

LEGAL SERVICES CORPORATION  
BOARD OF DIRECTORS

MEETING OF THE  
OPERATIONS AND REGULATIONS COMMITTEE  
OPEN SESSION

Tuesday, October 19, 2010

8:02 a.m.

Hyatt Regency Hotel  
320 West Jefferson Street  
Louisville, Kentucky 40202

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairman  
Robert J. Grey, Jr.  
Harry J.F. Korell, III  
Laurie I. Mikva  
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

Sharon L. Browne  
Victor B. Maddox  
The Reverend Joseph Pius Pietrzyk, O.P.  
Julie A. Reiskin  
Gloria Valencia-Weber

STAFF AND PUBLIC PRESENT:

Victor M. Fortuno, Interim President and General Counsel  
Kathleen Connors, Executive Assistant to the President  
Rebecca Weir, Special Counsel to the President  
Patricia Batie, Acting Corporate Secretary and FOIA Officer, Office of Legal Affairs  
Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs  
Katherine Ward, Executive Assistant, Office of Legal Affairs  
Jeffrey E. Schanz, Inspector General  
Joel Gallay, Special Counsel to the Inspector General, Office of the Inspector General  
Laurie Tarantowicz, Assistant Inspector General and Legal Counsel, Office of the Inspector General  
Ronald "Dutch" Merryman, Assistant Inspector General for Audit, Office of the Inspector General  
Stephen Barr, Media Relations Director, Government Relations and Public Affairs Office  
Janet LaBella, Director, Office of Program Performance  
Matilde Lacayo, Program Counsel III, Office of Program Performance  
Robert Henley, Member, LSC Finance Committee  
Jeffrey A. Been, Executive Director, Legal Aid Society of Louisville  
David R. Yoder, Executive Director, Legal Services of East Tennessee  
Richard A. Cullison, Executive Director, Legal Aid of the Bluegrass  
  
Terry Brooks, Standing Committee on Legal Aid & Indigent Defendants (SCLAID), American Bar Association  
Don Saunders, National Legal Aid and Defenders Association (NLADA)  
Linda Perle, Center for Law & Social Policy (CLASP)

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# 1 PROCEEDINGS

2 ( 8 : 02 a.m. )

3 CHAIRMAN KECKLER: Welcome to a duly noticed,  
4 in the Federal Register, meeting of the Operations and  
5 Regulations Committee of the Legal Services  
6 Corporation. I want to note the presence of members of  
7 the committee, Laurie Mikva and Harry Korell, and also  
8 the absence of our former committee members, Chairman  
9 Tom Meites and Jonann Chiles, who helped this committee  
10 enormously during their service.

11 Our first item of business is the approval of  
12 the agenda for today.

13 MOTION

14 MS. MIKVA: Motion to approve.

15 MR. KORRELL: Second.

16 CHAIRMAN KECKLER: All in favor?

17 (A chorus of ayes.)

18 CHAIRMAN KECKLER: The approval of the agenda  
19 has been accomplished.

20 The next item of business is slightly more  
21 complex than usual, the approval of the minutes of the  
22 committee's meetings from two prior open sessions, the

1 open session of August 17, 2010 and the open session of  
2 July 30, 2010, and two closed sessions of the  
3 committee, on August 17, 2010 and July 31, 2010. Those  
4 minutes, by the way, are slightly separated from the  
5 others. The closed session minutes are on pages 188  
6 and 189 of your Board book.

7 Is there a motion for the approval of these  
8 minutes?

9 M O T I O N

10 MS. MIKVA: Motion to approve -- that we do  
11 them all at once?

12 CHAIRMAN KECKLER: If that's the substance of  
13 the motion.

14 MS. MIKVA: That's the substance of the  
15 motion.

16 MR. KORRELL: Second.

17 CHAIRMAN KECKLER: Any discussion? I have a  
18 point to make, having been at these meetings. One of  
19 them, the July 31st, 188, on page 188, closed session  
20 meeting, there was a slight problem from the -- with  
21 the recording equipment in that session. However, it  
22 was reconstructed by best efforts of the individuals

1 involved.

2 With that note, all in favor of the approval  
3 of the motion?

4 (A chorus of ayes.)

5 CHAIRMAN KECKLER: The motion is approved.

6 The motion is approved, as are the minutes of the four  
7 sessions noted.

8 Now we turn to the first item of substantive  
9 business, which is item No. 3 on the agenda, a staff  
10 report on the end of the current Strategic Directions  
11 for the Legal Services Corporation and an opportunity  
12 to consider and act on transitional next steps towards  
13 a new strategic plan.

14 And a presentation will begin by Ms. Mattie  
15 Cohan. Thank you, Mattie.

16 MS. COHAN: Thank you. For the record, I'm  
17 Mattie Cohan. I'm with the Office of Legal Affairs at  
18 LSC. I suppose, perhaps, "presentation" is a little  
19 bit of a misnomer, a little overboard from what I think  
20 I'm really doing, which was I provided a memo to you in  
21 your Board books which had a little bit of background  
22 on the last two strategic planning processes that had

1    been done, as well as a timeline that had been  
2    previously prepared about the last one, from when the  
3    planning process started to when the Strategic  
4    Directions were adopted, the last time in 2005/  
5    beginning of 2006, as well as an analysis that had been  
6    prepared last summer about the Corporation's analysis  
7    of progress in achieving the goals that had been set  
8    out in the strategic plan document.

9                 So what I included in the memo was a couple of  
10   ideas to kind of kick off your discussion about how you  
11   might want to do this. This is your process, and we're  
12   in a place right now, of course, where you're still in  
13   the midst of searching for a new President. And I  
14   presume that the committee and the Board is going to  
15   want a new President to be fully involved in the  
16   strategic planning process.

17                 But I think at the same time that there are  
18   some things that the committee can be doing and can  
19   direct staff to do to kind of get the ball rolling,  
20   even while this transitional period is going on.

21                 So some of those suggestions that were in the  
22   memo for you to think about were:

1                   How you want to staff it -- the first  
2   strategic planning process was done with staff largely  
3   out of house; the last one was staffed entirely  
4   in-house;

5                   Whether you want to think about -- at this  
6   point, whether you want to think about a timeline. You  
7   can see the last one that we had;

8                   Whether you want to instead, before you get  
9   into that, just do some more information-gathering. We  
10   could issue a notice saying that this process has  
11   kicked off and get some public comment. There is more  
12   information, lots more information, out and about. OMB  
13   has new information about the federal government's  
14   strategic planning process. There is strategic  
15   planning in the nonprofit sector, in the private  
16   sector, and certainly the staff could go ahead and put  
17   some more information together to give to you.

18                  So those are ideas that were more or less  
19   thrown out. And at this point, my presentation is,  
20   talk amongst yourselves.

21                  CHAIRMAN KECKLER: Thank you, Mattie.

22                  I want to direct the committee's attention, as

1 well as the other Board members, to page 68, which is a  
2 before sort of historical look at the most recent  
3 strategic planning process in 2005. That has some  
4 ideas about things that could be carried out, along  
5 with the memorandum. But, more importantly, it  
6 represents a little bit of a timeline process.

7 Mattie, do you recall in 2000 or thereabouts,  
8 how long did that process take?

9 MS. COHAN: That's a good question. I think  
10 it took about a year from start to finish. As I noted,  
11 that was staffed almost entirely out of the house, and  
12 I wasn't personally particularly involved in it. But I  
13 think that process also took about a year.

14 CHAIRMAN KECKLER: And so the point being, of  
15 course, that as part of the charter of this committee,  
16 we are to monitor the Corporation with regard to  
17 strategic planning, to the last strategy plan.

18 And I think it's worth noting for the record  
19 that this will be the last quarterly meeting of the  
20 Board under an approved strategic plan. The strategic  
21 plan comes to an end at the end of 2010. And so any  
22 meetings, regular meetings operating after this, will

1       be outside a strategic plan.

2                 And my thought is that we should minimize the  
3       amount of time that that occurs. And with that, I  
4       guess I'll open it up for suggestions along the lines  
5       with those two sort of competing forces that you laid  
6       out.

7                 On the one hand, we don't want to do too much  
8       while there's not a permanent President because the  
9       President is going to want to be substantively  
10      involved. Moreover, I should note that -- and you can  
11      correct me if I'm wrong, Mattie -- the actual  
12      substantive planning of the strategic plan involved the  
13      full engagement of the full board.

14                 MS. COHAN: Yes, it did.

15                 CHAIRMAN KECKLER: And so in terms of actually  
16      sort of drafting and reviewing a document, if we follow  
17      the pattern of last time, and I certainly recommend  
18      that we do, a new permanent President and a full board  
19      will be involved in looking over, drafting, and  
20      revising that document.

21                 Nevertheless, given that it takes nine months  
22      to a year and at best, if we begin now, it might be

1       done by next summer -- if we wait until a new President  
2       is in place, then we might go all of 2011, effectively,  
3       without one -- so the idea would be, if we begin now,  
4       we might be able to have six months operating under the  
5       strategic plan that we otherwise might not have.

6                  With that, I'll open it up for suggestions for  
7       things that we might be able to do in the absence of a  
8       permanent President to prepare for that strategic  
9       planning in substance next year.

10                 MS. MIKVA: This is Laurie Mikva. I have a  
11       question. I think one of the suggestions is to  
12       consider staffing. Could you tell me what exactly that  
13       means? Do we just tell you, we would like you to staff  
14       it? Do we tell you we want --

15                 MS. COHAN: Yes. I put that in there since  
16       the first one had been done largely with the use of a  
17       consultant, and then the second effort had been done  
18       in-house. I figured that since there had been two  
19       approaches, that was at least game to put that idea in  
20       front of you.

21                 Going outside costs money, but you get  
22       somebody who's doing that effort. Staying in-house

1 costs less money, but I'm happy to do it. I  
2 volunteered for this. I'm not a strategic planning  
3 expert.

4 MS. MIKVA: Was Charles?

5 MS. COHAN: Not that I was aware.

6 MS. REISKIN: I'm not on this committee. is  
7 that --

8 CHAIRMAN KECKLER: Oh, please. Please go  
9 ahead.

10 MS. REISKIN: This is Julie Reiskin. IGS I  
11 had a question and a comment.

12 My question is, in terms of process, I don't  
13 know if we need a strategic planning expert. Maybe you  
14 could go through most of the plan and then get maybe  
15 two hours of someone's time to review it, maybe at the  
16 beginning and the end or something. That would be a  
17 more cost-effective way than hiring someone for the  
18 whole thing because that gets very -- and I'm sure in  
19 D.C. it's even more expensive than I'm thinking of.

20 My comment is -- and I'd be willing to -- if  
21 you would like to be involved in this is I want to make  
22 sure that there's a process where we get some client

1 involvement in the strategic planning. And that's  
2 something that we might be able to do now.

3                   What I found is a more effective way, rather  
4 than giving people, again, who generally aren't lawyers  
5 and don't do this for a living, a 100-page document, is  
6 to maybe come up with -- maybe a subcommittee could  
7 come up with like three or four questions, and we could  
8 then ask our grantees to survey their client board  
9 members on directions on those kinds of things.  
10 Because that's a process that can start now and might  
11 take a little bit more time.

12                   So that's my broken record thing of client  
13 involvement.

14                   MR. KORRELL: This is Harry Korell. I've got  
15 a question for Mattie.

16                   You were involved the last time. Is that  
17 right?

18                   MS. COHAN: Only tangentially.

19                   MR. KORRELL: Do you have observations on how  
20 the process worked before? I mean, one of the things  
21 it sounds like we're contemplating is doing something  
22 similar to this this time. Were there things about it

1       that you're aware of that worked well or did not? And  
2       if you're not the person, who might we ask?

3               MS. COHAN: I would actually defer to Vic.

4               MR. KORRELL: Fortunately, we've  
5       strategically --

6               MS. COHAN: You've cut his microphone off.

7               MR. KORRELL: -- we've strategically cut his  
8       mike off.

9               (Laughter.)

10              PRESIDENT FORTUNO: I think we can only do  
11       three at a time.

12              I think the executive team was heavily  
13       involved last time. We did a lot of work in-house, and  
14       it wasn't limited to the executive team. We involved  
15       all staff. But because we've got so many people who  
16       were heavily involved in the process the last time, I  
17       think we have considerable experience and resources  
18       in-house and will be tapping that.

19              But it will mean generating a fair amount of  
20       information and material internally, and then coming to  
21       the Board with a product that's fairly far along so as  
22       to not consume an inordinate amount of your time,

1       although it still will require a good deal of time.

2                 But I think that we can certainly build on  
3       prior experience, and we've got ample resources  
4       in-house to support Mattie.

5                 CHAIRMAN KECKLER: Well, one -- following up  
6       from Julie's suggestion, one aspect that seems to have  
7       been done early in the prior strategic planning process  
8       was some form of public notice. And I would add, more  
9       generally, the idea of outreach, the idea of outreach  
10      to grantees, because not everybody reads the Federal  
11      Register.

12                MS. COHAN: I'm shocked.

13                CHAIRMAN KECKLER: But I think a general sort  
14      of public process telling people something that's  
15      simply true -- we will, it looks like, be doing a  
16      strategic plan, or certainly considering a strategic  
17      plan -- that certainly corresponds to one thing that  
18      the Office of Management and Budget says. It says many  
19      things, but one thing it says is you will have a -- you  
20      should have a strategic plan.

21                And I've seen no evidence that we would not do  
22      that. So sending out outreach and public notice, and

1 reaching out to grantees, and not just to grantees but  
2 to the legal services community generally, and to the  
3 general interested public and people that might have  
4 something to say, as well as the Federal Register  
5 notice, seems like something that we can do now and  
6 should do.

7 MS. COHAN: Absolutely.

8 CHAIRMAN KECKLER: That's one item that I  
9 think we might consider.

10 And another is this issue of staffing. Now,  
11 we very much appreciate you doing this and look forward  
12 to your involvement. But of course, you have many  
13 other responsibilities at the Corporation.

14 And one thought, without engaging somebody  
15 in -- engaging consultants and so on, that's something  
16 that we might want to leave for -- there's different  
17 uses of consultants in strategic planning. Sometimes  
18 they come in to review a strategic plan. Sometimes  
19 they come in as facilitators to help the discussion of  
20 the Board as the Board works through the strategic  
21 plan.

22 But I think those things could be deferred to

1       the next President and the Board exactly what role such  
2       a person might be doing.

3                 However, it seems to me we might want to  
4       consider getting a staff member together whose primary  
5       responsibility is to help do this, help coordinate this  
6       and work through the paperwork and do the research,  
7       that could assist you, Mattie, and you, Vic, as  
8       coordinating the overall process, but some staff  
9       support.

10               So one suggestion would be hire, designate,  
11       indicate a person on staff whose primary purpose would  
12       be the strategic planning process. What are the  
13       committee's thoughts, and other Board members?

14               MR. KORRELL: I think it makes sense. It  
15       doesn't sound like there's any -- this is Harry  
16       speaking. It doesn't sound like there's any question  
17       that we need to have one as the process is going to  
18       take six months to a year, and we need to get started.

19               And so I think it makes good sense. I would  
20       hope that at the end of this discussion, we can have a  
21       resolution or motion that authorizes, directs, staff to  
22       start this process. I don't know how much direction we

1 need to give or if we're comfortable letting staff take  
2 the first stab at how to do it. But I think with a  
3 little more discussion, we ought to wind up with a  
4 motion and a vote to direct them to do something.

5 And I think leaving it to staff sounds good,  
6 and I think leaving it to staff to decide what role a  
7 consultant should have seems like a good idea. Whether  
8 that needs to be brought to us first or not I'll leave  
9 to others to weigh in on.

10 MS. REISKIN: This is Julie. In terms of  
11 getting back to the outreach piece, I'd like to see,  
12 maybe, certainly -- I don't know how this committee  
13 works, if there's phone meetings in between, but to  
14 come up with what is the outreach.

15 We can certainly say we're going to be doing  
16 this. But maybe if we could come up with a few things,  
17 or staff could recommend to us some stuff that we want  
18 to ask people to think about in terms of, again, being  
19 a little bit more intentional and focused so that we  
20 could say, again, we don't have to do it the way the  
21 federal -- the formal ones with these very long, wordy  
22 questions, but kind of the way they do in the Federal

1 Register, where they're saying, we want input on this.

2 We want input on that.

3               Certainly people can give input on anything  
4 they want. But I think you get better input that way.

5               And I certainly like the idea of broad outreach. And  
6 I'm wondering who else -- we have grantees. We have  
7 the broader legal services community, which are, I  
8 guess, the regular people.

9               But who else should we outreach to? I'd like  
10 to look at what communities are not commenting that we  
11 want to get comment from. I'm thinking -- certainly  
12 there's migrant communities. There's Native American  
13 communities. Do we want to reach out to like domestic  
14 violence communities? Housing rights advocates?  
15 Should we make a list? Do you guys have a list? How  
16 does that work? I don't know.

17               MS. COHAN: Well, I'm sure we can develop that  
18 information. Another thought, just to throw that out  
19 there, is to the extent that the strategic plan is also  
20 a document for the management of the Corporation, I  
21 don't know if you're interested in any outreach to  
22 other nonprofits or other -- rather than just looking

1 internally at the legal community and the client  
2 community, but looking at other organizations as small  
3 nonprofits or federal agencies. I mean, that's another  
4 avenue, and ius throw that out there.

5 CHAIRMAN KECKLER: I think that's a good idea,  
6 Mattie, and I think -- there's different ways that you  
7 can conceive, certainly, of outreach. And in terms of  
8 the pre-planning, if that's what we're contemplating  
9 here, I think that one thing that a staff member tasked  
10 with information-gathering would want to do would be to  
11 look at the strategic plans of federal agencies -- the  
12 good ones, the best practices -- strategic plans of  
13 federal agencies and nonprofit organizations, as well  
14 as the strategic planning advice out there, which is  
15 very voluminous.

16 And one of the tasks of this person, and then  
17 to you and to Vic, is to synthesize that the best out  
18 of these strategic plans and strategic planning advice.

19 I think that's one thing that would be useful and  
20 could be brought to the Board.

21 PRESIDENT FORTUNO: I would suggest  
22 that -- you have the October 5th background memo, which

1       lays the foundation for the discussion today. But what  
2       we can do is, Mattie, do you think that within a couple  
3       of weeks or so, you can come back with a concrete  
4       action plan, proposed action plan, that the committee  
5       can then review?

6                 And of course, if the committee would like to  
7       meet when we're in Washington next month for the events  
8       on the 19th, there's sufficient time to go ahead and  
9       schedule a meeting so that the committee can then take  
10      up the proposed action plan, and there's something more  
11      concrete to take up.

12                But we'll have things like focus questions and  
13       the outreach and staffing issues addressed. And I  
14       think that it'll make for a more concrete discussion  
15       once you have that provided to you by us and are able  
16       to meet next month to discuss it in detail.

17               PROFESSOR VALENCIA-WEBER: It seems  
18       that -- this is Gloria Valencia-Weber -- we're going to  
19       at some point, not necessarily today, have at least two  
20       motions that we move on.

21               One is, first, on the notice that goes to the  
22       Federal Register that we are discussing that includes

1 some outreach to not only the constituent groups but  
2 groups with allied interests, like the National  
3 Hispanic Bar, the minority bars, national bars, the  
4 Native American Rights Fund, et cetera. And by next  
5 month, we might -- that would be one of the goals of  
6 this information we would have at our November meeting.

7                 Second, action from this committee would be  
8 with regard to the staffing, how it is we decide we  
9 want to pursue the staffing. If some out of the house,  
10 then how much out of the house, or is it all going to  
11 be internal? And so that at least we're quite clear  
12 fairly early on on how that course of action will go.

13                 CHAIRMAN KECKLER: Thanks. This has  
14 been -- we'll work towards some kind of motion,  
15 although it might be here in a second.

16                 One other idea I want to throw out that might  
17 be a component of the action plan or our overall  
18 approach and recommendation, and I'm soliciting  
19 opinions on this, is whether or not it might make sense  
20 to also schedule Board training, perhaps in January, on  
21 strategic planning, after the strategic plans have been  
22 synthesized. And that would be part of it. You could

1 actually present it to the Board in the form of a  
2 training prior to our beginning to engage.

3 PRESIDENT FORTUNO: And I think part of what  
4 can be --

5 MS. REISKIN: You lost your mike.

6 PRESIDENT FORTUNO: Part of what can be  
7 included in the materials to be sent to you are some  
8 consideration of external resources that might be  
9 available so that the committee can, when it next  
10 meetings, consider those.

11 What I would suggest is that in the meantime,  
12 anyone who has any suggestions communicate those to  
13 Mattie so that they can be included in the paper that  
14 she goes ahead and produces in the next couple of  
15 weeks.

16 But I think that it's important not to neglect  
17 external resources. I think that while a great deal of  
18 the work can be done in-house, I think that we want to  
19 make sure that we tap all available resources. And  
20 there's a good deal of expertise outside that we want  
21 to be mindful of.

22 CHAIRMAN KECKLER: All right. With that, I'll

1 entertain a motion to develop an action plan.

2 MS. MIKVA: Do we need a motion, I guess would  
3 be my question, or is this something really we don't  
4 need anything at this point?

5 CHAIRMAN KECKLER: Well, we're going to ask  
6 management to do something. It's not something they  
7 seem disinclined to do, but I think we can have a  
8 motion to ask to begin the strategic planning process  
9 and to develop an action plan that includes components  
10 for best practices review, staffing, outreach, and  
11 Board training.

12 MR. KORRELL: I think it also would be helpful  
13 to have a timeline as part of that, which may be  
14 implicit in the suggestion, but I think as one of the  
15 elements of the proposed timeline for when these  
16 various events would take place.

17 CHAIRMAN KECKLER: So amended.

18 MOTION

19 MR. KORRELL: I'll make that motion.

20 MS. MIKVA: I'll second.

21 CHAIRMAN KECKLER: All in favor?

22 (A chorus of ayes.)

1                   CHAIRMAN KECKLER: The motion is approved.

2   We'll look forward to reading the materials.

3                   MS. COHAN: It'll be done.

4                   CHAIRMAN KECKLER: With that, let's move on to  
5   agenda item 4, which is to consider and act upon the  
6   draft advanced notice of potential rulemaking regarding  
7   amendment of the Sunshine Act regulations, 45 CFR Part  
8   1622, to example certain committees, which are in part  
9   the Governance and Performance Committee, the  
10   Development Committee, which is beginning, and the  
11   Search Committee.

12                  And I will turn it over for presentation back  
13   to you, Mattie Cohan.

14                  MS. COHAN: Sure. The ANPRM that you have in  
15   front of you came out of the discussion of the  
16   committee's telephonic meeting back in August. There  
17   was a bit of discussion then, and I know time is short  
18   in the committee so I don't know that I want to rehash  
19   it. But I'm happy to do so to the extent I get asked.  
20   I'm happy to do that.

21                  So yes, the committee has been debating for  
22   some time whether to remove some of the Board's

1 committees from the coverage of the Sunshine Act.  
2 Rather than issuing an actual notice of proposed  
3 rulemaking, which there were some drafts of, the  
4 committee decided it wanted to see an advanced notice  
5 of proposed rulemaking, which is basically a document  
6 used when the agency isn't sure exactly what direction,  
7 if any, it wants to go in, but isn't ready to table the  
8 issue altogether. And it's a way of putting those  
9 issues out in the public on the table and soliciting  
10 comment.

11 So on the basis of the discussion that we had  
12 had, I had drafted what you have in front of you, the  
13 advanced notice of proposed rulemaking. The discussion  
14 at the committee level last time suggested that this  
15 should very much go through all of the issues and be a  
16 very full discussion, which is why it's -- I know it  
17 seems like a bit of lengthy document, but I believe it  
18 reflects all of the discussions that we had had and the  
19 direction that we'd received from the committee about  
20 how to go about doing this notice.

21 And so, really, it's up to the committee  
22 whether the committee wants to recommend to the Board

1       that this notice be published for comment or take some  
2       other course of action altogether -- not pursue it,  
3       pursue a different course of action. That's where you  
4       guys pick up.

5                 MS. MIKVA: This is Laurie Mikva. Can you  
6       refresh us on what kind of time frame we're talking  
7       about if we do proceed this way?

8                 MS. COHAN: If we publish the advanced notice  
9       of proposed rulemaking, I believe it has a 30-day  
10      comment period. That's what we've put in there. So if  
11      it published some time before the end of October, the  
12      comment period would be approximately the end of  
13      November. And then we would have the public comment in  
14      and summarize those for you.

15               And if the committee met prior to the January  
16      meeting, they could be provided before then; or the  
17      committee could just wait and take this up in the due  
18      course of the next meeting in January. And we've have  
19      summary of the connects and management's  
20      recommendations about how to proceed on there, whether  
21      that would be to proceed to a notice of proposed  
22      rulemaking, to proceed to not do anything, whatever.

1                   MS. MIKVA: So it slows it down by at least 30  
2 to 60 days?

3                   MS. COHAN: Yes.

4                   MR. KORRELL: This is Harry Korell. I don't  
5 want to revisit the decision-making, but obviously this  
6 was done before I joined the Board. I read through all  
7 these materials, the discussions of the rationale for  
8 exempting certain of these activities from the Sunshine  
9 Act requirements. And I couldn't find an explanation  
10 for why the Development Committee piece would be  
11 exempted.

12                  And if you or somebody else can explain the  
13 thinking. The others made sense to me, and I confess,  
14 I just couldn't find a rationale for that one.

15                  MS. COHAN: My best understanding about that  
16 would be to the extent that there is a concern that the  
17 Development Committee would be potentially discussing  
18 sensitive information about individuals who it might  
19 approach for fundraising purposes.

20                  Other than that, I'm not sure what I can tell  
21 you, especially since we've never had a Development  
22 Committee before. So I personally don't know entirely

1 with the Development Committee is going to do and how  
2 it's going to do it because we've never had one before.

3                   But that's my understanding of what the major  
4 concerns are.

5                   MS. REISKIN: This is just a question, and  
6 it's probably one of those cost/benefit analysis  
7 things. Given that we don't know what the Development  
8 Committee is going to do, isn't it true that any  
9 committee can make a motion to go into executive -- or  
10 to go into a closed session if there's an appropriate  
11 reason?

12                  Is putting the Development Committee on this  
13 going to raise -- I'm thinking of the letter from  
14 Grassley. Is that going to raise a lot of -- is it  
15 going to be more work to -- you know what I'm saying.

16                  MS. COHAN: The committees themselves can't  
17 vote to go into closed session. The full Board has to  
18 vote to permit a committee to meet in closed session.  
19 But there are processes for that and I think you've  
20 seen them in action. They happen all the time. There  
21 are processes for that.

22                  The Development Committee is in there because

1 we were asked to include the development committee. I  
2 mean, I think to the extent that you saw the previous  
3 documents from this, management's recommendation is  
4 actually not to proceed, and just to operate the way  
5 we've been operating.

6 So I'm in a position of trying to faithfully  
7 execute the direction I am given from the Board and  
8 from the committee. I say that mindfully of  
9 management's recommendation, which was not to move  
10 ahead with a notice of proposed rulemaking, and with  
11 the Office of Legal Affairs' reservations about the  
12 matter.

13 PRESIDENT FORTUNO: If I may, I think this  
14 really all goes back to an interesting twist in our  
15 Sunshine regulation. I think the Sunshine Act applies  
16 to the governing body and any executive committees, that  
17 is, committees authorized to act on behalf of and bind  
18 the governing body.

19 The Corporation has no executive committees.  
20 All committees recommend to the Board, and final action  
21 is taken by the Board. So technically, Sunshine would  
22 not extend to our committees.

1                   But the Corporation, the Board in its infinite  
2 wisdom many years ago extended the reach of Sunshine to  
3 all committees, including non-executive committees.  
4 And we have functioned that way for many years,  
5 operating under the provisions that allow for closed  
6 session when authorized by the exemptions in Sunshine.  
7 And we've been able to do that.

8                   It can sometimes be cumbersome, but when  
9 appropriate, there is a mechanism for having the  
10 discussion in closed session. I think that there was  
11 some interest in exploring this because it was learned  
12 that, well, gee, if Sunshine doesn't by its own terms  
13 require it and it's simply something that the  
14 Corporation did on a voluntary basis, extended Sunshine  
15 to non-executive committees, maybe we should consider  
16 rolling that back.

17                  I think, for any number of reasons, we in the  
18 Office of Legal Affairs thought that it might not be  
19 necessary, but recognized the interest in possibly  
20 having greater flexibility. I think the Office of the  
21 Inspector General has also addressed this on occasion.  
22 I think at the last meeting we had some public comment

1       that opposed the rolling back, if you will, of  
2       Sunshine, and it has been noted we received a letter  
3       from Senator Grassley and Representative Issa that  
4       asked for assurances that we were committed to openness  
5       and transparency.

6                  And we think that there's a good deal to be  
7       said for that. We want to make sure that folks are  
8       comfortable with the level of transparency. And so  
9       there's that tension there that it's not necessarily  
10      required by the law. We've had it in place for some  
11      time. We've adjusted to it. There certainly is some  
12      level of discomfort with any effort to roll back, even  
13      though we may have the discretion to do that because  
14      Sunshine, by its own terms, doesn't extend to  
15      non-executive committees.

16                 But I just wanted to take this moment to try  
17      to pull that together for you as best I could and see  
18      if that's sufficient information or if you'd like to  
19      have a fuller discussion.

20                 CHAIRMAN KECKLER: Thank you, Vic. This sort  
21      of is a bit of a lead-in to comments that the Inspector  
22      General's office might want to make because I know

1       they've expressed some different concerns, and  
2       sometimes the similar concerns, but also a somewhat  
3       different perspective on the legal requirements about  
4       the committees under the Sunshine Act.

5                   So as a segue, perhaps we'll take comments at  
6       this time.

7                   MS. TARANTOWICZ: Thank you. For the record,  
8       my name is Laurie Tarantowicz, and I'm assistant IG and  
9       legal counsel to the Office of the Inspector General.

10                  The OIG takes a little bit different view than  
11       that which Vic expressed in terms of the requirements  
12       of the Sunshine Act, understanding that the outsource  
13       Act indicates that the Sunshine Act would apply to the  
14       Board and executive committees of the Board.

15                  The Sunshine Act by its terms applies to  
16       subdivisions of the agency authorized to act on behalf  
17       of the agency. We think that that likely means to  
18       conduct business on behalf of the agency, which we feel  
19       is something less than having to actually bind the  
20       Corporation.

21                  The conduct of business under the Sunshine Act  
22       includes something less than actually the

1 decision-making itself, but includes the whole  
2 decision-making process. And the way that, as Mattie  
3 mentioned, the Development Committee we really can't  
4 have a view on yet because we're not quite sure what  
5 the committee is going to do.

6                 But as to the Governance and Performance  
7 Committee, and the conduct of the performance  
8 evaluations of the IG and the President and perhaps the  
9 other officers of the Corporation and the Presidential  
10 Search Committee, we feel that the activities  
11 undertaken by those committees are -- at the committee  
12 level is really where the meat of the decision-making  
13 occurs.

14                 And particularly -- and I know this may change  
15 because we're now discussing how the performance  
16 evaluations are going to take place. But judging by  
17 what occurred in the past, the actual performance  
18 reviews were conducted by the committee.

19                 And it is true that the Board had input and  
20 was able to of course overrule any recommendations made  
21 by the committee. But under the Sunshine Act, it  
22 contemplates that subdivisions of the agency will make

1 recommendations to the full Board that can be  
2 overturned. But it's the whole decision-making process  
3 taking place at that committee level that we're  
4 concerned might not be legally authorized to pull.

5 We do understand that it is a difficult  
6 question, and the Sunshine Act has just a little bit of  
7 legislative history on this which we think makes clear  
8 a broad interpretation was intended. But understand  
9 that it is a complicated and difficult question.

10 PROFESSOR VALENCIA-WEBER: I don't know if  
11 this is the -- this is Gloria Valencia-Weber -- if this  
12 is the right moment to raise what was my understanding  
13 of why at least the Development Committee was projected  
14 to be part of the immunity or exception.

15 And in that we've not had one before and it's  
16 a whole new course of action in which we are inevitably  
17 going to be having some discussions, first of all,  
18 about particular kinds of strategy choices on how to  
19 pursue development, different courses of action that  
20 may or may not be worthy for us to consider or will be  
21 rejected.

22 And then possibly, even more, a need of

1 protection is the idea that one would then begin to  
2 talk about individuals, identifiable individuals or  
3 entities, that would be the parties that would be  
4 pursued under the adopted strategic plan for  
5 development. And so the nature of those two kinds of  
6 information alone raise concerns about not only how we  
7 do it, but also how effective we are when we attempt to  
8 move outside of this Corporation to pursue the  
9 achievement of those strategic goals.

10                 And we know that how fundraising is done -- if  
11 you've worked in foundations and all -- have pursued  
12 the strategy as well as the targeted potential donors,  
13 it is highly important confidential-type information  
14 that has to be properly treated if you're going to be  
15 successful.

16                 MS. MIKVA: Is there any way -- this is Laurie  
17 Mikva -- to make it easier to go into closed session,  
18 which would be obviously far shy of amending the  
19 Sunshine Act?

20                 MS. COHAN: Well, there are statutory  
21 requirements that we can't -- to the extent that some  
22 of the inconvenience is built into the Act, then no.

1     But we actually at the August meeting had suggested a  
2     couple of different administrative approaches that the  
3     committee could take, that the committee and the Board  
4     together could take, which required a little more  
5     advanced planning on the part of those committees to be  
6     able to figure out what they were going to be doing and  
7     when they might be meeting.

8                 We had a couple of ideas, and I'm happy to  
9     recirculate those. But at the time, there was not  
10    particular interest in them. But I'm happy to  
11    recirculate them.

12                MS. MIKVA: I just can't remember them, I  
13     guess. Did they require some changing of the rules, or  
14     just ways to proceed?

15                MS. COHAN: No, no. The suggestions that we  
16     had come up with were things -- leaving the rules the  
17     way they were, it was taking advantage of some of the  
18     structure of the rules.

19                Like, so for example, with the Search  
20     Committee, since we know at the outset that the  
21     discussions of the Search Committee, the discussions of  
22     the candidates, are going to be things that can be held

1       in closed session, there was a way that if the  
2       committee set a bunch of meetings ahead of time, since  
3       there could be a vote taken at one time of the Board to  
4       authorize closure of all those meetings so you wouldn't  
5       have to repeatedly do it.

6                  That requires some advance planning on the  
7       committee's part. But you can take advantage of the  
8       fact that you know, in those situations, the subject  
9       matter is amenable to closure. That process might not  
10      work as well for another committee, like I say, the  
11      Development Committee, where you don't necessarily know  
12      ahead of time which meetings are going to have which  
13      discussions.

14                 I don't know exactly what the Development  
15      Committee will be doing, but I can foresee that at  
16      least some of the discussions would be subject to  
17      closure. But some of them would likely not be  
18      something where closure applies under the Act. And so  
19      you don't have quite the same -- you can't take  
20      advantage of it in the same way. But there were other  
21      things you could do.

22                 So there were some of those suggestions, and

1 I'm happy to have those recirculated.

2 CHAIRMAN KECKLER: Just one further question,  
3 both to you, Mattie, and to the Inspector General. If  
4 we have in the current advanced notice of proposed  
5 rulemaking three different committees, is there some  
6 distinction between them as well as -- does it depend  
7 on the name of things or the constitution of them?

8 We have task forces. We have different kinds  
9 of bodies that are constituted that we don't term  
10 committees. So something like the Search Committee is  
11 obviously something that is not a standing committee.  
12 It's something that's temporary. It involves non-Board  
13 members, and so on.

14 Is there some distinction that can be drawn  
15 between entities like that -- perhaps if you didn't  
16 call them "committee" -- as opposed to standard  
17 committee such as the Governance and Performance Review  
18 Committee performing part of its chartered functions.

19 MS. COHAN: Right. Well, I think to the  
20 extent -- the regulation itself just says "committee."  
21 So I don't believe the regulation makes a distinction  
22 between a standing committee and an ad hoc committee.

1 And we've looked at that question before, unless you're  
2 going to correct me.

3 PRESIDENT FORTUNO: No, no. I was just going  
4 to point out that the federal regulation at 1622.2  
5 defines a committee as "any formally designated  
6 subdivision of the board established pursuant to  
7 Section 1601.27 of the bylaws."

8 There is a provision in the bylaws that  
9 governs establishment of committees, both executive  
10 committees and non-executive committees. And there are  
11 certain procedural niceties that have to be observed.  
12 And when established pursuant to those provisions of  
13 the bylaws, those subdivisions of the Board are  
14 considered committees and subject to the Sunshine Act.

15 I should note just for point of clarification  
16 that I agree with counsel for the IG's comment before.

17 I think that the gist of her comment was that if we  
18 exempt from Sunshine certain committees, that we still  
19 are confronted with a situation where if the discussion  
20 of the subject or the issue occurs entirely at the  
21 committee, which is now exempted from Sunshine, and  
22 then that committee makes a recommendation to the Board

1 and the Board simply takes a vote on approving or  
2 disapproving the recommendation of the committee, that  
3 that would probably fall short of Sunshine because the  
4 Board has not itself deliberated fully on the issue,  
5 but has simply acted on a recommendation that was  
6 formulated in private with Sunshine not governing it.

7 Is that essentially what you're saying,  
8 Laurie?

9 MS. TARANTOWICZ: Yes, I think it is,  
10 although --

11 PRESIDENT FORTUNO: That was good, just yes.

12 MS. TARANTOWICZ: Yes. Just to clarify,  
13 however, I think it's something less than the entire  
14 discussion taking place at the committee level and then  
15 rubber-stamped at the Board level.

16 I do think that it may be possible to do this.  
17 I think it would require a reworking of the way the  
18 Board acts now. if you'll recall, when we were in  
19 Milwaukee at the Board meeting, much of the work was  
20 done at the committee level, and understanding that  
21 mostly all the Board members were at the committee  
22 meetings, making them, in essence, for Sunshine

1       purposes, Board meetings. But that's of course another  
2       issue.

3                 But then when the Board meeting occurred and  
4       the motions from the committee were taken up, there was  
5       very little discussion, and they were either approved  
6       or -- I think they were all approved. But if that  
7       practice were to continue, then certainly there would  
8       be the issue that we raised under the Sunshine Act,  
9       regardless of what the regulation may or may not say.

10               MS. COHAN: Yes. And I will actually pick up  
11       on Laurie's other issue, is that as a practical matter,  
12       to the extent that the Board's traditions have been to  
13       meet with -- with the exception to hold concurrent  
14       meetings, but to more or less have all of the Board  
15       members sitting in committee meetings, once you have a  
16       majority of the Board -- once you have the quorum  
17       sitting in the committee meeting, it doesn't matter  
18       that you've called it a committee meeting. It becomes  
19       a meeting for the purposes of Sunshine.

20               So leaving aside the legal disagreement about  
21       whether we could or couldn't exempt the committees, if  
22       we could exempt the committees, then the Board and the

1       committees will have to conduct themselves differently  
2       than they have in the past. That's not to say it can't  
3       be done. It's just to say it will force a change in  
4       how the work is done.

5                    MR. KORRELL: Does that mean that if there is  
6       a quorum of the Board attending a committee meeting,  
7       that it's impossible then to exempt that from the  
8       Sunshine requirements?

9                    MS. COHAN: That's correct. If there was a  
10      quorum of the Board sitting here right now, regardless  
11      of what we called it, it's a meeting for Sunshine Act  
12      purposes.

13                  MR. LEVI: So my bouncing back and forth here,  
14       you see, has created a quorum in both rooms.

15                  (Laughter.)

16                  MR. LEVI: I want to say I have learned how to  
17       run the search process consistent with Sunshine. It's  
18       cumbersome, but it's doable. I think we probably will  
19       find the most difficulty in running a Development  
20       Committee.

21                  Now, people shouldn't assume that in making  
22       that proposal or asking for consideration of this that

1 we had some private agenda. It's more a question of  
2 protecting information about people. And there are  
3 ways, even there, with Sunshine to work with it. It's  
4 just it is more cumbersome.

5                   And I have run development committees, and the  
6 development committees, incidentally, do make reports  
7 to those boards. They're not done in secret. But the  
8 question is, for you, how much reporting would have to  
9 come from a development committee to the Board then to  
10 have you feel that Sunshine was satisfied. And I'll  
11 bet you don't know the answer to that today.

12                  MS. COHAN: I think it would be case-by-case.  
13                  And as a practical matter, you also have the -- if the  
14 committees are not meeting more or less in full  
15 session, in a committee of the whole, there's the legal  
16 question of how much of the discussion has to be  
17 redone.

18                  And there's a practical question of how much  
19 the Board members who are not in the committee want to  
20 have a discussion, which has nothing to do with  
21 Sunshine, but how much of a discussion they feel they  
22 need to have to feel fully informed to vote on the

1 recommendation of the committee.

2 There was a whole host of these practical  
3 questions. And I will be the first person to tell you  
4 that Sunshine is cumbersome. But it is what it is.

5 PRESIDENT FORTUNO: I do think that if it's a  
6 matter of protecting -- of avoiding unwarranted  
7 invasion into someone's personal privacy or protecting  
8 information the premature disclosure of which would  
9 defeat proposed agency action, I think that there are  
10 exemptions that would allow for that to be addressed in  
11 closed session under Sunshine.

12 So I think most of it is in fact doable. But  
13 I didn't -- I know we've been spending a lot of time on  
14 this, and wasn't sure that the chair wanted to -- I'm  
15 happy to if the chair would like to, but I just didn't  
16 want this to take on a life of its own here.

17 So I'd look to the chair for guidance on how  
18 you wish to proceed.

19 CHAIRMAN KECKLER: Well, I think that we've  
20 had a good discussion about it, building on the prior  
21 discussions. And certainly the document, the advanced  
22 notice of proposed rulemaking, has been a useful

1       document for us to talk about and think about these  
2       issues.

3                 I solicited the comments of the members of the  
4       committee whether or not this item should be moved  
5       forward to the Board for consideration or whether it  
6       should be tabled at this time, perhaps until we see how  
7       things operate with the Development Committee. And the  
8       Search Committee will probably be done, in any case,  
9       before this could be accomplished.

10               And so I think those are the two choices: to  
11       carry it to the Board, or to table it until we get some  
12       further information about the operations. And we're  
13       going to do how the performance evaluations actually  
14       happen, which are going to happen but haven't happened  
15       yet; how the Development Committee proceeds, which  
16       hasn't occurred yet; and the conclusion of the search  
17       process and whether we need to do something going  
18       forward to set up the searches in the future in a  
19       different way.

20               So thoughts on that?

21               MR. KORRELL: This is Harry. I had not  
22       intended to open it up for complete new discussion. I

1 wasn't convinced by the one piece. But based on what  
2 I'm hearing, I have no objection to the document that  
3 was prepared, and I'm sure Charles' view has been  
4 helpful to guide the discussion.

5 M O T I O N

6 MR. KORRELL: But based on what I'm hearing,  
7 there doesn't seem to be urgency here to do this. And  
8 so my inclination, unless someone who's involved in one  
9 of these activities, and maybe it's the chairman, John,  
10 on the Search Committee -- unless someone feels some  
11 urgency in pushing this forward, I'd be inclined to  
12 table it.

13 CHAIRMAN KECKLER: Is there a second?

14 MR. KORRELL: That'll be a motion.

15 CHAIRMAN KECKLER: Oh, that's a motion, yes.

16 MS. MIKVA: I'm sorry. I was talking back  
17 here. Could you restate it briefly?

18 MR. KORRELL: I apologize. I wasn't sure  
19 whether we were ready for a motion on this or not, but  
20 from the chairman's hint, I think we are. And so I'd  
21 move to table discussion of the Sunshine Act exemption  
22 process.

1 MS. MIKVA: I would second.

2 CHAIRMAN KECKLER: All in favor? Or any  
3 further discussion?

4 (A chorus of ayes.)

5 CHAIRMAN KECKLER: The motion to table the  
6 ANPRM for the current time is approved. And we may  
7 take it up again after the Development Committee has  
8 begun operations and can give us some insight, the  
9 Search Committee can result on the result of its  
10 process, and we finish the performance evaluations. So  
11 we'll probably come back again at some point to talk  
12 about it at least one more time.

13 The next item on the agenda, item No. 5, is to  
14 consider and act on a possible initiation of rulemaking  
15 on 45 CFR Part 1609 or 1610 to clarify the scope of  
16 fee-generating case restrictions to non-LSC-funded  
17 supported cases. And you have a rulemaking options  
18 paper that describes the regulatory issues. And I'll  
19 turn it back over to Mattie Cohan.

20 MS. COHAN: Thank you. We're bringing this in  
21 front of you really in the nature of what we see as a  
22 technical correction. Part 1609 of the Corporation's

1 regulations implements a provision in the Act that  
2 restricts grantees -- in the Act restrictions, it says,  
3 a grantee cannot use LSC funds to take a fee-generating  
4 case, with the exception of under certain  
5 circumstances, where there are procedural hoops to jump  
6 through, which is the very shorthand version of what  
7 the fee-generating case restriction is.

8                   That restriction is in the LSC Act. The  
9 restrictions in the LSC Act apply to the Corporation's  
10 funds and to a grantee's private funds, but do not  
11 apply to a grantee's other public funds if they're  
12 available for a particular purpose.

13                   So when all of the '96 restrictions happened,  
14 including the attorney's fees restriction -- which is  
15 now gone -- there was a lot of rulemaking done. And  
16 the 1609 rule was amended to move some provisions on  
17 attorney's fees into what was then the new attorney's  
18 fees rule. And there was a revision of the language of  
19 1609 which essentially went from referencing the funds  
20 by the Corporation to what the grantee can do. I'll  
21 back up.

22                   The LSC Appropriations Act restrictions, we

1 call those entity restrictions rather than fund  
2 restrictions because the structure under the  
3 Appropriations Act says, if you take a dollar of our  
4 money, you can't do this with any of your money. So  
5 it's a restriction on what the entity can do with any  
6 of its funds.

7 So there's a distinction between those  
8 restrictions that are in the Act and those restrictions  
9 that are in the Appropriations Act. And 1609 has  
10 always been an LSC Act restriction, so a funds  
11 restriction, not an entity restriction.

12 When it was rewritten, the language of 1609  
13 now reads as if it were an entity restriction, which  
14 the language itself, if you just read it, it's fairly  
15 clear. The language isn't particularly ambiguous. But  
16 the application is ambiguous because none of the other  
17 LSC Act restrictions have been adopted as entity  
18 restrictions. None of the entity restrictions  
19 are -- we've kept those separate.

20 And the legislative history, the regulatory  
21 history, of 1609 in fact suggests that there was no  
22 intention to change that restriction from a funds

1 restriction to an entity restriction. Rather, they  
2 were looking to just clarify the language. And with  
3 all due respect to my predecessors, I don't think they  
4 succeeded in this particular matter.

5 And where it's come up now is it came up  
6 through a question from OCE about whether the  
7 Corporation -- whether this is now an entity  
8 restriction or not. And so we think that the  
9 legislative and regulatory history is clear that there  
10 was no intention to change it.

11 Our understanding is that up until the  
12 question was most recently raised, no one has thought  
13 about applying it as an entity restriction. It's not  
14 understood as an entity restriction out in the field.

15 And so now is a good time to just make that  
16 technical correction and make sure that the regulation  
17 in 1609 refers to funds, not an entity restriction.  
18 That will not only truly clarify the application of  
19 1609, but will make 1609 consistent with Part 1610.

20 MR. LEVI: Is that what you need?

21 CHAIRMAN KECKLER: I have one question and one  
22 comment. In the rulemaking options paper, of course,

1 you'll see management's recommendation, which you've  
2 just also heard orally. There also is -- since it's a  
3 mismatch issue, there's also the option -- and I  
4 understand it's within our legal power -- to reconcile  
5 it so that it clearly becomes an entity restriction via  
6 regulation.

7 MS. COHAN: Yes. The Corporation is legally  
8 authorized to do that. I think there are a number of  
9 reasons, as discussed in the rulemaking options paper,  
10 not to do that. One is, I think, that it's a distinct  
11 change in policy, which is certainly within the  
12 committee and the Board's purview to do that.

13 It does set up a situation where it's the only  
14 restriction, the only Act restriction, that then is  
15 applied as an entity restriction. It's a distinct  
16 policy choice, though.

17 CHAIRMAN KECKLER: So two quick questions.  
18 One, I think, is clear from your comments, but I want  
19 to clarify.

20 This restriction on the use of funds was not  
21 acted on in the 1996 restrictions. That is, Congress  
22 had no comment whatsoever on fee cases?

1                   MS. COHAN: That's correct. The Congress, in  
2 adopting all of the Appropriations Act restrictions,  
3 did not -- Congress did not choose to turn the LSC Act  
4 restriction on fee-generating cases into an entity  
5 restriction.

6                   CHAIRMAN KECKLER: Did it have any comment at  
7 all on it, or was there anything in it to --

8                   MS. COHAN: Not that I'm aware of. The  
9 only -- there was the attorney's fees restriction on  
10 claiming and collecting attorney's fees, but that  
11 didn't reach the fee-generating case. They were still  
12 permitted to take fee-generating cases if they jumped  
13 through the procedural hoops. They just could no  
14 longer actually collect the fee. But they could help  
15 the people who had those cases.

16                  CHAIRMAN KECKLER: And so the fact that the  
17 attorney's fees restriction has now been lifted makes  
18 this issue more important, does it not?

19                  MS. COHAN: Well, to the extent that -- I  
20 don't think it was in anybody's head that it was an  
21 entity restriction all along. I think it's always been  
22 in kind of the collective feeling that it's an Act

1 restriction and it's always been an Act restriction and  
2 it should be an Act restriction.

3 So I would assume, although when you assume  
4 what Congress is thinking, you're always taking your  
5 life into your hands, but that when Congress repealed  
6 the attorney's fees restriction, it did so knowing that  
7 the Act restriction on LSC funds and private funds was  
8 in place.

9 I don't think -- when they repealed the  
10 attorney's fees restriction most recently, they also  
11 did not go back and opine about the fee-generating case  
12 procedural requirements and the scope of the  
13 restriction.

14 CHAIRMAN KECKLER: I'm just saying that when  
15 there was an entity level restriction on attorney's  
16 fees, this was kind of behind the scenes. But now that  
17 people can seek attorney's fees, then they would bump  
18 into this fee-generating case restriction more often.  
19 Is that not the case?

20 MS. COHAN: Well, if they're -- yes, that  
21 would still be there. But to the extent that -- before  
22 or after they could accept attorney's fees, they were

1 bumping into this, whether they could accept the case  
2 or not.

3 The acceptance of the case is before the  
4 claiming or the collecting of attorney's fees. And the  
5 procedural hoops are such -- I mean, quite honestly,  
6 the way the procedural hoops work, they don't preclude  
7 you from taking a fee-generating case.

8 But the procedural hoops are more like you're  
9 taking a fee-generating case when there's nobody else  
10 who's going to take it probably because there's not  
11 going to be much of a fee. The practicality of the  
12 matter is that's how the statute and regulation works.

13 CHAIRMAN KECKLER: I have one more question,  
14 which is, is there any -- we have our fee for our  
15 funds. We would still have our regulations about going  
16 through this aspect to make sure that there's not a  
17 private attorney available with our funds. So we try  
18 to work in conjunction with the bar and not in  
19 competition with it.

20 But if we don't apply this to other public  
21 funds, which are primarily state funds -- Is that  
22 correct?

1 MS. COHAN: That's correct.

2 CHAIRMAN KECKLER: -- then do the states, who  
3 presumably have some of this same idea, do they  
4 themselves have other state-level restrictions on the  
5 use of their public monies? We just heard about  
6 appropriations from Kentucky and so on. Do they have  
7 any restrictions or any hoops to go through for the use  
8 of their funds to take fee-generating cases?

9 MS. COHAN: They may. I suspect it differs  
10 from jurisdiction to jurisdiction. Our reg does, and  
11 the Act states, that those other public funds do have  
12 to be available for that purpose. So if the state  
13 funds were not available for the purpose under the  
14 terms of that funding, the grantees could not use the  
15 funds that way.

16 And this is an Act restriction. So to the  
17 extent that from '74 through 1996, grantees were  
18 clearly applying this to their LSC funds and to their  
19 private funds and not to their other available public  
20 funds, I don't think there was ever a particular  
21 difficulty with the private bar about that distinction  
22 over the years.

1 CHAIRMAN KECKLER: The reason I ask is that  
2 this would produce, then, potentially some multiple  
3 regulatory regimes for funds. So the argument, which  
4 would go against management's recommendation, one  
5 aspect of that argument would be regulatory simplicity.  
6 But I do understand that many grantees would say,  
7 don't do me that favor. Right?

8 All right. Well, I'll open it up for other  
9 comment.

10 MOTION

11 MR. LEVI: I move that we adopt management's  
12 recommendation in the interests of time here.

13 MS. MIKVA: I second.

14 CHAIRMAN KECKLER: Any discussion? I'll  
15 recognize some public at this time.

16 MS. PERLE: Thank you. I'm Linda Perle. I'm  
17 with the Center for Law and Social Policy, CLASP, and  
18 I'm also representing the National Legal Aid and  
19 Defenders Association.

20 I just wanted to say that I support the goal  
21 of the rule that's suggested by management. I'm not  
22 totally convinced that a rule is necessary; I think

1       that there may be simpler ways to deal with this,  
2       through an Office of Legal Affairs opinion. After all,  
3       we've been dealing with this, to the extent that it's  
4       viewed as a problem, since 1996.

5                 The field has always been advised by me to  
6       treat this as not an entity restriction but as an LSC  
7       restriction that does not go to their non-LSC public  
8       funds. But I've also advised programs that they should  
9       develop policies on fee-generating cases that they do  
10      apply to all their funds just for simplicity purposes.

11                But there are situations where it may not be  
12       reasonable or possible for them to go through the hoops  
13       that are imposed through this rule, and that they may  
14       want to use particularly IOLTA funds more than  
15       state-appropriated funds for some case for which they  
16       haven't gone through the hoops.

17               So sort of in summary, I'm not sure that the  
18       rule change is needed. But if you're going to do it, I  
19       support it, and the field, I think, understands and has  
20       been working in the last 14 years with the  
21       understanding that the current rules -- actually, 1610,  
22       the provisions of Part 1610, provide the construct in

1 which you interpret 1609. That's my view.

2 So again, I'm not sure it's necessary. If  
3 you're going to do it, we're supportive of the purpose  
4 behind the rule.

5 MR. LEVI: I want to ask Vic, is this an easy  
6 change to draft?

7 PRESIDENT FORTUNO: Yes, it is.

8 MR. LEVI: And it will not be inartful and  
9 lead to further --

10 PRESIDENT FORTUNO: I think it's easy. I  
11 think it won't be inartful. And I think it'll be a  
12 good first exercise for the committee to kind of walk  
13 through a rulemaking. This should be -- despite the  
14 complexity of discussion that has occurred thus far, I  
15 think it's actually a fairly simple one to implement.

16 MS. PERLE: I agree with that. And I would be  
17 happy to work with the staff to make sure it's simple  
18 and, that the field is fully cognizant of what's  
19 happening, and that they don't feel like there's  
20 something being slipped past them, and that it's  
21 simple.

22 CHAIRMAN KECKLER: Is there further

1 discussion?

2 (No response.)

3 CHAIRMAN KECKLER: All right. I'll call the  
4 question. All in favor?

5 (A chorus of ayes.)

6 CHAIRMAN KECKLER: Opposed?

7 (No response.)

8 CHAIRMAN KECKLER: The motion is carried, and  
9 we'll recommend the initiation of rulemaking along the  
10 lines of management's recommendation and the rulemaking  
11 options paper.

12 The next item on the agenda -- yes. Item No.  
13 6 on the agenda. Any further public comment on our  
14 actions today here at the committee?

15 MS. PERLE: Actually, this is Linda Perle  
16 again. I did want to make some comment. I know that  
17 you've tabled this discussion on the 1622 rule, and I'm  
18 perfectly content with that.

19 I do want to say that just as we go forward  
20 with consideration, possibly, of this, that there was a  
21 history about why the rules, the Sunshine rules, were  
22 adopted the way they were, and that it was because the

1     Board felt it was really important that it conduct its  
2     business as transparently as possible so that those in  
3     the field in the legal services community, those that  
4     were concerned about this program, knew what the Board  
5     was doing and what they were planning.

6                 There was, certainly, an understanding that  
7     there were certain aspects of the committee's works  
8     that needed to be done outside of the glare of the  
9     public, and so that there were a number of exceptions  
10    that were written into the rule that I think do take  
11    care of most of the situations that will confront this  
12    Board.

13                And we certainly understand that those things  
14    should be done in private, but that people should be  
15    aware that they're going on. So to the extent that you  
16    do come back to look at this rule in the future, we're  
17    very concerned about that.

18                And that's a policy. It's not so much a legal  
19    concern, like what the IG's concern was. But it's  
20    really a policy issue that was fully vetted around the  
21    time of the first LSC board of directors.

22                CHAIRMAN KECKLER: Thank you. Chairman Levi?

1                   MR. LEVI: I just want to ask you, Linda, how  
2 many of our grantees in the field have development  
3 committees? And if they do, have they considered the  
4 implications of running such a committee in the  
5 sunshine?

6                   MS. PERLE: I don't know the answer to that  
7 question. But the Sunshine Act provisions apply to  
8 lsc. They don't apply in the same respect to grantees.

9                   MR. LEVI: I'm just asking them. You're  
10 coming up here on behalf of the field to tell us that  
11 the field would believe that a Development Committee of  
12 LSC ought to be in the sunshine. And since they,  
13 probably more than LSC, have experience in having  
14 development committees, I'm putting it back to the  
15 field so that the next time you come up here supposedly  
16 representing the field --

17                   MS. PERLE: Okay.

18                   MR. LEVI: -- with respect to development  
19 committees that you bring with you their  
20 recommendations as to how they would run their own  
21 development committees in the sunshine. That's what  
22 I'd like to hear from the field.

1 MS. PERLE: Okay. Done.

2 PROFESSOR VALENCIA-WEBER: Yes. Gloria  
3 Valencia-Weber. I'd like to add to John's comment that  
4 while Linda points out who the current Sunshine Act at  
5 the federal level applies to, a number of our grantees  
6 do have some kind of development or fundraising that  
7 falls under their state sunshine laws or state  
8 foundation nonprofit laws.

9 And to the extent that we have some very  
10 visible, successful grantees doing development and  
11 fundraising, it would be helpful to know just how much  
12 they're doing in full public exposure.

13 MR. LEVI: And I say that with all  
14 seriousness. I don't want it to be taken as -- I need  
15 to learn how that -- because I'm going to chair the  
16 Development Committee -- how to do that.

17 MS. PERLE: Okay. I appreciate that. So I  
18 will find out to the best of my ability what the answer  
19 to your question is.

20 CHAIRMAN KECKLER: Thank you.

21 Is there any other public comment?

22 (No response.)

1                   CHAIRMAN KECKLER: Seeing none, move on to any  
2 other business that could be brought before the  
3 committee?

4                   (No response.)

5                   CHAIRMAN KECKLER: Seeing none, I will now  
6 entertain a motion to adjourn.

7                   M O T I O N

8                   MR. KORRELL: So moved.

9                   MS. MIKVA: Second.

10                  CHAIRMAN KECKLER: All in favor?

11                  (A chorus of ayes.)

12                  CHAIRMAN KECKLER: The motion is carried and  
13 the meeting is adjourned.

14                  (Whereupon, at 9:21 a.m., the committee was  
15 adjourned.

16                  \* \* \* \* \*

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