H.R. 3764 – Ending LSC Reforms, Transparency and Accountability

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Testimony Before the
Subcommittee on Commercial and Administrative Law
U.S. House of Representatives Committee on the Judiciary

April 27, 2010

Mr. Chairman, Congressman Franks and distinguished members of the subcommittee, thank you for this opportunity to testify on the proposed reauthorization of the Legal Services Corporation and H.R. 3764, the "Civil Access to Justice Act of 2009."

My name is Ken Boehm and I am Chairman of the National Legal and Policy Center in Falls Church, Virginia. From 1989 to 1994, I served in senior management positions at the Legal Services Corporation. From 1991 to 1994, I was Counsel to the Legal Services Corporation Board of Directors.

If there's one thing everyone familiar with the history of the Legal Services Corporation (LSC) can agree on, it's that it has been one of the most controversial federal programs.

Just the fact that it was last reauthorized in 1977 – an authorization that expired in 1980 – speaks volumes as to LSC's contentious record.

Few federal programs have the dubious distinction of going some 30 years without reauthorization.

Over the past 30 years, Congress has made attempt after attempt to reform the Legal Services program. Oversight hearings on wasteful spending and questionable activities have frequently followed GAO audits or investigations showing serious problems.

By the mid-1990s more than 80 national organizations had asked Congress to take action against the controversial program. Among these groups were the National Federation of Independent Business, American Farm Bureau Federation, National Rifle Association, National Taxpayers Union, U.S. Chamber of Commerce and other organizations representing many millions of Americans.

After a rising tide of complaints about the problem-plagued program, the House of Representatives Fiscal Year 1996 budget resolution proposed a three-year phase out of funding. Appropriations of $276 million in FY1996, $141 million in FY 1997 and elimination in FY 1998 was recommended.

The report of the House Budget Committee stated:

> "Too often…lawyers funded through federal LSC grants have focused on political causes and class action lawsuits rather than helping the poor solve their legal problems… A phase out of federal funding for LSC will not eliminate free legal aid for the poor. State and local governments, bar associations, and other organizations already provide substantial legal aid to the poor."
>
> (H.Rept. 104-120)

Congress then proceeded to show it meant business by voting for deep funding cuts in the FY 1996 LSC appropriations.

A Congressional consensus quickly developed that LSC programs should continue to be funded but only if there were extensive reforms to eliminate the wide variety of political and abusive practices which had plagued the program.

This consensus for broad reform was incorporated into the Fiscal Year 1996 appropriations law for LSC, Public Law 104-134. LSC promulgated regulations to cover the many reforms.

With only several modifications, these reforms and restrictions were subsequently incorporated into all subsequent LSC appropriations and have had broad, bipartisan support.

Under appropriations law, Legal Services programs funded by LSC may not:

- engage in legislative redistricting activities or litigation
- attempt to influence regulatory, legislative or adjudicative action at the federal, state or local level
- attempt to influence oversight proceedings of the LSC
- initiate or participate in any class action
- represent certain categories of aliens, except that nonfederal funds could be used to represent aliens who have been victims of domestic violence
- conduct advocacy training on a public policy issue or encourage political activities, strikes, or demonstrations
- claim or collect attorneys' fees
- engage in litigation related to abortion
- represent federal, state or local prisoners
- represent clients in eviction proceedings if they have been evicted from public housing because of drug-related activities
- solicit clients
- use non-LSC funds to engage in activities prohibited with LSC funds unless specifically allowed by law and regulation

Appropriations law from 1996 forward also required LSC to set up a program of competition for LSC grants to end the practice of presumptive refunding. Prior to this reform, Legal Services programs almost uniformly received their grants regardless of whether they were doing a good job or not.

H.R. 3764 would also eliminate the provision, first passed in 1998 as an appropriations rider, which requires LSC and its programs to disclose the court cases brought by LSC-funded attorneys. Apparently, the belief is that the Congress, the media and the taxpayers are not entitled to know what cases federal taxes fund.

H.R. 3764 would largely eliminate or weaken most of the reforms that have been in place with bipartisan support since 1996.

It would also significantly weaken transparency and accountability of both LSC and the programs it funds while promoting a dramatic increase in LSC funding as well as a substantial pay increase for the LSC President.

H.R. 3764: Eliminating or Weakening Most of the 1996 Reforms

The Legal Services reforms enacted in 1996 have remained largely intact since then.

They were passed with bipartisan support and have passed as part of the LSC appropriations law every year since – regardless of which party controlled the House and Senate.

H.R. 3764 would eliminate or weaken most of the reforms and would make any kind of objective oversight of the Legal Services program virtually impossible.

At a time when the escalating federal deficit and the ballooning expenditures for entitlement programs are creating more pressure than ever to rein in discretionary spending, this legislation would mean the largest increase in LSC spending ever while guaranteeing that the types of controversies that almost sunk all federal spending for LSC in the 1990s return in full force.

When future Congresses are looking for places to cut discretionary federal funding, this legislation – if passed – is certain to put a giant bill's eye on LSC funding.

We do not have to wonder what kinds of controversies will return. All we need do is examine what Legal Services lawyers were doing before the 1996 reforms.

Prisoner lawsuits

H.R. 3764 will largely repeal the restriction against using money intended to help the poor with their day-to-day legal needs to file lawsuits on behalf of prisoners at the local, state and federal levels. The only concession is to continue to prohibit activities related to prison conditions.

This gutting of the restriction against prisoner lawsuits will allow Legal Services lawyers to once again get involved in highly controversial cases which outraged the public and Congress prior to the 1996 reforms.

Consider some of the cases in which Legal Services lawyers were involved before Congress clamped down. LSC-funded lawyers:

- sued a prison for punishing a prisoner planning a riot (Cook v. Lehman, 863 F.Supp. 207 (E.D. Penn. 1994)

- sued a prison for extending an inmate's sentence for attempting to escape (Mayner v. Callahan, 873 F.2d 1300, 9th Cir. 1989)

- sued a Florida county prison for placing an inmate caught planning to escape in solitary confinement (Chandler v. Baird, 926 F.2d 1057, U.S. App Ct, 1991)

- sought social security disability benefits for a convicted felon in a home-monitoring program with an electronic tether. The court rejected the reasoning of the Legal Services lawyer in the case, stating that the felon was not on parole and was still serving his sentence. (Calaf v. Secretary of HHS, US Dist. Ct., 1994)

- represented convicted cop-killer Joseph Bowen who was placed in solitary confinement after murdering the warden and deputy warden of a Pennsylvania prison. Legal Services lawyers got the murderer returned to the general prison population where Bowen and three other inmates held 38 people as hostage following a botched prison escape attempt. Pennsylvania's Governor Thornburgh stated, "Never again should government permit 'cause' groups…to place the purported rights of vicious criminals above the safety of law enforcement and correction officers." (Jerry Flint, "Friends in Court," *Forbes,* Dec. 21,1981, page 34.)

- sued Tennessee for delaying the parole of a violent prisoner. The inmate was found guilty of assaulting a guard and had his parole postponed. Although state law gives prison officials broad authority to adjust inmate sentences within the full sentence originally imposed, Legal Services tried to argue that authorities violated their client's rights for vague bureaucratic reasons. A state appeals court dismissed the case as groundless. (*Green v. Reynolds,* Tenn. App. Ct. 1991)

- filed an *amicus curiae* brief in a Michigan case arguing that the Michigan Dept. of Corrections was obligated to provide female prisoners free legal representation in child custody cases. A federal appeals court rejected this argument, ruling that the Constitution only mandates legal assistance for prisoners in criminal cases. The court concluded "if the ordinary law-abiding Michigander has no constitutional right" to a lawyer in civil cases, neither does a convict. (*Glover v. Johnson,* 75 F.3d 264, US App. Ct., 1996)

<u>Legislative redistricting</u>

H.R. 3764 has no provision to prohibit legislative redistricting activities by LSC-funded programs and lawyers.

The enactment of the restriction as part of the 1996 reforms has to be one of the most broadly supported restrictions of all.

I have attended many LSC appropriations and oversight hearings over the last twenty years but I have never once heard an LSC representative argue that they need more taxpayer funding in order to carry out lobbying and litigation with respect to legislative redistricting.

While LSC is supposed to help the poor with their legal needs, it is hard to imagine a less worthy use of LSC funds than something as charged with partisanship as Congressional redistricting or any other type of legislative redistricting.

With the census under way and heated redistricting battles just around the corner, spending anti-poverty funds on highly controversial Congressional redistricting lobbying and litigation efforts is a remarkably sure way to show the public just how politicized and out of control the federal Legal Services program has become.

Yet there have been activist Legal Services lawyers who have engaged in redistricting litigation prior to the restriction. In fact, when the Legal Services Corporation sought to restrict redistricting activities by regulation prior to the 1996 reforms, three LSC-funded programs (Texas Rural Legal Aid, California Rural Legal Assistance and Northern Mississippi Rural Legal Services, Inc.) sued LSC in an attempt to overturn the regulation.

One of the major controversies over the years has been the dispute as to whether the Legal Services program should stick to helping the poor with their day-to-day legal problems or whether it should push a political or ideological agenda.

Removing the restriction against legislative redistricting activities will send a loud message that Legal Services is a politicized federal program which uses taxpayers' funding to promote a political agenda.

<u>Drug-related evictions from public housing</u>

H.R. 3764 will largely eliminate the restriction against LSC-funded lawyers taking legal action to stop drug-related evictions from public housing.

Prior to the 1996 restrictions in which Legal Services programs and lawyers were prohibited from involvement in drug-related public housing evictions, activist LSC-funded lawyers were the major obstacle to such evictions.

After a policeman was shot to death in a n Alexandria, Virginia public housing drug raid, Secretary of Housing and Urban Development Secretary Jack Kemp wrote to all 3,300 public housing authorities in the country asking them about the extent of the drug problem in public housing and what should be done. A flood of letters came back from public housing authority officials saying that Legal Services was the chief impediment to eliminating drug dealers from public housing.

While the problem continued to fester, public outrage mounted. By 1996, one of the most popular of the LSC reforms was the restriction against representing anyone charged with or convicted of a drug offense in a public housing eviction.

The public outrage didn't stop there as the Clinton Administration supported a tough "One Strike and You're Out" policy designed to make it easier to evict drug offenders from public housing. President Clinton signed the Housing Opportunity Program Extension ("HOPE") Act of 1996 which strengthened the ability of federally subsidized housing projects to screen out and evict drug dealers who prey upon their law-abiding neighbors.

The "One Strike and You're Out" policy was drafted by Clinton's HUD Secretary Henry Cisneros. He argued that "the number one group of people" demanding such toughened eviction and screening rules "are the residents themselves" who have suffered so much from drug violence in public housing.

The H.R. 3764 language so weakens the drug-related eviction provision as to make it essentially worthless. It restricts Legal Services involvement in drug-related evictions in public housing only to when the "individual has been convicted in a criminal proceeding with the illegal sale or distribution of a controlled substance."

Compare that language to the 1996 restriction which restricts such Legal Services involvement in drug-related public housing eviction cases in which the client is "has been charged with the illegal sale or distribution of a controlled substance."

The H.R. 3764 restriction would rarely come into play for the obvious reason that someone convicted of the illegal drug sales or distribution would most likely be sent to prison making eviction something of a minor issue.

In short, H.R. 3764 will make it more difficult to solve the problem of drug violence in public housing. That may be a nice federal perk for drug criminals but anyone who believes the law-abiding poor living in public housing want to slow down drug-related evictions is out of touch with reality.

Consider the irony: a proposed piece of anti-poverty legislation that hurts the poor.

<u>Class action lawsuits</u>

H.R. 3764 does not restrict class action lawsuits.

The prohibition against class action lawsuits was a major feature of the 1996 reforms because class actions by LSC-funded programs were overwhelmingly political or ideological in nature. Such lawsuits were so resource-intensive that they often precluded programs from serving the day-to-day legal needs of the indigent.

Another factor contributed to the popularity of class action lawsuits with Legal Services lawyers. Many viewed Legal Services work as a stepping stone to much better paying positions in private practice. Class action skills are much better compensated than skill in assisting poor individuals with legal needs such as landlord tenant law, welfare benefits, and the like.

This attitude that routine legal services for the poor are not the mission of LSC-funded programs was expressed by a former Legal Services lawyer Mike Daniels who spoke out against the effort by Congress to direct the program back to traditional legal services:

> "I don't know how you justify taking federal money to provide routine legal services. There are other lawyers who will do those services." (*Dallas Morning News,* Aug. 21, 1996, page 25A)

Prior to the restrictions, LSC-funded lawyers used class action lawsuits to:

- challenge Atlanta Housing Authority's policy of denying housing to persons with criminal backgrounds (Bonner v. Atlanta Housing Authority, N.D. Ga., Oct 1995)

- sue Pennsylvania when Gov. Casey cut off some welfare benefits to able-bodied adults if they had no children and were fit to work (*Legal Intelligencer,* Aug. 4, 1994)

- sue INS to prevent enforcement of INS regulations denying participation in the Seasonal Agricultural Workers program to aliens convicted of a felony or more than two misdemeanors. (Naranjo-Aguilera v. INS, No. S-91-1462 EKG/GGH, Eastern District of California, June 29, 1992)

<u>Lobbying</u>

H.R. 3764 puts the Legal Services program back in the controversial lobbying business by allowing lobbying with non-federal funds.

Lobbying was restricted because it was not only a highly politicized activity but it siphoned off Legal Services resources that should have been used to provide traditional legal services to the poor.

Few middle class families can afford to hire lawyers to lobby for them, yet lobbying is rarely mentioned when Legal Services programs are seeking more taxpayer funds.

One of the obvious problems with lobbying is that the Legal Services programs would have a great deal of discretion as to what they take up when lobbying. It should come as no surprise that the decision is generally to lobby on an ideological or political issue that fits the political agenda of the LSC-funded program doing the lobbying.

Using taxpayers' hard-earned money for a political slush fund to allow activist lawyers to lobby is bad enough. Worse is the inclination to lobby against legislation passed by Congress or state legislators that really does help the poor.

One example seen over and over has been the attempt by Legal Services to lobby against efforts to eliminate welfare fraud. Apparently, Legal Services believes that welfare fraud is a good thing for the poor. Common sense suggests otherwise.

Attorneys' fees

H.R. 3762 ends the restriction on LSC-funded lawyers receiving attorneys' fees.

The reform was enacted in 1996 and every subsequent year as part of LSC's appropriations legislation for very sound reasons.

First, laws granting attorneys' fees were enacted generally to attract lawyers to cases which otherwise might not attract an attorney. The Legal Services program was not set up to recruit lawyers to compete with the private bar. If there are attorneys willing to take a case involving a law allowing attorneys' fees, then why should the taxpayers have to subsidize those attorneys?

Second, Legal Services lawyers are paid a salary to provide legal advice and representation to the indigent. One sound reason for the salary model and to restrict fees to LSC-funded attorneys is that the selection of cases should be based on what is best for the clients in a service area, not what is best for the bottom line of the program. To the degree obtaining fees lures Legal Services attorneys to select such cases over more deserving cases which do not generate fees, the case selection process becomes corrupted.

At its core, the reason to restrict attorneys' fees for LSC-funded lawyers is quite similar to the reason that Legal Services lawyers are not allowed to take personal injury contingency cases: there are plenty of lawyers only too eager to have a poor client with a good personal injury case.

Using non-LSC funds to conduct activities forbidden with LSC funds

H.R. 3764 eliminates the restriction against undertaking activities forbidden with LSC funds with non-LSC funds.

This would return the Legal Services program back to the "anything goes" era prior to the 1996 restrictions. Most LSC programs receive significant funding from sources other than LSC. The cat and mouse game that generated endless controversy then was for Legal Services programs to engage in almost any prohibited conduct it wanted. When a member of the public or a Congressman complained that the program was doing a prohibited activity, the program simply claimed that it was using non-LSC funds.

Given the numerous hurdles to any serious investigation, especially the fact that client files were off limits and funding is fungible, programs had wide latitude to engage in a host of political or restricted activities.

Allowing Legal Services to get back into the game of routinely undertaking a variety of restricted cases while claiming they were done with "other funds" creates an unworkable system where LSC has neither the investigative tools nor the resources to maintain the integrity of the Legal Services program. This is a victory for those who view the Legal Services program as taxpayer subsidized-legal arm of ACORN or some other activist group. It is a defeat for those who believe the role of the Legal Services program is to provide needed legal help to truly deserving poor people.

If there were true accountability – such as exists in many other federal programs which involve professional privileges – the GAO or Inspector General would have access to attorney-client privileged files for the limited purpose of determining whether waste fraud or abuses have occurred. The mechanism for this in the Medicaid program is to have incoming patients agree to a limited waiver of the physician-client privilege in cases where waste, fraud or abuse is being investigated. After all, the privilege belongs to the client or patient, not to the attorney or doctor.

Allowing restricted activities with non-LSC funds is a sure way to have a program with a long history of abuses return to its old habits.

H.R. 3764: Less Transparency and Accountability

At a time when national polls show increasing public disdain for out-of-control federal spending and non-transparent government programs, H.R. 3764 offers far less transparency and accountability for a program that hasn't been reauthorized in 30 years because of its dysfunctional reputation

Hiding LSC-funded Cases

Almost all cases funded by taxpayers through the federal government are readily identifiable. This was not the case with the cases funded through LSC. The reason was

that LSC would send its funding to programs around the country and the litigation funded by tax dollars was filed in the names of the plaintiff and the defendant. Court case records are not indexed by the name of the LSC-funded program that paid the lawyer.

There was no way to determine – short of spending untold hours examining every case in a particular jurisdiction – which ones were funded by federal tax dollars.

This state of affairs meant that the public, the media and even Congress had no knowledge as to which cases were LSC-funded cases. In an environment in which LSC-funded lawyers chaffed at restrictions, finding restricted litigation was extremely difficult with no rule requiring transparency and disclosure.

This changed with Public Law 105-119, the appropriations for LSC for 1998. Section 505 of that law required disclosure of litigation funded by LSC:

> (a) Not later than January 1, 1998, the Legal Services Corporation shall implement a system of case information disclosure which shall apply to all basic field programs which receive funds from the Legal Services Corporation from funds appropriated in this Act.
>
> (b) Any basic field program which receives federal funds from the Legal Services Corporation from funds appropriated in this Act must disclose to the public in written form, upon request, and to the Legal Services Corporation in semiannual reports, the following information about each case filed by its attorneys in any court:
>
> (1) The name and address of each party to the legal action unless such information is protected by an order or rule of the court or by State or Federal law or revealing such information would put the client at risk of physical harm.
>
> (2) The cause of action in the case
>
> (3) The name and address of the court in which the case was filed and the case number assigned to the legal action.
>
> (c) The case information disclosed in the semi-annual reports to the Legal Services Corporation shall be subject to disclosure under section 552 of title 5, United States Code.

This straightforward requirement regarding basic transparency in cases filed by LSC-funded lawyers is now found in LSC regulations at 45 C.F.R §1644.

Surely, Congress, the media and the public are entitled to know how taxpayer dollars are being spent by LSC-funded lawyers.

Yet, there is nothing in H.R. 3764 to continue this requirement.

What possible legitimate reason can there be to deny disclosure of cases being litigated with the public's tax dollars?

Hiding information from the LSC Inspector General

H.R. 3764 severely undercuts the ability of the LSC Inspector General to promote efficiency and accountability of LSC and its grantees and recipients.

In the past, the Government Accountability Office has been highly critical of the weakness of LSC's accountability practices as was clearly pointed out in the August 2007 GAO Report to Congressional Requestors in Legal Services Corporation: Governance and Accountability Practices Need to be Modernized and Strengthened. GAO-07-993

It scarcely needs arguing but a federally funded program with a thirty year track record of controversy and lack of accountability should have the strongest possible oversight from a truly independent IG if it is to have any credibility with those in Congress tasked with oversight and funding.

I'll leave more specific objections regarding the impact of H.R. 3764 on the ability of the IG to perform his job to the Inspector General.

It is appropriate to point out that if there is a common thread through the legislation, it is to make the program far less accountable to the public, to Congress and to any meaningful oversight.

Put another way, the oversight needed to maintain a responsible program depends on the type of accountability, transparency and management controls advocated in the past by LSC IGs and by the Government Accountability Office. H.R. 3764 ensures that any such oversight will be undercut severely.

H.R. 3764: More Money and a More Politicized LSC

H.R. 3764 increases the authorized funding level to $750 million.

The LSC appropriation for Fiscal Year 2010 contained in the Consolidated Appropriations Act of 2010 (Public Law 111-117) is $420 million.

The argument for this radical increase in proposed spending is that the $750 million amount, adjusted for inflation, is equal to what LSC received in FY 1980.

Here are a few things that LSC proponents do not tell Congress when seeking more taxpayer funding:

- LSC provides well less than 10% of the legal services for the poor each year. The rest comes from attorneys in private practice providing pro bono service, private non-profits which provide legal services to the poor, and a host of other sources. A study by a former LSC Inspector General based on analysis of states providing such information supports the view that most legal services provided to the indigent does not come from LSC-funded programs. (*See Capital Research Center's* Legal Services for the Poor: Is Federal Support Necessary?)

  The less than 10% figure would be even lower if other methods of providing access to justice for the indigent were calculated. These other factors include contingency fee arrangements, expanded mediation and ombudsman programs for certain types of cases and the increases in the dollar amount of cases which can be handled without an attorney in small claims courts in the last 30 years.

- Since the arbitrary benchmark year of 1980, the non-LSC funding received by LSC-funded programs has grown dramatically. The Interest on Lawyers Trust Accounts program did not exist in 1980 but by 2007 LSC-funded programs received $99.3 million in IOLTA funds alone. Additionally there has been increased federal funding since 1980 from a host of programs addressing the legal needs of the poor in domestic violence cases, seniors legal matters and even tax assistance.

- Every dollar spent on lobbying, prisoner lawsuits, stopping drug-related evictions, congressional redistricting and other activities restricted by the 1996 reforms which H.R. 3764 seeks to remove is one less dollar that can be spent on traditional legal services for the poor. The reforms forced Legal Services programs to spend more on day-to-day legal needs of the poor and the cuts in funding caused them to find sources of funding in addition to the federal taxpayer.

Conclusion

H.R 3764 eviscerates most of the bipartisan reforms that have been supported by Congress as part of LSC's appropriations every year since 1996.

We don't have to wonder why legal services attorneys and their allies want to strip out the reforms that prevented them from doing prisoner litigation, stopping drug-related evictions, lobbying for favored legislation, engaging in ideological class actions, and a host of other controversial activities.

They advocate removing the restrictions from those types of cases because those are the cases they want to bring. And will bring if they get their way.

If that happens, once again Legal Services will be known as a federal program plagued with unaccountability and controversy.

Expect more embarrassing GAO reports and audits, fights between Legal Services programs and the LSC IG, and all manner of politicized activities.

What the opponents of reform never seem to learn is that Congress prefers to fund programs which are accountable, transparent and which deliver services in an efficient, economical way.

A program which doesn't even want Congress or the public to know what cases it brings is a program headed for disaster.

In 1996, Congressional supporters of LSC knew they had to reform the program or risk being zeroed out.

In 2010, the threat is even greater due to ballooning deficits, endangered entitlement programs and a mounting public disgust with federal spending.