

LEGAL SERVICES CORPORATION  
OPERATIONS AND REGULATIONS COMMITTEE MEETING

Thursday, March 2, 1989  
Commencing at 3:15 p.m.

The Marriott Marquis Hotel  
McKenzie-Yukon Room  
265 Peachtree Center Avenue  
Atlanta, Georgia

Board Members Present:

Robert Valois, Chairman  
Hortencia Benavidez, Member  
Lorain Miller, Member  
Thomas Smegal, Member  
Claude Swafford, Member

Staff Present:

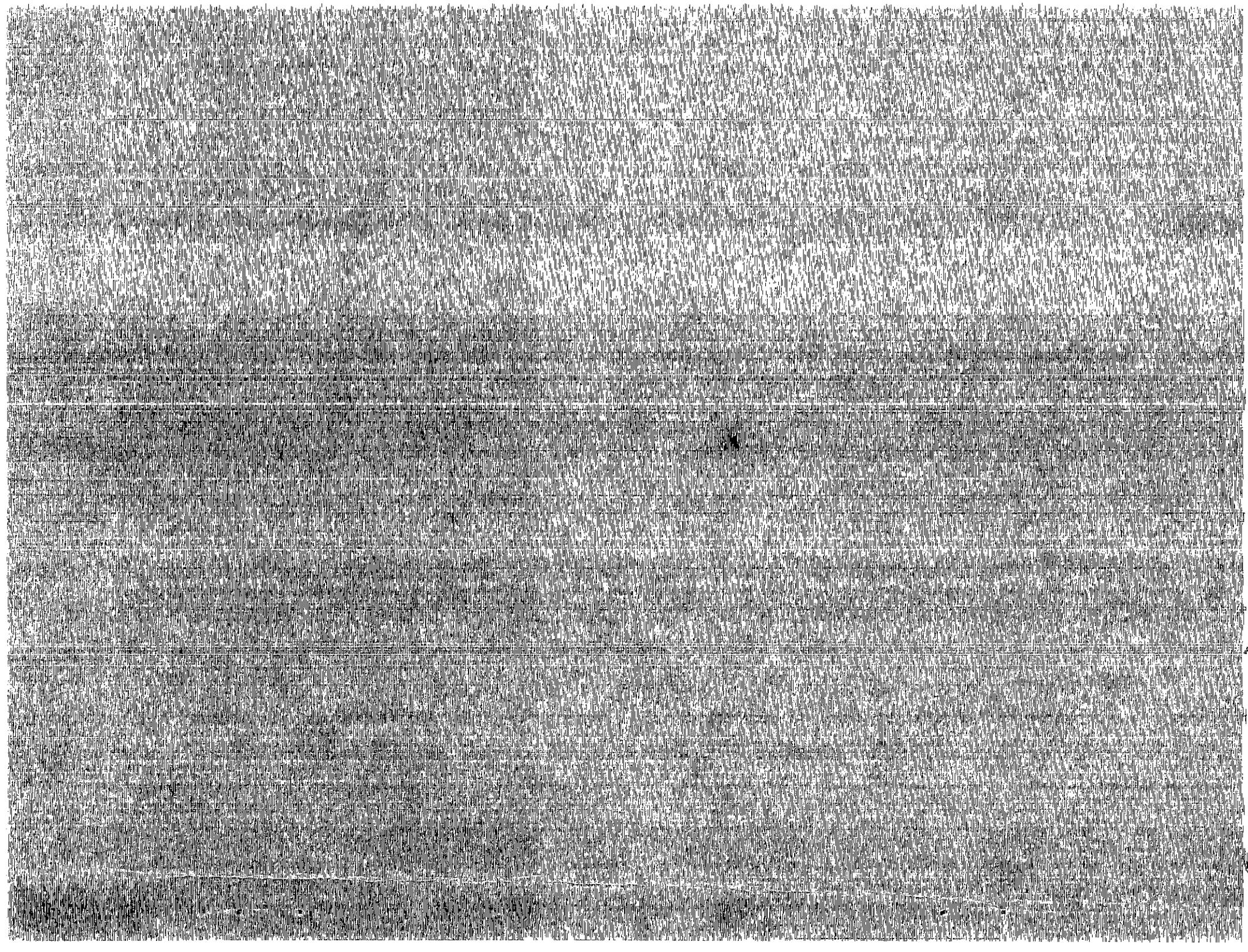
Terrance Wear, President  
Timothy Shea, Vice President  
and General Counsel  
Suzanne Glasow, Senior Counsel  
for Operations & Regulations  
Maureen Bozell, Secretary

Diversified Reporting Services, Inc.

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## P R O C E E D I N G S

(3:15 p.m.)

1  
2  
3 CHAIRMAN VALOIS: The Committee on Ops & Regs is here.  
4 Ms. Swafford is temporarily out of the room, but everybody else  
5 is here. It is 3:15, we are in Atlanta, and this is a meeting  
6 of the Legal Services Corporation Operations and Regulations  
7 Committee.

8 The first item on the agenda is approval of the  
9 agenda. Is there any objection to approving the agenda as  
10 printed in the committee book?

11 (No response.)

12 CHAIRMAN VALOIS: Hearing none, we will approve the  
13 agenda.

14 The second item on the agenda is approval of the  
15 minutes of January 20, 1989. That was the meeting we had in  
16 Raleigh, North Carolina. Are there any corrections, deletions,  
17 additions to the minutes?

18 (No response.)

19 CHAIRMAN VALOIS: May we approve them by unanimous  
20 consent?

21 (No response.)

22 CHAIRMAN VALOIS: Hearing no objection, the minutes of

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1 January 20, 1989 are approved.

2 The third and fourth items are open hearing on 45 CFR  
3 1610 and 1611 as printed in the bulletin. I would like to get  
4 some idea about how many people are here to speak about the  
5 third item first, 1610. Who is here to speak about that?

6 (Show of hands.)

7 CHAIRMAN VALOIS: Mr. Cutler and Mr. Houseman. Anyone  
8 else?

9 (No response.)

10 CHAIRMAN VALOIS: How many people are here to speak  
11 about 1611?

12 (Show of hands.)

13 CHAIRMAN VALOIS: Mr. Cutler and Mr. Houseman again.  
14 Anybody else?

15 (No response.)

16 CHAIRMAN VALOIS: I didn't see our General Counsel  
17 raise his hand, but I wrote his name down because I knew he was  
18 going to say a few words.

19 Is there anyone else who wants to address this  
20 committee on either of those two items?

21 (No response.)

22 CHAIRMAN VALOIS: No response, okay. Mr. Shea, what

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1 is your pleasure? Do you want to do these in tandem, or do you  
2 want to take up 1610 first?

3 MR. SHEA: I think they are parallel proposals. May I  
4 step forward?

5 CHAIRMAN VALOIS: You may. Let the record show Ms.  
6 Glasow is accompanying Mr. Shea.

7 (Ms. Swafford enters the hearing room.)

8 CHAIRMAN VALOIS: Ms. Swafford --

9 MS. SWAFFORD: I'm sorry.

10 CHAIRMAN VALOIS: That's okay. We have approved the  
11 agenda and the minutes, and Mr. Shea is our first speaker on  
12 1610 and 1611 and he has not said anything yet.

13 Presentation of Timothy Shea, General Counsel

14 MR. SHEA: Thank you, Mr. Chairman.

15 I am appearing with Suzanne Glasow, also with the  
16 General Counsel's Office. I will have available Emilia DiSanto  
17 who is the Director of the Office of Monitoring Audit Compliance  
18 to perhaps give you the opportunity to hear some factual  
19 background in connection with the regulation.

20 On February 3, 1989, we noticed a proposed rule urging  
21 amendments to sections 1610 and 1611 of LSC's regulations. In  
22 response to that, we have received something on the order of 85

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1 comments. Most of them were adverse. The regulations focused  
2 largely on the issue of what constitutes prohibited activities  
3 within the meaning of 1010(c).

4 Part 1610 of our regulations applies the prohibitions  
5 of 1010(c) in a specific way. If I may back up, I have a  
6 memorandum dated March 1, 1989 which I have made available to  
7 Board Members. I hope all of you have it.

8 CHAIRMAN VALOIS: Just for purposes of my  
9 clarification, accompanying the memorandum was another -- is  
10 this a different draft of 1610 than is in the committee book?

11 MR. SHEA: It is slightly different, yes.

12 CHAIRMAN VALOIS: Does everybody have what Mr. Shea  
13 has delivered to us today? Mr. Cutler does not. Mr. Houseman  
14 has it. Can we give Mr. Cutler a copy, so we can all be working  
15 from the same song sheets here.

16 Can you, Tim, tell us what is different between what  
17 we have got in the committee book and what we got from you  
18 today?

19 MR. SHEA: I certainly can. If you can please refer  
20 to page 3 of that attachment, in capital letters -- these  
21 changes are modest in the two, but in 1610.2, we changed  
22 "another source" to "sources other than LSC", and that was

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1 simply a drafting proposal.

2 CHAIRMAN VALOIS: Is that the only difference?

3 MR. SHEA: Well, on page 4, there is a similar change  
4 that says, "There shall be a presumption that all funds" and we  
5 added "received by a recipient or subrecipient". Largely, those  
6 are technical and they do not change the substance of this  
7 proposal.

8 CHAIRMAN VALOIS: Okay.

9 MR. SHEA: Returning, then, to my introduction, we  
10 received something on the order of 85 comments. Commenters were  
11 largely LSC recipient programs and subrecipients. We received  
12 comments from the American Bar Association, as well as PAG,  
13 NLADA. The comments were also provided by private  
14 practitioners, by funders and law firms, as well.

15 By way of background, the purpose of these proposed  
16 changes were to assure that private funds made available to LSC  
17 recipient and subrecipient programs are directed to the purposes  
18 intended by the LSC Act.

19 The focus, then, of these changes are private funds  
20 that are in the hands of our recipient programs. Under section  
21 1010(c), non-federal funds that are received for the provision  
22 of legal assistance are supposed to be used for purposes that

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1 are consistent with the LSC Act.

2 Perhaps I should say that the term of art is that  
3 "federal funds received for the provision of legal assistance  
4 shall not be expended by recipients for any purposes prohibited  
5 by this Title", this title being the LSC Act.

6 There is a safe harbor provision as to private funds,  
7 as to public funds and as to certain tribal funds, as well, so  
8 those are outside the terms of our discussion for the purposes  
9 of this rule.

10 Currently, Part 1610 has a list of -- actually, what  
11 it does is simply incorporate certain provisions of the LSC Act  
12 that are identified as prohibited activities. Those cover  
13 political activities, legislative and administrative  
14 representation, segregation cases, abortion, certain kinds of  
15 advocacy training and the like.

16 Proposed amendments would add -- actually, to some  
17 extent, some of the references are consolidated. The proposed  
18 amendment would add four provisions as prohibited purposes  
19 within the meaning of 1610.

20 CHAIRMAN VALOIS: All right. Let me interrupt you at  
21 that point. New (a) as printed in what you handed to us today  
22 as well as what was handed out previously, the first subsection

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1 which is proposed to be added is subsection (a).

2 MR. SHEA: Right.

3 CHAIRMAN VALOIS: You have there a reference to 1006  
4 as well as 1003 and then the phrase "broad general legal policy  
5 or research". While this appears to be new, 1006(a)(3) already  
6 has that phrase, "broad general legal policy research"; is that  
7 correct?

8 MR. SHEA: Well, this is a cross reference to the  
9 provision.

10 CHAIRMAN VALOIS: The question is whether or not  
11 "broad general legal policy research" is already prohibited by  
12 the statute.

13 MR. SHEA: It certainly is as to LSC funds.

14 CHAIRMAN VALOIS: What is different here is --

15 MR. SHEA: As to grants or contracts made by LSC,  
16 correct.

17 Continuing, then, the four activities that are added  
18 as prohibited purposes are then the eligibility, the question of  
19 eligibility, that is, a requirement that serving -- a provision  
20 that serving ineligible clients would be a prohibited purpose as  
21 to private funds; broad and general research, as I've just  
22 mentioned; class actions.

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1           There are certain procedural requirements in the LSC  
2 Act that must be met before a class action is undertaken. This  
3 provision would not preclude undertaking class actions; it would  
4 merely require that the same procedural prerequisites for class  
5 actions that must be observed with respect to LSC funds be  
6 observed with respect to cases undertaken with private funds.

7           Lastly, there was a proposal that certain grants or  
8 contracts to private law firms would be identified as a  
9 prohibited purpose.

10           I would like to address the specific proposals in some  
11 detail, but I should add, finally, there was a proposed addition  
12 to a certain presumption that all funds received by a recipient  
13 or subrecipient are LSC or private funds received through the  
14 provision of legal assistance absent a clear and convincing  
15 demonstration by the recipient to the contrary.

16           The effect of that proposal would simply be to state,  
17 to assert, the proposition that insofar as most of our  
18 recipients are primarily involved in providing legal services to  
19 the poor, that we will assume any private funds they received  
20 are funds received through the provision of legal assistance  
21 and, hence, are covered by 1010(c).

22           Generally, the comments we received urge, first of

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1 all, that there are some -- they expressed Constitutional  
2 concerns about the scope and tenor of section 1010(c). That is  
3 something that the Corporation has visited before with respect  
4 to 1010(c) and, frankly, we have expressed disagreement with it,  
5 number one.

6 Number two, in any event, I do not think the  
7 Corporation is in a position to declare 1010(c)  
8 unconstitutional.

9 Secondly, there were concerns, general concerns, about  
10 the proposal that these four activities are or may properly be  
11 considered to be prohibited purposes. Some of the commenters  
12 suggested they are affirmative requirements, that they are  
13 procedural in nature, but they are not genuinely prohibited.

14 On a policy level, a number of the commenters urged  
15 that the effect of the changes would be to simply dry up or  
16 drive away private funds from LSC providers. A number of them  
17 urged that some specific grants that are provided to the elderly  
18 or disabled or the abused or homeless wouldn't be available.  
19 They simply wouldn't be funds that our programs could compete  
20 for,

21 With respect to the presumption, there was a certain  
22 amount of argument about what the practical effect of it was. I

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1 do not know that there was any argument that it was  
2 unauthorized.

3 Fundamentally, I think the issues with respect to the  
4 four prohibitions center on what should properly be  
5 characterized as a prohibition under the LSC Act. For the most  
6 part, first of all, there are a number of -- most of the  
7 prohibitions in the LSC Act are characterized to the effect  
8 that no funds made available to the Corporation may be used for  
9 a certain purpose.

10 Many of the prohibitions do not, by their own terms,  
11 subsume private funds; it is only when you get to 1010(c) that  
12 it says anything that you cannot do with LSC funds, you should  
13 not be doing with private funds.

14 This process and these proposals would add these four  
15 provisions as new prohibitions. I think the intent of it,  
16 first, they implement the purposes of the Act in section 1010(c)  
17 insofar as they would impose the same constraints that apply to  
18 LSC money to private money.

19 The first and perhaps the most controversial proposal  
20 among these is the matter of eligibility. As you know, section  
21 1011 of the LSC Regulations establishes some detailed  
22 eligibility tests for clients, for LSC clients.

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1           Basically, the test is 125 percent of the federal  
2 poverty guideline, but under certain circumstances, the income  
3 can go up to 150 percent of the poverty guideline based on  
4 consideration of other kinds of encumbrances that a client may  
5 have. Those are established in 1611. For the most part, those  
6 will remain undisturbed.

7           The one change that we propose with respect to 1611 is  
8 to eliminate the portion of 1611 -- I think it is .2(c) -- that  
9 permits LSC recipients to represent ineligible clients with  
10 private funds. Again, the purpose of this change was to focus  
11 the resources of LSC programs on the eligible clients.

12           The comments, first of all, argue that eligibility  
13 does not constitute a prohibition, yet surely, no one has  
14 disputed and it really is not susceptible to dispute that the  
15 centerpiece of the LSC Act is that the funds are to be made  
16 available for eligible clients, and that is a constant theme  
17 throughout the Act.

18           It surely would serve the purposes of the Act, then,  
19 to direct the resources of the program, both as to LSC funds and  
20 as to non-LSC funds, to eligible clients and, in that sense,  
21 preclude the use of program resources, both private and LSC,  
22 with respect to ineligible clients.

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1           Now, much of the comments urged that some specifically  
2 protected classes, such as the disabled and the abused, grants  
3 made available for them would be driven away from LSC recipient  
4 organizations. Of course, to the extent that grants are made by  
5 public agencies, either federal government or otherwise, or  
6 state or local grantors, those would be unaffected by this  
7 proposal.

8           Likewise, there were some comments urging that  
9 matching funds, private matching funds, which are raised to  
10 attract other federal or state funds, to the extent that the  
11 basic program does not have a means test, those funds would also  
12 be encumbered or driven away, not just the private funds, but,  
13 as well, the public funds that require matches. Those would be  
14 endangered by this proposal.

15           Moving on, then, to class actions, our proposal is to  
16 require that recipients follow the same procedural requirements  
17 for the use of private funds as the LSC Act requires for LSC  
18 funds.

19           Under 1065, "no class action can be undertaken by a  
20 recipient staff attorney without the approval of the Executive  
21 Director in accordance with policies that are established by the  
22 governing body."

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1           This prohibition is purely a procedural one. It does  
2 not prevent programs from taking on class actions. It merely  
3 requires that -- across the board, that is -- it merely requires  
4 that certain procedural prerequisites be observed.

5           I might add there was a certain amount of comment in  
6 connection our Federal Register notice that suggested that the  
7 notice itself indicated that class actions were inefficient or  
8 cumbersome.

9           Actually, the tenor of the notice was that class  
10 actions characteristically may consume more resources than  
11 perhaps an individual action and that, in that sense, more  
12 careful attention by the program management should be given to  
13 undertaking a class action.

14           In that sense, our proposal would establish and simply  
15 require that before a class action is undertaken with private  
16 funds, that the matter come to the attention of the Executive  
17 Director, and that the decision be made consistent with the  
18 governing body's policies in that area.

19           The next issue is the broad general research. Under  
20 section 1006(a)(3) and I might refer you to page 7 of my  
21 memorandum in the footnote, the Corporation is not authorized to  
22 make grants for research unrelated to -- for broad general legal

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1 or policy research unrelated to representation of eligible  
2 clients.

3           The tenor of this proposal would be to establish that  
4 prohibition as one that applies to private funds pursuant to  
5 1010(c). That, again, would further the purposes of 1010(c) so  
6 that our programs would be about the business of providing legal  
7 services to eligible clients.

8           The last proposal related to a prohibition in section  
9 1007(b)(5) of the LSC Act that LSC funds must not be made  
10 available to make grants or enter into contracts with a private  
11 law firm, which expends fifty percent or more of its resources  
12 and time litigating issues of broad interest with the majority  
13 of the public.

14           There are a number of comments related to that, that  
15 it was both vague and, as well, that it was uncertain as to  
16 whether there were any particular problems in this vein. More  
17 to the point, though, it was pointed out that section 1010(c),  
18 of course, has an exclusion for private law firms itself.

19           So, upon reflection, frankly, I would urge that the  
20 Board -- I would urge that you recede on this issue. I do not  
21 frankly think that there is an awful lot to be gained by  
22 proceeding with this portion of the proposal.

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1 MS. SWAFFORD: 1010(c)?

2 MR. SHEA: With the public interest firms feature.

3 CHAIRMAN VALOIS: What would you have us do with the  
4 regulation that you gave us today in order to recede?

5 MR. SHEA: You would delete Part A.

6 CHAIRMAN VALOIS: No. Paragraph (g), I think.

7 MS. GLASOW: You would delete the words on page 3,  
8 "grants or contracts with public interest law firms". Also, we  
9 would delete -- we have to change the 1007(b)(1) to (4) and  
10 1007(b)(6), 1007(b)(5).

11 CHAIRMAN VALOIS: That's (b)(5)?

12 MS. GLASOW: Yes, "grants or contracts with public  
13 interest law firms would be" --

14 MR. SMEGAL: I thought that was advocacy training.

15 MS. GLASOW: Maybe you're right.

16 MR. SMEGAL: Is that supposed to be a catch-all for  
17 1007.1(b) to (10)?

18 MS. GLASOW: Yes. We had everything under 1007(b)1 to  
19 10, so we just put it all in one paragraph.

20 CHAIRMAN VALOIS: That is the only place we would need  
21 to take it out is in (g); is that correct?

22 MS. GLASOW: Right.

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1 CHAIRMAN VALOIS: It doesn't appear anyplace else?

2 MR. SHEA: That's right.

3 CHAIRMAN VALOIS: What is the sense of the committee  
4 on that?

5 MS. GLASOW: "Grants or contracts with public interest  
6 law firms".

7 MR. SMEGAL: I guess I am still a little confused by  
8 the fact that your heading on (g) goes from (b)(1) to (b)(10).

9 MS. GLASOW: Right. I said we would have to change  
10 those numbers there. We would have to change it to 1007(b)(1)  
11 to (4) and 1007(b)(6) to (10).

12 CHAIRMAN VALOIS: Through (10).

13 MR. SMEGAL: Okay. Well, my problem is I don't know  
14 where (10) is. Where was (10) before? I don't see any heading  
15 for (10) in here.

16 CHAIRMAN VALOIS: Mr. Smegal --

17 MS. GLASOW: Maybe that is an incorrect number. No,  
18 (10) is to provide legal assistance pursuant to litigation  
19 arising out of the Military Selective Service Act.

20 MR. SMEGAL: That's (10)? Your old (j) was (b)(9) and  
21 it said exactly that, violations of --

22 MS. GLASOW: They changed the designation when they

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1 amended the Act in 1977 and Part 1610 has not been revised since  
2 the Act has been revised. That is a technical change.

3 MR. SMEGAL: Is there a (9) under the new Act?

4 MS. GLASOW: Yes, that is now the desegregation, I  
5 believe.

6 MR. SMEGAL: What is (7), which is what it was before?

7 MS. GLASOW: Seven is organizing --

8 MR. SMEGAL: Activities?

9 MS. GLASOW: That is correct.

10 MR. SMEGAL: That was (6) before. What is (6) now?

11 MS. GLASOW: Training.

12 MR. SMEGAL: That was (5) before? What is (5) now?

13 MS. GLASOW: Five is now the private law firms. That  
14 is the one we are suggesting be changed.

15 MR. SMEGAL: I understand it now.

16 CHAIRMAN VALOIS: In other words, on page 3, what we  
17 received today, (g) would read Section 1007(b)(1)-4; correct?

18 MS. GLASOW: Correct.

19 CHAIRMAN VALOIS: Then the words ANB, that is one  
20 word.

21 MS. GLASOW: Correct.

22 CHAIRMAN VALOIS: Then (6)-(10).

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1 MS. GLASOW: Correct.

2 CHAIRMAN VALOIS: And then we strike, on the third  
3 line, beginning with "grants" after the first semicolon through  
4 the first semicolon or just before the first semicolon on the  
5 second line?

6 MS. GLASOW: Actually, you do it after, unless you  
7 took out the --

8 CHAIRMAN VALOIS: You take one or the other out.

9 MS. GLASOW: You have a semicolon after the  
10 "activities".

11 CHAIRMAN VALOIS: That's fine, yes; take it out.

12 MR. SMEGAL: What is (b)(3)?

13 CHAIRMAN VALOIS: In the statutes?

14 MR. SMEGAL: Section 1007(b)(3), what is that?

15 MS. GLASOW: Civil actions.

16 MR. SHEA: It is basically a habeas provision.

17 CHAIRMAN VALOIS: Correct. All right. What is the  
18 sense of the committee receding from this part of the proposal?  
19 Thomas?

20 MR. SMEGAL: I guess I am in favor of it, and I do not  
21 know why we were there to begin with. I guess what I have  
22 missed in not paying attention to what was being said is that

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1 whatever the reason was, it wasn't a very good reason.

2 CHAIRMAN VALOIS: I don't want to debate any more than  
3 we have to.

4 MR. SMEGAL: I'm not debating.

5 CHAIRMAN VALOIS: We are all agreed to take it out?

6 MR. SMEGAL: Yes.

7 CHAIRMAN VALOIS: Ms. Swafford?

8 MS. SWAFFORD: I'm prepared to accept Mr. Shea's  
9 recommendation.

10 CHAIRMAN VALOIS: Ms. Benavidez?

11 MS. BENAVIDEZ: No.

12 CHAIRMAN VALOIS: You want to leave it in? Let me do  
13 it in the form of a motion, then.

14 All those in favor of striking that which we have just  
15 described in the colloquy between me and Ms. Glasow say aye?

16 (Chorus of ayes)

17 CHAIRMAN VALOIS: Those opposed?

18 (One no vote.)

19 CHAIRMAN VALOIS: I believe the ayes have it.

20 Proceed.

21 MR. SHEA: Thank you.

22 The last item was the matter for presumption. This

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1 portion of the proposal evoked some measure of opposition; I do  
2 not know that I would necessarily characterize it as strong  
3 opposition.

4 Fundamentally, the purport of the proposal would be  
5 that any private funds are considered to be within the purview  
6 of 1010(c) that are in the hands of an LSC recipient. Some of  
7 the commenters suggested that the current LSC Audit Guide should  
8 address or satisfy that concern already.

9 I do not think that is the case. The Audit Guide  
10 requires that separate funds be maintained, but they do not deal  
11 with the characterization of the funds, necessarily. This would  
12 establish a proposal that the funds received by our programs are  
13 funds for the provision of legal assistance and therefore are  
14 covered by 1010(c).

15 Obviously, they permit a program to demonstrate  
16 otherwise, but the program is in a position that they have the  
17 grant documents; they know the purposes for which they were  
18 received, that the funds were received as well as the purposes  
19 for which they were used; and, they are in a position to make  
20 the showing as to whether, for one reason or another, the funds  
21 should be outside the terms of 1010(c).

22 That is all I have, I think, by way of a direct

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1 presentation. I would like, as well, to have Emilia DiSanto to  
2 appear briefly to talk about some record-keeping issues and  
3 perhaps about the presumption, as well.

4 I leave it to Board Members as to whether you want to  
5 inquire of me now or want to wait to hear her.

6 CHAIRMAN VALOIS: Do the Board Members have some  
7 questions of Mr. Shea? Thomas?

8 MR. SMEGAL: No.

9 CHAIRMAN VALOIS: Claude?

10 MS. SWAFFORD: No.

11 CHAIRMAN VALOIS: We will excuse you for the present,  
12 I suppose.

13 MR. SHEA: Thank you.

14 CHAIRMAN VALOIS: Mr. Houseman and Mr. Cutler, do you  
15 all want to come, or are we going to do Ms. DiSanto first?

16 MR. SHEA: I suggested, if we may, have Emilia first.  
17 That would be my proposal.

18 CHAIRMAN VALOIS: Okay. Fine. Sure.

19 Presentation of Emilia DiSanto

20 MS. DiSANTO: This is the second time that MAC has had  
21 the opportunity to speak to this Board regarding certain issues  
22 and certain difficulties that we have encountered in monitoring

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1 1010(c).

2 In January of 1987, we provided a report to this Board  
3 regarding the use of private funds by Legal Services programs  
4 for prohibited activities and also, at that time, a panel of  
5 monitors discussed their findings with you, specifically in that  
6 regard.

7 At that time, the panelists told the Board that Legal  
8 Services programs do receive substantial sums from non-LSC  
9 sources and that some Legal Services programs consider private  
10 funds and use those private funds for prohibited activities.

11 At the same time, the panelists identified some major  
12 difficulties with regard to monitoring 1010(c). Among the  
13 difficulties were that there is an absence of records and the  
14 second is that there is the presumption on the part of some  
15 Legal Services programs that absent specific language to the  
16 contrary, private funds may be used for prohibited activities.

17 Since that time, in January 1987, MAC has increased  
18 its monitoring efforts and has found that private funds continue  
19 to be used for prohibited activities. Indeed, that was reported  
20 to Senator Rudman on May 27th of 1988.

21 With regard to the difficulties encountered in  
22 monitoring section 1010(c), a major issue is that of record

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1 keeping. Generally, there is a lack of verifiable documentation  
2 and it continues to present MAC with difficulties in monitoring  
3 1010(c).

4 The record keeping that is currently used by a  
5 majority of Legal Services programs is done in such a fashion  
6 that the actual allocation of LSC resources or other resources  
7 is not verifiable.

8 For example, most programs lack contemporaneous time  
9 and effort records. In addition, most programs utilize a set  
10 percentage allocation of resources as opposed to using actual  
11 information as to what is to be funded by LSC funds and what  
12 should be funded by non-LSC funds.

13 In addition, most programs will reconcile allocations  
14 of LSC funded activities versus non-LSC funded activities on an  
15 annual basis as opposed to doing so on an ongoing basis, so  
16 those are some of the difficulties that are encountered in  
17 record keeping.

18 Coupled with that, we have the presumption by some  
19 Legal Services programs that absent specific language to the  
20 contrary, private funds may be used for purposes prohibited by  
21 the LSC Act. That is what our monitoring effort has shown more  
22 or less to date.

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1           CHAIRMAN VALOIS: Let me ask you a bunch of question,  
2 but one of the last things you said was that some programs make  
3 these records on an annual basis versus an ongoing basis. I  
4 don't understand, mechanically, how you do that if you get some  
5 private funds in January and you expend them by May and then you  
6 wait until December 31st to make that record.

7           How does that happen? Mechanically, how does one do  
8 that?

9           MS. DiSANTO: Generally, if you have private funds,  
10 let's just say you have a program that receives one hundred  
11 dollars from LSC and receives fifty dollars from a private  
12 source. You will have individuals that are working at that  
13 particular program that will be engaged in activities that are  
14 prohibited by the LSC Act and activities that are permitted by  
15 the LSC Act.

16           As opposed to maintaining any type of records which  
17 would say that today, from 9:00 o'clock to 12:00 o'clock, I  
18 worked on this case which, let's just say, is an abortion-  
19 related matter which is prohibited by LSC; I worked from 9:00 to  
20 1:00 and "X" funding source will be charged for that activity  
21 and from 1:00 o'clock to 6:00 o'clock, I worked on LSC funded  
22 activities.

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1           What will happen is that some programs will say that  
2 sixty percent or seventy percent of this staff attorney's time  
3 will be allocated to LSC and thirty percent will be allocated to  
4 non-LSC, and I'll make all the necessary adjustments to my books  
5 at the end of the year so that all the LSC funds are spent, all  
6 the non-LSC funds are spent, and everything will come down to  
7 zero in the end.

8           So, you find yourself in the situation that LSC funds  
9 can subsidize, for lack of a better word, non-LSC activities and  
10 for prohibited activities during the course of a year, and then  
11 it will all be adjusted at the end of the year when the  
12 independent auditors' report is submitted.

13           CHAIRMAN VALOIS:     What kind of things would be  
14 allocated to the division of the funds from the non-LSC versus  
15 the LSC? Salary, is that commonly allocated?

16           MS. DiSANTO:     Salary is the -- if you were to divide  
17 up the funds, yes, is commonly allocated as far as LSC.

18           CHAIRMAN VALOIS:     Overhead?

19           MS. DiSANTO:     Overhead is another question because the  
20 Audit Guide allows overhead to be charged to LSC for those  
21 activities funded by non-LSC sources so long as those activities  
22 are permissible.

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1 I guess the long and short of your answer is that we  
2 cannot tell whether or not overhead is being charged to LSC  
3 funds for activities that are conducted with non-LSC funds as a  
4 result of the lack of records.

5 CHAIRMAN VALOIS: And you can't tell whether any has  
6 been allocated or whether any of the prohibited funds have been  
7 allocated to LSC overhead?

8 MS. DiSANTO: That's very true. You can't really make  
9 that cut.

10 MR. SMEGAL: So you don't know?

11 MS. DiSANTO: That's right.

12 CHAIRMAN VALOIS: You have no records to show that  
13 they are being so allocated or they have no records to show that  
14 they are?

15 MS. DiSANTO: Precisely.,

16 MS. SWAFFORD: Would you give us an example of what  
17 private funds are? This has been explained many times, but I  
18 think it just needs to be again. What is an example?

19 MS. DiSANTO: I think the easiest way to make the  
20 division is that public funds are those funds that are received  
21 by a Legal Services program from some state or federal entity.  
22 A good example of that could be Title III or Title XX funds that

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1 are used for senior citizens.

2 The way of looking at private funds, we usually  
3 identify that a private foundation of sorts is providing those  
4 funds to the Legal Services providers and, where the area then  
5 becomes, I guess, a little grayer is when you are dealing with  
6 IOLTA funds on a state-by-state basis.

7 MS. SWAFFORD: Would something like a fund from a  
8 private Bar or State Bar Association, would that be considered a  
9 grant from a private fund?

10 MS. DiSANTO: It would depend. Usually, those funds  
11 are considered IOLTA funds, the interest on lawyers' trust  
12 accounts. That, you would have to look to the specific state  
13 law and to the specific entity on how it is created.

14 MS. SWAFFORD: You said something about some private  
15 funds can be used for prohibited activities.

16 MS. DiSANTO: I'm sorry?

17 MS. SWAFFORD: Did you say that some think private  
18 funds can be used for prohibited activities?

19 MS. DiSANTO: Yes.

20 MS. SWAFFORD: That is not your thinking?

21 MS. DiSANTO: We have evidence that private funds have  
22 been used for prohibited activities. The argument that is set

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1 forth is that the documents -- since the documents do not  
2 specifically state that these funds are for the provision of  
3 legal assistance, the presumption is made that they may be used  
4 for any purpose that the Legal Services provider sees fit.

5 MS. SWAFFORD: Prohibited or not prohibited?

6 MS. DiSANTO: Precisely.

7 MS. SWAFFORD: Is that your position, that that can be  
8 done?

9 MS. DiSANTO: No. I think MAC has consistently taken  
10 the position that private funds are to be used consistent with  
11 the LSC Act and its regulations.

12 CHAIRMAN VALOIS: We are addressing allocations of  
13 resources, building, salaries and so forth. Another resource we  
14 have is people. It occurs to me that if a program gets a large  
15 private fund grant -- let me use an example -- to serve the  
16 needs of battered women, just to make one up, and that obviously  
17 takes some manpower.

18 Do we have any knowledge -- if the answer to that is  
19 no, I'm going to ask if you have an opinion -- about whether we  
20 then hire additional people to take care of the grant or we use  
21 existing staff, or is there a pattern or practice?

22 MS. DiSANTO: Generally, when private funds are

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1 received by Legal Services programs, the work is usually divided  
2 up among the existing staff at the time.

3 A good way of looking at this is through the refunding  
4 applications in which our programs will identify various staff  
5 attorneys and they will tell us that sixty percent of this  
6 attorney's salary is charged to LSC and the remaining portion is  
7 charged to non-LSC.

8 Usually, they will use existing staff. Indeed, I  
9 guess, even for an example of a current example, we have a  
10 request to buy a copier machine under 1630. Numerous letters  
11 went back and forth trying to make a determination as to why do  
12 we suddenly need this giant copier machine.

13 One of the responses was that they had recently  
14 received some non-LSC funds and they needed this machine to take  
15 care of a lot of the work that was going to be done as a result  
16 of this thing, this influx, of non-LSC funds.

17 We responded, "Well, could you not use the non-LSC  
18 funding source to pay for the copier that you now have a need  
19 for as a result of your having received non-LSC funds?"

20 MS. SWAFFORD: Were those non-LSC funds designated for  
21 a specific kind of service?

22 MS. DiSANTO: I couldn't answer that question for this

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1 specific instance. I could not tell you exactly what the non-  
2 LSC funds were for.

3 MS. SWAFFORD: So, you don't know whether they were  
4 prohibited or not prohibited?

5 MS. DiSANTO: At this point, no.

6 CHAIRMAN VALOIS: It seems to me, if I understand your  
7 testimony correctly, what you are saying is that there are some  
8 instances -- how many, I guess we don't really know -- in which  
9 the priorities and purposes of the Legal Services recipients'  
10 attorneys have their work diverted or occupied in varying  
11 degrees by attention being paid to non-LSC activities.

12 Is that a fair summary of what you are saying?

13 MS. DiSANTO: Yes.

14 CHAIRMAN VALOIS: I take it, because we do not have  
15 record keeping, we do not know the extent to which that is  
16 happening?

17 MS. DiSANTO: Right. You could not -- you have no  
18 assurance on your allocation, on your money, on whether or not  
19 LSC money is, in fact, being used for prohibited activities as a  
20 result of the current, usual system that is used by our Legal  
21 Services programs.

22 CHAIRMAN VALOIS: You have already answered this

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1 question. There are two alternatives. Either you can hire  
2 additional attorneys and staff to carry out the private purpose  
3 or you can receive from, retract from the number of poor people  
4 you are serving and just absorb that additional funding.

5 MS. DiSANTO: Right.

6 CHAIRMAN VALOIS: Okay.

7 MR. SMEGAL: You mentioned a January '87 MAC report.  
8 I do recall seeing that. It sounds to me like what you also  
9 said was, in addition to those matters that were reported in  
10 that particular document, there are others now that you are  
11 monitoring.

12 I don't recall that I have seen any update on that  
13 January '87 report. Is there another document that I should  
14 have where you summarize these things that you are talking  
15 about?

16 MS. DiSANTO: In writing, I think the most recent  
17 information, particularly on the prohibited activities, is in  
18 the May 27th responses to Senator Rudman.

19 MR. SMEGAL: What were those?

20 MS. DiSANTO: I'm sorry?

21 MR. SMEGAL: What were those?

22 MS. DiSANTO: Basically, in that document, LSC

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1 reported that there are Legal Services programs who are using  
2 private funds for prohibited activities, including, I guess, and  
3 not limited to organizing, networking and lobbying, which are  
4 specifically prohibited by the LSC Act.

5 MR. SMEGAL: Is that a document that is here?

6 MR. SHEA: I may have a copy.

7 MS. DiSANTO: I can get you a copy, Mr. Smegal.

8 MR. SHEA: I may have one here.

9 MR. SMEGAL: Thank you.

10 MR. SHEA: Do you want it right now?

11 MR. SMEGAL: Well, if we are going to discuss it.

12 CHAIRMAN VALOIS: We are discussing that in the  
13 context of the need for this change in the regulation.

14 MR. SHEA: That's correct.

15 CHAIRMAN VALOIS: I think we should keep in mind there  
16 are, I guess, at least three categories. There are approved  
17 purposes, prohibited purposes and I guess the third category is  
18 permissive, neither prohibited or approved, is that correct,  
19 services?

20 (No response.)

21 CHAIRMAN VALOIS: We have got three categories for the  
22 receipt of the funds, ours -- that is, LSC -- public funds and

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1 private funds? IOLTA, in the opinion of some, falls into both  
2 public or private.

3 MR. SMEGAL: I might point out to you that the State  
4 of California, the California Supreme Court in a decision of  
5 February 23 has made it pretty clear that activities by the  
6 State Bar of California are not private; they are public. IOLTA  
7 is public in the State of California.

8 CHAIRMAN VALOIS: I tend to think that is probably  
9 correct in every state that I can imagine.

10 MR. WEAR: Mr. Chairman?

11 CHAIRMAN VALOIS: Yes, Mr. Wear.

12 MR. WEAR: In looking at that question and in looking  
13 at the case about which Mr. Smegal spoke, if the program -- that  
14 is, the IOLTA program -- is a mandatory program and lawyers  
15 don't have any discretion on it, it appears that those programs  
16 would be classified as public.

17 If, however, an IOLTA program is voluntary and there  
18 may be some other wrinkles with regard to a particular voluntary  
19 program, in general, those voluntary programs are probably  
20 private, but we continue to review that.

21 CHAIRMAN VALOIS: Mr. President, isn't it a fact that  
22 in some cases, the money may be collected on a voluntary basis

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1 and then, under your category, be private, but then be put into  
2 the hands of a public agency under the control of an  
3 administrative arm of the courts and perhaps change its  
4 character from private to public?

5 MR. WEAR: It might.

6 CHAIRMAN VALOIS: That is certainly the case in  
7 Florida, I think.

8 MR. WEAR: We focused on the example of California  
9 here very recently. I'm not familiar with the one in Florida.

10 CHAIRMAN VALOIS: I'm going to take a Valois two-  
11 minute recess to get something to drink.

12 MR. SMEGAL: Are we going to continue in your absence?

13 CHAIRMAN VALOIS: No.

14 (A brief recess was taken.)

15 CHAIRMAN VALOIS: We are back in session.

16 Ms. DiSanto, Mr. Smegal had another question, I  
17 believe.

18 MR. SMEGAL: Yes.

19 MS. DISANTO: I'm sorry. I don't have the exhibits  
20 that --

21 MR. SMEGAL: I don't think I need them. I'm looking  
22 at the Rudman letter to which you referred. I was trying to

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1 determine in my own mind what there was beyond what we had  
2 before us in January of '87.

3 It looks to me like what was provided to Mr. Rudman  
4 was no different than that. There is a footnote that I see here  
5 referring to some monitoring of 16 national support centers in  
6 1986. As a recall, your January '87 MAC report was that, so as  
7 of May 27, 1988, there is no more data beyond what there was in  
8 January of '87, is there?

9 MS. DiSANTO: I believe there was some additional data  
10 included in that, Mr. Smegal. I think it was, in particular,  
11 with the National Center for Youth Law, I believe.

12 MR. SMEGAL: Well, the only footnote you have refers  
13 to monitoring of these national support centers identified  
14 examples of problems and abuses which occurred subsequent to--  
15 your footnote talks about other monitoring business but it makes  
16 no reference to anything that was found.

17 MS. DiSANTO: Since, Mr. Smegal, we have been on  
18 additional monitoring visits that have identified additional  
19 abuses with non-LSC funds by Legal Services programs.

20 MR. SMEGAL: I understand what you are saying, but I  
21 am asking you what document reflects it. Where is there a  
22 document that summarizes what those -- for lack of a better

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1 term, I will accept your term "abuses", but we looked at a  
2 report back in January of '87.

3 I am looking now at what Senator Rudman was provided  
4 with and I see no examples of abuses that have been discovered  
5 since 1986 in this material. Now, I am not suggesting that  
6 there aren't any; I don't know that.

7 I am just saying that you referred me to a letter of  
8 May 27, 1988, and I have looked at it and I do not see where  
9 there are any in this letter. I am trying to determine what it  
10 is that we are -- what we are dealing with now that we did not  
11 have before us in January of '87.

12 What is the difference?

13 MS. DiSANTO: You are dealing with the --

14 MR. SMEGAL: What do I have before me, not what you  
15 have before you. What do I have before me?

16 MS. DiSANTO: Before you, you have the '88 responses  
17 to Mr. Rudman that I believe address a lot of the 1986 on-site  
18 reviews of various programs with regard to 1010(c).

19 MR. SMEGAL: But those were addressed in January of  
20 '87 in the MAC report.

21 MS. DiSANTO: Yes. We have no -- I will tell you I do  
22 not have an updated document. I merely have that information

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1 which I have gathered since the most recent on-site reviews of  
2 various programs.

3 MR. SMEGAL: That is not in the document anywhere that  
4 I have and it was not in any document anywhere that Senator  
5 Rudman got. Something you are telling me about today that I  
6 have not seen --

7 MS. DiSANTO: I am going to rely on my memory here a  
8 little bit, but I believe that some of the exhibits did address  
9 post-1986 on-site reviews. I am relying on my memory there and  
10 I do not have all of the exhibits that went with that document  
11 with me here.

12 MR. SMEGAL: My concern was that I looked over those  
13 footnotes in the January '87 report and I think the record will  
14 reflect we had a meeting. The public record will reflect that  
15 the assertions made in some of those footnotes, if not  
16 incorrect, were distorted, and that is probably a kind term.

17 I am wondering what we have got to deal with here.  
18 What is the reality here?

19 MS. DiSANTO: I do not have a new document for you in  
20 the same terms of that January 1987 document, but I can tell you  
21 that we have been on hundreds of on-site reviews since that time  
22 and have continued to identify the fact that private funds

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1 continue to be used for prohibited activities.

2 MR. SMEGAL: Okay.

3 CHAIRMAN VALOIS: Mr. Smegal has permitted me to take  
4 a look at the letter. The letter makes reference to a number of  
5 exhibits.

6 MS. DiSANTO: I can provide those.

7 CHAIRMAN VALOIS: Do you have any objection to letting  
8 the witness take a look at that letter?

9 MR. SMEGAL: Certainly not, as she just gave it to me.

10 CHAIRMAN VALOIS: Are these exhibits with you?

11 MS. DiSANTO: No, I don't have the exhibits with me to  
12 that particular letter.

13 CHAIRMAN VALOIS: The exhibits contain something  
14 relevant to this?

15 MS. DiSANTO: I believe so. I am relying on my memory  
16 there, but there is no recent report in the type of that January  
17 1987 report at this point in time.

18 CHAIRMAN VALOIS: Okay. Proceed. Any other questions  
19 of Ms. Di Santo?

20 (No response.)

21 CHAIRMAN VALOIS: If there are no other questions from  
22 Members of the Board, at this time, we will let Mr. Houseman or

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1 Mr. Cutler speak.

2 Mr. Houseman? I congratulate you, as always, Mr.  
3 Houseman, on presenting written comments. I know you have had  
4 numerous conversations and opportunities to discuss the present  
5 subject with Mr. Shea and you and he have reached some  
6 compromises which, I take it, are incorporated in what is before  
7 us.

8 Presentation by Alan Houseman

9 MR. HOUSEMAN: Well, I do not think on this issue we  
10 have reached any compromises, maybe the private law firm issue.

11 Let me tell you what I want to do. I want to talk a  
12 little bit about the impact of this proposal as currently  
13 written.

14 CHAIRMAN VALOIS: You are talking about 1610 now?

15 MR. HOUSEMAN: 1610. I want to talk about it  
16 generally just to give you the overall feel.

17 Then I want to talk about the legal issue, the several  
18 legal issues. I want to first talk about 1010(c) itself and  
19 then I want to talk about the three remaining provisions that  
20 you are suggesting be incorporated here.

21 Finally, I want to come back to this question of  
22 presumptions and record-keeping that we were just talking about.

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1 That is sort of the order that I plan to go in. There is a lot  
2 to cover. It is not all stated in my comment or other comments,  
3 although what I am trying to do is distill from a set of  
4 extremely excellent comments the major points.

5 I want to first start by clearing the air a bit. This  
6 term "abuses" is a loose term. I'll get to this when we talk  
7 about 1010(c), but let's be quite clear about this. All of the  
8 reports that I've seen, including the January 27, '87 report and  
9 the May '88 report documented uses by programs of private funds  
10 for prohibited activities, yes.

11 But that begs the question of whether those funds were  
12 restricted by 1010(c) and that is really --

13 CHAIRMAN VALOIS: When you say "prohibited  
14 activities", you mean LSC prohibited activities?

15 MR. HOUSEMAN: That is right. There is no doubt that  
16 private funds are received by LSC recipients and used for  
17 activities that they could not use LSC funds for; there is no  
18 doubt about that.

19 CHAIRMAN VALOIS: I don't think there is necessarily  
20 any disagreement.

21 MR. HOUSEMAN: Right. That is not necessarily an  
22 abuse. I want to be quite clear about that. It's only an abuse

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1 if --

2 CHAIRMAN VALOIS: Now you are getting into the legal  
3 issues. Why don't you address --

4 MR. HOUSEMAN: Yes. What we need to talk about is  
5 private funds that are restricted and private funds that may not  
6 be restricted, so when you said that there are three categories  
7 of funds, let's be clear: There is not.

8 There are at least four: There are LSC funds; there  
9 are public funds -- there's actually five. There are tribal  
10 funds, which are treated as public funds. Then there are two  
11 categories of private funds. There is no dispute that there are  
12 two categories.

13 The question is: What are the dividing lines between  
14 these categories? One category of private funds are private  
15 funds that are restricted. Another category is private funds  
16 that are not restricted. I want to come back to that.

17 I do not want to start there, because I want you to be  
18 clear as to what is going on here.

19 CHAIRMAN VALOIS: I mean, when you told me the order  
20 of what you were going to present, I was happy because I really  
21 do want to know. You call it "impact". I call it "effect". I  
22 want to know what is the effect of passing this regulation.

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1 That is the most important part.

2 MR. HOUSEMAN: That's what I'm going to talk about  
3 first.

4 CHAIRMAN VALOIS: The legal stuff, we'll work out.

5 MR. HOUSEMAN: Unfortunately, I have to get into the  
6 legal stuff. I wish I didn't, but I do.

7 CHAIRMAN VALOIS: Fine.

8 MR. HOUSEMAN: What is the impact of this regulation?  
9 First, it is going to reduce private funds to programs. It is  
10 going to reduce private funds to programs because many sources  
11 of private funds go to programs for activities that would now be  
12 restricted by the proposed changes you are about to make or you  
13 are considering making.

14 That is, it will go to programs for representation of  
15 non-LSC eligible clients; they go to programs for broad general  
16 legal research; and, they go to programs for activities that,  
17 under your interpretation that's in the preamble, would now be  
18 restricted.

19 A consequence is that programs are going to lay off  
20 staff; they are going to reduce the number of clients served and  
21 they are going to have to close offices as a consequence of  
22 this. I can give you numerous examples of this, but I want to

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1 just say that what this does is inevitably reduce private funds.

2 It also reduces private funds that would be available  
3 for the representation of eligible clients, not just ineligible  
4 clients. The reason for that is that many public and private  
5 funding sources give money for the representation of both  
6 eligible and ineligible clients, but won't give money solely for  
7 the representation of eligible clients. The whole pot will dry  
8 up.

9 A classic example of this is that many programs  
10 receive funds under Title III(b) of the Older Americans Act for  
11 representation of the elderly. They must put up a 15 to 25  
12 percent match depending on what state you are in and a variety  
13 of other factors.

14 Title III(b) absolutely prohibits a means test from  
15 being used by statute, by federal law. You cannot use a means  
16 test. They cannot fund a program that uses a means test; that's  
17 the other side of it, so that Title III(b) cannot give funds to  
18 a Legal Services program which uses a means test for those  
19 funds.

20 Now, most of the clients served with Title III(b)  
21 funds are, in fact, eligible clients.

22 CHAIRMAN VALOIS: How do you know that? Do you have

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1 some data?

2 MR. HOUSEMAN: Yes, because most of the elderly that  
3 the Legal Services program sees when they do not use Title  
4 III(b) as a match are eligible clients. The Administration on  
5 Aging has done some spot surveys and concluded that most are  
6 eligible clients, but you can't use a means test so you can't  
7 sort that out definitively.

8 The comments make that crystal clear. Most of the  
9 clients served under Title III(b) would be eligible clients.  
10 Most of them are on SSI. Most of them are on Social Security.  
11 They are automatically eligible.

12 CHAIRMAN VALOIS: What you are saying is that --

13 MR. HOUSEMAN: They are automatically eligible under  
14 the LSC Act.

15 CHAIRMAN VALOIS: Some older people are eligible; some  
16 older people are not eligible, eligible meaning under our Act.

17 MR. HOUSEMAN: That's right.

18 CHAIRMAN VALOIS: They may have needs, whether they  
19 are technically eligible under our Act or not.

20 MR. HOUSEMAN: That's correct.

21 MS. SWAFFORD: But we can't ask.

22 MR. HOUSEMAN: You can't ask; that's correct.

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1 MS. SWAFFORD: That is the means test.

2 MR. SMEGAL: Title III(b).

3 MR. HOUSEMAN: Title III(b).

4 MR. SMEGAL: Prohibits asking.

5 CHAIRMAN VALOIS: The programs can't ask is what you  
6 are saying.

7 MR. HOUSEMAN: That's right. Neither can the  
8 Corporation ask about Title III(b). You could ask about LSC  
9 funds.

10 Today, the current situation that a program can use  
11 private funds to match those Title III(b) funds and LSC doesn't  
12 look into that issue. This would change that, so it not only  
13 reduces private funds that will come to programs; it reduces  
14 private funds that would be available for representation of  
15 eligible clients.

16 In addition, there are other consequences of this that  
17 are much more abstract in some sense. They are not unimportant.

18 It certainly is going to increase tensions between various  
19 private foundations and private agencies' legal services  
20 programs.

21 What you are doing is you are telling those agencies  
22 they cannot fund certain activities that they now fund, have

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1 been historically funding and which they feel the local Legal  
2 Services program is the most important agency and the most  
3 effective agency to deliver those activities.

4           There is a whole host of those activities, not only  
5 the representation of non-LSC eligible clients like elderly,  
6 like disabled clients, like domestic violence victims, but  
7 providing training to social services agency personnel,  
8 providing training to mediation agencies, a whole range of  
9 things.

10           The consequence is that many private donors who now  
11 give money that can be used for both representation of eligible  
12 clients and non-eligible clients are not going to give money to  
13 the Legal Services program for that.

14           Finally, in terms of an introduction, clients are  
15 going to lose under these proposals. They are going to lose  
16 access to staff with broad knowledge and expertise, who won't  
17 work for a provider.

18           They are going to suffer reduced services. They are  
19 going to receive less training because LSC funds can't be used  
20 for client training, only private funds, public funds. They are  
21 going to lose advocates they now have in various forms where  
22 there are restrictions on LSC funds.

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1           In some cases, they are going to lose access to any  
2 legal services that can serve them, so that the impact generally  
3 of this is to reduce funds that are available, to reduce  
4 services that are available and to cause clients problems.

5           Now, let's just talk about the impact on some of the  
6 examples more specifically. The comments make clear that today,  
7 LSC recipients get private funds to represent a range of  
8 ineligible clients.

9           They get private funds to represent battered women and  
10 battered women's shelters.

11           MR. SMEGAL:     You are talking about financially  
12 ineligible clients?

13           MR. HOUSEMAN:   Yes, financially.

14           MR. SMEGAL:     When you say "ineligible clients", you  
15 mean financially?

16           MR. HOUSEMAN:   Yes, this entire discussion is premised  
17 on financially ineligible clients.

18           MR. SMEGAL:     There is no other definition of  
19 "ineligible" in this particular --

20           MR. HOUSEMAN:   That we are talking about right now,  
21 no.

22           CHAIRMAN VALOIS:   What is the definition in our

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1 statute?

2 MR. HOUSEMAN: I'll get to that when we get to the  
3 statute.

4 Many programs represent battered women, battered  
5 women's shelters. For a variety of reasons, they can't apply a  
6 means test, often because the funding source won't let them but  
7 sometimes because the battered woman does not have access to  
8 records or the records are in the husband's name and time  
9 prevents getting access to records to verify eligibility, so  
10 they serve them. They use private funds for this.

11 Legal Services represents residents of mental health  
12 facilities, many of whom are not LSC-eligible but who are  
13 otherwise unable to afford an attorney. I have talked about the  
14 elderly, disabled persons, the P&A system.

15 Many Legal Services programs are the protection and  
16 advocacy program in the state. Under the Developmental  
17 Disability Act, each state must set up a protection and advocacy  
18 program for disabled people.

19 There is no means test in these protection and  
20 advocacy programs and, in fact, regulations prohibit a means  
21 test in these protection and advocacy programs and in three-  
22 fourths or four-fifths of the states, the Legal Services program

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1 in the state is the P&A system in the state.

2           There are examples of this in the comments. Minnesota  
3 has an excellent example, but there are about fifteen examples  
4 in the comments of this. Private funds are used as a match to  
5 the P&A money which is a requirement of the P&A system, no means  
6 test, or that money will dry up.

7           Many, many programs have provided representation to  
8 homeless shelter providers. There are a number of comments on  
9 that. They have provided representation to nonprivate housing  
10 development corporations and housing cooperatives.

11           Obviously, both of these, if you provide  
12 representation to shelter providers and nonprofit housing  
13 development corporations, the consequence is that you are  
14 helping to build housing for poor people, for low-income people,  
15 for our clients, and you are thereby aiding our clients.

16           There is a range of other examples. One of the most  
17 interesting, I thought, was --

18           CHAIRMAN VALOIS: On the last point, you may or may  
19 not, Alan. I don't think you can say -- you meant nonprofit  
20 housing corporations; right?

21           MR. HOUSEMAN: Yes.

22           CHAIRMAN VALOIS: They may or may not meet our

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1 eligibility rules, as we are using the phrase today.

2 MR. HOUSEMAN: That's correct.

3 CHAIRMAN VALOIS: They may meet somebody else's.

4 MR. HOUSEMAN: That's correct.

5 There are similar kinds of providers, not-for-profit  
6 food providers, community development organizations, child care  
7 providers and nonprofit centers. These are all from the  
8 comments. They are today being served and, under this reg,  
9 would likely not be able to be represented.

10 One of the more interesting comments, I thought, was  
11 made by the Omaha program about a Farm Mediation Program which  
12 serves farmers in the mediation program. Some farmers are  
13 eligible; some aren't, but the program prohibits a means test  
14 and will not give them the money for this mediation program to  
15 conduct the mediation program if the means test is used.

16 Now, there is no doubt that in each of the examples I  
17 have given and I can give many more. By the way, another public  
18 example, many Title XX funds are given out and require a match.  
19 In many of the cases, the Title XX eligibility limits are much  
20 higher than the LSC eligibility limits, and the match must be  
21 used to represent all the Title XX eligible clients, because  
22 Title XX has a much higher eligibility than our LSC eligibility

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1 guidelines.

2           Those are a number of examples of this. In each of  
3 these examples, benefits accrue to eligible clients and, in many  
4 of these examples, the funds are not available for other  
5 representation; that is, programs are not going to receive these  
6 funds if they are limited to financially eligible clients.

7           CHAIRMAN VALOIS: Let me interrupt you again, Alan.  
8 You said benefits accrue to eligible clients. What do you mean  
9 by that?

10           MR. HOUSEMAN: In all kinds of ways. One, they accrue  
11 because some of these funds go directly to the representation of  
12 eligible clients and noneligible clients, like the housing  
13 example. If you are representing a nonprofit housing  
14 development corporation, building housing for low-income people,  
15 low-income people benefit by this.

16           CHAIRMAN VALOIS: Again, that's not necessarily true  
17 of all the people. In Title XX, I mean, all old people are old,  
18 but not all old people are poor.

19           MR. HOUSEMAN: I am not saying all. I said that there  
20 are benefits to eligible clients from these.

21           CHAIRMAN VALOIS: Maybe. I mean, they probably are.  
22 Some.

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1 MR. HOUSEMAN: Certainly, some if not many.

2 CHAIRMAN VALOIS: Yes.

3 MR. HOUSEMAN: And, as many of the comments pointed  
4 out, as I said, these funds will be withdrawn if they are not  
5 used for the purposes for which they are given.

6 The consequence of this proposal is, in fact, to dry  
7 up funds generally and to dry up funds that could go to the  
8 representation of eligible clients.

9 CHAIRMAN VALOIS: Again, when you say "dry up funds",  
10 you mean --

11 MR. HOUSEMAN: Dry up funds from --

12 CHAIRMAN VALOIS: -- divert them from Legal Services  
13 recipients?

14 MR. HOUSEMAN: Well, they may not go anywhere, but  
15 divert them from Legal Services recipients.

16 MR. WEAR: Alan, do you have any numbers as to how  
17 much or what the magnitude of the private funds is for each of  
18 the categories that you have picked out?

19 MR. HOUSEMAN: No, and I don't think that there is any  
20 way that I know of to find that out.

21 What we have is a number of comments that lay all this  
22 out.

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1 MR. WEAR: We have comments that say that these things  
2 may happen. You don't have any numbers to show what the  
3 magnitude of those changes, if they occurred, would be?

4 MR. HOUSEMAN: You have them; I don't. You have the  
5 number of programs that receive Title III(b) funds; you have the  
6 number of programs that receive protection and advocacy funds.  
7 I don't know what that number is.

8 I think we are talking about probably in the nature of  
9 ten to fifteen million dollars, maybe more, I would guess, as a  
10 rough guess.

11 MR. WEAR: What percent of that is the total private  
12 funds?

13 MR. HOUSEMAN: A third. That's a guess. It may be  
14 higher.

15 MR. WEAR: Since there is that much private money out  
16 there, is it possible for these organizations to set up a  
17 separate corporation that is not part of LSC and to do that  
18 activity and to utilize that private fund that way?

19 MR. HOUSEMAN: I don't know. Under your Audit Guide  
20 that you adopted in '86 and the opinions that you have taken  
21 previously, you can't set up an interrelated organization.

22 MR. WEAR: No, it wouldn't be interrelated. It would

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1 be completely separate, some other outfit out there that will do  
2 this.

3 MR. HOUSEMAN: Somebody else? There may or may not be  
4 other outfits that would do it.

5 MR. WEAR: If there is a market there for it, some of  
6 the people that are currently part of the various Legal Services  
7 programs could go out and do that on their own.

8 MR. HOUSEMAN: Sure, and that will drive some of the  
9 better people out of the Legal Services program and they will be  
10 somewhere else. Clients will use that expertise and knowledge.

11 MR. WEAR: What is the turnover rate now in the  
12 program of people leaving?

13 MR. HOUSEMAN: I don't know what the turnover rate is.  
14 It has diminished considerably over the last several years.

15 All right, now, there is one other set of impact, I  
16 think, or two other sets of impacts are important to understand  
17 before we get to some very technical discussions.

18 The second category that you are adding that is not  
19 there now is broad general legal or policy research. Translated  
20 out, what is the impact of adding that into those groups of  
21 activities that are restricted?

22 CHAIRMAN VALOIS: Wouldn't it immediately make more

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1 man hours available to serve clients?

2 MR. HOUSEMAN: No.

3 CHAIRMAN VALOIS: Why not?

4 MR. HOUSEMAN: Because the money for these activities  
5 comes from private sources and, in virtually every case, the  
6 private source will not give that money to the Legal Services  
7 program.

8 CHAIRMAN VALOIS: And if they do not give it to the  
9 Legal Services program, man hours will not be consumed  
10 performing the broad policy research.

11 MR. HOUSEMAN: That's right, and the Legal Services  
12 program will have to cut staff; they will have to close offices.

13 CHAIRMAN VALOIS: I don't know whether they will or  
14 not. You're not telling me, are you, that these grants are  
15 continuous rather than intermittent?

16 MR. HOUSEMAN: Most of them --

17 CHAIRMAN VALOIS: Do we lay people off when we don't  
18 have a broad policy question to be researched?

19 MR. HOUSEMAN: No, many, many programs, probably in  
20 the range of fifty to sixty, I would guess, maybe higher,  
21 receive grants from private foundations on a continuing basis  
22 and, in many circumstances, as these comments state over and

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1 over again, the foundations will not give money for litigation;  
2 they will not give it for direct advocacy.

3 CHAIRMAN VALOIS: There are plenty of private firms,  
4 non-LSC, who will do broad policy research, aren't there?

5 MR. HOUSEMAN: In some areas, no. There are a number  
6 of examples of that in here, in the comments.

7 MR. WEAR: But, again, if there was a demand for this,  
8 it is like our grants.

9 MR. HOUSEMAN: It doesn't work like the private  
10 market. The Ford Foundation does not go out and fund private  
11 practitioners to do a study of subsidized housing.

12 MR. WEAR: No, but if the Ford Foundation has money,  
13 Alan, it's like our program. We have \$300 million a year and we  
14 have all kinds of grantees that sprung up to absorb that money.  
15 It's like the Defense Department. When they have a program  
16 going, there are all kinds of people who spring up to get  
17 involved in it.

18 MR. HOUSEMAN: That's not what happens with Legal  
19 Services.

20 MR. WEAR: But, in this case, if there is a demand for  
21 it, it may be that some of the people from Legal Services  
22 programs will go out and do that; it may be that that money

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1 would be taken up by other sources, other people, at a  
2 university or someplace else.

3 MR. HOUSEMAN: Be clear what you are doing. It may  
4 not be taken up or it may be taken up. What you are doing is  
5 you are taking away from the foundations the ability to fund  
6 what, in their judgment, is the best people to do it.

7 You are telling the foundations that they cannot fund  
8 certain kinds of programs to do certain things that they think  
9 those programs can do better than others. That is what you are  
10 doing.

11 MR. WEAR: We are telling our programs to focus their  
12 resources on serving the poor rather than on --

13 MR. HOUSEMAN: They are doing that now.

14 MR. WEAR: -- fringe activities.

15 MR. HOUSEMAN: These are not fringe activities, first  
16 of all. Second of all, they are doing that now.

17 CHAIRMAN VALOIS: Congress meant something in this  
18 section here. This "broad general policy" is not something that  
19 the General Counsel invented. It is in the statute.

20 MR. HOUSEMAN: First of all, let me get to the  
21 argument on it, if you wish. The statute does not prohibit  
22 broad general legal policy research. Show me where it is

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1 prohibited. There is no prohibition in the statute against  
2 that.

3 The statute says you cannot make a grant or contract  
4 to do that but you can do it yourself.

5 CHAIRMAN VALOIS: Now you are getting to the legal  
6 issue about whether we can spend our money to have you do it;  
7 right? Isn't that the legal issue?

8 MR. HOUSEMAN: You can spend your money and then hire  
9 me as a consultant to do it. There is no question about that.

10 CHAIRMAN VALOIS: I mean one of the recipients.

11 MR. HOUSEMAN: You can hire a recipient as a  
12 consultant to do it; there is no question about that, I think.  
13 What you can't do is give a grant or a contract to a program to  
14 do broad general legal or policy research. That's what this  
15 section is all about.

16 CHAIRMAN VALOIS: I thought you just said we can do  
17 that.

18 MR. HOUSEMAN: You cannot give a grant or a contract  
19 to a program whose purpose is to do broad general legal or  
20 policy research.

21 MR. WEAR: If that's the substantive effect of the  
22 statute and 1010(c) applies the substantive effect of these

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1 prohibitions --

2 MR. HOUSEMAN: That is not what it does.

3 MR. WEAR: It goes through and it applies it here,  
4 does it not?

5 MR. HOUSEMAN: No, because this is not a prohibition.  
6 There is no prohibition on --

7 MR. WEAR: It substantively prohibits the corporation  
8 from contracting in the manner that you've outlined.

9 MR. HOUSEMAN: That's right. It does not prohibit a  
10 recipient from doing that, though. It is not a prohibition on a  
11 recipient's activities.

12 MR. WEAR: It is a prohibition on the use of our  
13 funds. It limits our ability --

14 MR. HOUSEMAN: It limits how you can do it; that's  
15 correct.

16 MR. WEAR: It is a limitation on the use of our funds.

17 MR. HOUSEMAN: For what you can do with your funds;  
18 that is correct.

19 MR. WEAR: It limits our funds, limits the funds that  
20 the Corporation can provide to grantees for various and sundry  
21 purposes; that limitation also applies to the private funding  
22 through 1010(c).

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1 MR. HOUSEMAN: No, it doesn't.

2 MR. SMEGAL: It doesn't. That is not correct, Terry.  
3 The Act says the Corporation cannot spend money in a certain  
4 way. The Act does not say a recipient cannot go out and find a  
5 funding source to allow them to do research or litigation in all  
6 those ways. You are looking at the wrong end of the tunnel.

7 Let me give you an example about it. Let's go back to  
8 where we were a minute ago. There is an organization in San  
9 Francisco called the Youth Law Center that I was very much  
10 involved in for a long time. It has no federal funding any  
11 longer.

12 When it goes to the Ford Foundation to make a  
13 presentation, it is not competing with Boeing and Hughes for an  
14 airport contract or an airlines contract; it is going to Ford  
15 Foundation and asking them to do some funding that they wouldn't  
16 even realize needed to be done.

17 They aren't sending out a grant opportunity and  
18 saying, "Hey, guys, come on in and tell us what you can do in  
19 this particular area of the law." The Ford Foundation has lots  
20 of requests for the use of its money.

21 A program such as the Youth Law Center goes to the  
22 Ford Foundation and makes a presentation and says, "We think you

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1 should spend some of your money in this way." It isn't the  
2 airline industry; it isn't the defense industry; it isn't any of  
3 that.

4 If those people did not show up on that doorstep and  
5 ask for that grant, the Ford Foundation wouldn't know they  
6 existed. The Ford Foundation has a line of people waiting for  
7 grants and that subject would never get to the front door. It  
8 is an entirely different circumstance than what we are talking  
9 about.

10 MR. WEAR: Is that the same circumstance for our field  
11 programs? In other words, the grantees of these private sources  
12 of money are not going to them offering money? Our grantees  
13 are, in fact, going to the Ford Foundation and others and  
14 soliciting the money?

15 MR. SMEGAL: It may or may not. I think both of those  
16 situations exist, Terry, but the point is --

17 MR. WEAR: I am just asking now. I thought he might  
18 now.

19 MR. SMEGAL: -- it is not the Defense Department going  
20 out and trying to find someone to build a missile. Somebody is  
21 going to the Ford Foundation and saying, "There is an area of  
22 the law that needs some research. There is an area of the law

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1 that needs some litigation. There are poor people involved in  
2 it. It's elderly, it's abused women, whatever it is, and we  
3 think you should give us a grant to go and do something about  
4 this."

5 MR. WEAR: That is what our grantees are doing. They  
6 are going to various and sundry entities and asking for this  
7 money.

8 MR. SMEGAL: Yes, sure.

9 MR. HOUSEMAN: Wait. Two things happen. Two things  
10 happen, let's be clear. First, our grantees who are strapped  
11 for funds go to the Ford Foundation to try to get money to  
12 maintain their staff that they currently have.

13 The Ford Foundation says, "We are not going to fund  
14 litigation. We will fund you to do a case study on subsidized  
15 housing problems but we won't fund you to do litigation." By  
16 giving them that money, two questions arise, two consequences  
17 happen.

18 First, the program is able to retain staff that it  
19 otherwise would have to get rid of and, secondly, the program  
20 produces a report, a case study, if you wish, on the problems of  
21 subsidized housing. That case study is also turned into a legal  
22 memorandum.

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1 Both of those are made available not only to the  
2 program staff but to staffs around the country and that  
3 information is used by Legal Services attorneys in their  
4 representation of eligible clients, so everybody benefits.

5 The funds are not diverted away to some fringe  
6 activity. The funds are directly used, ultimately, in  
7 representation of eligible clients, but the Ford Foundation  
8 won't give that program the money to do litigation.

9 The consequences of this activity are not to divert  
10 resources away from activities relevant to the representation of  
11 poor people, but to enhance the ability of those programs to  
12 provide such representation.

13 CHAIRMAN VALOIS: We will get on with this, because we  
14 will disagree or argue. We can speculate about whether or not  
15 the research would be performed by somebody else or would not.

16 MR. HOUSEMAN: In that case and in virtually all of  
17 the cases I know of, it wouldn't.

18 CHAIRMAN VALOIS: Wait a minute now. You don't know  
19 whether that would or not. Some private law firms, such as your  
20 own, would perhaps be willing to undertake that; that's number  
21 one.

22 Number two, quite frankly, as a policy matter, we may

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1 decide that we would rather have our attorneys directly serving  
2 the poor rather than engaging in this research.

3 MR. HOUSEMAN: They are engaged in serving the poor.  
4 The restriction, again, is on broad general legal or policy  
5 research. It is not on whether you serve the poor or not. This  
6 activity I just described -- and there are a host of comments on  
7 a number of activities -- all relate to serving the poor.

8 CHAIRMAN VALOIS: Let's go ahead.

9 MR. HOUSEMAN: There are a number of examples of this.  
10 Now let me give you an example of the opposite. We are talking  
11 here about a grantee going to the Ford Foundation.

12 Many foundations come to our programs and ask them to  
13 undertake reports or studies because they think the program is  
14 the best place to do it and there are a number of comments on  
15 that in the record.

16 For example, in Denver, a foundation in Denver, the  
17 Teton Foundation, came to the Denver Legal Aid Society and said  
18 to the Denver Legal Aid Society, "We want you to do a study of  
19 service delivery in two neighborhoods in Denver."

20 The reason they came to the Legal Aid Society is  
21 because it is the only entity the representatives from those two  
22 communities in Denver, one Hispanic and one black, would accept

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1 as a neutral entity.

2 As a consequence of that, the Legal Aid Society was  
3 able to retain a staff person that they otherwise would have let  
4 off, and they were able to do a study that benefited both the  
5 Hispanic and the black community in Denver. Those kinds of  
6 things happen all the time.

7 So, it seems to me that the consequence of the broad  
8 general legal or policy research is the same as the consequence  
9 of ineligible clients. Funds will be dried up. Staff will  
10 leave and you are losing the expertise that exists out there.

11 Now, as to the legal argument on both of these issues,  
12 I just want to refer you to what the statute says, after all.  
13 The statute says, first of all, that the funds that are affected  
14 are those for the provision of legal assistance and, second of  
15 all, the restrictions are on any purpose prohibited by this  
16 Title.

17 The language, "any purpose prohibited by this Title",  
18 with one exception, was used uniformly throughout the  
19 legislative debate, and seems to me to mean something. The  
20 question, then, is what is a prohibited purpose, not what is a  
21 restricted activity. That question you have to answer, it seems  
22 to me, by looking at the Act.

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1 I do not think representation of a financially  
2 ineligible client is a prohibited purpose for a number of  
3 reasons. First of all, the Act defines the purpose as  
4 representing clients unable to afford inadequate legal counsel,  
5 not just clients who are eligible under LSC financial  
6 guidelines.

7 The financial eligibility provision in the Act sets  
8 out what limited LSC funds should go for but nowhere in the Act,  
9 nowhere in the legislative history, is there any suggestion that  
10 it is a prohibited purpose for Legal Services recipients to be  
11 serving financially ineligible clients.

12 Indeed, when the Act was passed, virtually every  
13 provider of Legal Services, when the Act was passed, served  
14 financially ineligible clients and Congress was fully aware of,  
15 and the legislative history in '73 and '74 indicates that  
16 Congress was fully aware of that.

17 Never was there a suggestion that that was to be  
18 included within the restrictions on 1010(c). The entire  
19 legislative debate around 1010(c) focused on prohibited  
20 activities and talked explicitly and the illustrations used were  
21 prohibited activities.

22 Second, you mentioned the broad general legal or

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1 policy research. This is a much more complicated statutory  
2 construction issue than I think we have dealt with so far, but  
3 you have got to look at the statute to understand what it is  
4 that is and is not meant by this.

5 Tom Smegal, the questions that he raised, I think,  
6 pinpoint the problem, but this section of the Act, first of all,  
7 the section of the Act on broad general research is not in any  
8 of the sections of the Act that impose restrictions. It is in  
9 the sections of the Act that authorize grant making for LSC.

10 Secondly, it is in that part, 1006(a)(3), which is  
11 talking about activities relating to the delivery of legal  
12 assistance. It says that certain activities relating to the  
13 delivery of legal assistance that can be done by grant or  
14 contract, one of those is research, except that certain kinds of  
15 research can only be done by the Corporation. That is the  
16 structure of the Act.

17 Obviously, other kinds of research can be done by  
18 recipients. Nowhere in here, in this section or any other  
19 section, nowhere is this meant to be a prohibition, and nowhere  
20 in the legislative history is there any discussion of this as a  
21 prohibition.

22 Finally, we have class actions. I have not really

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1 referenced it previously and just a quick word about it,  
2 clearly, the class action restriction is not a prohibition; it  
3 is a procedural issue.

4 Class actions are not restricted. As a practical  
5 matter, this probably doesn't have significant impact on most  
6 programs, but there are some programs that it would have some  
7 impact on which receive a significant amount of their funding  
8 from private sources and not LSC and do not now utilize the same  
9 procedures for bringing class actions.

10 Those are the three issues that are here. There is a  
11 fourth issue which I want to discuss because it relates to the  
12 second of these statutory phrases or the first, as the case is,  
13 provision of legal assistance.

14 This has less to do with the presumption. It has to  
15 do with your interpretation of what the phrase "provision of  
16 legal assistance" means. Let's go back to the statute. The  
17 statute says the funds affected are those for the provision of  
18 legal assistance.

19 The history of that is that when Representative Kwi  
20 (phonetic) on the House Floor in 1973 introduced this amendment  
21 to the LSC Act, his amendment originally applied to all funds.  
22 His amendment said, "Funds received by any recipient from a

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1 source other than the Corporation, including public funds."

2           There was an amendment on the House Floor. There was  
3 no debate on the amendment at all. It was adopted. Then, the  
4 Senate bill had nothing in it, no reference to this issue in the  
5 Senate bill, so there is no discussion in the committee reports  
6 on this.

7           The conference bill, however, does two things. It  
8 adds the exception for public funds to a bunch of other  
9 exceptions and it limits the scope of this to funds provided for  
10 the provision of legal assistance. It does that deliberately  
11 and there is discussion about it, uniformly throughout the  
12 entire Act, which talks about funds provided for delivering  
13 legal services to eligible clients.

14           What we have is a prohibition on funds received for  
15 the provision of legal services, those funds are the funds that  
16 are restricted. Under your interpretation, new interpretation,  
17 I might add, you appear, in the preamble and in the discussion  
18 from Emilia DiSanto, to be defining the phrase "provision of  
19 legal assistance", to mean virtually any activity a Legal  
20 Services program would undertake.

21           If that is so, then the consequence of this change and  
22 this interpretation is to prevent Legal Services programs, using

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1 private funds, to do a number of things that you can't do with  
2 LSC funds, for example, training clients, training lay  
3 volunteers.

4           You cannot use LSC funds to train clients or to train  
5 lay volunteers unless the clients are a member of the client  
6 board. Private funds can be used for training clients and  
7 training lay volunteers today; under this interpretation, they  
8 couldn't be.

9           I mentioned earlier there is a Farm Mediation Project  
10 that Omaha has funded by private funds. It involves training  
11 mediators who are not lawyers and not paralegals. It involves  
12 supervision of those mediators. That could not be done any  
13 longer under this interpretation.

14           Delaware has a community legal education program.  
15 They put out a pamphlet on lead-based paint that is circulated  
16 to all kinds of folks, eligible and noneligible. I don't think  
17 that could properly be done under this.

18           The Denver Legal Aid Society again is about to give or  
19 has given -- I'm sorry. The Junior League in Denver has given  
20 the Denver Legal Aid Society a grant to train and supervise  
21 Junior League volunteers who will conduct child support  
22 enforcement clinics in Denver.

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1           Some of the child support people that would be served  
2 by these lay volunteers are noneligible clients; in addition,  
3 the Denver Legal Aid would be training and supervising  
4 nonlawyers and non-paralegals. Under this interpretation of the  
5 Act, they couldn't do that.

6           The third impact is on a number of activities that now  
7 are currently being done by programs, many of which Members of  
8 your Board have encouraged programs to do which would no longer  
9 be able to be done.

10           Those are at least the major issues that need to be  
11 addressed. Let me say a couple of things about a couple of  
12 other issues. First, the change that was proposed that I saw  
13 for the first time today and that you saw for the first time  
14 today, I presume, on page 4 of the hand-out, which adds the  
15 phrase "subrecipient" to the presumption is not, in my view at  
16 least, a technical change.

17           It is, in fact, a substantive change. Today, most  
18 subrecipients do not believe that their independent, private  
19 funds are restricted. Private funds they receive from the  
20 recipient are restricted, but they do not believe their  
21 independent private funds are restricted.

22           There is some disagreement about this, but most

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1 subrecipients do not believe that. This change clearly will  
2 mean that any private funds of a subrecipient are now going to  
3 be covered the same way as any private funds of a recipient, so  
4 that if you have a Bar Association that has independent private  
5 funds and it is a subrecipient, its private funds are now  
6 restricted under this change, as I understand it. That, to me,  
7 is a substantive change, certainly in the regulations if not in  
8 policy.

9 I think, in all fairness, you should publish that  
10 change for comment so that subrecipients understand what is  
11 happening here. Many Bar Associations and PAI programs are  
12 going to be surprised by the inclusion of this in this  
13 regulation, so I don't think it is a technical issue at all.

14 There were a number of statements made by Emilia  
15 DiSanto about recordkeeping and, obviously, I do not have an  
16 ability to immediately respond to all of the issues she raised  
17 because I have not seen some of the data that she referred to.

18 I have seen both the January and the May reports which  
19 I don't think -- first of all, her statement and those data  
20 don't have anything to do with the addition of financially  
21 ineligible clients and broad general legal research or class  
22 actions to this regulation. That information is irrelevant to

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1 this. That information is relevant only to the presumption  
2 issue.

3 Let me just point out that you passed a regulation,  
4 Part 1630, and we debated it ad infinitum in front of this  
5 committee and in front of this board and this regulation, 1630,  
6 was designed to address virtually every one of the accounting  
7 problems that Ms. DiSanto suggested.

8 Under this regulation, you must allocate funds between  
9 funding sources in a consistent and timely manner. We fought  
10 that out. We must follow general accounting practices, and this  
11 regulation follows general government, nonprofit, accounting  
12 profits.

13 You have to have some vehicle of allocating those  
14 funds that is supported by general accounting practices and by  
15 your auditor. You do not necessarily have to use time records  
16 to do that but you must have in place a system that works from  
17 day one to allocate those funds appropriately.

18 I think this regulation covers the problem. I do not  
19 think you need this new presumption, but in terms of what was  
20 said here today, virtually all of the issues that were raised  
21 are addressed by this regulation.

22 CHAIRMAN VALOIS: 1630.12?

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1 MR. HOUSEMAN: 1630.4, the allocation issue; 1630.4 is  
2 the heart of this regulation. It is the standards covering  
3 accountability of costs and appropriation grants or contracts.

4 CHAIRMAN VALOIS: Look at 1630.12 and tell me what you  
5 think that has got to do with it.

6 MR. HOUSEMAN: That has to do with whether this  
7 regulation affected private funds, not whether LSC funds had to  
8 be accounted according to certain principles. That is, the  
9 regulation didn't affect private funds; that is mainly addressed  
10 to 1630.5, the unallowable costs.

11 Part 1630.4 covers the accounting practices of a  
12 program. It isn't limited to just LSC funds. You can't do it  
13 that way. 1630.4 sets out standards for allocation between  
14 restricted and nonrestricted funds.

15 For all of the kinds of issues that were just  
16 discussed under 1630.4, the programs would have to have in place  
17 an allocation system that appropriately allocates funds under  
18 general nonprofit and general accounting practices between  
19 various sources of grants and have to have documentation in  
20 order to show where those funds went.

21 So, I can't respond to what the problems are. I  
22 haven't seen them. What I have seen --

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1           CHAIRMAN VALOIS: Maybe you haven't looked.

2           MR. HOUSEMAN: Well, I know something about 1630 and I  
3 know something about how the programs are doing the  
4 implementing. I've read many monitoring reports.

5           CHAIRMAN VALOIS: You would agree with Ms. DiSanto if  
6 we had the information that she speaks of already, it would be  
7 easier to evaluate the effect of this.

8           MR. HOUSEMAN: Most of the reports that I've seen in  
9 the last year have not found violations of 1630 and they've  
10 looked at them. They have not found that there has been a  
11 difficulty allocating funds between funding sources.

12           I have not read every single one of them, but I  
13 probably have read fifty or sixty.

14           CHAIRMAN VALOIS: The question of violation aside, you  
15 would agree that we could better evaluate this proposal if we  
16 knew how these times, in particular, were allocated to different  
17 funding sources?

18           MR. HOUSEMAN: In most cases, I think you can't  
19 implement 1630 without some kind of a timekeeping system, or you  
20 have to have an accounting system that is, you know, the  
21 presumptions are tested out in some way.

22           The programs that I have been working with, which are

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1 quite a few, have such systems in place. They may not be  
2 functional accounting but there is accounting between various  
3 grants.

4 CHAIRMAN VALOIS: How about manpower? Do they  
5 allocate manpower?

6 MR. HOUSEMAN: Yes, overhead, manpower, all of that.

7 Now, when you say an auditor comes back at the end of  
8 the year and looks at an audit and makes some auditing  
9 decisions, that, first of all, is consistent with 1630 and  
10 consistent with general accounting practices. Let's be clear  
11 about that.

12 If your accounting system in place is allocated over  
13 the year, various sources of funds in various ways in a timely  
14 fashion, and an auditor at the end of the year may come back and  
15 take a look at that allocation system and make some adjustments.  
16 It happens all the time. It happens with my audit every year.

17 It is not changing the rules of the game in midstream.  
18 It is just the normal auditing procedure. It depends on how you  
19 spread your cost. I spread my costs, for example, based on  
20 timekeeping, so my costs and my program, between five or six  
21 different grants, are spread by timekeeping.

22 My auditors have spread them until the end of the year

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1 for the purposes of the audit, but they are all allocated during  
2 the year based on the time that is kept. These are accounting  
3 terms. I think that most of that testimony went to the issue of  
4 the presumption.

5 Finally, I've got two other points to make. One is  
6 that the record before you and Ms. DiSanto's testimony does not  
7 support the changes you are proposing to make with regard to  
8 either financially eligible clients or broad general legal or  
9 policy research.

10 Second, I think you've got your retroactivity problem  
11 that you ought to try to address whatever we do with this  
12 regulation, which is that programs are now receiving private  
13 funds for various activities. I don't want to create a problem  
14 where programs end up in violation of something because of a  
15 change in your regulation.

16 CHAIRMAN VALOIS: Do you mean we ought to have an  
17 effective date that is --

18 MR. HOUSEMAN: Well, an effective date or some  
19 grandfather provision that grandfathers in grants a program has  
20 already received where they are using those funds for the  
21 representation of financially ineligible clients or undertaking,  
22 you know, studies, et cetera. Clearly, those are not today

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1 restricted.

2           Finally, I do not think this constitutional issue is  
3 so clear-cut, but I don't want to get into an argument about it.  
4 We have been through it before, but I do think that this raises  
5 constitutional problems; 1010(c) has always raised  
6 constitutional problems.

7           This, particularly with regard to reports and studies,  
8 raises constitutional problems no different from the kind of  
9 constitutional problems that were raised around the lobbying  
10 regulation.

11           To some degree, this raises those same kinds of  
12 problems. You do not have them in parts of 1010(c). You do  
13 have them if you include particularly non-eligible clients and  
14 broad general research within the scope of 1010(c).

15           CHAIRMAN VALOIS: The general counsel has a different  
16 opinion; I know you have and Mr. Cutler has one, too.

17           MR. HOUSEMAN: In any case, I think, again, I would  
18 indicate that the effect of this is going to be to reduce funds  
19 and reduce what programs can do and it is going to diminish the  
20 capacity of Legal Services programs to do the kind of work that  
21 they are now doing, and I do not think you want to do that.

22           MR. WEAR: Again, though, by your testimony a third of

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1 these private funds is associated with this thing and the other  
2 two-thirds would go to represent the basic clients and take care  
3 of their individual day-to-day problems, as has been the intent  
4 of the Corporation, would it not?

5 MR. HOUSEMAN: Yes.

6 MR. WEAR: Yes.

7 MR. HOUSEMAN: I do not know what the amount of that  
8 figure is. It could be higher or lower than one-third.

9 MR. WEAR: Yes.

10 MR. SMEGAL: Where does the one-third come from?

11 MR. HOUSEMAN: He asked me for a guess and I made a  
12 guess.

13 MR. WEAR: Well, I asked you for a number and that was  
14 the number you gave me.

15 MR. HOUSEMAN: I said I am estimating that roughly a  
16 third or even higher of private funds would dry up by this  
17 regulation.

18 CHAIRMAN VALOIS: Fellow Board Members, we --

19 MR. HOUSEMAN: Maybe more, for all I know, and some  
20 public funds would dry up, all the Title III(b) and the P&A  
21 funds would dry up, too.

22 CHAIRMAN VALOIS: We told Mr. Cutler he could talk.

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1 Now let's give him a chance. I know Mr. Houseman is going to be  
2 available.

3 Mr. Cutler?

4 MR. SMEGAL: I have a question of Ms. DiSanto, but  
5 that can wait.

6 CHAIRMAN VALOIS: Yes.

7 Presentation of Edward Cutler

8 MR. CUTLER: Thank you, Mr. Chairman and Members of  
9 the Committee. You have already had a long day and I am not  
10 going to try to prolong it too much. You have a big day  
11 tomorrow, too.

12 I appreciate the opportunity to be here on behalf of  
13 the American Bar Association through the Standing Committee on  
14 Legal Aid and Indigent Defenders of which I am a member. The  
15 few times that I have had occasion to visit the Board Members  
16 and some of the committee meetings, they have been very  
17 illuminating to me.

18 I know you are all trying to do your job and it is not  
19 easy. I was impressed upon receiving today the comments that  
20 have been compiled that were submitted by February 23rd by the  
21 various persons who responded to the invitation to comment.

22 I wish I could have read all of them. I hope you will

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1 have a chance to read some of them. They are very graphic  
2 illustrations of the impact which the adoption of rules like  
3 this will have.

4 I think, Mr. Chairman, your initial concern was the  
5 impact. While I represent lawyers and I am a lawyer, I think  
6 that is something that I would like this committee to keep  
7 foremost in its mind: What will the impact be?

8 I know we all are very grateful that there are private  
9 funds available to help provide legal services to persons who  
10 cannot afford to provide them. The fact that our federal  
11 government cannot fund a social program to pay for all such  
12 legal services means that the money and the services have to  
13 come from some other source.

14 I only wish that the Bar could provide them all and  
15 excuse the Corporation from any further duties. We cannot do  
16 that, but I do think that the Bar is doing a splendid job of  
17 contributing to the furnishing of legal services to those who  
18 need them.

19 I am impressed by the fact that you have already made  
20 on change, recognizing that private law firms' contributions  
21 ought not to be in this regulation. I am concerned that there  
22 will be a serious effect on the huge number of IOLTA dollars

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1 that may be coming from IOLTA sources that are not or cannot be  
2 considered public funds, and there must be some.

3 Florida has only recently adopted a compulsory  
4 program. It has not really gone into effect fully, as of yet.  
5 California, I believe, has now approved it and there are some  
6 other states that have.

7 While large funds are involved in the states that have  
8 adopted mandatory programs, the bulk of the programs are still  
9 not mandatory. It seems very short-sighted to me to say that  
10 they cannot furnish any funds to a recipient of funds from Legal  
11 Services Corporation.

12 If that is the import of this, unless those funds are  
13 used only for the indigent, those who are eligible under your  
14 Act --

15 CHAIRMAN VALOIS: Expand a little on that, because I  
16 do not really see why that is so radical. Why can't this  
17 Corporation say, you know, Congress has given us some guidance  
18 about eligibility and talked about eligibility.

19 Why cannot we, as a policy matter, decide that the  
20 only people we want our recipients serving are eligible clients,  
21 somebody else, some other private foundation, some law firm,  
22 some public interest law firm. Somebody else can take

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1 prohibited funds, private funds, and do whatever they want with  
2 them.

3 MR. CUTLER: That could be the Congressional policy  
4 and then --

5 CHAIRMAN VALOIS: Why is it so radical?

6 MR. CUTLER: I didn't say it was radical.

7 CHAIRMAN VALOIS: No, I did.

8 MR. CUTLER: I said it was short-sighted.

9 CHAIRMAN VALOIS: Short-sighted, okay.

10 MR. CUTLER: Because I think it is just rejecting  
11 large funding availability to your recipients who can get those  
12 funds if they are not restricted to purely indigent eligible  
13 users. I say it is short-sighted because I do not think you  
14 ought to say that we will support only those recipients who deal  
15 purely with the indigent. I think that is about what you are  
16 saying.

17 CHAIRMAN VALOIS: That's close.

18 MR. CUTLER: I think it is awful, because what you are  
19 doing is segregating and saying --

20 CHAIRMAN VALOIS: Eligible poor from poor.

21 MR. CUTLER: -- if you are poor, you can go to a  
22 particular agency and it won't do any work for anybody else, and

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1 it won't provide any services in any program where it might be  
2 helping somebody other than the poor, directly.

3 CHAIRMAN VALOIS: Mr. Cutler, isn't that so of many  
4 federal programs, that unless you are eligible, you meet their  
5 eligibility guidelines, you need not darken their door because  
6 they will not serve you? That's not uncommon.

7 MR. CUTLER: Now, what you are doing is saying that  
8 every recipient is a federal agency. I don't think that you  
9 intend that.

10 But, I am more concerned about the overall impact, not  
11 the legalities of it. I am concerned that you would tell one of  
12 your recipients, "Either you confine yourself to serving  
13 eligible people, regardless of whether you can get money to  
14 serve a mixed group of people who may have very deserving needs,  
15 we just don't want you doing anything else."

16 That is about what I hear from President Wear. I  
17 think I hear that from him: We don't want you to use any of  
18 your personnel to do anything even if you can get paid by  
19 somebody else for doing it.

20 To me, that is so short-sighted. In the first place,  
21 it is going to make second class citizens out of the recipients,  
22 the lawyers who are not going to be the best qualified lawyers

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1 if they are going to be confined to the limited purposes of this  
2 Act, regardless of whether they can be funded for other things  
3 by other people.

4           What I really think you are doing is using a canon or  
5 at least an Uzo or automatic machine gun to strike down any  
6 agency, any recipient, who maybe isn't accounting one hundred  
7 percent correctly for his funds. I think that's what you are  
8 doing.

9           You are concerned about the administrative features of  
10 letting an employee who can do some work for eligible and some  
11 work for noneligible, because you are afraid some of the money  
12 that is provided by the federal government might be used in some  
13 way for the ineligible.

14           I think that is what you are doing and may I just add  
15 one more thing. I do not think you are just cutting down,  
16 restricting, curtailing and maybe even putting out of business  
17 some of your recipients, but I think you are driving some of  
18 them away and maybe they will become that agency that you are  
19 talking about that can handle the IOLTA monies. They will just  
20 abandon you and go to work for somebody else.

21           CHAIRMAN VALOIS: Why is that bad?

22           MR. CUTLER: Well, you will lose a recipient. You

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1 will lose somebody who had been doing a job.

2 CHAIRMAN VALOIS: But they will be doing the job for  
3 the people you just said --

4 MR. CUTLER: Yes, but they won't be doing your job,  
5 and that is what you are funding, your job. I think you want to  
6 fund it unless you just really don't want to fund it. That's a  
7 different point. I think you want to fund your job.

8 CHAIRMAN VALOIS: I'm not sure you're right, that we  
9 are going to keep all the bad lawyers, if we have some, and run  
10 all the good ones off. I'm not sure that's right.

11 MR. SMEGAL: It's the qualified versus the less  
12 qualified. It's the senior partner in your law firm, Bob,  
13 versus the young associate who just came out of law school;  
14 that's what we are talking about.

15 MR. CUTLER: I shouldn't have used those words. You  
16 know, the American Bar Association adopted our committee's  
17 recommendations on standards for the provision of legal services  
18 to the poor.

19 One of the things that we said was they've got to be  
20 the best. They've got to do the best kind of job. It's like  
21 the federal judges. If you tell the federal judges that they  
22 are not going to have a diversity of cases, and all they are

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1 going to have is drug cases, some of them are going to leave the  
2 bench. That is, I think, merely an alternate to the other  
3 proposition.

4 You may drive some of them away. You are certainly  
5 going to dry up their money and you may put them out of business  
6 for that reason.

7 MR. WEAR: Let me ask a couple of things, if I can,  
8 and let me back up by saying the intent of this regulation, it  
9 was not formulated because there are accounting problems. I  
10 know there are accounting problems and the Corporation is going  
11 to address those, too. I do not intend to ignore anything.

12 The thing that is driving this regulation is to try to  
13 focus our resources on the people that need those resources the  
14 most. We went through this contest in the food stamp area when  
15 I was a member of the staff of the Senate Agriculture Committee  
16 and I am reasonably familiar with those arguments. Most of  
17 them are the same kinds of arguments that we have heard here  
18 today.

19 Our intent is to try to focus our private resources on  
20 these individuals that need service.

21 MR. CUTLER: Private resources?

22 MR. WEAR: Yes, sir; yes, sir.

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1 MR. CUTLER: I think I misunderstood that.

2 MR. WEAR: By applying our restrictions here, our  
3 intent is that these private funds will be used for the purposes  
4 in the Act, used for the purposes of the Act.

5 MR. SMEGAL: Those are not our funds, are they, Mr.  
6 Wear? I mean, the private funds are not our funds.

7 MR. WEAR: Those private funds are subject to  
8 regulation under the statute.

9 MR. SMEGAL: Whose funds are they? I mean, I'm  
10 sitting here and I think the funds I have to worry about are LSC  
11 funds. Now, you are telling me that my funds are private funds?  
12 Those aren't my funds, Mr. Wear.

13 MR. WEAR: That's not the comment at all.

14 MR. SMEGAL: That's what you just said.

15 MR. CUTLER: I'm sure we have a misunderstanding,  
16 because that's why I couldn't understand what you were saying.

17 CHAIRMAN VALOIS: He is saying once we get the private  
18 fund in our house, in our checkbook, they are then our private  
19 funds and we want to spend them on eligible clients.

20 MR. CUTLER: But, then, you have to assume that  
21 private funds will be delivered to the federal government for  
22 the use --

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1           CHAIRMAN VALOIS: To our recipients.

2           MR. CUTLER: I don't know whether we are getting  
3 around to that yet.

4           CHAIRMAN VALOIS: We have had plenty of testimony  
5 today and at other times that some of the private funds are  
6 given to us unrestricted, right?

7           MR. CUTLER: Sure.

8           MR. SMEGAL: Therefore, we can restrict them, right?

9           MR. CUTLER: I have no problem with that, if they give  
10 them on an unrestricted basis to you to spend, just like a gift  
11 can be made to the federal government, like people who fail to  
12 pay their income tax send a secret gift. That can be used by  
13 the government.

14           MR. SMEGAL: The point that Mr. Valois is making now  
15 is that they come to us unrestricted and we can restrict them if  
16 we want to.

17           CHAIRMAN VALOIS: We can restrict them to eligible  
18 clients; that is exactly what the point is.

19           MR. CUTLER: The point, of course, will be that those  
20 very donors are going to stop giving if they are going to be  
21 restricted. Why would the --

22           CHAIRMAN VALOIS: Maybe they will; maybe they won't.

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1 MR. CUTLER: Why would our IOLTA in Florida ever want  
2 to give anything directly to the federal government when it can  
3 handle these programs on its own and, preferably, it could give  
4 some to your recipients who could use the money wisely? But,  
5 they are certainly not going to give it if their own programs  
6 call for something broader.

7 Let's say they want to give something for battered  
8 women. What are you going to do? Just say, "No, you can't give  
9 money for battered women. If you want us to use it for anything  
10 but poor?"

11 CHAIRMAN VALOIS: I think everybody on this Board has  
12 recognized that as an issue. I will speak for myself. That is  
13 an issue. That whole litany that Alan went through, I think,  
14 needs some further development.

15 MR. CUTLER: But that's a practical effect.

16 CHAIRMAN VALOIS: I understand.

17 MR. CUTLER: I am not talking law. I am talking about  
18 the practical effect of this. It can only be discouraging to  
19 have private funds taken away from your recipients.

20 CHAIRMAN VALOIS: I don't know why you are discouraged  
21 about focusing -- I don't think you really mean that. I don't  
22 think you really mean that you are discouraged about focusing

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1 all money or as much money as we can get in our funnel on the  
2 neediest of the poor.

3 MR. CUTLER: I agree with that.

4 CHAIRMAN VALOIS: That is what we are talking about.

5 MR. CUTLER: I think the measure you are using is  
6 wrong, the means you are using, because there is where we get  
7 into the canon or the shotgun. You are saying, "We want to  
8 spend our time and we'd like to have our people to spend as much  
9 of their time as they can and devote their good services to the  
10 people that our corporation has been created to help."

11 CHAIRMAN VALOIS: Right. Eligible.

12 MR. CUTLER: Absolutely, but you are not going to get  
13 the money, you are not going to get that support, from anybody  
14 who wants to help a bigger group, whether they want to help the  
15 aged that you can't fund or whether they want to help battered  
16 women or maybe even immigrants or somebody else.

17 To me, it is short-sighted. I guess we can disagree  
18 on that.

19 CHAIRMAN VALOIS: I understand what you are saying.

20 MR. CUTLER: That is where I think your policy is  
21 wrong. I think the effect, therefore, is going to be really  
22 very bad if this is adopted.

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1           If you are presently allowing and can allow your  
2 recipients to receive private funds, let them use it on an  
3 unrestricted basis provided they account properly for that. To  
4 me, that is the way they go.

5           CHAIRMAN VALOIS: Another alternative is to put a  
6 limitation on it. Tom?

7           MR. SMEGAL: I want to make a comment, because I am  
8 really hung up on what you and Mr. Wear just said. I think I  
9 heard you say, and maybe this is the whole crux of it all, that  
10 any money a recipient receives is our money, our, LSC, you, I,  
11 the rest of this Board and our Corporation. Is that what you  
12 are saying?

13           MR. WEAR: No, that's not correct, Mr. Smegal.

14           CHAIRMAN VALOIS: Not necessarily.

15           MR. WEAR: That money --

16           MR. SMEGAL: I think the record will reflect --

17           MR. WEAR: That money is subject to regulations  
18 through this statute.

19           MR. SMEGAL: I understand that.

20           CHAIRMAN VALOIS: You said if it is unrestricted money  
21 then --

22           MR. SMEGAL: The record will reflect that you said,

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1 "You give me unrestricted money and now it is mine to restrict."

2 MR. WEAR: The record will show what the record will  
3 show.

4 MR. SMEGAL: That's right, and I am referring to what  
5 you said earlier. If our recipient gets money, it's our money  
6 and we can do anything we want with it; we can restrict it any  
7 way we want.

8 CHAIRMAN VALOIS: No.

9 MR. WEAR: No, that's not correct, Mr. Smegal.

10 CHAIRMAN VALOIS: You are forgetting what you said.  
11 What you said is, "If it's unrestricted funds and you give it to  
12 us without restrictions --

13 MR. SMEGAL: First off, it isn't given to us. It is  
14 given to our recipient. We don't get it. We don't ever get it.  
15 It's not ours.

16 CHAIRMAN VALOIS: Thank you. I appreciate that. But  
17 now, our recipients have these unrestricted funds they gave us,  
18 i.e., without restriction, without -- now, whose money is it?

19 MR. SMEGAL: It is theirs. It is not ours.

20 CHAIRMAN VALOIS: Okay.

21 MR. SMEGAL: How could it become ours?

22 CHAIRMAN VALOIS: They gave it to us.

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1 MR. SMEGAL: They didn't give it to us. Somebody gave  
2 it to a recipient. They didn't give it to us.

3 CHAIRMAN VALOIS: That's what I'm talking about.

4 MR. SMEGAL: I mean, there is a difference. We are  
5 not them. We have recipients and we are the Legal Services  
6 Corporation. We have federal funds that Congress gives us to  
7 distribute to our recipients. The recipients have other funding  
8 sources -- private, other public sources. That money is not our  
9 money.

10 Now, I agree with you that Congress has given us,  
11 under this statute, the right to place some restrictions on how  
12 those recipients can use other funds, but that does not make it  
13 our funds. You are talking about it as if it is our money and  
14 we can do anything we want with it.

15 MR. WEAR: Mr. Smegal, that is absolutely not correct  
16 and you know that.

17 MR. SMEGAL: Well, that is what the record is going to  
18 reflect you said, Mr. Wear.

19 MR. WEAR: The record will not reflect that.

20 MR. SMEGAL: Well, then, what is it we are talking  
21 about here?

22 MR. WEAR: We're talking about the ability of the

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1 Corporation to regulate private funds; that is what this is  
2 about. The intent of the regulation is to focus those private  
3 funds on those persons that are most in need.

4 We have heard a lot of testimony and I am sure we will  
5 hear more this spring when the authorization cycle starts, about  
6 the unmet need that exists in this country for the provision of  
7 legal services.

8 The intent of this regulation is to focus all those  
9 resources that are available to our grantees on those that are  
10 most in need. That is what this is about.

11 MS. SWAFFORD: Let me comment on that just a minute.

12 CHAIRMAN VALOIS: Ms. Swafford, I recognize you.

13 MS. SWAFFORD: Are you recognizing me? Thank you.

14 I have been laboring under the misinformation that the  
15 purpose of this Board was to meet the unmet legal needs of the  
16 poor. Now, if our recipients are to take some of this money  
17 that you say are funds not from Legal Services and use monies  
18 that we have no control over, then we listened to a man here  
19 today who was on the board who went over and over the fact that  
20 one of the complaints of their program was that there were many  
21 needs that never got met.

22 Why in the world are we even arguing about this? I

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1 mean, I realize we need the regulation, but it just seems to me  
2 absolutely preposterous that we are going -- that our recipients  
3 are going to be agents to do some of these things out here that  
4 probably are good. Maybe they are not, though.

5 Now, have I missed the mark entirely?

6 MR. CUTLER: You missed the mark in this respect. You  
7 are quite right if you want to have an integrated system whereby  
8 you have a Legal Services Corporation and every recipient is an  
9 agent of the Corporation and, therefore, an agent of Uncle Sam  
10 that opens its doors only to the indigent, yes, you are right.

11 But, if you want to maintain some kind of quality  
12 program, why shoot down with this excessive shooting ability,  
13 why shoot down these great opportunities to let them get the  
14 money, let them serve people and let them respond, and let them  
15 be audited. They are audited, anyway.

16 'I don't see what the problem is. Let them be audited.  
17 Let them not spend the government's money on non-government  
18 purposes, but remember, too, I call these recipients mixed-use  
19 organizations.

20 If you don't want any mixed-use organizations, sure,  
21 adopt this kind of regulation.

22 MS. SWAFFORD: Do you mean other things than meet the

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1 needs of the poor?

2 MR. CUTLER: Yes.

3 MS. SWAFFORD: There should be other things out there,  
4 but that's not what the Act says.

5 MR. CUTLER: But that does not prevent you from giving  
6 money to the recipients who will use it only for the poor, and  
7 that is your job.

8 Look, you make contracts with law firms that represent  
9 other clients. You are going to do that with all kinds of  
10 people. You are going to continue to do that.

11 MS. SWAFFORD: Yes, but we are not paying them for  
12 their representation of other clients.

13 MR. CUTLER: Exactly. Why can't you say the same  
14 thing to your recipients? We do not pay you for doing the work  
15 where you are spending the money of other donors. Why not do  
16 that?

17 This is almost like saying that lawyers ought not to  
18 be able to provide any legal services to your recipients because  
19 they do other work, as well. Uncle Sam is not going to bear  
20 this alone. He cannot do it himself.

21 Why not do it in some cooperative way and don't just  
22 shoot down everything because you've got some accounting

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1 problems? You are still going to spend your own money only to  
2 help the indigent and you have a right to do so.

3 CHAIRMAN VALOIS: Mr. Cutler, that's not --

4 MS. SWAFFORD: Wait a minute. We are using our  
5 resources for them to do these other things.

6 MR. CUTLER: What other than money?

7 MS. SWAFFORD: We just heard testimony today from Ms.  
8 DiSanto that said it is impossible to determine, really, how  
9 much manpower goes for this and how much for rent and overhead  
10 and everything; at least, that is what I thought I heard her  
11 say.

12 MR. CUTLER: I missed that and I do not know. I  
13 cannot believe that that is true. In the first place, you have  
14 got auditing standards. You have certified public accountants  
15 that can certify to something. It's done all the time by all  
16 businesses; that's not to say that there is never cheating.

17 But, I cannot see why it cannot be handled. I think  
18 that your accounting measures, your regulation, probably is  
19 designed for that. I like the idea of a presumption. I think  
20 you are entitled to it. I don't like the particular language,  
21 and I want to make some other suggestions, but I think that's  
22 the way to go.

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1           Sure, they are entitled to a presumption. But don't  
2 shoot everything down just because you are afraid you won't  
3 catch every penny.

4           CHAIRMAN VALOIS: The point, Mr. Cutler, that I think  
5 you are mistaken on or maybe overlooked, and Mr. Houseman went  
6 through a long list of examples here, which I will state in a  
7 slightly different way.

8           Not all of these farm people engaged in this farm  
9 mediation program are necessarily indigent or necessarily meet  
10 our eligibility guidelines.

11           MR. CUTLER: I learned that the first year in college.  
12 It is logical.

13           CHAIRMAN VALOIS: Not all battered women are poor, for  
14 that matter; rich women get beat up, too. We have a mixed  
15 problem here. You are correct. It is partially a reporting  
16 problem, partially an accounting problem. We also have a policy  
17 issue, I think.

18           MR. CUTLER: You can go ahead and decide you don't  
19 want to do anything or have any recipient that does anything but  
20 take care of the indigent. You can do that. Maybe the  
21 legislation provides for that. I hope the Congress did not mean  
22 that. I know you have not amended it up until now.

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1           CHAIRMAN VALOIS: But every meeting I've gone to over  
2 the last four years is that we are turning away eligible  
3 clients. I have heard that once or twice.

4           One answer Mr. Houseman might supply us, if he had the  
5 floor, is more money, but he doesn't have the floor.

6           MR. CUTLER: I would say that's probably the answer  
7 every recipient is going to give you.

8           CHAIRMAN VALOIS: Another might be to redirect the  
9 resources.

10          MR. CUTLER: We are spending time on other things. We  
11 want to fool around with a class action; we don't want to fool  
12 around with you. You know they can't do much of that, anymore.  
13 We have done a lot toward reducing that diversion of funds.

14          I don't think that that is a great issue. We heard  
15 about this report, the post-1986 monitoring scandals. I do not  
16 think there really have been any to speak of. You haven't seen  
17 any. Maybe it's in those exhibits that were submitted to  
18 Senator Rudman -- maybe. It's sure not in the text.

19          I think you have overblown that problem. Well, that  
20 gets only to the practical issue. I think it is the most  
21 important one. We, as lawyers, can address the legal issue. I  
22 think that Mr. Houseman did a great job.

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1 I will refer you to the Chairman of my Committee's  
2 letter which is in your yellow book, and I hope you have a  
3 chance at least to glance at that before you make a  
4 recommendation. Maybe you will be ready to make a  
5 recommendation tomorrow.

6 CHAIRMAN VALOIS: I've had all those comments for  
7 several days and I've read them all..

8 MR. CUTLER: Well, Joanne Garvey, in just four pages,  
9 gives you every legal point that we could make and I think they  
10 are sound. I am not going to try to do them here. I think Mr.  
11 Houseman has done a good job in reviewing them.

12 I think that Mr. Shea has been fair in his general  
13 analysis of these comments, but you really have to read them.  
14 If you have read them, you can see how graphic some of them are  
15 and how they think they will be affected.

16 CHAIRMAN VALOIS: Thank you, very much.

17 MR. WEAR: Let me ask one question. Mr. Cutler, you  
18 mentioned that you might have some suggestions on the  
19 presumption.

20 MR. CUTLER: It won't take me long. It won't take me  
21 long.

22 MR. WEAR: What I've got is a four-page handout here.

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1 Mr. Shea, do you have another one of these so that we are all  
2 singing off the same song sheet?

3 MR. SHEA: Yes.

4 CHAIRMAN VALOIS: Is this 1610 or 1611?

5 MR. CUTLER: It is 1610.4. I go along with Alan's  
6 remark about subrecipients. That is a new issue. I think we  
7 really need to know more about it before you can have that  
8 reference to subrecipients.

9 I guess I am not bothered by clear and convincing  
10 demonstrations to the contrary, although that is putting a  
11 pretty heavy burden on people. You can do it if you want to. I  
12 think it's a little strong. You can do it if you want to.

13 I am concerned about the reference to the provision of  
14 legal assistance, because I think that's undefined and you are  
15 going to have a lot of arguments on what is legal assistance.  
16 You really should explore that. Maybe if you can better define  
17 it, maybe it will work.

18 Now, the preamble to that had some points in it that I  
19 think I might be able to help a little bit with. One of the  
20 items in the preamble, as I recall, was a reference to the fact  
21 that the presumption would be rebutted -- maybe those were not  
22 the exact words -- by the audit report.

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1 Do you know what I am referring to?

2 MR. WEAR: Generally, I think, yes. That language is  
3 similar to some other language that we have in our regulations  
4 now.

5 MR. CUTLER: I think that is wise. I would like to  
6 see it be more specific and maybe in the regulation itself,  
7 that that would constitute prima facia clear and convincing  
8 evidence.

9 In other words, if they've got an audit report and the  
10 auditor has gone into this, he's given you exactly what you  
11 want. He has explained it. He has followed your guidelines.  
12 Why shouldn't that be sufficient, without saying, "Well, we  
13 still have an argument about this"?

14 I'd like to see it, since you have gone into  
15 presumptions, in the text. I would like to see you, as a  
16 lawyer, put in this same thing that was in the preamble. Yes,  
17 it says here that the independent auditors will likely have made  
18 an independent determination of the nature of all the  
19 recipient's funds, which will be able to substantiate the  
20 recipient's assertion.

21 I say put that in the text and that will suffice, not  
22 that it can't be overcome, but it will be enough by itself. I'd

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1 like to see you do that.

2           The other problem, though, is what is a nonlegal  
3 purpose. This is in the preamble, too, and it is not in the  
4 text. It is the last sentence in the next to the last paragraph  
5 of the preamble. It says:

6           "Therefore, unless a private funding source  
7 specifically restricts the use of its funds for some non-legal  
8 purpose, all LSC and private funds will be considered received  
9 for legal assistance."

10           I think that also leaves it open to debate and  
11 argument and it ought to be clarified and identified in some  
12 way. I think you can do it by definition.

13           MR. WEAR: I see.

14           MR. CUTLER: I think this may be constructive. I  
15 certainly cannot quarrel with some kind of presumption, putting  
16 the burden on the one that has the information. I do appreciate  
17 this opportunity.

18           I do not know whether you will be prepared to make a  
19 recommendation by tomorrow. Maybe you will. I noticed in some  
20 of these comments that they say, "Please let us have more time  
21 for some of the donors, these outside donors, to comment,  
22 because they have not known they were involved."

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1           There is, at least, I think a letter or two from a  
2 United Fund Agency or something like that, but for example, the  
3 IOLTA organizations throughout the country might have an  
4 opportunity to comment, it might be helpful. Remember how much  
5 money we are talking about.

6           We are talking about millions of dollars and growth.  
7 Please, take that into account. I think, whether consciously or  
8 not, the Bar has done a great thing in providing this and I  
9 think this is something you need to consider in helping the  
10 funding of services to people who cannot afford it.

11           Thank you.

12           MS. SWAFFORD: Thank you.

13           CHAIRMAN VALOIS: By consensus of the committee here,  
14 we are not going to take a vote on this today.

15           MR. HOUSEMAN: Can I make a very short statement in  
16 response to something Mrs. Swafford said?

17           CHAIRMAN VALOIS: Sure.

18           MR. HOUSEMAN: Ms. Swafford, I just wanted to address  
19 one thing you said and that was whether we want our recipients  
20 to use their non-LSC funds for representation of eligible  
21 clients.

22           Let me make the point I started with. If this passes,

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1 funds that are now used, private funds, for the representation  
2 of eligible clients, will be diminished. There will be fewer  
3 private funds available for the representation of eligible  
4 clients and that is because many recipients get private funds  
5 for the representation of both eligible and non-eligible  
6 clients, to be used as a match for elderly or disabled which  
7 includes those eligible and those funds will be dried up.

8 This will have no impact on targeting private funds  
9 for representation of eligible clients. The impact will be that  
10 funds that are currently available will be dried up, so that by  
11 passing this regulation as proposed, you will dry up funds that  
12 currently exist to represent and meet the unmet needs of  
13 eligible clients. That is what this does.

14 CHAIRMAN VALOIS: Alan, once again, that is an  
15 opinion. Their funds, when they get the money, right? They may  
16 get more of their money from somebody else, right, and it may be  
17 unrestricted, which they receive.

18 MR. HOUSEMAN: I'm not talking about restrictions.  
19 I'm talking about --

20 CHAIRMAN VALOIS: We don't really know what is going  
21 to happen.

22 MR. HOUSEMAN: Well, but it is quite clear that Title

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1 III(b) would, and it is quite clear from the comments.

2 CHAIRMAN VALOIS: Right.

3 MR. HOUSEMAN: You have nothing in the record that  
4 suggests that what I'm saying is consistent with all the  
5 comments, is incorrect. This is not some debatable point. This  
6 is not some little, you know, sophisticated analysis.

7 The fact is: You cannot use Title III(b) funds with a  
8 means test. You have to be able to match it or the funds will  
9 dry up.

10 CHAIRMAN VALOIS: I understand that. The effect on  
11 this is something we might all have an opinion about and some of  
12 us may, but I do not think anybody can really predict what might  
13 happen.

14 Tom had a question he wanted to ask.

15 MS. SWAFFORD: Let me just respond to Mr. Houseman's  
16 comment.

17 CHAIRMAN VALOIS: Sure.

18 MS. SWAFFORD: Tom, would you let me ask him a  
19 question?

20 MR. SMEGAL: Go ahead.

21 MS. SWAFFORD: I did not hear this said in so many  
22 words, but I think I heard this implied, that we have just got

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1 to have this extra money for these extra things that are not  
2 under the Act because those are really the interesting things  
3 and that's where you are going to keep the good lawyers.

4 If you are just doing these uninteresting, dull cases  
5 of just representing the poor, why, we'll lose our lawyers, our  
6 good lawyers. Did I hear something like that said or implied?

7 MR. HOUSEMAN: I didn't say that. What I said was --

8 MS. SWAFFORD: Let's just clarify that.

9 MR. HOUSEMAN: There is nothing in any record that  
10 says that. You can't find that in this record.

11 MS. SWAFFORD: I agree with that. I said that right  
12 in the beginning, that no one said that exactly, but for some  
13 reason, as I sat at this table, I certainly got that impression,  
14 that we've just got to have these other kinds of things that we  
15 can get this extra money for and do, because that is where you  
16 will keep your good lawyers.

17 MR. HOUSEMAN: No, that is not what I said.

18 MS. SWAFFORD: No, I hope it's not and I hope it is  
19 not true.

20 MR. HOUSEMAN: What I said was that many programs are  
21 now strapped for funds, and have been, and rely upon private  
22 funding sources to keep their existing staff; that if the

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1 private funding sources dry up, which will be the consequence of  
2 this, they will have to get rid of some of their existing staff.

3 Some of those staff have expertise and knowledge that  
4 is very useful, which is why they get the private funds in the  
5 first place; that is what I said. It has nothing to do with  
6 interesting cases or uninteresting cases.

7 MS. SWAFFORD: Maybe I read into it more than I  
8 should. Excuse me, Tom. Thank you.

9 CHAIRMAN VALOIS: Does Mr. Smegal have a question for  
10 Ms. DiSanto?

11 MR. SMEGAL: Yes. I want to go back to those  
12 footnotes you have in your January '87 and whatever else you  
13 were able to provide to Senator Rudman.

14 Are those all litigation, first, those abuses that  
15 were listed in those footnotes? Are those litigation matters?

16 MS. DiSANTO: No, I don't believe so, Mr. Smegal.

17 MR. SMEGAL: Let's focus on the litigation matters,  
18 then. With respect to the litigation matters, are they all  
19 circumstances where a Legal Services recipient, corporation  
20 recipient, was representing a plaintiff?

21 MS. DiSANTO: Mr. Smegal, I can't answer that question  
22 with regard to specific questions, without reviewing the matter,

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1 but I'd be happy to get back to you on that.

2 MR. SMEGAL: I've got several other questions which  
3 maybe you can get back to me on, too. With respect to those  
4 matters that are litigation and the Legal Services Corporation  
5 recipient is representing the plaintiff, could you tell me  
6 whether they are all individual plaintiffs or whether some of  
7 them are individual plaintiffs or none of them are individual  
8 plaintiffs? That's another question I have.

9 MS. DiSANTO: Okay.

10 MR. SMEGAL: Finally, with respect to those  
11 circumstances in which a Legal Services Corporation recipient  
12 and those you have identified, a Legal Services Corporation  
13 recipient is representing a plaintiff group, would you identify  
14 for me those circumstances where that plaintiff group is  
15 restricted so that it does not include eligible recipients?

16 MS. DiSANTO: Sure.

17 CHAIRMAN VALOIS: Mr. Shea, we are going to give you  
18 some time to rebut any of this if you would like or talk about  
19 it.

20 MR. SHEA: Thank you, Mr. Chairman.

21 I only have a few brief points to make. I think the  
22 issues have largely crystallized for the Board, but several

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1 points emerge I think as somewhat significant. One persistent  
2 issue that Alan and I find ourselves with some differences on,  
3 as I understand it, is the scope of the undertaking of LSC sub-  
4 recipients.

5 It will come up in the attorney's fee matter tomorrow  
6 and apparently is an issue, in part, because Alan expressed some  
7 concerns about our inclusion of subrecipient here and in what I  
8 had styled and actually I perceived as a technical amendment.

9 As I indicate in the debate on deliberations on the  
10 attorney fee regulation, the LSC subrecipients execute and  
11 undertake to be bound by the LSC Act and regulations. There is  
12 a subrecipient agreement that says that and there is a  
13 regulation that requires that they undertake to be bound by the  
14 LSC Act and regulations and that surely includes section 1010(c)  
15 of the Act.

16 My understanding is that LSC subrecipients are  
17 monitored, not only as to the LSC funds they get but as to  
18 private funds they get. I am aware that here and there, there  
19 are disputes on, let's say, the reach or the proper scope of LSC  
20 monitoring as to subrecipients but that those are -- well, I  
21 don't know that I would say they are episodic or unusual, but at  
22 least to my understanding, subrecipients expect to be monitored

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1 on private funds and do not resist that proposition.

2 I think the subrecipients think that the private funds  
3 are 1010(c) but apparently there may be some other perceptions  
4 with respect to that out in the field. I do not know how to  
5 deal with that as a general proposition, but I think that surely  
6 our documents are wholly consistent with that.

7 CHAIRMAN VALOIS: But --

8 MR. SHEA: I think that is the only legal point I  
9 wanted to make.

10 There were some questions raised about the sums that  
11 are made available, that are obtained by LSC recipients for  
12 services to the elderly. I actually have some data, at least,  
13 projected data for 1988 for that, if that would be helpful.

14 My understanding is that approximately \$12 million in  
15 Title XX money was projected by LSC recipients and \$11 million  
16 in what is styled as Older Americans, which may be Title III, I  
17 assume it is Title III money, projected to be received by LSC  
18 recipients.

19 CHAIRMAN VALOIS: What was the second in the Title  
20 III, the second dollar amount?

21 MR. SHEA: Eleven million.

22 CHAIRMAN VALOIS: Eleven?

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1 MR. SHEA: Those are rounding a little bit. Eleven  
2 million was the second figure.

3 CHAIRMAN VALOIS: What was the first figure, then?

4 MR. SHEA: Twelve million.

5 CHAIRMAN VALOIS: Twelve million, okay.

6 MR. SHEA: Those are projections for 1988 receipts.

7 I am prepared to deal with other questions, but I am  
8 not so sure of --

9 CHAIRMAN VALOIS: Are you prepared to deal with some  
10 of the issues raised? I hope the answer is that you are, but  
11 not today.

12 MR. SHEA: Sure.

13 CHAIRMAN VALOIS: In the meantime, between now and  
14 when we meet again, which tentatively, fellow Members of the  
15 Committee, may be April 13th, based on other information I have,  
16 I would hope that you will once again see if you and Mr.  
17 Houseman can come to any mutual agreement on this; if not, get  
18 it clarified.

19 I am not concerned about the -- I do not have the  
20 constitutional concerns from my standpoint, and other board  
21 members can say what they have. I do not have concern about the  
22 issue on broad policy research that Mr. Houseman apparently has.

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1 I do have some concern about how we accommodate some  
2 of these other needy programs, if at all, and I also would love  
3 to have and I know I won't get it, all of the information that  
4 we need to decide the effect of this, and we won't get that,  
5 either. Maybe we need to look at some accounting. Maybe we  
6 need to look at some percentages, limitations.

7 MR. SHEA: Certainly, I'd be happy to do that.

8 MR. WEAR: Yes, Mr. Chairman. The staff will  
9 certainly explore those questions and any others that you may  
10 have during this intervening time period with regard to those.  
11 I think they have been characterized as the "mixed motive"  
12 grants.

13 CHAIRMAN VALOIS: We have a meeting in three minutes  
14 here. If there is nothing further to come before our committee,  
15 then --

16 MR. SMEGAL: I've got a thirty-second question. Tim,  
17 with respect to subsection (c) of 1610.1 definitions, what  
18 follows are prohibited by this Act, (c) is class actions now.  
19 Does that mean all class actions or class actions as defined in  
20 16(d)(5)?

21 MR. SHEA: As defined in (d)(5). All this does is  
22 incorporate that by reference which merely again requires the

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1 matter come to the attention of the Executive Director and he  
2 basically approves the class action consistent with the  
3 guidelines that the Board of Directors has adopted. It is  
4 purely a procedural requirement.

5 MR. SMEGAL: So the activity prohibited, with respect  
6 to that one, would be taking on a class action in a way that is  
7 inconsistent with the procedures set out in 1006(b)(5)?

8 MR. SHEA: That is correct.

9 CHAIRMAN VALOIS: Also, another issue that Mr.  
10 Houseman raised and I think Mr. Cutler did, as well, is the  
11 effective date of this and retroactivity, grandfather clause.  
12 Mr. Cutler also raised the other question on definition of legal  
13 assistance and so forth.

14 MR. SHEA: Yes.

15 CHAIRMAN VALOIS: Is there anything further to come  
16 before this committee?

17 (No response.)

18 CHAIRMAN VALOIS: If not, the committee meeting is  
19 adjourned.

20 (Whereupon, at 6:00 o'clock p.m., the committee  
21 meeting was adjourned.)

22 \* \* \* \* \*

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