the *Yale Law Journal* announcing a new kind of legal services which was being tried out in New Haven, Connecticut, and which, it seemed, might become a component of the newly-declared War on Poverty.<sup>8</sup> The title of the Kahn’s memorable article is “The War on Poverty: A Civilian Perspective.”<sup>9</sup> “President Johnson has declared unconditional war on poverty. The strategy of that war appears to have been shaped by an awareness of the interrelatedness of the social, economic, legal, educational, and psychological problems which beset the poor and by a recognition of the necessity to involve all segments of society in a many-pronged attack on these problems.”<sup>10</sup>

In their article, the Cahns made no mention of legal aid restricting itself to the handling of little cases, which have come to be called “service work;” nor was there any mention of “legal aid” as such. The new term was “legal services” or, preferably, “neighborhood legal services,” signifying that the services were to be brought closer to the people.<sup>11</sup>

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6. THEODORE DREISER, *SISTER CARRIE* (1982).

7. AUERBACH, *supra* note 2, at 56.

8. Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317 (1964).

9. When one rereads the Cahns’ seminal article thirty years after it was written, one is struck by how dated it seems. But how electrifying it was for many at the time, the author included. Here is the opening paragraph of the Cahns’ article:

10. *Id.*

11. As funding for old-style legal aid was limited, most legal aid societies could afford to maintain only one office, which was usually located in a downtown area. With the infusion of federal money, on the other hand, legal services programs could afford to be more democratic and go to the people.

There was also talk of representing poor people's groups, as if the poor had a corporate identity. What could this mean?<sup>12</sup>

In 1965, Sargent Shriver, the newly-appointed Field Marshall of the War on Poverty and Lyndon Johnson's selection as the head of the Office of Economic Opportunity, decided to create both neighborhood legal services and the neighborhood health centers out of whole cloth, as neither program was expressly authorized in the War's enabling legislation, the Economic Opportunity Act of 1964.<sup>13</sup> Although at the time it is not clear what Mr. Shriver had in mind, within a year after legal services was started, the first two grants funded were DNA-People's Legal Services, Inc., which purported to represent a whole Indian tribe, even a nation, (the Navajo nation), and California Rural Legal Assistance, Inc., which proposed to provide representation to a whole social class in California, namely the farm workers striking on the side of Cesar Chavez.

Some neighborhoods!

As Gary Bellow, now a clinical professor of law at Harvard Law School, would observe in 1967, "Neighborhoods, shoot, what this thing is about is power."<sup>14</sup>

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12. Little did conservatives realize at the time that the Cahns' article would serve as a blueprint for a social change financed by taxpayers' dollars. Sprinkled throughout the Cahns' article were some of the concepts and buzzwords of the time, including "maximum feasible participation" by the poor themselves, focus on the neighborhood," "comprehensive plan," "a war to be fought by professionals on behalf of the citizenry through service programs," and administration "on a decentralized basis" but involving the "integration of various disciplines." Cahn & Cahn, *supra* note 12, at 1318-21. It would not take conservatives long to realize that they wanted no part of this "citizenry" that the war was being fought on behalf of and that these government-paid "professionals" were certainly not representing them.

13. For a recounting of the early history of OEO-funded neighborhood legal services, see EARL JOHNSON, *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974). The beginning of the OEO-funded neighborhood health centers is described in PAUL STARR, *THE SOCIAL TRANSFORMATIONS OF AMERICAN MEDICINE* 370-73 (1982).

14. Conversation with the author sometime in 1967. For a time, Mr. Bellow and the author worked together in California Rural Legal Assistance. During this period, the author's explanation as to why CRLA should be representing groups as well as individuals was somewhat different than Mr. Bellow's, which was reflective of their different backgrounds, the author having worked for a corporate law firm in Los Angeles and Mr. Bellow, for the public defender's office and the community action program in Washington, D.C. In the author's view, the poor deserved to be represented in the group interests just as corporations were, that is by highly competent corporate-style law firms like the one the author had worked for. This was also the position of Sargent Shriver, another corporate lawyer. When John Sutro, President of the California Bar Association in 1966, wired Sargent Shriver to say that the Bar opposed CRLA's initial grant application "because it proposes to take sides in an economic struggle still pending," Mr. Shriver wired back that if Pillsbury, Madison & Sutro, Mr. Sutro's law firm, would retire from the struggle, Mr. Shriver would be happy to decline CRLA's grant application. As Mr. Sutro declined to respond to Mr. Shriver's offer, Mr. Shriver approved CRLA's grant application in May of 1966.

And therein laid the seed of the legal services controversy, which hasn't abated to this day.

When people speak of guaranteeing "equal access to the system of justice,"<sup>15</sup> do they mean access equal to the kind of representation which the ordinary, middle class American citizen can afford—or do they mean access equal to that enjoyed by big corporations and government agencies?

During the debate over legal services which has taken place over the past thirty years, critics of the program have generally meant the former, supporters of the program, the latter. At the nub of the dispute is the failure to make a conceptual distinction between the completion of basic service work, which most critics of the program are willing to support with federal money, and the completion of impact (or ideological) litigation, which many congresspersons are not so willing to support. And the failure to make the distinction—and the effort to keep Congress from making it—has been quite intentional on the part of some of the program's supporters in that they realize that if Congress were ever to separate out the service component from the impact component and vote on each separately, the service component would win by a wide margin and the impact component would lose by a wide margin. What has ensued over the thirty years, then, has been a purposeful dis-information campaign<sup>16</sup> conducted by some legal services' supporters which is intended to induce Congress to keep the impact work along with the service work, the bath water along with the baby.

Of course, the main fault lies with Congress itself, who does after all have the authority to legislate restrictions on the legal services program pursuant to Article I of the U.S. Constitution and can choose to interpret the program as it sees it.

## II. A MATTER OF PRIORITIES: WHEN LAWYERS FOR THE NEEDY HANDLE CASES WHICH CONGRESS DOES NOT WANT THEM TO TAKE.

It all seems simple enough. The supply of free legal services is less than the demand for such services, which means that the providers of the services

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15. "Equal access to the system of justice" is the catch phrase which appears in the very first part of the Preamble to the Legal Services Act of 1974. See *supra* note 14. It is also the *mantra* which American Bar Association representatives use when they go up to Capital Hill to plead for more appropriations for the legal services program. See Roberta C. Ramo, *Let's Not Take It Anymore, Speaking Out Against Spurious Attacks on the Legal System is Vital*, 82 A.B.A. J. 6 (1996).

16. "Dis-information" is a word which has come into vogue in the Information Age. It means to put out information which, although it may be true in itself, is peripheral to the issue at hand and which therefore has the effect of diverting attention from a consideration of the main issue.

must ration the dispensing of the services in some way or another, which requires, in turn, the setting of some sort of priorities.

But how to do this? And who should do it?

During the First World War, the French army developed a method of distributing limited medical care on the battlefield which they called *triage*, or the taking into account of (a) the seriousness of the injury and (b) the likelihood of survival.<sup>17</sup>

When it comes to legal services, however, it is not as clear what constitutes the “seriousness” of an applicant’s problem. In fact, for some thirty years the federal agencies which have funded legal services have passed the buck on the question, leaving it up to their grantees to determine how their own priorities will be set.<sup>18</sup> The current funder of the legal services program, the Legal Services Corporation, requires its grantees to go through a priority-setting process but does not tell them what priorities to set. According to Sec. 1620.3 of 61 Federal Regulations 45,749, for example:

- (a) The Governing body of a recipient must adopt procedures for establishing priorities for the use of all of its Corporation and non-Corporation resources and must adopt a written statement of priorities. . .
- (b) The procedures adopted must include an effective appraisal of the needs of eligible clients in the geographic area served by the recipient, and their relative importance, based on information received from potential or current eligible clients solicited in a manner reasonably calculated to obtain the views of all significant segments of the client population.
- (c) The following factors should be among those considered by the recipient in establishing priorities:
  - (1) Suggested priorities promulgated by the Legal Services Corporation;. . .
  - (2) [An appraisal of]. . . all significant segments of. . . [the client] population with special legal problems or special difficulties of access to legal services;
  - (3) The resources of the recipient;
  - (4) The availability of another source of free or low-cost legal assistance in a particular category of cases or matters;
  - (5) The availability of other sources of training, support, and outreach services;

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17. See THE NEW MERRIAM-WEBSTER DICTIONARY 765 (1989).

18. The current funder of the legal services program, the Legal Services Corporation, requires its grantees to go through a priority-setting process but does not require what shall be the priorities. See 45 C.F.R. § 2996 (1996).

- (6) The relative importance of particular problems to solution through legal processes;
- (7) The susceptibility of particular problems to solution through legal processes;
- (8) Whether legal efforts by the recipient will complement other efforts to solve particular problems in the area served;
- (9) Whether legal efforts by the recipient will result in efficient and economic delivery of legal services; and
- (10) Where there is a need to establish different priorities in different parts of the recipient's service area.

In other words, legal services programs can pretty much set their priorities in any way they like. Another thing which can be noted about the priorities requirement contained in Section 1620.3 is that distinction is blurred between service work and impact work; and if anything, the word 'priority' creates a bias in favor impact work in that handling 'bigger' cases can mean more 'bang for the dollar.' Insofar as the author is aware, the Legal Services Corporation has never cut off a grantee's funding because of a failure to do its priorities correctly.

No doubt the legal services program would have met a quick and spectacular end if most of its grantees had behaved like California Rural Legal Assistance (CRLA), Ronald Reagan's least favorite legal services program, which in a two-week period during the summer of 1967 halted the importation of *braceros*, or Mexican contract workers, into the California tomato harvest and blocked \$860 million in cuts which Governor Reagan was proposing to make in the state's Medicaid/Medi-Cal program.<sup>19</sup> But fortunately for "neighborhood legal services," as it was then called, most of the programs continued to operate in the conventional legal aid manner of doing mostly service work on behalf of individual indigents; and most of the programs continued to operate in the conventional legal aid manner today.

As early as 1968, the Congress began restricting the kinds of cases legal services programs could handle and has been laying down prohibitions ever since. If one wishes to know what the Congress—and the American people—have been worried about during this almost-30 year period, one can do little better than to consult the list of prohibitions which the Congress has laid on legal services.

No involvement in Selective Services had to do with the Vietnam War and the large number of young men who were trying to opt out of military service. The prohibition against representing persons who were allegedly engaging in riots was precipitated by the Watts and Detroit riots. The prohibition against

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19. The *braceros* case was never reported as it was settled before it was appealed. The Medi-Cal case is reported as *Morris v. Williams*, 433 P.2d 697, 67 Cal.2d 733, 63 Cal. Rptr. 689 (1967).

conducting training programs or to organize and demonstrate was caused by Cesar Chavez’s California grape strike and efforts at community and labor organizing throughout the country. No providing of legal representation in non-therapeutic abortion cases – this was post-*Roe v. Wade*, of course. No voter registration or transportation of legal services clients to the poll – this was to calm Republican fears about the Democrats using the legal services program to overwhelm them at the polls.<sup>20</sup>

Over and over again, Congress said to the some legal services program, in effect, “Just stick to doing legal aid work,” and over and over again, legal services were refusing to listen.

Despite the continual Congressional cutbacks on what legal services could do, they continued to receive larger and larger annual appropriations from Congress until the first years of the Reagan administration; and legal services did not suffer a catastrophic funding loss until the 1965-1996 Congress under Newt Gingrich when \$122 million was cut from the legal services program.

Perhaps the greatest achievement of legal services during the period from 1965-80 was the creation, in 1974, of a separate funding agency for legal services, the Legal Services Corporation (LSC) which had the effect of successfully insulating the local programs from hostile political pressure. The support of the American Bar Association has also been crucial.<sup>21</sup> In both the creation of the LSC and the maintenance of Congressional funding for legal services throughout the 30-year history of legal services, the ABA made the difference for legal services. How well the ABA fared financially for legal services depended, in turn, on which party was in control of the House, the Senate, and the Presidency. When Democrats were in control of the House, the Senate, and the Presidency, as they were from Fiscal Year (FY) 1977 through 1980 and from FY 1993 through 1995, appropriations for legal services climbed substantially, although the Clinton administration was somewhat less generous than the Carter administration had been:

<u>FY Year</u>	<u>Appropriation</u>	<u>Change From Previous Year</u>
1977	\$125 million	\$33 million (+)
1978	\$205 million	\$80 million (+)
1979	\$270 million	\$65 million (+)

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20. See 42 U.S.C. §§ 2996f(b)(10), 2996e(5)(b)(i), 2996fb(6), 2996b(8), and 2996a(6)(B) & (C).

21. All of the components of the War on Poverty which had gone by the wayside by 1974 were those which a) did not involve the dispensation of services by professionals and b) did not have the lobbying support of professional organizations such as the American Bar Association, the American Medical Association, and the National Education Association. Hence, legal services, community health services, and Head Start were saved—and community action was lost.

1980	\$300 million	\$30 million (+)
****	*****	*****
1993	\$357 million	\$ 7 million (+)
1994	\$400 million	\$43 million (+)
1995	\$400 million	None

When the White House was held by a Republican such as George Bush, who was not hostile to legal services, and one or both houses of Congress were held by the Democrats, appropriations for legal services also increased:

<u>Fiscal Year</u>	<u>Appropriation</u>	<u>Change From Previous Year</u>
1989	\$308 million	\$ 3 million (+)
1990	\$316 million	\$ 8 million (+)
1991	\$327 million	\$11 million (+)
1992	\$350 million	\$23 million (+)

When, on the other hand, the White House was held by a Republican who was hostile to legal services, such as Ronald Reagan,<sup>22</sup> the legal services appropriation went up, then way down, then up again, then down, then up for some reason:

<u>Fiscal Year</u>	<u>Appropriation</u>	<u>Change From Previous Year</u>
1981	\$321 million	\$21 million (+)
1982	\$241 million	\$80 million (-)
1983	\$241 million	\$80 million (-)
1984	\$275 million	\$34 million (+)
1985	\$305 million	\$30 million (+)
1986	\$292 million	\$13 million (-)
1987	\$305 million	\$13 million (+)
1988	\$305 million	None

During the first and second congressional sessions after the Republicans took over the House and Senate, President Clinton was still in office, and the Republicans in the House were led by Newt Gingrich, who, like Ronald Reagan, was openly hostile to legal services, legal services suffered the greatest decrease of all time in its appropriations:

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22. Mr. Reagan's thoughts about California Rural Legal Assistance and legal services are set forth in his 1976 campaign biography *SINCERELY, RONALD REAGAN* 46-48 (New York: Berkley Books, 1976).

<u>Fiscal Year</u>	<u>Appropriation</u>	<u>Change From Previous Year</u>
1996	\$278 million	\$122 million (-)
1997	\$283 million	\$ 5 million (+)
1998	\$283 million	\$ 0
1999	\$300 million	\$ 17 million (+).

The \$122 million decrease which legal services suffered in FY 1996 occurred despite the fact that Mr. Clinton, a Democrat, was President and the First Lady, Hillary Rodham Clinton, had served as Chairperson of the board of the Legal Services Corporation in the late 1970's.<sup>23</sup>

Along with the Gingrich onslaught on legal services came further prohibitions on what legal services attorneys could do, including no representing of illegal aliens, no filing of class actions, no challenging of federal restrictions on welfare, and no use of LSC money in support of any of the above.<sup>24</sup> According to legal services people, these restrictions were the most crushing of any of the prohibitions they had suffered in 25 years. In all in 1996, some 19 restrictions were imposed on what legal services lawyers could do.

In early 1997, legal services programs in different parts of the country filed three law suits against LSC arguing that the Congressional bans on the use of federal monies for certain purposes constituted a violation of the First Amendment rights of both legal services clients and attorneys.<sup>25</sup> After LSC adopted 45 C.F.R. 1610 (1997) permitting the use of non-federal funds to finance Congress-prohibited litigation by entities which were separate and independent from LSC grantees, the attacks on the Congressional prohibitions were rendered moot.<sup>26</sup>

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23. The source of the FY 1976-1992 figures is the LEGAL SERVICES CORPORATION APPROPRIATIONS HISTORY, as prepared by LSC. The source of the FY 1993-1998 figures is Ken Boehm, Executive Director, National Legal & Policy Center, McLean, VA, who has graciously provided the numbers to the author.

24. For a description of the damage that Newt wrought, see "*Recent Legislation: Constitutional Law – Congress Imposes New Restrictions On Use Of Funds By The Legal Services Corporation – Omnibus Consolidated Rescissions And Appropriations Act of 1996*. Pub. L. No. 104-134, 110 Stat. 1321," 110 HARV. L. REV. 1346 (1997) [hereinafter Recent Legislation].

25. Varshavsky v. Geller, No. 40767/91 (N.Y. Sup. Ct.), Dec. 24, 1996, reprinted in N.Y. L.J. 2 (1996); Legal Aid Society v. Legal Services Corp., No. 97-00032 (D. Ha. 1997); Velasquez v. Legal Services Corp., No. 97-00182 (S.D.N.Y. 1997).

26. 45 C.F.R. 1610 (1997). The date the final rule was effective was June 20, 1997. Since 45 C.F.R. 1610 provides a viable way for legal services programs to conduct litigation prohibited by Congress, it has been widely followed. Not only can entities spun off from legal services programs use IOLTA monies to do litigation prohibited of LSC grantees, they can also raise monies from other private sources, including charitable foundations, to do so.

As Professor Richard Epstein has pointed out in a 1988 Harvard Law Review article,<sup>27</sup> one consideration to take into account in deciding whether a condition imposed on the receipt of federal benefits is constitutional or not is whether the recipient is totally barred from engaging in a prohibited activity which may be constitutionally protected or whether it is only barred in engaging in the activity with federal funds. Where the latter is this case, as was true in the three suits challenging Congress' 1996 restrictions, in *Regan v. Taxation with Representation* (1983),<sup>28</sup> and in *Rust v. Sullivan* (1991),<sup>29</sup> the restrictions are more likely to be found constitutional. In *Regan v. Taxation with Representation*, it might be recalled, the Court held that the section of the Internal Revenue Code which prohibits nonprofit organizations from using tax-exempt contributions to finance lobbying activities does not offend their First Amendment rights because they still have the right to do lobbying with non-tax exempt monies; and in *Rust v. Sullivan*, the Court upheld regulations that prohibited recipients of federal family planning funds from using such monies in programs where abortion was a method of family planning because, as the Court noted, a grantee can continue to perform abortions, provide abortion-relation services, and engage in abortion advocacy with independent funds. In *FCC v. League of Women Voters of California* (1984),<sup>30</sup> by contrast, the prohibition at issue was a ban on public television airing editorials no matter what the source of funding – and this was struck down.

In light of *Regan v. Taxation with Representation*, *Rust v. Sullivan*, and *FCC v. League of Women Voters of California*, it would seem that LSC's 45 C.F.R. 1610 regulation is valid in that a way for entities separate from LSC grantees to expend non-LSC funds on litigation which Congress has prohibited LSC grantees from doing with LSC funds.

In the approximately thirty years in which restrictions have been placed on the legal services program, none of Congress' restrictions have been overturned by a court on a permanent basis; and in addition, none of Congress' restrictions have been withdrawn by Congress once they were imposed, even though the control of both Houses of Congress and the Presidency have shifted from one party to the other and back again.

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27. Richard A. Epstein, *Unconstitutional Conditions: State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988).

28. 103 S. Ct. 1997, 76 L.Ed.2d 129 (1983).

29. 500 U.S. 173, 114 S. Ct. 1997, 114 L.Ed.2d 233 (1991).

30. 468 U.S. 364, 82 L.Ed.2d 278, 104 S.Ct. 3106 (1984).

### III. THE MATTER OF PRIORITIES CONTINUED: WHEN LAWYERS FOR THE NEEDY REFUSE TO TAKE CASES WHICH THE INDIGENT WANT THEM TO DO.

Although this second sort of situation is less common than the instance where legal services attorneys are doing types of cases which Congress disapproves of and finally prohibits, it does arise and is more common than might be supposed. The typical instance arises when an applicant for legal services has a legal problem which involves suing someone who the legal services program wish not to sue or has a type of problem which the legal services program does not think is very important or is not interested in handling.

Are legal services programs within their rights in refusing to handle certain types of problems which poor people have on a regular basis and which the Congress had not prohibited the programs from handling? So far LSC's answer has been "yes" and the Congress hasn't said otherwise. Although Congress has begun to move in the direction of saying what legal services programs should do as well as what they shouldn't do.

In 1966, shortly after California Rural Legal Assistance was funded by the office of Economic Opportunity (OEO), its founder and first director made an agreement with Cesar Chavez whereby CRLA agreed not to handle any domestic relations cases, so that more attorney time might be freed up to file lawsuits against growers which would be of help to the farm worker's union. In return, Cesar agreed to support CRLA. A corollary to the agreement was that CRLA would not file any lawsuits against the union.<sup>31</sup>

Both policies have remained in effect to this day.

Because of the sensitivity of the two agreed upon policies, no public announcement was made by CRLA about them, nor, over a thirty-year period, did CRLA explicitly inform either of the federal agencies which funded it about the policies. Every year, CRLA would submit, first to OEO and then to the Legal Services Corporation, its statistical caseload reports, which reported that CRLA did less domestic relations work per total caseload than any other legal services program in the country—and every year, OEO or LSC would not ask any questions.

Perhaps this was the first instance of President Clinton's "Don't ask, Don't tell" rule, who can say.

It was also the case that when CRLA reported on its priorities, as it was required to do by a LSC regulation, it would say what it did do but not what it did not do. Again, LSC would ask no questions.

Since CRLA is the only federally-funded legal services program in its service area, which comprises 19,226 square miles of territory and contains

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31. The author is familiar with CRLA's policies because as the founder and first director of CRLA, he was the one who agreed to them with Cesar Chavez.

some 287,164 poor people, many of the indigents residing in the area had no alternative way of securing free domestic relations assistance.

In California, CRLA is the only one of 24 LSC-funded programs providing basic legal assistance which has a no-domestic relations policy. During 1995, the other 23 legal services programs in California handled more than 90,000 domestic relations cases, which comprised some 30% of their total caseloads, including 28,967 divorce/annulments, 18,465 espousal abuses, 17,431 child custody/visitations, and 9,342 child supports.<sup>32</sup>

On May 20, 1996, the Board of Directors of the Legal Services Corporation declared domestic relations cases the number one priority of the legal services program, with particular emphasis on protecting against spousal and child abuse. This policy was later incorporated into a federal regulation recorded at 61 Fed. Reg. 26,934 (1996). But despite the resolution and regulation, CRLA made no change in its policy.

Nor did CRLA alter its policy after a lawsuit was filed against it in November of 1996 alleging that the policy constituted gender discrimination because, in refusing to take domestic violence and paternity cases, it especially affected women adversely.<sup>33</sup> The most notable aspect of the lawsuit was that it was brought by three female farm workers (*campesinas*) who were also members of CRLA's board of directors, and/or advisory committees.

The *campesina's* grievance was widely reported in the electronic and print media, and on December 12, 1996, an article appeared on the editorial page of the *Wall Street Journal* entitled "When Legal Aid's No Help."<sup>34</sup> "California Rural Legal Assistance is one of the oldest, largest and most radical of the 300 federally funded legal services programs for the poor," the article began.

Long under fire of conservative ire, it is now under fire from its own side. Last month, the organization was named as a defendant in a suit charging the group with systematically refusing to represent women who were victims of domestic violence. In the words of the complaint, the message was 'CRLA to Battered Women and Children: Get Lost.'

The chief culprit here was allegedly CRLA's fund-raising and lobbying arm, the CRLA Foundation. Several years ago several women farm workers decided to create an organization called Lideres Campesinas (Farmworker Women Leaders) to promote women's interests. Seeing dollar signs, the CRLA

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32. The only domestic relations work which CRLA reported itself as doing were brief interviews and consultations before its interviewers referred people out the door. The annual caseload statistics referred to, which were for 1995, were graciously provided the author by the Legal Services Corporation.

33. The case, *Campesinas de Cal. v. Cal. Rural Legal Assistance, Inc.*, Monterey County Superior Court No. 96-109567, was based on California's Unruh Civil Rights Act, Civil Code 51, which prohibits any private business enterprise from discriminating against various classes of people, including women and children.

34. Rael Jean Isaac, *When Legal Aid's No Help*, WALL ST. J., Dec. 12, 1996, at A12.

Foundation offered to raise money, and sent off fund-raising proposals to a series of feminist foundations, describing domestic violence as an important problem to be addressed. Needless to say, . . . none of the prospective funders was informed that neither the foundation nor CRLA would touch domestic violence cases.

Although the money was ostensibly to benefit the new organization, the complaint charges that the CRLA Foundation pocketed most of it, using it for overhead and to fund a staffer hot on the trail of the 'root causes' of the women's problems—which, according to the funding proposal, lay in 'institutional discrimination, gender segregation, and class stratification.'

When the CRLA did spend money on the women, the group used them as weapons in an ideological struggle. Several of the women were packed off to the International Women's Conference in Beijing and to the United Nations in New York as exhibits on the oppression of women farm workers in the U.S. They also enjoyed a private audience with President Clinton at the White House.

But their involvement in the campesinas project proved costly to the women's domestic life. Several say they were beaten in the course of their participation in the project by their husbands, one of them fleeing to another town. According to the complaint, a plaintiff, on her return from Beijing, was 'beaten by her husband because she was away from home so much, she wasn't cooking dinner for the family and because she wasn't bringing any salary home from the project the CRLA Foundation had begun 'for her.' She too fled from the house, sleeping in the back seat of the family car.<sup>35</sup>

Certainly in December of 1996, the Legal Services Corporation had in place all the regulations it needed to resolve the CRLA problem, including its regulation 1602.3 dealing with priorities.<sup>36</sup> In addition, to 45 C.F.R. § 1620 (1996), LSC has adopted a Notice of Suggested Priorities, published in 61 Fed. Reg. 26,934 (1996), which puts "Support for Families" at the top of LSC's priorities list and placed special importance on protecting women and children against domestic violence. Although the Notice was only a recommendation to LSC grantees, it would seem that at the very least it was incumbent on applicants/grantees to indicate why they were not following the suggested

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35. *Id.*

36. 45 C.F.R. § 1620 (1996), which was most recently published by LSC on August 29, 1996, requires LSC grant applicants to go through a priority-setting process with potential clients, existing clients, and other groups of persons, such as local bar members, and to notify LSC of the priorities they propose to follow—which presumably means the types of cases they aren't going to handle as well as the kinds of cases they are going to do. At the time the announcement of priorities is made to LSC, during the grant application process, LSC then has the opportunity to accept the application in whole, in part, reject it, and/or attach special conditions to the grant which, for example, might require the grantee to take certain types of cases which, in its priority statement, the grantee/applicant said it wasn't going to handle. *See* 61 Fed. Reg. 45,747 (1996).

priority in their own set of recommended priorities, which LSC retains the authority to approve or disapprove. Yet the LSC made no reference to any of these regulations, nor did it choose to take any action regarding CRLA except to re-fund the program for a 3-year period.<sup>37</sup>

As it turns out, CRLA is not alone in using ideological considerations in picking and choosing whom and what it will represent. Until recently, a gay and lesbian legal rights group in San Francisco would file lawsuits against straights who injured gays or lesbians but not against gays or lesbians who allegedly injured other gays or lesbians.<sup>38</sup> Certain non-profit civil rights groups will file Title VII employment discrimination suits against White-controlled business or government agencies, but not against entities controlled by people of color.<sup>39</sup>

In the instances cited above and others that could be mentioned, a determination has been made concerning who it is acceptable to provide legal representation against and who not. It is also almost invariably the case that the groups making such decisions do not choose to publicize them for fear of appearing discriminatory.

This is partly what the debate over "political correctness" has been about, namely whether it's OK to determine who should be including the provision of legal representation "in" and who should be "out" when it comes to determining who will get special protections from the government and non-profit agencies.

What distinguishes legal services programs which discriminate from other advocacy groups which do so is that the legal services organizations are largely dependent on the federal government for their funding, enjoy exclusive franchises for federal funding in their service areas, and, by statement of statute, are supposedly dedicated to the provision of equal access to justice among all the needy.

During the 1980's, the in-group/out-group problem became so extreme that CRLA actually filed lawsuits on behalf of poor women who wanted state-

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37. Letter from Alexander D. Forger, President, LSC, to Jose Villarreal, Chairperson, Board of Directors, CRLA (Dec. 19, 1996), announcing a 3-year grant to CRLA for \$4,375,270/year. The 3-year grant period, perhaps coincidentally, would carry CRLA's funding beyond the November, 1998 congressional elections, when, it is possible that there might be a political configuration in the House which was more favorable to legal services, particularly the more radical programs such as CRLA.

38. The typical cases the legal rights organization had trouble with was where a gay or lesbian couple had a dispute over spousal abuse or child custody/support. To its credit, the organization finally agreed to handle such cases.

39. This observation is based on the author's personal experience accumulated while litigating civil rights cases in the bay area and other regions of California.

subsidized abortions while refusing to represent women who wished to protect their children against family abuse once the children were born.<sup>40</sup>

Now that Congress has prohibited legal services programs from doing numerous types of cases, Congress may now need to look at the other side of the ledger and consider what types of cases the Legal Services Corporation has an affirmative duty to insure are undertaken by one of its grantees, such as domestic relations cases. That is, unless the LSC determines there is some sort of problem here and decides to remedy it before Congress does.

Probably the best resolution to the CRLA problem would be for LSC to fund some other entity to operate in CRLA's 19,226 square mile service area to do domestic relations cases and to require CRLA, as a condition of its grant, to expend at least 90% of its LSC grant in the rural areas where CRLA clients actually live.

#### IV. THE COMPETITIVE BIDDING AND PER CAPITA FUNDING EXPERIMENTS

In theory, both competitive bidding and equal funding per capita made good sense. Competitive bidding recognizes the reality that a single program operating in a service area may not be able to represent all the diverse, and sometimes conflicting, groups of poor people residing there, and that different approaches may be needed to meet diverse needs. Equal funding per capita, in turn, insures that the funding of services will be equal from area to area, both in an *inter-* and *intra-* program sense.

Let a thousand flowers bloom, Congress seemed to be saying, but let each get equal amounts of water and fertilizer!

Upon until now we have been considering the situations where Congress tries to regulate legal services programs through the Legal Services Corporation. Now we are going to consider two instances where, in 1995-1996, the Congress adopted provisos which attempted to regulate the Corporation directly and, even more importantly, attempted to introduce new ways by which the Corporation – and legal services programs – should do business. The first of these provisos was, that no later than April 1, 1996, the Corporation should “implement a system of competitive awards of grants and contracts to all basic field programs. . . .” The second innovation was that funds for basic field programs should be allocated “so as to provide. . . an equal figure per individual in poverty for all geographic areas.”

It is noteworthy that both of these new approaches to legal services were introduced at the instigation of middle-of-the-road Republicans and Democrats such as Congressman Jon Fox (R., Pennsylvania, 13th Dist.) and Congressman

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40. CRLA's policy of not representing the poor in court in domestic relations cases has already been discussed. Regarding CRLA's handling of a major lawsuit which established the right of poor women to obtain California-funded abortions, *see* Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 29 Cal.3d 252, 172 Cal. Rptr. 866 (1981).

Charles Stenholm (D., Texas, 17th Dist.), who had gotten tired of the old game of command-and-control regulation and decided to introduce some free marketing into the game (the competitive bid requirement) along with some old fashioned populism (per capita funding). This was the same group of moderate Congresspersons who were able to restore \$50 million to the final LSC appropriation for FY 1996 on condition that LSC implemented competitive bidding and per capita funding. Much to the credit of Congressmen Fox, Stenholm, and other middle-of-the-rovers, the competitive bidding and per capita funding requirements were the most innovative interventions made in legal services since the program itself was established in 1965.<sup>41</sup>

On April 1, 1996, LSC published its proposed competitive bidding regulations in the *Federal Register*.<sup>42</sup> On October 29, 1996, LSC announced the list of the various programs which it funded for 1997 and beyond.<sup>43</sup> The scorecard: Previously-funded legal services programs, 288 out of 289; new proposals in competition with existing legal services program: 1.

After the union representing the workers of the program that had been defunded brought pressure, that program was de-funded too, and the final score read: Incumbents 289, competitive-bid challengers, 0.<sup>44</sup> Coincidentally enough, the one program which was initially de-funded by LSC in 1996 was located in the district of the Congressperson who had proposed the competitive-bid requirement to begin with.<sup>45</sup>

So much for competitive bidding. The initial competitive bidding regulation was issued on April 1, 1996.

If California Rural Legal Assistance was any indication, the equal allocation/client requirement fared no better. Since at least 1995, for example, CRLA allocated \$4.00/poor person to its Stockton office; \$5.80 to its Modesto office; \$6.50 to its Santa Rosa office; \$13.20 to its Medera office \$13.60 to its Delano office; and \$14.0 to its Salinas office,<sup>46</sup> not to mention that CRLA was spending a full third of its \$6 million total budget on its San Francisco office,

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41. To give credit where credit is due, the first program of per capita funding was introduced by Thomas Ehrlich, President of the Legal Services Corporation in the Carter Administration and former dean of the Stanford Law School. After leaving LSC, Mr. Ehrlich became President of Indiana University, where his duties included supervising basketball coach Bob Knight.

42. 45 C.F.R. § 1634, published in 61 Fed. Reg. 14,252 (1996).

43. 61 Fed. Reg. 55,827 (1996).

44. Eleven new proposals were funded under the competitive bidding requirement, but all were spin-offs of previously LSC-funded programs. Interview with Ken Boehm, President, National Legal and Policy Center (May 1, 1997).

45. The Congressman was Jon Fox, R., Pennsylvania 13<sup>th</sup> District. Interview with Ken Boehm, President, National Legal and Policy Center (May 8, 1997).

46. The figures on how much CRLA spent on each of its offices in 1995 were prepared by CRLA's Santa Rosa office. David Harkavy & David Grabill, "Comments on Executive Director's Restructure Plan," Oct. 20, 1995.

where no rural poor or farm workers were located! In 1995, this practice was decryd by 15 of 16 of CRLA's directing attorneys from its local offices.

To the best of the author's knowledge, no survey has ever been done by the Legal Services Corporation as to whether the per capita funding requirement is being enforced by its some 400 programs, nor in the past three years has the Congress exercised any oversight as to whether the requirement has been enforced. Clearly, if the Congress had wished to have its 1996 innovations implemented by LSC, it could have held oversight hearings in the House, which has the power of the purse, and withheld funding to LSC if LSC's conduct was less than satisfactory. If President Clinton let down legal services by putting up little, if any, fight against any of the Gingrich retrenchments of 1996, Republicans forgot about implementing the market reforms of 1996.

#### V. TRYING TO COMPENSATE FOR LEGAL SERVICES LOSSES IN FEDERAL FUNDING THROUGH IOLTA FUNDING

In 1980, just before Ronald Reagan was sworn in as President, Congress authorized the creation of Negotiable Order of Withdrawal (NOW) accounts, which for the first time permitted federally insured banks to pay interest on demand deposits.<sup>47</sup> NOW accounts were permitted, though, only for deposits that consisted solely of funds in which the entire beneficial interest was held by one or more individuals or by an organization that were operated primarily for charitable, e.g. not-for-profit purposes. But so long as the NOW accounts were devoted only to non-profit purposes, attorneys were free to create such accounts from short-term deposits which their clients made with them. What was valuable about such accounts funded by clients was the interest they generated, which although small per each individual client, could add up if the interest from all the clients' accounts in a state were together by, say, a state bar association and, say, used to fund legal services programs. During the early 1980's, this was exactly what state bar associations did around the country, and by 1985, every state in the country except Indiana had such programs, which were called "Interest Only Lawyers Trust Account" programs, or "IOLTA" for short.<sup>48</sup> By 1998, it is estimated, the IOLTA programs in the 49 states were returning to legal services programs some \$100 million/year, or 36% of the funding which legal services was receiving from the Congress in 1996.<sup>49</sup> Another way of looking at the IOLTA phenomenon

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47. Sec. 303, 94 Stat. 146, as amended, 12 U.S.C. 1832.

48. See discussion in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996, 1000 (5th Cir. 1996).

49. Total IOLTA revenues throughout the country have ranged from \$100 million per annum to \$130 million, depending on what the prevailing interest rate is. In 1998, total revenues were estimated at \$110. Interview with Richard Samp, attorney for the Washington Legal Foundation, who headed up the litigation against Texas' IOLTA program, April 13, 1999.

was that while Gingrich took \$122 million away from the legal services program in 1996, IOLTA gave \$100 million back, making up for 82% of what legal services had lost. As the Bible saith at Job 1:21, "The Lord giveth and the Lord taketh away, blessed be the name of the Lord."

In addition to IOLTA money, legal services programs around the country raise an estimated \$10-15/year million in other non-federal monies, primarily from charitable foundations.<sup>50</sup> Since soon after its inception, IOLTA began arousing the ire among conservatives who wished to see little or no legal services program at all, first because IOLTA monies were being to supplement for cuts which conservative congresspersons were sometimes able to make in the program, and second and even more important, because the IOLTA monies were being used to fund litigation which Congress had prohibited legal services lawyers to do with federal monies. Finally in 1995, a conservative public interest law firm, the Washington Legal Foundation, filed suit against Texas' IOLTA program, and in 1996, the Fifth Circuit Court of Appeals found for the Plaintiffs, holding that "any interest which accrues belongs to the owner of the principal," rather than to the IOLTA program.<sup>51</sup>

In 1998, in *Phillips v. Washington Legal Foundation*, the U.S. Supreme Court upheld the Fifth Circuit, ruling that in authorizing the taking of interest earned by the principal deposited by clients with their lawyers, the Texas IOLTA program was violative of the Takings Clause of the 5th Amendment to the U.S. Constitution.<sup>52</sup> The rule that "interest follows principal" has been established under English common law since at least the mid- 1700's, Chief Justice Rehnquist argued in writing for the majority. This is the law of Texas as well. The fact that IOLTA accounts are usually so small in amount for each individual client that they cannot reasonably be expected to generate any interest for the client is irrelevant, the Chief Justice said. "We have never held that a physical item is not 'property' simple because it lacks a positive economic or market nature. . . .While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere to the property."<sup>53</sup>

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50. The CRLA Foundation, begun by California Rural Legal Assistance in 1980 shortly before Ronald Reagan was inaugurated, raises approximately \$500,000/year in non-federal, non-IOLTA. Increasingly, the tendency among legal services programs is to raise all non-federal monies through separate-but-related non-profit, tax-exempt entities. See Penelope Hammil, "Elder Rights Advocacy and the Legal Services Corporation Restrictions: How Serious is the Conflict?," *Clearinghouse Review* (1997) 263-64.

51. See *supra* note 47.

52. 118 S. Ct. 1925 (1998). The case was decided by a 5-4 majority, with Chief Justice Rehnquist writing the opinion for the majority and Justices Souter and Breyer writing dissenting opinions.

53. 118 S. Ct. at 1933.

Another argument which could have been advanced in support of the majority's opinion in *Washington Legal Foundation* but was not is that if clients of lawyers funding IOLTA accounts were given the opportunity to decide for themselves whether they wanted their monies supporting legal services programs, some of them might decide not; but under current IOLTA programs, clients are not permitted to exercise such rights, which in and of itself may be described as an unconstitutional "taking."<sup>54</sup>

Given the closeness of the Court's decision in *Washington Legal Foundation*, it is possible that with one or two more appointments to the Court by Democrat Presidents, the Court's decision could be reversed and IOLTA programs will be resurrected in all 49 states much as before. An even more likely scenario is that after some going back and forth, IOLTA programs will have to do with clients' short-term deposits what labor unions were required to do with the portion of the members' dues being expended on political activities, namely that the unions had to get some sort of OK from each member before such was done. The Supreme Court decision which established the latter duty, on unions, was *Abood v. Detroit Board of Education*,<sup>55</sup> and *Abood* was followed by *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Employees*,<sup>56</sup> *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*,<sup>57</sup> and *Communications Workers of America v. Beck*,<sup>58</sup> not to mention numerous federal courts of appeal and district court opinions.<sup>59</sup> It may be that after *Washington Legal Foundation*, state bar associations undertaking IOLTA programs will need to require each attorney to give full written disclosure to his/her client about what IOLTA

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54. This argument was devised by the author.

55. 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 261 (1977).

56. 466 U.S. 435, 104 S. Ct. 1883, 80 L.Ed.2d 428, (1984).

57. 475 U.S. 292, 106 S. Ct. 1066, 89 L.ER.2d 232, (1986).

58. 487 U.S. 735, 108 S. Ct. 2641, 101 L.Ed.2d 634, (1988).

59. Although *Washington Legal Foundation* and the *Abood* line of cases reach much the same conclusion, namely that the approval of lawyers' clients and union members must give their approval before certain monies are used for certain purposes, *Washington Legal Foundation* and the *Abood* line of cases are based on different constitutional theories. *Washington Legal Foundation*, for its part, is based on a Fifth Amendment Takings Clause theory. See generally, Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard U. Press, 1985). *Abood* and its progeny, on the other hand, are based on a First Amendment/Compelled Speech theory, which was first enunciated in the 1943 case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.E. 1628. "If there is any fixed star in our constitutional constellation," Mr. Justice Jackson stated for a majority of the Court in *Barnette*, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," 319 U.S. at 642, 63 S.Ct. at 1187; and 43 years later, the same passage was quoted in *Abood*, (by Mr. Justice Stewart). Conceivably, if *Washington Legal Foundation* had been brought under a Compelled Speech theory, the same result could have been reached.

monies would be used for and to obtain informed written consent from each client before interest on the client's trust account could be to benefit, say, legal services – or it may be that something less than this will be held to suffice in various of the county's eleven federal circuits; but whatever is decided, it seems certain that there will be further litigation and that much of it will be launched by conservative legal groups like the Washington Legal Foundation.

A lot can be stake when decisions are made as to how monies are deducted from members' paychecks or dues. In Washington state, for example, after a majority of the voters approved so-called paycheck protection which would require union members' annual written permission before allowing payroll deductions for political contributions, only 6,921 teachers union members check off for political contributions as opposed to c. 48,000 who checked off before the initiative passed.<sup>60</sup> A measure similar to the Washington initiative was put on the California ballot for the June, 1998, election,<sup>61</sup> but it lost after state and national unions expended a reported \$20 million in defeating it. In the author's opinion, the likely result of all this skirmishing will be that most clients will check off for IOLTA in one fashion or another because they have nothing to gain financially by not checking off.

#### VI. WHY LEGAL SERVICES ATTORNEYS HAVE SO LONG HELD ON TO THE HOPE OF DOING IMPACT LITIGATION DESPITE CONGRESSIONAL DIRECTIVES TO THE CONTRARY

In 1998, the Legal Services Corporation reported, legal services programs around the country handled some 1.9 million cases.<sup>62</sup> Now that legal services attorneys can do little more than service work, it is safe to assume than most of these cases involved service, rather than impact, work. Assuming that legal services programs have handled a minimum of 1.5 million service cases for each of the past twenty years, from 1979 through 1998, legal services as a whole has handled c. 30 million cases during this time period.

One way of looking at the major structural changes that were made in legal services in 1996 were that they were the culmination of more than twenty years of restricting what legal services lawyers could do and cutting back on their funding. Another way of viewing the 1996 changes was to put them in the context of still other structural changes which were made in 1996, to wit: impecunious mothers could no longer get AFDC for more than five years in each mother's lifetime; as of the year 2000, most mothers on the rolls would be

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60. Letter from Jami Lind, Evergreen Freedom Foundation, Olympia, WA, to author, February 10, 1998.

61. Marc Sandalow, *Unions Fight California Proposition*, SAN FRANCISCO CHRONICLE, Feb. 18, 1998.

62. *Federal Legal Service Acknowledge Overcounting Caseload*, SAN FRANCISCO CHRONICLE, April 8, 1999, at A5.

taken off and had to get jobs instead; immigrants illegally present in the country could no longer receive most kinds of public benefits; disabled persons under the age of 65 could no longer receive Supplemental Security Income (SSI) if they were found to be abusing alcohol and/or drugs.<sup>63</sup>

It might be a mistake to suppose that the reforms of 1996 were simply aberrations of a Radical Republican Congress, (the most radical, it might be argued, since the Radical Republican Congresses of the late 1860's). It point of fact, the 1996 legislations, arrived at by an Opportunity Society Republican (Mr. Gingrich) and a New Democrat (Mr. Clinton) may not only have anticipated what most Americans wish for the future – namely the acceptance of more personal responsibility, at least for the poor – but also acknowledged the frustration which had been building up among most Americans for some time about undeserving people getting something for nothing and complaining about how little they were getting besides. It is realistic for even the most die-hard of legal services attorneys to believe that with the House returning to Democrat control in due course, the 1996 reforms will somehow be reversed and the needy will be told that, yes, it's once again OK for welfare mothers to implement a life strategy of not working, foreign nationals to cross the border illegally and receive a variety of public benefits, and SSI applicants to abuse drugs and/or alcohol as much as they like? Of course not.

If, then, the 1996 reforms may be here to stay, at least for the foreseeable future, it may be reasonable to ask why so many legal services attorneys still seem to cling to the notion that at sometime in the future, they will be restored to the position of being able to do as impact litigation of their choice.

In order to understand why legal services lawyers have clung so long to the idea that they should and once again will be able to undertake big case litigation on behalf of the poor, one might return to the euphoria of the mid-1960's when legal aid was being transformed into legal services and, indeed, an Access to Justice revolution was breaking out all over the country, begun by the U.S. Supreme Court, no less. Let us recall, for example, the case which began it all, *Griffin v. Illinois*,<sup>64</sup> where five members of the Court led by Mr. Justice Black held in 1956 that indigents convicted of a crime had a right to obtain a free copy of the transcript of their trial proceedings when appealing their convictions. Then, seven years later, came *Gideon v. Wainwright*,<sup>65</sup> which held that indigents who were being criminally prosecuted had a right to free

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63. The restriction in public benefits pertaining to AFDC and illegal immigrants are set forth in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 125 (1996), as codified in 8 U.S.C. 1601 et seq. The drugs/alcohol prohibitions for SSI applicants and recipients are found in the Contract with America Advancement Act of 1996, P.S. 104-121, Sec. 105, 110 Stat. 852 (1996), as codified in 42 U.S.C. 423.

64. 351 U.S. 12, 100 L.Ed. 891, 76 S. Ct. 585 (1956) (Black, J.).

65. 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963) (Black, J.).

legal counsel, followed by *Miranda v. Arizona*,<sup>66</sup> which held that a person who was in police custody had to be advised of his/her right to remain silent and to counsel before a confession could be taken from him which was admissible in court; *In re Gault*,<sup>67</sup> which held that the right to counsel extends to juveniles accused of a crime; *Sniadach v. Family Finance Corp. of Bay View*,<sup>68</sup> which held that before a worker's wages could be garnished, he must receive notice and a judicial hearing; and *Goldberg v. Kelly*,<sup>69</sup> which held that before welfare benefits could be cut off or denied to a recipient or applicant, an administrative fair hearing must be granted. After Mr. Justice Brennan retired, he said that of all the opinions he wrote, the one he was proudest of was for the majority in *Goldberg*. By the time the Court decided *Edelman v. Jordan* in 1974,<sup>70</sup> the brakes were being put on what the Warren court had wrought and there would be few, if any, further sweeping judicial interventions would be made on behalf of the poor.

But during the seven years that the Access to Justice revolution was in full swing, it was euphoric indeed to behold what was going on and, to small degree, participate in it, especially for those like the author who had been accused of being members of the "silent generation" during the 1950's and, as a result, were largely of no social consequence. Years later, younger lawyers who followed in the footsteps of the first generation of equal access practitioners would speak with reverence of what seemed to them like a golden age, and in April, 1999, California's leading legal newspaper, the *Daily Journal*, devoted a front page retrospective of CRLA circa. 1966-72.<sup>71</sup> It is unlikely that the *Daily Journal* would have expended such effort if the CRLA-of-then had been handling only service cases.

#### CONCLUSION: A CONSENSUS HAS FINALLY BEEN REACHED

Everything now about legal services seems to be decided for the foreseeable future, namely that LSC-funded legal services programs are going to receive LSC funding so long as they stick to doing service work and non-profit spin-offs from these programs can raise as much non-LSC money as they can to do the kinds of impact litigation which LSC-funded programs are prohibited from doing, just as the A.C.L.U., Environmental Defense Fund, and other public-interest law firms have been doing for some time.

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66. 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) (Warren C.J.).

67. 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed. 527 (1967) (Fortas, J.).

68. 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969) (Douglas, J.).

69. 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970) (Brennan, J.).

70. 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974) (Rehnquist, J.). In what would soon become a time-honored tradition, the six-man majority of the newly constituted Berger Court would invoke the Eleventh Amendment to hold that although a federal court could issue injunctive relief against state officials, it could not impose damages on them.

71. DAILY JOURNAL, April 12, 1999.

All that remains now is a gracious acknowledgment of the obvious, which will enable friends of the program to appear more grateful for the largesse they do receive from the Congress, which is not inconsiderable, and foes of the program to appear more humane. And who knows, some legal services and their clients might even write thank you notes to their local congresspersons who vote appropriations for the program, “making nice,”<sup>72</sup> as it were and the funding for legal services might climb upward, whether the Democrats or Republicans are in power—because almost every story, after all, can have a happy ending.

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72. “Making nice” is a Jewish expression for, well, making nice.