

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS AND REGULATIONS COMMITTEE

OPEN SESSION

Tuesday, October 19, 2010

8:02 a.m.

Hyatt Regency Hotel
320 West Jefferson Street
Louisville, Kentucky 40202

COMMITTEE MEMBERS PRESENT:

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

OTHER BOARD MEMBERS PRESENT:

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

STAFF AND PUBLIC PRESENT:

Victor M. Fortuno, Interim President and General Counsel

Kathleen Connors, Executive Assistant to the President
Rebecca Weir, Special Counsel to the President

Patricia Batie, Acting Corporate Secretary and FOIA Officer, Office of Legal Affairs

Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs

Katherine Ward, Executive Assistant, Office of Legal Affairs

Jeffrey E. Schanz, Inspector General

Joel Gallay, Special Counsel to the Inspector General, Office of the Inspector General

Laurie Tarantowicz, Assistant Inspector General and Legal Counsel, Office of the Inspector General

Ronald "Dutch" Merryman, Assistant Inspector General for Audit, Office of the Inspector General

Stephen Barr, Media Relations Director, Government Relations and Public Affairs Office

Janet LaBella, Director, Office of Program Performance

Matilde Lacayo, Program Counsel III, Office of Program Performance

Robert Henley, Member, LSC Finance Committee

Jeffrey A. Been, Executive Director, Legal Aid Society of Louisville

David R. Yoder, Executive Director, Legal Services of East Tennessee

Richard A. Cullison, Executive Director, Legal Aid of the Bluegrass

Terry Brooks, Standing Committee on Legal Aid & Indigent Defendants (SCLAID), American Bar Association

Don Saunders, National Legal Aid and Defenders Association (NLADA)

Linda Perle, Center for Law & Social Policy (CLASP)

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

2 (8:02 a.m.)

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

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

13 M O T I O N

14 MS. MIKVA: Motion to approve.

15 MR. KORRELL: Second.

16 CHAIRMAN KECKLER: All in favor?

17 (A chorus of ayes.)

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

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

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

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

9 M O T I O N

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

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

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

16 MR. KORRELL: Second.

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

1 involved.

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

4 (A chorus of ayes.)

5 CHAIRMAN KECKLER: The motion is approved.

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

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

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

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

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

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

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

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

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

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

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

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

21 CHAIRMAN KECKLER: Thank you, Mattie.

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

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

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

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

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

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

1 be outside a strategic plan.

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

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

14 MS. COHAN: Yes, it did.

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

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

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

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

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

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

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

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

4 MS. MIKVA: Was Charles?

5 MS. COHAN: Not that I was aware.

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

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

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

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

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

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

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

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

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

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

18 MS. COHAN: Only tangentially.

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

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

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

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

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

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

9 (Laughter.)

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

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

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

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

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

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

12 MS. COHAN: I'm shocked.

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

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

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

7 MS. COHAN: Absolutely.

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

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

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

22 But I think those things could be deferred to

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

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

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

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

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

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

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

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

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

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

2 We want input on that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MS. REISKIN: You lost your mike.

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

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

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

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

1 entertain a motion to develop an action plan.

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

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

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

17 CHAIRMAN KECKLER: So amended.

18 M O T I O N

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

20 MS. MIKVA: I'll second.

21 CHAIRMAN KECKLER: All in favor?

22 (A chorus of ayes.)

1 CHAIRMAN KECKLER: The motion is approved.

2 We'll look forward to reading the materials.

3 MS. COHAN: It'll be done.

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

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

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

20 I'm happy to do that.

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

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

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

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

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

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

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

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

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

3 MS. COHAN: Yes.

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

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

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

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

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

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

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

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

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

22 The Development Committee is in there because

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

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

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

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

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

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

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

22 I think at the last meeting we had some public comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 And then possibly, even more, a need of

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

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

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

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

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

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

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

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

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

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

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

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

22 So there were some of those suggestions, and

1 I'm happy to have those recirculated.

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

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

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

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

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

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

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

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

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

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

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

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

11 PRESIDENT FORTUNO: That was good, just yes.

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

16 I do think that it may be possible to do this.

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

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

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

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

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

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

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

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

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

15 (Laughter.)

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

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

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

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

12 MS. COHAN: I think it would be case-by-case.

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

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

1 recommendation of the committee.

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

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

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

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

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

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

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

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

20 So thoughts on that?

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

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

5 M O T I O N

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

13 CHAIRMAN KECKLER: Is there a second?

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

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

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

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

1 MS. MIKVA: I would second.

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

4 (A chorus of ayes.)

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

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

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

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

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

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

22 The LSC Appropriations Act restrictions, we

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

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

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

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

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

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

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

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

20 MR. LEVI: Is that what you need?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MS. COHAN: That's correct.

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

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

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

1 CHAIRMAN KECKLER: The reason I ask is that
2 this would produce, then, potentially some multiple
3 regulatory regimes for funds. So the argument, which
4 would go against management's recommendation, one
5 aspect of that argument would be regulatory simplicity.

6 But I do understand that many grantees would say,
7 don't do me that favor. Right?

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

10 M O T I O N

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

13 MS. MIKVA: I second.

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

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

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

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

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

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

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

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

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

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

7 PRESIDENT FORTUNO: Yes, it is.

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

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

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

22 CHAIRMAN KECKLER: Is there further

1 discussion?

2 (No response.)

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

5 (A chorus of ayes.)

6 CHAIRMAN KECKLER: Opposed?

7 (No response.)

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

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

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

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

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

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

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

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

22 CHAIRMAN KECKLER: Thank you. Chairman Levi?

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

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

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

17 MS. PERLE: Okay.

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

1 MS. PERLE: Okay. Done.

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

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

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

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

20 CHAIRMAN KECKLER: Thank you.

21 Is there any other public comment?

22 (No response.)

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

4 (No response.)

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

7 M O T I O N

8 MR. KORRELL: So moved.

9 MS. MIKVA: Second.

10 CHAIRMAN KECKLER: All in favor?

11 (A chorus of ayes.)

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

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

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