

Legal Services-Past and Present

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Recommended Citation

Shira A. Scheindlin, *Legal Services-Past and Present*, 59 Cornell L. Rev. 960 (1974)
Available at: <http://scholarship.law.cornell.edu/clr/vol59/iss5/6>

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LEGAL SERVICES—PAST AND PRESENT

It has been eight years since the federal government first began providing legal services to the poor. The program has resulted in an unparalleled availability of legal assistance to those who previously had been unable to afford such services.¹ Yet the program has also raised profound questions about the responsibilities of attorneys to their clients, to their profession, and to the society in which they live and work. As the 93d Congress moves closer to a decision on the future shape and character of the federal legal services program,² it is appropriate to reflect upon the history of federal efforts in the field.

I

THE DEVELOPMENT OF THE LEGAL SERVICES PROGRAM 1965-1971—ACHIEVEMENTS AND CONTROVERSIES

A. *Legislative Overview*

Before the mid-1960's the legal profession had traditionally provided legal services to the poor on a limited scale.³ In 1965, however, as part of the War on Poverty, the federal government assumed this responsibility.⁴ The Legal Services Program (LSP) was

¹ In 1965, there were 247 legal aid offices, of which 157 had a paid staff. By 1971, there were 735 legal aid offices, of which 684 had a paid staff. In 1965, 414,000 cases were handled; by 1971, this figure had grown to 1,237,275. In 1966, \$4.3 million was the gross cost of the programs; by 1971, this figure had risen to \$77.2 million. *See generally* NATIONAL LEGAL AID & DEFENDER ASS'N, STATISTICS OF LEGAL AID AND DEFENDER WORK IN THE UNITED STATES AND CANADA (1965); NATIONAL LEGAL AID & DEFENDER ASS'N, 1971 STATISTICS OF LEGAL ASSISTANCE WORK IN THE UNITED STATES AND CANADA (1972).

The LSP has also devoted a good deal of attention to the educational function. *See* OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICES PROGRAMS 2 (1966). *But see* Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966) (suggesting that LSP has not been adequately fulfilling its obligations in area of education).

² *See* notes 115-59 and accompanying text *infra*.

³ *See* E. BROWNELL, LEGAL AID IN THE UNITED STATES (1951). Prior to 1965, private organizations engaged in well-meaning but inadequate efforts to provide legal representation to the poor. *See generally* Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381 (1965); Marden, *Equal Access to Justice: The Challenge and The Opportunity*, 19 WASH. & LEE L. REV. 153 (1962); Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROB. 211 (1966).

The very limited supply of legal services being offered by private legal aid societies is described in one article which points out that in 1963 less than 0.2% of all funds spent on legal services were spent on legal aid (civil cases only).

⁴ *See* Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701-2994 (1970). The legal services program was not among the programs specifically authorized by the Economic

originally established within the Office of Economic Opportunity (OEO) as a subsidiary of the Community Action Program (CAP).⁵ As initially organized, the LSP was not entitled to direct appropriations from Congress, but received only the monies donated to it by the CAP.⁶

The first priority of the new LSP was to use the funds it did have to organize and begin to administer local legal services offices throughout the country.⁷ These local legal services units were not agencies of the government, but rather were private, nonprofit enterprises, which were designed to respond directly to the legal needs of the local community.⁸ As a result, legal services offices took many different forms, ranging from the traditional legal aid offices⁹ to group legal services,¹⁰ experimental *judicare*

Opportunity Act of 1964. However, Congress, in the 1965 amendment to the Act, stated that financial assistance to Community Action Programs (CAP) was not limited to named programs. Act of Oct. 9, 1965, Pub. L. No. 89-253, § 12, 79 Stat. 973-74. The effect of the amendment was to allow OEO to provide additional and experimental services such as the LSP, Project Headstart, and Upward Bound.

⁵ The statute provides that antipoverty assistance from federal, state, and local sources be used to respond to local needs and conditions and envisions the creation of new types of services to attack the causes of poverty. 42 U.S.C. §§ 2781(a)(1), (3) (1970).

The Community Action Agency (CAA) was established under title 11 of the Economic Opportunity Act of 1964, *id.* §§ 2781-2837. An important goal of the Act is to encourage "the maximum feasible participation of residents of the areas and members of the groups served" in CAA sponsored programs. *Id.* § 2781(4)(a). To ensure that this goal is met, the CAA's are to be governed by boards consisting of 51 persons—one-third public officials, one-third representatives of the poor of the area, and one-third local community leaders. *Id.* § 2791(b). For an excellent summary of the operating rules of the CAP, see J. KERSHAW, *GOVERNMENT AGAINST POVERTY* 44-56 (1970).

⁶ There was no mention of the LSP in the Economic Opportunity Act in 1965. Funding was made possible by the 1965 amendments to the Act which extended the permissible programs beyond those specified in the language of the statute. *See* Act of Oct. 9, 1965, Pub. L. No. 89-253, § 12, 79 Stat. 974. (1970).

⁷ *See* OFFICE OF ECONOMIC OPPORTUNITY, *HOW TO APPLY FOR A LEGAL SERVICES PROGRAM* (1966). In many instances, the CAA itself proposed to establish and administer an LSP. In other cases, another community organization, such as an existing legal aid society, a bar association, or a law school, chose to establish a program. In the latter situation this organization was considered a delegate agency of the CAA and operated under contract with it. Rarely did an LSP have no affiliation with the local CAA. Prior to submission of a proposed program to the OEO for funding, the approval of the local CAA was necessary. *Id.* at 43-44, 67.

⁸ *See* 42 U.S.C. § 2781 (1970); OFFICE OF ECONOMIC OPPORTUNITY, *supra* note 1, at 22-28 (directing that offices be established in poor neighborhoods; that education be given to poor people, both in availability of legal services when needed, and in avoidance of legal problems; and that research and law reform be undertaken).

⁹ In the traditional legal aid office, the only concern of the attorneys was to handle a large volume of cases brought by poor persons. No effort was made to develop test-case litigation, to create education programs for the community, or to serve in the role of lobbyist for the poor.

¹⁰ *See generally* Bartosic & Bernstein, *Group Legal Services As a Fringe Benefit: Lawyers for*

programs,¹¹ neighborhood practice organizations,¹² and law reform and research back-up centers.¹³ No uniform standards were applied to the operation of these centers. Eligibility requirements,¹⁴ case load,¹⁵ and the extent of community participation¹⁶ had to be adapted by individual offices to suit local needs.

Forgotten Clients Through Collective Bargaining, 59 VA. L. REV. 410 (1973); Kriger, *Pragmatic Approach to Problems of Group Law Practice*, 18 CLEV.-MAR. L. REV. 1 (1969); Steiner, *Bargained-for Group Legal Services: Aid for the Average Wage Earner?*, 11 ARIZ. L. REV. 617 (1969). For a close analysis of certain group legal services projects, see Ashe, *Group Legal Services—Equal Justice in Fact: A Prognosis for the Seventies*, 23 SYRACUSE L. REV. 1167 (1972).

¹¹ Four experimental judicare programs were funded by the OEO from the LSP budget in 1966. Under a judicare system, after a potential client is certified to be eligible by the local Community Action Agency, he can then see a private attorney of his choice in his community. The program will pay the attorney's fees at a rate of 80% of the minimum fee schedule up to a maximum of \$300 per case without approval of the local judicare office. See Preloznik, *Wisconsin Judicare*, 25 NLADA BRIEFCASE 91, 93 (1967).

The OEO has financed judicare experiments in rural Wisconsin, rural Montana, Alameda County, California, and New Haven, Connecticut. The judicare system of supplying legal services uses local practitioners instead of a special legal services staff. The comparative effectiveness of the two methods has been the subject of considerable debate. The majority of commentators prefer the staffed office approach. See Robb, *Alternate Legal Assistance Plans*, 14 CATH. LAW. 127 (1968); Schlossberg & Weinberg, *The Role of Judicare in the American Legal System*, 54 A.B.A.J. 1000 (1968). The main reasons expressed for preferring the staffed offices are: (1) legal services attorneys have become specialists in areas of poverty law; (2) because of this expertise, staff attorneys are more efficient and consequently less expensive than private attorneys; (3) the poor have more confidence in staff attorneys; (4) judicare encourages more federal control and interference; (5) judicare is less visible to the poor. See Robb, *supra* at 132-36.

The pending Legal Services Corporation bill provides for the "study . . . of alternative and supplemental methods of delivery of legal services to eligible clients including judicare, vouchers, prepaid legal insurance, and contracts with law firms." See H.R. 7824, 93d Cong., 2d Sess. § 1007(g) (1974).

¹² See Note, *Neighborhood Law Offices: The New Wave in Legal Services For the Poor*, 80 HARV. L. REV. 805 (1967). See also Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970). For the view that the neighborhood offices have not been particularly successful, see Cahn & Cahn, *supra* note 1, at 928-29.

¹³ See Note, *Beyond the Neighborhood Office—OEO's Special Grants in Legal Services*, 56 GEO. L.J. 742 (1968). See also Sullivan, *Law Reform and the Legal Services Crisis*, 59 CALIF. L. REV. 1, 8 (1971).

¹⁴ See Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 J. URBAN L. 549 (1967). Some commentators argue that the overly strict eligibility standards of legal aid programs excluded many persons who should have received legal services. Carlin & Howard, *supra* note 3, at 399. At present, eligibility standards vary widely from program to program, but the general principle is that

[t]he standard should not be so high that it includes clients who can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter. This is a program of legal assistance for the poverty-stricken.

OFFICE OF ECONOMIC OPPORTUNITY, *supra* note 1, at 19. For the proposed eligibility standard embodied in the Legal Service Corporation bills, see note 149 *infra*.

¹⁵ See Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URBAN L. 217 (1969). See also Samore, *Legal Services for the Poor*, 32 ALBANY L. REV. 509 (1968). Burdensome case loads have been a problem for the LSP and will continue

The original administrative framework immediately generated difficulty. The relationship between the CAP and the LSP was never clearly defined, and it was uncertain which agency controlled what functions.¹⁷ The CAP had the power to make decisions regarding the funding and refunding of local LSP's and often used this power to exercise control over the programs.¹⁸ The intertwined organizational structure of the CAP and the LSP also resulted in a substantial time-drain on project directors and attorneys.¹⁹ Furthermore, CAP's were far more susceptible than

to plague the program until the demand for services and the supply of attorneys is balanced. Sullivan, *supra* note 13, at 5.

¹⁶ See generally Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Wexler, *supra* note 12. One specific suggestion for using human resources in the community is to expand the role of paraprofessionals. See Statsky, *Paraprofessionals: Expanding the Legal Service Delivery Team*, 24 J. LEGAL ED. 397 (1972).

¹⁷ Mr. John D. Robb, a member of the National Advisory Council, provides a general description of the allocation of duties between the LSP and the CAP. Essentially, the LSP was to control the administration and set the professional policies of the program. The LSP also was to have a say in funding, staffing, and paying salaries in national, regional, and local offices. The CAP, however, had the power ultimately to decide on funding, modifying, or refunding programs. The CAP also had power to control the selection, promotion, and payment of regional legal services lawyers. Where the powers of the two programs overlapped, there was considerable tension. See Robb, *Poverty Lawyers' Independence—Battle Cry for Justice*, 1 N.M.L. REV. 215 (1971). See generally Cahn & Cahn, *supra* note 16 (suggesting that legal services programs should not be subordinate to other interest groups, *i.e.*, CAP, but should function independently). See also Cahn & Cahn, *supra* note 1; Hannon, *Legal Services and the Community Action Program: Oil and Water in the War on Poverty*, 28 NLADA BRIEFCASE 5 (1969); Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971). One author presents the rarely heard CAP side of the dispute. He argues that the growing number of specific programs to be run by the CAP, *e.g.*, Project Headstart, Upward Bound, Emergency Medical Services, to name a few, results in the specific earmarking of allocations to the program, thereby stifling local initiatives in the CAP. J. KERSHAW, *supra* note 5, at 56.

¹⁸ See note 21 *infra*.

One study closely examined the relationship between a local LSP and the Economic and Youth Opportunities Agency (EYOA), a local CAP agency in Los Angeles, California. The head of the LSP said of the EYOA:

[W]e have been seriously delayed in our mission by some of the worst administrative foul-ups it has been my unfortunate duty to encounter. In some cases, we began to wonder if it was not due to intentional mishandling of matters which kept us from receiving any funds for operation from August 1, 1966, until December 1.

Hannon, *supra* note 17, at 8. One legal services program director reported 16 trips to EYOA in four months to secure the program's monthly check. *Id.* at 9. All of the poverty lawyers interviewed felt that better results could be achieved if the CAP were bypassed. *Id.* at 10.

¹⁹ [M]uch of the productive time of the lawyers in the regional offices was occupied in attempting to explain decisions on professional aspects of the Legal Services Programs to the Community Action staff. Similar controversies required substantial time on the part of neighborhood lawyers in local legal services programs, particularly the chief attorney's time, which thereby was diverted from the primary function of rendering services to clients.

LSP's to direct political pressure and thus were often at odds with LSP's which actively sought to assist the poor in their disputes with landlords, police, social service agencies, and state legislatures.²⁰

Because of these difficulties, Congress amended the Economic Opportunity Act in 1966 to permit congressional appropriations to be made directly to the LSP, thus removing most CAP control over LSP funding.²¹ This action was followed in 1969²² by an order of the Director of the OEO, raising the LSP to independent status

²⁰ Because CAP's dealt directly with leaders of the community, partly to raise the required 20% local share of the funding of the agency, leaders of the CAP were very anxious not to antagonize those upon whom they were dependent for financial support. In 1970, the Chicago Committee on Urban Opportunity, an OEO-funded CAP, threatened to cut off funds to a local LSP if it persisted in suing municipal agencies. See Pearson, *To Protect the Rights of the Poor: The Legal Services Corporation Act of 1971*, 19 U. KAN. L. REV. 641, 646 (1971).

At the national level, the program was subject to political pressure from the President, who in turn was pressured by state and local politicians. Although the resulting interference did not greatly weaken the day-to-day effectiveness of local programs, it did at times take the form of proposed congressional action which threatened the existence of the entire program. See notes 101-03 and accompanying text *infra*. The program felt it could fight its battles best at the national level (*i.e.*, with Congress and the President) and therefore strongly opposed any attempts to regionalize the LSP. See notes 106-09 and accompanying text *infra*.

²¹ Act of Nov. 8, 1966, Pub. L. No. 89-794, § 211-1(b), 80 Stat. 1451, 1462 (codified at 42 U.S.C. § 2812(b) (1970)).

Until the time of this amendment, the Community Action Agency was given a sum of money by the CAP to spend at its discretion. After the formal recognition of the LSP, funds were specifically designated by Congress for the program. This designation of funds limited the discretion of the CAP over the LSP. However, the CAP did retain some controls over the funding of local offices.

The 1966 amendment also delineated the role of local bar associations in the program: [T]he Director shall carry out programs . . . which provide legal advice and legal representation to persons when they are unable to afford the services of a private attorney, together with legal research and information as appropriate to mobilize the assistance of lawyers or legal institutions, or combinations thereof, to further the cause of justice among persons living in poverty: *Provided*, That the Director shall establish procedures to assure that the principal local bar associations in the area to be served by any proposed program of legal advice and representation are afforded an adequate opportunity to review the proposed program and to submit comments and recommendations thereon before such program is approved or funded.

Id. § 211-1(b). Support by the bar is crucial to the LSP's success. See McCalpin, *The Bar Faces Forward*, 51 A.B.A.J. 548 (1965). See also notes 55-68 and accompanying text *infra*.

²² In the interim, few substantive changes were made in the program. However, Congress did amend the Economic Opportunity Act in 1967 in order to make several refinements of the LSP. See 42 U.S.C. § 2809(a)(3) (1970). Most significant was the designation of legal services as one of the new "special emphasis" programs. *Id.* "Special emphasis" is defined in the statute as follows:

In order to stimulate actions to meet or deal with particularly critical needs or problems of the poor which are common to a number of communities, the Director may develop and carry on special programs under this section.

Id. § 289(a) (1970). At the same time three other "special emphasis" programs were also begun—Project Headstart, Follow Through, and Comprehensive Health Services. *Id.* §§ 2809(a)(1), (2), (4).

within the OEO and relieving the CAP of administrative supervision over the LSP.²³ Unfortunately, these two changes did not guarantee that the LSP would remain totally free from outside interference.²⁴ As the work of LSP attorneys in the field began to gain momentum, the agency inevitably found itself at odds with private interests, including landlords, local businessmen, and government officials on the state and local level who were potentially subject to embarrassment and exposure by legal services attorneys and who therefore felt threatened by LSP activities.²⁵ Factions so affected were likely to attempt to challenge, or at least contain, the legal services program either directly or through friendly legislators on the state and national levels.²⁶

President Johnson, in a special message to Congress on March 14, 1967, had been one of the first to pinpoint the problem of political interference and to warn of its danger:

Community action agencies should devote their energies to self-help measures and new initiatives To be effective, it is essential that they be non-partisan and totally disengaged from any partisan political activity. This Administration . . . will be constantly alert to the danger of partisan political activity and will take the necessary steps to see that it does not occur.²⁷

By 1971, however, the problem had grown to such dimensions that both the Nixon Administration and the organized bar felt that drastic changes were warranted, including the creation of an independent Legal Services Corporation.²⁸

There were several other important features of the 1967 amendment. The legislation provided an expanded list of the kinds of legal services the program would make available (*see id.* § 2809(a)(3)), declared the need to maintain a proper attorney-client relationship (H.R. REP. No. 866, 90th Cong., 1st Sess. 24 (1967)), and once again emphasized the role of the state and local bar associations in the program. 42 U.S.C. § 2809(a)(3) (1970). Finally, the amendment expressly prohibited the use of LSP funds or personnel to aid a person indicted for a crime. *Id.*

But see 2 LAW IN ACTION 6 (Feb. 1968) (specifying exceptions to ban on criminal representation).

²³ *See* 5 WEEKLY COMP. PRES. DOCS. 1135 (1969).

²⁴ Even after the LSP was separated from the CAP at the national level, there was still a great deal of interaction at the local level between the local LSP's and CAA's. Since all communities have a privately organized community action agency or have established the state or county as a community action agency pursuant to the statute (42 U.S.C. § 2790 (1970)), it is likely that at the local level and under the current political structure the two must maintain extensive ties.

²⁵ *See* Robb, *Controversial Cases and the Legal Services Program*, 56 A.B.A.J. 329, 331 (1970).

²⁶ *See* notes 100-04 and accompanying text *infra*.

²⁷ 3 WEEKLY COMP. PRES. DOCS. 459 (1967).

²⁸ On May 5, 1971, President Nixon sent a message to Congress proposing the

While proposals for the establishment of a Legal Services Corporation were being debated, the program continued to function as a part of the OEO.²⁹ Because major structural changes seemed to be in the offing, no effort was made during this period to increase the size or scope of the LSP.³⁰ Then in January 1973, President Nixon announced his decision to dismember the OEO.³¹ He appointed a new Acting Director of the OEO, Mr. Howard Phillips, to carry out his mandate.³² Mr. Phillips immediately discharged the Acting Director of the LSP,³³ set a temporary agency-wide thirty-day limitation on the refunding of programs,³⁴ repealed all efforts at law reform,³⁵ and set severe restrictions on hiring, promotions, travel, and annual leaves.³⁶

In June of 1973, the United States District Court for the District of Columbia enjoined Mr. Phillips from any further action to disband the OEO prior to its legal date of expiration.³⁷ In a

establishment of a national Legal Services Corporation. 7 WEEKLY COMP. PRES. DOCS. 726 (1971). The organized bar strongly desired an independent LSP. See Arnold, *Whither Legal Services*, 1 JURIS DOCTOR, Feb. 1971, at 3; Karabian, *Legal Services for the Poor: Some Political Observations*, 6 U. SAN FRANCISCO L. REV. 253 (1972); Lenzner, *Legal Services Fights for the Poor, But Who Fights for Legal Services?*, 1 JURIS DOCTOR, Feb. 1971, at 9; Robb, *supra* note 25. See also notes 131-59 and accompanying text *infra*.

²⁹ After attaining independent status within the OEO, the Director of the LSP was made an Associate Director of the OEO with direct access to the OEO Director. Greater independence led to more freedom and thereby to activities which aroused the hostility of the program's opponents. More than ever, the President was anxious to move the program out of the executive branch so that this hostility would be focused only on the Corporation. See Arnold, *The Knockdown, Drag-out Battle over Legal Services*, 3 JURIS DOCTOR, April 1973, at 4.

³⁰ See note 40 *infra*.

³¹ See 9 WEEKLY COMP. PRES. DOCS. 86-98 (1973). The President's budget for 1974 made no request for funding the OEO. This was in effect an order to disband the OEO and to transfer the programs to other departments.

³² *Id.* at 122; see note 38 *infra*.

³³ Arnold, *supra* note 29, at 4.

³⁴ See CCH Pov. L. REP. ¶ 8719, at 9781 (1973).

³⁵ Initially, law reform was not an enunciated goal of the LSP. See OFFICE OF ECONOMIC OPPORTUNITY, *supra* note I. In 1967, a new set of goals for the program was promulgated in a Manual. See OFFICE OF ECONOMIC OPPORTUNITY, EVALUATION MANUAL: LSP (1967). Of the five new goals set forth, law reform was given priority. None of these goals was ever made official by publication in the *Federal Register*. In reaction to this policy, Acting Director Phillips declared that:

(a) The Legal Services program has only one major goal . . . : To provide quality legal services in noncriminal matters to individuals who meet the eligibility criteria . . . and who are otherwise unable to afford counsel.

(b) Law reform will no longer be a primary or separate goal of the program

45 C.F.R. § 1061.5-6 (1973). But see note 38 *infra*.

³⁶ Arnold, *supra* note 29, at 5.

³⁷ Local 2677, *Am. Fed. of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

separate action even Mr. Phillips's appointment as Acting Director of OEO was held to be illegal because his name had never been submitted to the Senate for confirmation.³⁸ The LSP continues to operate with funds authorized by Congress in 1972;³⁹ however, both these funds and the statutory life of the program itself will end in June 1974, unless Congress enacts legislation establishing a Legal Services Corporation or takes other emergency action.

B. *Achievements*

1. *Funding*

The amount of money spent for the OEO-LSP is one measure of the program's growth during its first six years.⁴⁰ In general, the

After this ruling, Phillips issued an order rescinding many of his previous directives which he felt were invalid in light of the decision. See 38 Fed. Reg. 14,260 (1973).

³⁸ *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C.), *motion for stay denied*, 482 F.2d 669 (D.C. Cir. 1973).

³⁹ See note 130 *infra*.

⁴⁰ The relevant available statistics are provided here in chart form.

	LSP's	Offices	Attorneys	Clients	Funds Appropriated (millions)	Funds Spent (millions)
1966	160 ^a	500 ^a				\$27 ^a
1967	200 ^b	600 ^b	1200 ^b	350,000 ^b	\$22 ^c	\$28 ^c
1968	260 ^d	850 ^d	1800 ^d	475,000 ^d	\$32 ^c	\$38 ^c
1969					\$46 ^e	
1970	265 ^f	800 ^f	1850 ^f	900,000 ^f	\$54 ^f	
1971				1,200,000 ^g	\$61 ^g	

^a See 1 LAW IN ACTION 4 (Aug. 1966). The OEO allocated an initial expenditure of \$20 million to the LSP in fiscal year 1966. See note 15 and accompanying text *supra*. Forty-three states and 37 of the 50 largest cities established programs in 1966. See 1 LAW IN ACTION 5 (Aug. 1966). In 1965, the year immediately preceding the inception of the program, the federal government spent only \$603,000 on legal services. See Greenawalt, *OEO Legal Services for the Poor: An Anniversary Appraisal*, 12 N.Y.L.F. 62 (1966).

^b LEGAL SERVICES PROGRAM, OFFICE OF ECONOMIC OPPORTUNITY, THE POOR SEEK JUSTICE 3 (1967).

^c Act of Nov. 8, 1966, Pub. L. No. 89-794, § 2(b)(2), 80 Stat. 1451. Of the \$28 million spent by the LSP in 1967, \$22 million were appropriated by Congress and \$6 million were added by OEO Director Shriver. Of the \$38 million spent in 1968, \$33 million were appropriated by Congress, and \$5 million were from the Director of the OEO. See Pious, *Congress, the Organized Bar, and the Legal Services Program*, 1972 Wis. L. Rev. 418, 436.

^d *Hearings on Legal Services Program of the Office of Economic Opportunity Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. 104-05 (1969) [hereinafter cited as *1969 Hearings*].

^e *Hearings on the Legal Services Program of the Office of Economic Opportunity Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess., pt. 2, at 337 (1970) [hereinafter cited as *1970 Hearings*].

^f See SUBCOMM. ON EMPLOYMENT, MANPOWER, AND POVERTY, OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 91ST CONG., 2D SESS., LEGAL SERVICES PROGRAM UNDER THE

funding of the LSP has fallen short of its proponents' expectations. In 1966, OEO asked each of its departments to submit a five-year projection of its anticipated costs. These "five-year plans" were then to be used by OEO to formulate its own budget requests. The LSP projection was from \$88 million in 1967 to \$175 million in 1971. The CAP staff adjusted these figures with the result that OEO Director Shriver ultimately requested a congressional appropriation of \$25 million in 1967 and \$123 million by 1971.⁴¹

Congress appropriated only \$22 million in 1967, however, and \$61 million in 1971.⁴² Thus, the program received only one-third of the funds it originally requested and only one-half of the financial support that the OEO Director felt was adequate.⁴³ In 1970, the Office of Legal Services' Office of Information estimated that the program was reaching only twenty-one percent of those who needed legal services.⁴⁴ This left at least three million poor persons, known to have legal problems, without legal assistance.

2. Staff Achievements

The national office of the LSP has made significant contributions to the success of the program. The professional staff in Washington together with the National Advisory Committee has established what is essentially a legal intelligence network. The creation of a background literature in areas important to the practice of the LSP's had an immense impact on the developing

OFFICE OF ECONOMIC OPPORTUNITY: SELECTED REPLIES TO SUBCOMMITTEE QUESTIONNAIRE 8 (Comm. Print 1970). *But see* Karabian, *supra* note 28, at 255.

A measure of the increased organization and efficiency of the LSP is shown by the decline of the net cost per case from \$97 in 1967 to \$53 in 1970. *See* Interview with Francis J. Duggan, Director of Program Operations, Office of Legal Services, Office of Economic Opportunity, in Washington, D.C., April 21, 1971, *quoted in* Pearson, *supra* note 20, at 642.

⁴⁰ 1970 Hearings 342.

⁴¹ Pious, *supra* note 40, at 433. Professor Pious argues that the low funding of the program was due both to attempts by Congress to hold down spending in general and to tight control of policy by the national bar associations. If the local bar associations had had a greater degree of control over the LSP, they could have lobbied effectively for higher budgets. *Id.* at 438.

⁴² *See* note 40 *supra*.

⁴³ The inability of the program to maintain adequate funding levels was partly due to the subordinate position of the LSP within the OEO. OEO Directors who succeeded Sargent Shriver were relatively unenthusiastic in their support for the LSP and did not see any need for large appropriations. The Bureau of the Budget was anxious to hold down federal spending in the face of inflation spawned by the Vietnam War and therefore was not receptive to pressure by lobbyists for the program. Presidents Johnson and Nixon often spoke out in favor of the program, but rarely lent more than moral support to the LSP. *See* Pious, *supra* note 40, at 436-37.

⁴⁴ 1970 Hearings 342.

legal doctrines in such fields as tenants' rights and welfare law. Another contribution at the national level was the establishment of the large back-up centers which provided a network of researchers to guide local practitioners in developing legislative reform and appellate arguments.⁴⁵ Finally, the national office was influential in the establishment of the *Clearinghouse Review for Legal Services* and the *CCH Poverty Law Reporter*.⁴⁶

During the LSP's first six years, the local LSP lawyers performed well. Not only was the bulk of the case load handled successfully,⁴⁷ but a number of decisions won by LSP attorneys had considerable impact on the lives of the poverty-stricken. Two landmark LSP cases, *Brown v. Southall Realty Co.*,⁴⁸ and *Edwards v. Habib*,⁴⁹ made important contributions to housing law. The first LSP case to reach the Supreme Court, *Shapiro v. Thompson*,⁵⁰ produced significant advances in welfare law. In *Shapiro*, the Court abolished the residency requirement as a test for welfare recipient

⁴⁵ See note 13 *supra*. The model for the first back-up center was the Center on Social Welfare Policy and Law at Columbia University, which is currently funded by the OEO. There are now at least 12 back-up centers including centers at Boston College to study consumer law problems, at the University of California at Berkeley to study housing and economic development, at UCLA to study health problems of the poor, and at Harvard University, where the center for Law and Education has aroused great controversy.

In the recent debates on the proposal to establish a national Legal Services Corporation, the continued existence of back-up centers has become a major issue. The House bill (H.R. 7824, 93d Cong., 1st Sess. (1973)) eliminates the back-up centers. See note 142 *infra*. The Senate version (H.R. 7824 as amended January 31, 1974) continues to support the back-up centers.

⁴⁶ The *Clearinghouse Review* was established with OEO funding to provide current information on the work of the LSP's to all who are engaged in legal services for the poor. The *CCH Poverty Law Reporter* is not funded by the LSP, but is similarly engaged in reporting the work of LSP's, thus increasing the publicity given to decisions affecting the poor. In 1973, the *Clearinghouse Review* had a budget of \$276,600. See 120 CONG. REC. S 969 (daily ed. Jan. 31, 1974).

⁴⁷ See note 49 *infra*.

⁴⁸ 237 A.2d 834 (D.C. Ct. App. 1968). In *Brown*, the defense of illegal contract was held to be available to a tenant upon his landlord's suit for possession for nonpayment of rent when serious building code violations existed at the time of letting. At the time, at least 100,000 units in the District of Columbia were in violation of the housing code. The landlords of these units were henceforth estopped from compelling the tenant to pay rent or from evicting for nonpayment of rent. See 2 LAW IN ACTION 1 (Feb. 1968). But see Comment, *Lease Executed in Violation of District of Columbia Housing Regulations Is an Illegal Contract—Brown v. Southall Realty Co.*, 66 MICH. L. REV. 1753, 1761 (1968).

⁴⁹ 397 F.2d 687 (D.C. Cir.), *cert. denied*, 393 U.S. 1016 (1968) (retaliatory eviction upon filing of housing code complaint held illegal).

Both *Brown* and *Habib* involved the Neighborhood Legal Services Project, Washington, D.C. (NLSP). See OFFICE OF ECONOMIC OPPORTUNITY, 4TH ANNUAL REPORT: AS THE SEED IS SOWN (1969). See also P. WALD, LAW AND POVERTY: 1965 at 74-76; Pye, *supra* note 3, 231-43.

⁵⁰ 394 U.S. 618 (1969).

eligibility;⁵¹ the monetary relief to the poor as a result of this decision has exceeded the entire cost of the LSP.⁵² Two other important welfare cases brought by LSP attorneys were *King v. Smith*⁵³ and *Goldberg v. Kelly*.⁵⁴

3. Relationship with the Organized Bar

The LSP has always been dependent upon the active and enthusiastic support of the nation's organized bar.⁵⁵ The organized bar is a highly influential lobby on the local, state, and national levels, and its support is essential to counteract the opposition of other groups whose interests may be endangered by LSP actions.⁵⁶ The bar has also been assigned a specific statutory role in the

⁵¹ At the time the *Shapiro* suit was instituted in 1967, 41 states had residency requirements. LSP lawyers had already won six federal court decisions on the issue of the constitutionality of residency requirements and 14 other cases were pending in other jurisdictions.

⁵² Striking down the residency requirements for welfare recipients was estimated to have resulted in the payment of \$140-200 million annually to 100,000 recipients. 3. LAW IN ACTION 1 (Oct.-Nov. 1968).

⁵³ 392 U.S. 309 (1968) (state "substitute father" rules which deny benefits to eligible children whose mother lives with employable man struck down). *King* was researched by an OEO-funded welfare law research center at Columbia University Law School. HEW estimated that as a result of the decision 400,000 children would receive \$200 million per year in benefits. Man-in-the-house laws had existed in 19 states and the District of Columbia. See OFFICE OF ECONOMIC OPPORTUNITY, *supra* note 49, at 31.

⁵⁴ 397 U.S. 254 (1970) (welfare recipients entitled to hearing before payments discontinued). The LSP has obtained judgments beneficial to the poor in other areas as well. See, e.g., *Tate v. Short*, 401 U.S. 395 (1971) (alternative penalties of jail or fine unconstitutional as applied to indigents); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce proceedings brought in forma pauperis).

One of the most active and controversial LSP's is California Rural Legal Assistance, Inc. (CRLA), founded in 1966. For an excellent and brief overview of CRLA, see Karabian, *supra* note 28, at 257-61. It is useful, as an example of the battles being fought by LSP's, to look at some of the impressive victories of this program. In one of the earliest and most highly publicized of the CRLA cases, California was forced to restore \$210 million in cut-backs that had been made in medical aid funds. *Morris v. Williams*, 67 Cal. 2d 733, 433 P.2d 697, 63 Cal. Rptr. 69 (1967). The political and financial costs to Governor Reagan of CRLA's victory in *Williams* were so great that he was determined to limit the program's effectiveness by applying pressure on Congress and the President to curtail grants to CRLA.

Governor Reagan vetoed the \$1.8 million grant to the CRLA for 1971. The Director of the OEO then established a three-man commission to make an investigation of the situation. This commission said that the CRLA was not guilty of misconduct, and the OEO refunded the program. The attack on CRLA illustrated the great vulnerability of the programs to political interference. See 3 LAW IN ACTION 2 (Dec. 1968).

⁵⁵ See Greenawalt, *supra* note 40; Hannon, *Legal Services and the Local Bars: How Strong is the Bond?*, 6 CALIF. WESTERN L. REV. 46 (1969); McCalpin, *supra* note 21; Pye & Garraty, *The Involvement of the Bar in the War Against Poverty*, 41 NOTRE DAME LAW. 860 (1966); Stumpf, *Law and Poverty: A Political Perspective*, 1968 WIS. L. REV. 694.

⁵⁶ See notes 64-65, 103 & 106-09 and accompanying text *infra*.

program by the 1966 and 1967 amendments to the Economic Opportunity Act.⁵⁷

Because no single bar association represents all practicing lawyers and because there are great differences in the outlook and interests of national, state, and local bar associations,⁵⁸ it is difficult to generalize accurately about the response of "the bar" to the federally funded legal services programs.⁵⁹ It is fairly clear, however, that the national bar associations supported the fledgling program,⁶⁰ although the favorable response may well have been prompted more by a sense of self-preservation than by a real desire to aid those in need of legal assistance.⁶¹

⁵⁷ See notes 22 & 27 *supra*. In 1969, rules were published to implement the statutory directive requiring that the OEO consult with state and local bar associations.

The State bar association and the principal local bar associations must be given an opportunity to comment directly to OEO on proposed legal services projects before they are funded. They must also be given the opportunity to comment directly to OEO on the operations of ongoing programs. The same opportunities shall be afforded local bar associations composed primarily of lawyers from minority groups. In addition to these requirements, each local project is expected to maintain continuing cooperation with State and local bar associations, including consultation during the preparation of the grant application.

45 C.F.R. § 1061.2-3 (1973).

⁵⁸ For a discussion of the bar associations' varying views on legal services, see Pye & Garraty, *supra* note 55, at 861-62.

⁵⁹ For a discussion of the opposition by several bar associations, see J. HANDLER, NEIGHBORHOOD LEGAL SERVICES—NEW DIMENSIONS IN THE LAW (L. Wells ed. 1966). The reasons for opposition include: (1) fear of competition with private practitioners, (2) competition with existing legal assistance programs, (3) fear that federal funding might result in federal control and lead to unethical conflicts of interest, and (4) fear that affiliation with the CAP would violate the Canons of Ethics. *Id.* at 12. One of the bar associations most violently opposed to OEO-financed legal services was that of Tennessee. See Bethel & Walker, *Et Tu, Brute!*, 1 TENN. B.J. 11 (Aug. 1965).

⁶⁰ On February 8, 1965, the House of Delegates of the American Bar Association adopted a resolution in support of legal services programs being developed by the OEO:

FURTHER RESOLVED, that the Association, through its officers and appropriate Committees, shall co-operate with the Office of Economic Opportunity and other appropriate groups in the development and implementation of programs for expanding availability of legal services to indigents and persons of low income, such programs to utilize to the maximum extent deemed feasible the experience and facilities of the organized Bar such as legal aid, legal defender, and lawyer referral, and such legal services to be performed by lawyers in accordance with ethical standards of the legal profession

McCalpin, *supra* note 21, at 551. Support was also given by the National Bar Association (NBA), the National Legal Aid and Defender Association (NLADA) and the American Trial Lawyers Association (ATLA). The board of governors of the ATLA overrode its president and vice-president in order to support the OEO program. See Greenawalt, *supra* note 40, at 62.

⁶¹ Mr. F. William McCalpin, Chairman of the Committee on Lawyer Referral Service of the ABA expressed this feeling:

Adoption of the resolution represents but the first step in what must be a long, historic and sometimes difficult push forward by the legal profession to meet the needs of the public we are sworn to serve. The consolation is that by pushing

Much of the impetus for the prompt support of the national bar associations came from the OEO's promise that a National Advisory Council (NAC) consisting of leaders of the American Bar Association (ABA), National Bar Association (NBA), National Legal Aid and Defender Association (NLADA), American Trial Lawyers Association (ATLA), the General Counsel of OEO, the Attorney General, and the Secretary of Health, Education, and Welfare, would be established to serve as an official liaison between OEO and the professional legal community.⁶² The role of the NAC was to police the professionalism of the programs,⁶³ to provide a needed conduit for effective communication between government agencies and private attorneys,⁶⁴ and to lobby for or against administrative and legislative proposals affecting the program.⁶⁵ Since 1971, when the NAC prepared a report supporting the establishment of a Legal Services Corporation, the OEO has bypassed the NAC,⁶⁶ using the rather transparent argument that a separation of the Office of Legal Services from OEO was imminent. Thus, in the past two years the importance of the NAC has decreased greatly.

A caveat needs to be added to the foregoing description of the role of the organized bar in the development of legal services for the poor. Although the cooperation of the bar is important to the success of the program,⁶⁷ the interests of the organized bar and of

forward we can remain the masters in our own house. The risk is that if we falter the job will be done for us, not by us.

McCalpin, *supra* note 21, at 551.

⁶² See generally Pious, *supra* note 40.

⁶³ One of the most widely held fears of the bar associations is that the LSP would encourage a decline in professional standards.

⁶⁴ Real hostility or antagonism by local bar associations could ensure the failure of any particular program. Thus, the role of the NAC was to allay the fears of local groups of attorneys, such as the legal aid societies.

⁶⁵ Lobbying is the most important function the bar has performed. Each time the OEO has proposed changes which the organized bar felt would interfere with the independence of the attorney in his relations to his client, or which would impose the control of nonlawyers over legal decisions, the bar has spearheaded the fight to prevent these destructive changes. See notes 106-09 and accompanying text *infra*.

Moreover, when serious threats have been made in Congress, the defeat of those proposals was directly attributable to the work of the NAC and of the organized bar. See notes 101-03 and accompanying text *infra*.

⁶⁶ For example, in 1972 Mr. Ted Tetzlaff was appointed Acting Director of the Office of Legal Services without consultation with the NAC. See Haddad, *The National Advisory Committee to Legal Services*, 30 NLADA BRIEFCASE 198, 202 (1972). The NAC was abolished by Mr. Howard Phillips, Acting Director of the OEO. See Arnold, *supra* note 29, at 4.

⁶⁷ See, e.g., Pye & Garraty, *supra* note 55; Stumpf, *supra* note 55; Note, *Competition in Legal Services Under the War on Poverty*, 19 STAN. L. REV. 579 (1967).

the LSP do not necessarily correspond: "Hostility is certain to result in the future if the support of the bar is achieved under the guise of giving a poor man a right to counsel when the real objective is providing the legal leadership for institutional reform."⁶⁸ One of the anomalies of the current program is that the LSP depends on the support of the organized bar, yet simultaneously attempts to maintain independence in determining its own priorities.

C. Controversies

1. Ethics

Because the OEO-LSP is attempting to provide a specialized form of legal services to a new class of clients, some of the methods employed by legal services attorneys create potential conflicts with the traditional ethical standards of the legal profession.⁶⁹

One of the most important objectives which the LSP has established for itself is the education of residents of the communities which it serves about their legal problems and the sources to which they may turn for assistance. Local offices have initiated publicity campaigns⁷⁰ to alert the poor to the illegal practices to which they are often subjected. Such a program of "advertising" and "stirring up litigation" poses significant ethical questions; however, upon closer examination it appears that neither the old ABA *Canons of Professional Ethics* nor the newly adopted *Code of Profes-*

⁶⁸ Pye, *supra* note 3, at 244-45.

⁶⁹ The ABA published the *Canons of Professional Ethics* in 1908. As early as 1924, the report of the Committee on Professional Ethics suggested revisions of the *Canons*. This suggestion was repeated in reports of 1933, 1935, and 1955, but no action was taken until 1965 when a Special Committee on Evaluation of Ethical Standards was created. The final draft of the new *Code of Professional Responsibility* was reported in 1969, adopted by the ABA in August of that year, and became effective in 1970. See generally Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1 (1970).

The new *Code* replaces the *Canons* and makes some significant changes. Certain rules have been eliminated; others have been modified or clarified.

In the LSP's formative years, many writers expressed concern over the difficulties faced by an LSP in adhering strictly to the profession's canons of ethics. See P. WALD, *supra* note 49, at 98-109; J. HANDLER, *supra* note 59, at 19-25; *Special Supplement: Legal Services and Legal Ethics*, 2 LAW IN ACTION 3-10 (Sept. 1967). See also Greenawalt, *supra* note 40; Pye & Garraty, *supra* note 55; Note, *Ethical Problems Raised by the Neighborhood Law Office*, 41 NOTRE DAME LAW. 961 (1966).

⁷⁰ A neighborhood lawyer may desire, as part of a community action education program, to give lectures to indigenous groups on their legal rights and on the availability of free legal services; to advise individuals in such meetings to engage in litigation concerning welfare, landlord-tenant, and other problems affecting them. . . . He may go further and invite them to use his service in such litigation. P. WALD, *supra* note 49, at 100. This kind of activity by program lawyers is known to encourage residents to seek legal advice. See *Special Supplement*, *supra* note 69, at 7.

sional Responsibility automatically prohibits such activities on the part of legal services attorneys.⁷¹

In 1935, the ABA Committee on Professional Ethics and Grievances, in interpreting the *Canons*, carefully distinguished between advertising for personal gain and advertising oriented towards helping those in need of legal assistance.⁷² The committee condemned the former kind of advertising on the ground that it might expose an uninformed public to abusive practices.⁷³ That same danger would not be present in an advertising program conducted by a government agency for the purpose of protecting an unwary public.

In the new *Code*, exceptions to the prohibition of solicitation and stirring up litigation are even clearer. Section DR 2-104(A)(2) of the *Code* reads:

A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5)⁷⁴

Sections DR 2-103(D)(1)-(5) include legal aid organizations sponsored by the government, law schools, nonprofit community organizations or bar associations, and four other categories of organizations providing legal services.⁷⁵

The problem of advertising is not the only ethical question raised by the LSP. Canon 35 of the old standards stated that no lay groups should intrude in the relations between a lawyer and his client, although an exception was always made for charitable organizations.⁷⁶ Canon 35 had a twofold effect on the LSP. First, since the LSP was originally a subsidiary of the CAP, the individual

⁷¹ Canon 27 prohibited forms of advertising by attorneys, with the exception of calling cards. ABA CANONS OF PROFESSIONAL ETHICS No. 27 [hereinafter cited as CANONS]. Canon 28 prohibited a lawyer from fomenting litigation. *Id.* No. 28. More recently, the Supreme Court recognized the right of a lawyer to instigate litigation at the behest of an interested third party. *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964).

⁷² See ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, OPINIONS No. 148 (1936).

⁷³ *Id.* at 291.

⁷⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(2) [hereinafter cited as CODE]; see Nahstoll, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR 2-103(D)(5): Stale Wine in New Bottles*, 48 TEXAS L. REV. 334, 350 (1970).

⁷⁵ CODE DR 2-103(D)(1)-(5). But see ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AVAILABILITY OF LEGAL SERVICES—1972, at 26.

⁷⁶ CANONS No. 35.

attorney-client relationship was subject to potential influence by CAP personnel.⁷⁷ Second, the statute required that the programs must involve the "maximum feasible participation of the poor."⁷⁸ In both of these situations, the potential control by nonlawyers of legal decisionmaking raised the possibility of further conflict with Canon 35.

The new *Code* does not forbid a lawyer to be employed by a lay organization, but still warns the lawyer to insulate himself from interference by nonlawyers.⁷⁹ Moreover, in the section on disciplinary rules, the lawyer is specifically forbidden from allowing his employer to regulate or control his professional judgment.⁸⁰ The drafters of the *Code* remain concerned about the independence of a lawyer from those who would seek to control his decisions.⁸¹ Canon 35 has been superseded by the *Code* with its liberalized stance on lawyers' employment by lay organizations. Yet the dangers of interference remain the same, and opinions and decisions relating to Canon 35 are applicable to the limitations implied in the *Code*.

A third rule in the *Canons* created problems for legal services lawyers. Canon 37 directed that a lawyer was never to disclose information revealed to him by a client without the client's permission.⁸² By strictly adhering to this rule, lawyers were unable to cooperate with layworkers in the same poverty project. For

⁷⁷ See notes 17-20 and accompanying text *supra*. In response to political pressure, or different self-interests, a local CAP has occasionally attempted to force an LSP attorney to drop a potentially embarrassing or troublesome suit. This is the kind of intrusion by a lay group which is offensive to the ethical standards of the legal profession.

⁷⁸ See note 5 and accompanying text *supra*. See also J. HANDLER, *supra* note 59, at 23.

⁷⁹ CODE EC 5-23:

A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

⁸⁰ *Id.* DR 5-107(B).

⁸¹ The kinds of interference which have been and will continue to be felt by legal services attorneys are specifically mentioned in the *Code*:

Some employers may be interested in furthering their own economic, political, or social goals. . . . Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment.

Id. EC 5-23.

⁸² The duty to preserve his client's confidences . . . involves the disclosure or use of these confidences, either for the private advantage of the lawyer . . . or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information.

example, many different professionals will often work in the same building to handle individual cases in a more efficient manner. This enables social workers, welfare workers, counselors, and attorneys to share centralized information files and a cross-professional referral system. Lawyers are often the weak link in this chain because of the inhibiting effect of the confidentiality rule, as well as Canon 47's proscription of the unauthorized practice of law.⁸³ Consequently, lawyers have hesitated to share information with nonlawyers.⁸⁴ This inability to cooperate has its greatest effect on the client himself who is consequently unable to receive adequate or appropriate treatment of interrelated legal and nonlegal problems.⁸⁵ The *Code* has not made substantial changes in Canon 37. Canon 4 imposes a general rule of strict confidentiality, requiring the client's consent to a disclosure of confidential information.⁸⁶

A final problem is presented by the old Canon 15, which raised the question of how zealously the lawyer should support his client's position.⁸⁷ Must a lawyer adhere strictly to his client's wishes? Is it wrong for a lawyer to encourage a client not to make a settlement because the lawyer feels that a judicial decision is vital? Is it wrong for a lawyer to turn down routine cases in favor of test-case litigation? The *Code* repeats the profession's traditional view in answering these questions,⁸⁸ but guidelines promulgated by the

⁸³ CANONS No. 47.

⁸⁴ See J. HANDLER, *supra* note 59, at 20-22. Sometimes outsiders try to abuse the confidentiality privilege between lawyer and client. When evaluating the programs, local CAP officials occasionally used the opportunity to look through the files of a project attorney to discover any potentially embarrassing appeals that were to be prosecuted.

Consent by a client to divulge confidential information raises difficult legal questions. Consent must be given with full knowledge and understanding by the client, which often is difficult to prove in the case of a poor, uneducated client. Poverty lawyers, rather than risking possibly unethical behavior, often refused to share information.

⁸⁵ See generally J. HANDLER, *supra* note 59; Sparer, *The Right to Welfare*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* (N. Dorsen ed. 1970); Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A.L. REV. 361 (1965); Wexler, *supra* note 12.

⁸⁶ See CODE, Canon 4. In the ethical considerations and disciplinary rules following the new Canon 4, there is no discussion of the problems of information gathering or central data systems used by co-professionals. Since the problem had been identified well before the drafting of the new *Code*, it is noteworthy that the difficulties arising out of the confidentiality rule were simply avoided.

⁸⁷ CANONS No. 15.

⁸⁸ See *id.* CODE, Canon 7.

In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself.

Id. EC 7-8 (footnotes omitted).

LSP for the practicing poverty lawyer were often so broad and vaguely worded as to be useless as a practical rulebook for attorneys:

Needless to say, attorneys directed or employed in a legal services program must ensure that the conduct of the program conforms to the Canons of Professional Ethics . . . [which] are intended primarily to serve the best interests of the public. Neither the letter nor the spirit of the Canons prohibits the effective representation of the poor.⁸⁹

2. Goals—Service, Law Reform, or Both?

As alluded to above, the issue causing the most controversy about the LSP was whether project attorneys should engage in judicial or legislative law reform activity.⁹⁰ In 1972, for example, former Vice President Agnew criticized the LSP for ignoring the individual client in favor of the “test-case” client who serves as a vehicle for the attorney’s view of society.⁹¹ Mr. Agnew’s views were

⁸⁹ OFFICE OF ECONOMIC OPPORTUNITY, *supra* note 1, at 8-9.

A number of ethical problems have been raised in connection with alternative methods of providing legal services. For a critical comment on the rules of the bar against solicitation see Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1958). For two critiques of the minimum fee schedules approved by the bar, see Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972); Note, *The Applicability of the Sherman Act to Legal Practice and Other “Non-Commercial” Activities*, 82 YALE L.J. 313 (1972). For a look at the Code treatment of the specialization concept, see Wallace, *The Code of Professional Responsibility—Legislated Irrelevance?*, 48 TEXAS L. REV. 311 (1970). And for a discussion of attitudes toward group legal services, see Nahstoll, *supra* note 74; Comment, *Group Legal Services and the New Code of Professional Responsibility*, 20 BUFFALO L. REV. 507 (1970).

⁹⁰ Not all of those who have written on the role of legal services feel that law reform activity is justified. See note 20 *supra*. Professor Hazard of the University of Chicago Law School argues that the LSP has mistakenly favored litigation-oriented law reform over legislative-oriented reform:

In the light of the limitations on what courts can do in law reform, the legislative course would seem obviously preferable for achieving law reform on behalf of the poor that is structural rather than symptomological, general in its effect rather than “show case.”

Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 250 (1970). Professor Hazard goes on to question whether it is proper for a government-funded agency to act as lobbyist for a special interest group—the poor. His conclusion is that it is dangerous and undemocratic for a government agency to formulate what is supposed to be the will of the people. *Id.* at 254.

See generally Hannon, *The Leadership Problem in the Legal Services Program*, 4 LAW & SOC’Y REV. 235, 242-43 (1969); Hannon, *supra* note 17, at 5; Shriver, *Law Reform and the Poor*, 17 AM. U.L. REV. 1 (1967); Note, *supra* note 12. These authorities argue that law reform should be carried out as a primary goal of the LSP.

⁹¹ Agnew, *What’s Wrong With the Legal Services Program*, 58 A.B.A.J. 930, 931 (1972): What we may be on the way to creating is a federally funded system manned by ideological vigilantes, who owe their allegiance not to a client, not to the citizens of a

widely shared both inside and outside the legal community.⁹²

The leaders of the LSP have never taken a definite stand on the role of law reform activity in the work of a particular program.⁹³ At the outset, some LSP supporters argued that the LSP ought not become a mere legal aid office on a national scale. These people felt that continuing the traditional approach would merely treat the symptoms and not the cause.⁹⁴ On the other side of the debate were other LSP supporters who wanted the program to maintain a strict service approach and avoid social engineering.⁹⁵

particular state or locality and not to the elected representatives of the people, but only to a concept of social reform.

But see Klaus, *Legal Services Program: Reply to Vice President Agnew*, 58 A.B.A.J. 1178 (1972). In response to Mr. Agnew's criticisms, Mr. Klaus stated that only 17% of all legal aid matters ever reached trial, indicating that 83% ended in settlement, and that 80% of all legal aid cases were in the four classic nonpolitical poverty law areas of domestic relations, housing, consumer, and welfare law.

⁹² See note 88 and accompanying text *supra*. See also note 98 and accompanying text *infra*.

⁹³ The initial statement on policy of the OEO-LSP has always been the OEO *Guidelines*. On page two, the overall objectives of the program are specified. There is no mention of law reform activity. Yet later, almost as an afterthought, the law reform function is recognized:

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.

OFFICE OF ECONOMIC OPPORTUNITY, *supra* note 1, at 23.

⁹⁴ See note 90 and accompanying text *supra*.

We cannot be content with the creation of systems of rendering free legal assistance to all the people who need but cannot afford a lawyer's advice. This program must contribute to the success of the War on Poverty . . . Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope, and ambition.

Address by E. Clinton Bamberger, Jr., National Conference of Bar Presidents, Feb. 19, 1966, quoted in Stumpf & Janowitz, *Judges and the Poor: Bench Responses to Federally Financed Legal Services*, 21 STAN. L. REV. 1058, 1059 (1969).

The ABA has given explicit support to lobbying and law reform objectives in the new *Code of Professional Responsibility*. See CODE EC 8-2.

Others who generally took the more innovative position included academics and project attorneys. The poor community itself was split. In part, its leaders were aware of the value of law reform efforts, but at the same time, they knew that the people were in desperate need of routine legal services.

⁹⁵ At the beginning, the bar associations believed the new LSP was just a more efficient way of providing more legal aid: "[I]f the program was properly implemented along professional lines, it would merely involve financial assistance to local communities for more and better legal aid—a movement which the organized bar had been actively promoting for many years." Marden, *Introduction, Symposium: Justice and the Poor*, 41 NOTRE DAME LAW. 843, 845 (1966) (emphasis added). Others who supported the narrower approach included business and professional community leaders, and some politicians. See notes 100-03 and

As a result of this split among supporters of the program, the leadership was forced to adopt an ambivalent attitude which left programs and attorneys without guidance.⁹⁶

In spite of Washington's initial ambivalence, the program's staff developed a penchant for law reform activity.⁹⁷ Since this development occurred while many service programs were already functioning, there was fear that the new direction might cause a decline in the quality of services. This fear proved groundless.⁹⁸ However, the movement toward law reform did increase the political opposition of many established interests which suddenly felt vulnerable to an attack from reform-oriented legal services attorneys.⁹⁹

Many of the attempts to shift the LSP's direction attracted considerable national attention. For example, Senator Murphy of California twice tried to curtail the power of the LSP and thereby of the California Rural Legal Assistance, Inc.¹⁰⁰ In 1967, he offered an amendment to the Economic Opportunity Act which would have forbidden one government-funded program from suing another,¹⁰¹ and in 1969, he proposed that the governor of

accompanying text *infra* (discussing amendments proposed by Senator Murphy of California).

⁹⁶ Because the leadership was unable to choose between the service approach and the law reform route, it called for simultaneous work on both fronts. According to one commentator, this policy led to an emphasis on "service to individuals at the expense of other goals." Hannon, *The Leadership Problem in the Legal Services Program*, *supra* note 90, at 246.

⁹⁷ See OFFICE OF ECONOMIC OPPORTUNITY, EVALUATION MANUAL: LSP (1967); note 35 *supra*. The goals enunciated in the *Evaluation Manual*, in contrast to the earlier OEO *Guidelines*, showed a growing concern with law reform. See Hannon, *The Leadership Problem in the Legal Services Program*, *supra* note 90, at 244.

⁹⁸ Law reform has at least three elements—research and drafting, litigation, and legislative lobbying. An attorney handling 1,000 cases a year cannot do the kind of legal research necessary to provide the basis for reforming the legal system. Back-up centers, academics, and law students have functioned as the research division of the LSP. See note 12 *supra*.

The most widespread fear regarding law reform activities was that local service to the individual client would be curtailed in favor of test-case litigation; the tenor of the *Evaluation Manual* only reinforced this belief. See notes 35 & 97 *supra*.

The goals of a law reform policy appear to be consistent with the initial idea that the war on poverty should attack the root causes of poverty, but the enforcement of this policy by federal fiat is inconsistent with the promise of local control.

Hannon, *The Leadership Problem in the Legal Services Program*, *supra* note 90, at 251.

⁹⁹ See note 25 and accompanying text *supra*. Others believed that only a militant LSP would be capable of solving problems while working within the law. See U.S. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 152 (1968).

¹⁰⁰ See note 54 and accompanying text *supra*.

¹⁰¹ "Provided, no project under such program may grant assistance to bring any action against any public agency of the United States, any State, or any political subdivision

each state should have the absolute power to veto any programs, or parts of programs, in his state.¹⁰² Both of the proposals were eventually defeated, but the victories were hard-fought.¹⁰³ Moreover, other amendments were added to the Economic Opportunity Act which did provide some limitations on the independence of the LSP.¹⁰⁴

The Nixon Administration also attempted to curb the LSP's politically sensitive law reform activities. Shortly after the passage of the 1969 amendment to the Economic Opportunity Act, which gave the LSP independence from the CAP,¹⁰⁵ OEO Director Rumsfeld announced a plan to regionalize the LSP.¹⁰⁶ This proposal arose out of a management study within the OEO known as the *McKinsey Report*.¹⁰⁷ Regionalization would have involved a transfer of authority from the Director of the LSP in Washington to regional directors of the CAP's throughout the country, resulting in greater control by laymen of legal activities and greater susceptibility of the program to local political pressure.

The organized bar countered the proposal with the *Fuchsberg Report*, prepared by a subcommittee of the NAC, which framed the issue in the following terms:

The fundamental question is whether the advocacy process is to be maintained and protected as a national instrument . . . or is to be subverted and subordinated to managerial and administrative prerogatives which are inappropriate for a program of this kind.¹⁰⁸

The bar's strong attack on regionalization prevented its implemen-

thereof." 113 CONG. REC. 27,871 (1967). The amendment was defeated 52-36 and was not considered by the House. *Id.* at 27,873.

¹⁰² See 115 CONG. REC. 29,894-97 (1969). This amendment was another attempt to stop the CRLA from attacking California politicians and public agencies. See Hannon, *supra* note 55; Karabian, *supra* note 28.

¹⁰³ The second Murphy amendment passed the Senate 45-40. 115 CONG. REC. 29,898 (1969). The amendment was defeated in the House after a massive lobbying effort by the ABA, and was not included in the conference report.

¹⁰⁴ The so-called "City Hall" amendments of 1967 provided that henceforth a CAA must be "a State or a political subdivision of a State . . . or a public or private nonprofit agency or organization which has been designated by a State or such a political subdivision." 42 U.S.C. § 2790(a) (1970). This provision tightens local governments' control over the CAA. See J. KERSHAW, *supra* note 5, at 46.

¹⁰⁵ See note 24 *supra*.

¹⁰⁶ Regionalization was first proposed in 1967 by the Director of the CAP.

¹⁰⁷ See MCKINSEY REPORT, *cited in* NATIONAL ADVISORY COMM. FOR OEO LEGAL SERVICES, REGIONALIZATION OF LEGAL SERVICES: AN EXAMINATION OF PROBLEMS AND ISSUES 48 (1970).

¹⁰⁸ *Id.* at i.

tation. In 1970, the regionalization plan was revived, and again the NAC and the organized bar worked to defeat it.¹⁰⁹

Even as these two specific proposals to destroy the independence of the national LSP were defeated, political interference, usually in the form of withholding funds, still plagued local programs.¹¹⁰

The continuing opposition to the LSP's law reform activities raised serious questions about the wisdom and propriety of a federal agency pursuing such a policy. Is law reform activity an economically feasible approach to providing legal services to those who cannot afford it?¹¹¹ What makes a good "test case," and what are the dangers in the "test case" approach?¹¹² What are the dangers to the program of attacking local and national centers of political or economic power? Will the goals of the lawyer conflict with those of his client?¹¹³ Is it legitimate for a federal agency to act as a lobbyist for one segment of the population?¹¹⁴

By 1971, the debate over legal services was crystallizing. All sides believed that the LSP needed to be revamped and that the most viable alternative to the present arrangement was the removal of the LSP from the OEO and the creation of an independent

¹⁰⁹ See 116 CONG. REC. 36,823 (1970). OEO Director Rumsfeld also attempted to institute a policy of "decentralization." The decentralization plan was Mr. Rumsfeld's last effort to curb the activities of the LSP, which were considered too radical by the President and other politicians.

The plan was adopted over the protests of bar leaders and program directors on November 15, 1970. See OEO Release No. 71-34, CCH Pov. L. REP. ¶ 8050, at 9092. However, the plan was rescinded after two months. *Id.* After this plan was dropped, the program returned to the centralized administration adopted in 1969. But Mr. Rumsfeld did fire LSP Director Lenzner and LSP Assistant Director Jones, ostensibly for being unwilling to administer the program. See Lenzner, *supra* note 28, at 10.

¹¹⁰ See Lenzner, *supra* note 28, at 10.

¹¹¹ An effective law reform program . . . is the most economical use of time and money. True, the time spent is time taken away from providing individual services but a reform in the law may aid thousands of the poor in the time it takes to solve a hundred individual problems. . . . The valuable time of legal service attorneys, then, is exceedingly well spent on law reform.

Shriver, *supra* note 90, at 7.

¹¹² See Note, *supra* note 12, at 813-15. There are many dangers involved in test-case litigation. The client may settle or the client may lose, either of which could occur after a great investment of time and money. An even greater problem may be enforcement, *i.e.*, securing compliance by the defendant and all such potential defendants with the court's decision.

¹¹³ See notes 24 & 44 and accompanying text *supra*. An attorney must respect the wishes of his client and must settle at the client's request. But test-case material is something which will arise often in the community. The expense and effort of the attorney is not lost since he will eventually get a client who will continue to fight. See Shriver, *supra* note 90, at 5-6.

¹¹⁴ See note 90 and accompanying text *supra*.

Legal Services Corporation. There the consensus ended, however, for there was no agreement on either the characteristics or responsibilities of the new Corporation. The old controversy between reformers and traditionalists merely entered a new phase.

II

THE NATIONAL LEGAL SERVICES CORPORATION

A. *Introduction—1971-1972*

In 1971, the Nixon Administration launched a serious campaign to establish a Legal Services Corporation to replace the current Legal Services Program.¹¹⁵ The concept of an independent corporation won wide support, but because of the conflicting objectives of those who favored its establishment, there was little agreement on how the program should be implemented.

The Administration's proposal¹¹⁶ was essentially a response to the barrage of complaints about LSP which the White House had received from Republican governors and mayors across the country.¹¹⁷ By removing the program from the executive branch, the President sought simply to divert that criticism elsewhere. Supporters of legal services, however, preferred the establishment of a corporation in order to take the program "out of politics" and allow the professional legal services staff to continue its unpopular activities without fear of political reprisal.¹¹⁸

This difference in perspective was reflected in some of the details of the proposals which were first introduced in the early days of the 92d Congress. The Administration's bill placed restrictions on the range of legal services which could be provided by the Corporation, forbidding lobbying, criminal representation, or duplicative appeals.¹¹⁹ Ironically, the Administration proposal gave the President authority to select the board of directors of the

¹¹⁵ The Ash Council on Executive Reorganization had recommended the establishment of a legal services corporation divorced from the executive branch.

[T]his program should be placed in an organizational setting which will permit it to continue serving the legal needs of the poor while avoiding the inevitable political embarrassment [*sic*] that the program may occasionally generate.

See PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, ESTABLISHMENT OF A DEPARTMENT OF NATURAL RESOURCES—ORGANIZATION FOR SOCIAL AND ECONOMIC PROGRAMS 61 (1971).

¹¹⁶ 7 WEEKLY COMP. PRES. DOCS. 727 (1971).

¹¹⁷ See Lenzner *supra* note 28, at 9.

¹¹⁸ See, e.g., Haddad, *supra* note 66; notes 27 & 28 *supra*.

¹¹⁹ See S. 1769, 92d Cong., 1st Sess. §§ 905(a)(6),(8), (b)(1) (1971).

Corporation.¹²⁰ This provision allowed the executive branch to retain substantial control over the direction of the program and simultaneously to renounce responsibility for any unpopular activities of legal services attorneys.

The so-called "bipartisan bill"¹²¹ sponsored by Senator Mondale and Representative Steiger differed sharply from the Administration proposal. It provided that the majority of members of the board of directors be chosen by various private organizations,¹²² and that some restrictions be placed only on the Corporation's representation of criminal defendants.¹²³ The bipartisan bill also ensured that LSP would have sufficient funds to function during the Corporation's formative years.¹²⁴

Late in 1971, Congress passed a Legal Services Corporation bill,¹²⁵ which denied to the President the right to appoint all of the members of the Corporation's board of directors¹²⁶ and which placed control of the program in the hands of private interest groups during the transition from the OEO to the Corporation.¹²⁷ For these reasons the President vetoed the legislation.¹²⁸ Then in 1972, both the House and the Senate passed revised versions of the 1971 Act, but the provisions for a Legal Services Corporation were dropped by the conference committee because the differences between the two versions were irreconcilable.¹²⁹ Moreover, neither

¹²⁰ *Id.* § 904.

¹²¹ S. 1305, 92d Cong., 1st Sess. (1971); H.R. 6361, 92d Cong., 1st Sess. (1971).

¹²² S. 1305, 92d Cong., 1st Sess. § 904(a) (1971). Five members of the board were to be selected by the President of the United States and one by the Chief Justice of the Supreme Court. Three members were to be selected by a Clients Advisory Council and three by a Project Attorney Council. Six ex officio members of the board were to include the president and president-elect of the ABA, the president of the NLADA, the president of the National Bar Association (a black lawyer professional association), the president of the ATLA, and the president of the American Association of Law Schools.

¹²³ S. 2007, 92d Cong., 1st Sess. § 906(h) (1971).

¹²⁴ Like the administration bill (S. 1669, 92d Cong., 1st Sess. § 908 (1971)) the bipartisan bill did not place a ceiling on the amount which could be appropriated for the LSP. S. 1305, 92d Cong., 1st Sess. § 909 (1971). However, the bipartisan bill added a provision which would have forced the Congress to reserve for the LSP at least \$140 million of the OEO's fiscal 1972 appropriation and at least \$170 million of the OEO's fiscal 1973 appropriation. *Id.* § 4(a).

¹²⁵ See 117 CONG. REC. 14,042, 31,248 (1971).

¹²⁶ See S. REP. NO. 523, 92d Cong., 1st Sess. §§ 904(a)(1)-(5) (1971). Basically, lists of nominees from various organizations were to be submitted to the President from which he was required to make his choice. Every list was to contain between three and ten names for each board position. The board itself would elect one of its number to be the chairman.

¹²⁷ S. REP. NO. 523, *supra* note 126, at 903.

¹²⁸ See 7 WEEKLY COMP. PRES. DOCS. 1634-35 (1971); 117 CONG. REC. 46,057 (1971).

The veto withstood an attempt by Congress to override it. See *id.* at 46,222.

¹²⁹ See H.R. REP. NO. 1367, 92d Cong., 2d Sess. 26 (1972).

bill met the President's objections regarding the appointment of the board and would surely have been met with another veto. In the meantime, the existing Legal Services Program was kept alive by emergency funding which provided support for the LSP at the level of \$71.5 million for each fiscal year through June 30, 1974.¹³⁰ If new authorizing legislation is not approved by that time the future of the program is in grave danger.

B. *The 1973 Proposal—The Impasse Continues*

On May 11, 1973, President Nixon once again proposed legislation to establish a Legal Services Corporation.¹³¹ On June 4, 1973, the House Education and Labor Committee reported out a bill which was very similar to the Administration version, although it did contain some significant modifications.¹³² Key changes included a more flexible standard of eligibility for legal assistance,¹³³ elimination of the requirement that certain clients pay a portion of the legal costs they incur,¹³⁴ the deletion of language barring "frivolous" appeals,¹³⁵ and the elimination of a new administration

¹³⁰ 42 U.S.C. § 2702b(c)(2) (Supp. II, 1972).

¹³¹ See 9 WEEKLY COMP. PRES. DOCS. 665 (1973).

¹³² H.R. REP. NO. 247, 93d Cong., 1st Sess. (1973) [hereinafter cited as COMMITTEE REPORT].

¹³³ President Nixon suggested that only if a person's income was less than 200% of the poverty level and did not result from a refusal to seek or accept employment, could he qualify for assistance from the Corporation.

In § 7(2) of the *Committee Report*, the eligibility requirements are less specific. The standards will be determined by taking into account such factors as the client's assets and debts, size of family, and cost of living. More discretion will be given to individual attorneys to accept clients. The final House version of the bill retained the committee's standard of eligibility. H.R. 7824, 93d Cong., 1st Sess. § 7(a)(2) (1973) [hereinafter cited as H.R. 7824].

¹³⁴ The ABA was instrumental in convincing the committee to drop the partial payment plan. See 1973 CONG. Q. 1448. *But see* COMMITTEE REPORT 28.

¹³⁵ President Nixon once again requested a ban on all "frivolous and duplicative" appeals. The *Committee Report* provides an unusually clear and decisive guideline on the matter of appeals:

[The corporation should] establish guidelines for consideration by recipients in determining whether appeals should be taken to insure efficient utilization of resources. Although such guidelines would seek to discourage the taking of frivolous appeals, the corporation is not expected to take any steps that would inhibit or interfere with an attorney's responsibility to take all legal steps necessary to protect his client. Choices of how best to proceed in particular cases is [*sic*] always best left to the attorney and client, and the corporation should not seek to substitute its judgment for that of the attorney in determining how best to serve the interests of particular clients

COMMITTEE REPORT 9-10. The language of the Act passed by the House is far more cryptic and possibly open to abuse, but it does not specifically ban "frivolous and duplicative" appeals: "[The corporation should] [e]stablish guidelines for consideration of possible appeals, to be implemented by each recipient to insure the efficient utilization of resources; except that such guidelines shall in no way interfere with the attorney's responsibilities." H.R. 7824, § 7(a)(7).

proposal prohibiting grants to public interest law firms.¹³⁶ A minority report was filed, which strongly criticized the bill for the failure of the subcommittee or the committee to hold hearings before reporting the legislation¹³⁷ and for specific changes in the Administration proposal which the minority felt would result in abuses by politically activist project attorneys.¹³⁸ Both of these criticisms were to be repeated in the House and the Senate during debate on the Corporation bill. However, the committee bill did meet the objections raised by President Nixon in his 1971 veto message. According to the new proposal, the President is to appoint all of the members of the board of directors¹³⁹ and the Secretary of Health, Education, and Welfare is to administer legal services during the transitional stage from the OEO to the Corporation.¹⁴⁰

On June 21, 1973, the House debated the committee bill at length. The bill was eventually passed, but was accompanied by

In the House debate on the committee bill, an amendment was added which would impose on the Corporation the responsibility of paying for court costs and attorney's fees in an action commenced by the Corporation if a final judgment is rendered for the defendant. *Id.* § 6(e). This provision may inhibit the full use of the appeal process.

¹³⁶ President Nixon suggested a ban on the allocation of funds to public interest law firms. The committee bill suggests that only those firms spending more than 75% of their time and resources on such activity should be prohibited from receiving grants from the Corporation. In the final House version, the figure was reduced to 50%. H.R. 7824 § 7(b)(3).

¹³⁷ See COMMITTEE REPORT 26. During debate in the House and the Senate, many accusations were made concerning the lack of hearings on this particular bill. In fact, although hearings were not held on the precise proposal, hearings had been held on similar proposals in 1971 and 1972 and as recently as February-March 1973. See *Hearings on H.R. 3147, H.R. 3175, and H.R. 3409 Before the Subcomm. on Equal Opportunities of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

¹³⁸ In spite of the President's request for a total ban on lobbying by legal services attorneys, the House bill allows such activity when it is part of the necessary representation of an eligible client pursuant to the guidelines of the Corporation written in accordance with the ABA *Canons of Professional Ethics* and *Code of Professional Responsibility*. See COMMITTEE REPORT §§ 6(d)(4), 7(a)(5), at 18-19. The House bill stated in § 6(c)(2) that lawyers of the Corporation could only testify on legislation if requested to do so by the legislators. Later, however, in § 7(a)(5) the bill provided that lawyers of the Corporation could participate in lobbying if necessary to the representation of the client. All references to guidelines in accordance with the *Canons of Professional Ethics* and *Code of Professional Responsibility* of the ABA were deleted as possibly "ambiguous" in this context.

¹³⁹ See COMMITTEE REPORT § 4(a). The full House retained this provision. The President will appoint an 11-member board of directors with the advice and consent of the Senate. A majority of the members must be members of the bar of the highest court of the state, none may be full-time employees of the United States, and only six may belong to the same political party.

¹⁴⁰ See *id.* § 12. This provision was also retained in the House bill. The control of the transition period by the Secretary of HEW eliminates earlier Administration objections to control during this period by private interest groups.

twenty-four amendments restricting the activities of the Corporation and of the poverty lawyers.¹⁴¹ Two amendments resulted in a ban on the funding of back-up centers.¹⁴² Three amendments were passed that would effectively ban any political activities by full-time or part-time poverty lawyers.¹⁴³ Not only were the attorneys themselves prohibited from engaging in political activities, but also they were now prohibited from encouraging others to engage in picketing, boycotts, or strikes.¹⁴⁴ Further restrictions were also placed on the kinds of cases which legal services attorneys could handle. Besides the ban on criminal representation, attorneys are no longer allowed to handle school desegregation cases,¹⁴⁵ abortion cases,¹⁴⁶ or draft cases.¹⁴⁷

The committee bill was a compromise between the President's demands for some executive control and a desire for a strong

¹⁴¹ See 119 CONG. REC. H 5067-138 (daily ed. June 21, 1973).

¹⁴² Representative Green offered the amendments, and they were carried by votes of 244-166 and 233-139. See 119 CONG. REC. H 5102, 5127 (daily ed. June 21, 1973).

If the Congress decides that it is necessary to fund somebody to be the cutting edge for social reform, then I would certainly recommend that it create another corporation for that purpose. Let us not turn this function over to the Legal Aid Services attorneys and pretend that the American public is getting a fair deal. *Id.* at 5097-98 (remarks of Representative Green). If this provision against funding back-up centers is enacted into law, much of the work done by the LSP in research and law reform will have to be curtailed.

¹⁴³ All of the amendments restricting the political activity of the poverty lawyer were introduced by Representative Quie. The first amendment provided that any employee working more than half-time for the corporation, "could not be even in his *off time* involved in voter registration drives, or transporting voters to the polls, and he could not take an active part in political management or political campaigns, whether partisan or non-partisan." *Id.* at H 5120 (remarks of Representative Quie) (emphasis added). This amendment passed 207-171. *Id.*

Representative Quie was also successful in adding a section to the bill declaring that "neither the corporation nor any recipient shall . . . make available . . . funds or . . . personnel . . . for use in advocating or opposing any ballot measures, initiatives, referendums, or similar measures." *Id.* at H 5096. One other amendment prohibited the Corporation or its lawyers from contributing money, personnel, or equipment to a political candidate. *Id.* Prior to the amendment, federal funds could not be used for these purposes. Now, any funds received from any source are likewise prohibited from being used in this manner.

¹⁴⁴ H.R. 7824, § 6(b)(5).

¹⁴⁵ *Id.* § 7(b)(7). Representative Mizell was particularly incensed over the involvement of the Harvard Center for Law and Education in the Detroit, Michigan, desegregation case, *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972). See 119 CONG. REC. H 5126 (daily ed. June 21, 1973) (remarks of Representative Mizell).

¹⁴⁶ H.R. 7824 § 7(b)(8). In debate on the abortion amendment, Representative Abzug suggested that the main effect of the amendment was to make it more difficult for *poor* women to get abortions. See 119 CONG. REC. H 5130 (daily ed. June 21, 1973).

¹⁴⁷ Representative Waggonner offered the amendment prohibiting legal assistance for any matter arising out of a violation of the Selective Service Act or of desertion from the armed forces. See H.R. 7824 § 7(b) (10).

independent Legal Services Corporation. Many outright concessions were made by supporters of the latter position. Nonetheless, many members of Congress who had previously supported the LSP believed that the amended version of the bill so limited any independence the Corporation was to have had, that they were not able to vote for the final House version.¹⁴⁸

The Senate Labor and Public Welfare Committee did not report out a legal services bill until November 9, 1973. The Senate bill made only two major changes in the Administration's proposal,¹⁴⁹ and both of these were designed to relax restrictions proposed by the White House. The committee's *Report* was unanimous and was prepared without hearings. On December 10-14, 1973, the Senate held debates on the committee bill.¹⁵⁰ Supporters of the legislation urged the quick passage of the bill,¹⁵¹ but many amendments were submitted on the Senate floor.¹⁵²

On January 31, 1973, the Senate passed the legal services bill.¹⁵³ The legislation which emerged from the Senate differed significantly from that approved by the House. The Senate bill authorized a funding limit of \$261.5 million for the first three years of the Corporation's existence, whereas the House bill imposed no limit on funding, but provided for automatic termination of the program in five years.¹⁵⁴ The Senate resoundingly voted to

¹⁴⁸ I was prepared to swallow the compromise agreement that had been worked out on the legal services bill. . . .

However, there must come a time in every Member's existence where he reaches the breaking point, and I am leaving this bill as of right now. I refuse in the name of common decency . . . to continue my support of this bill.

119 CONG. REC. H 5136 (daily ed. June 21, 1973) (remarks of Representative Conyers).

¹⁴⁹ See S. REP. NO. 495, 93d Cong., 1st Sess. (1973). One change approved by the committee was a more flexible definition of eligibility requirements for clients. The committee's *Report* used a test of inability to afford legal services as a criterion for eligibility and for denying aid to persons who refused suitable work. A second change made in committee was the addition of a 15-member national advisory council to be appointed by the board of directors to assist the Corporation to establish policy.

The remainder of the *Report* was in harmony with the President's proposal.

¹⁵⁰ See 119 CONG. REC. S 22,394-408 (daily ed. Dec. 10, 1973); *id.* S 22,556-64 (daily ed. Dec. 11, 1973); *id.* S 22,701-20 (daily ed. Dec. 12, 1973); *id.* S 22,840-46 (daily ed. Dec. 13, 1973); *id.* S 22,963-70 (daily ed. Dec. 14, 1973).

¹⁵¹ See, e.g., Letter from Presidential Advisor Melvin Laird to Gaylord Nelson, October 4, 1973, quoted in 119 CONG. REC. S 22,403 (daily ed. Dec. 10, 1973).

¹⁵² The introduction of numerous amendments embodied a strategy of opponents of the bill aimed at blocking any passage during the session. After two previous unsuccessful attempts, a motion to invoke cloture was finally passed, and the filibuster was ended. See 120 CONG. REC. S 823 (daily ed. Jan. 30, 1974).

¹⁵³ See 120 CONG. REC. S 1012 (daily ed. Jan. 31, 1974). The vote for final passage was 69-17.

¹⁵⁴ See S. 2686, 93d Cong., 2d Sess. § 1010(a) (1974); H.R. 7824, §§ 3(d), 10(a).

preserve the back-up centers, which were eliminated by the House bill,¹⁵⁵ and to reestablish the National Advisory Council.¹⁵⁶ The Senate approved in principle the right of legal services attorneys to accept outside compensation for work done on their own time, which was prohibited in the House bill.¹⁵⁷ Finally, the Senate rejected any ban on the use of legal services funds in busing suits.¹⁵⁸ Only abortion suits or suits on behalf of violators of the Selective Service laws or deserters from the armed forces are prohibited.¹⁵⁹ These differences portend a very difficult conference, but should the bill survive the conference, it is likely that the President will sign it into law.

CONCLUSION

Lawyers must be able to act independently for the best interests of their clients. Political pressures should not be allowed to impinge on the process of providing legal services to those who are unable to afford private attorneys. The proposed legislation will be one step in the right direction, providing a permanent, independent, and relatively well-funded home for one of the most successful of the poverty programs. But it is not yet time for complacency. More innovation in methods of providing legal services needs to be undertaken. Moreover, through whatever means possible, more of the people who need legal assistance must be reached so that tensions and inequities in our society can begin to be resolved through peaceful, rather than violent means.

Shira A. Scheindlin

¹⁵⁵ See 120 CONG. REC. S 971-72 (daily ed. Jan. 31, 1974); note 142 *supra*.

¹⁵⁶ S. 2686, 93d Cong., 2d Sess. § 1004(i) (1974).

¹⁵⁷ See 32 CONG. Q. 254 (1974); note 143 *supra*.

¹⁵⁸ See 120 CONG. REC. S 964 (daily ed. Jan. 31, 1974).

¹⁵⁹ See *id.* S 965. See also S. 2686, 93d Cong., 2d Sess. § 1007(b)(7), (8) (1974).