

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS & REGULATIONS COMMITTEE
OPEN SESSION

Sunday, April 14, 2013

2:33 p.m.

Legal Services Corporation
McCalpin Conference Center
3333 K Street, N.W.
Washington, D.C. 20007

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson
Robert J. Grey, Jr.
Laurie I. Mikva
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

Sharon L. Browne (by telephone)
Martha L. Minow
Father Pius Pietrzyk, O.P.
Julie A. Reiskin
Gloria Valencia-Weber

STAFF AND PUBLIC PRESENT:

James J. Sandman, President
 Lynn Jennings, Vice President for Grants Management
 Richard L. Sloane, Chief of Staff & Special Assistant
 to the President
 Rebecca Fertig, Special Assistant to the President
 Victor M. Fortuno, Vice President for Legal Affairs,
 General Counsel, and Corporate Secretary
 Mark Freedman, Senior Assistant General Counsel,
 Office of Legal Affairs
 Kara Ward, Assistant General Counsel, Office of Legal
 Affairs
 Atitaya Rok, Staff Attorney, Office of Legal Affairs
 Katherine Ward, Executive Assistant, Office of Legal
 Affairs
 David L. Richardson, Comptroller and Treasurer,
 Office of Financial and Administrative
 Services
 Jeffrey E. Schanz, Inspector General
 Laurie Tarantowicz, Assistant Inspector General and
 Legal Counsel, Office of the Inspector General
 Thomas Coogan, Assistant Inspector General for
 Investigations, Office of the Inspector
 General
 David Maddox, Assistant Inspector General for
 Management and Evaluation, Office of the
 Inspector General
 Janet LaBella, Director, Office of Program
 Performance
 Carol Bergman, Director, Office of Government
 Relations and Public Affairs
 Carl Rauscher, Director of Media Relations, Office of
 Government Relations and Public Affairs
 Lora M. Rath, Deputy Director, Office of Compliance
 and Enforcement
 LaVon Smith, Office of Information Management
 Eric Jones, Office of Information Management
 Allan J. Tanenbaum, Non-Director Member, Finance
 Committee (General Counsel, Equicorp Partners)

Chuck Greenfield, National Legal Aid and Defender
 Association (NLADA)
 Terry Brooks, American Bar Association
 Leslye Orloff, NIWAP, American University Washington
 College of Law
 Sofia Vivero, NIWAP, American University Washington
 College of Law
 Dominique Martin, Law99.com

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

2 (2:33 p.m.)

3 CHAIRMAN KECKLER: I note the presence of a
4 quorum, and will now call to order the noticed meeting
5 of the Operations & Regulations Committee.

6 You should have before you an agenda. And I
7 ask for approval of the agenda.

8 M O T I O N

9 MR. LEVI: So move.

10 MS. MIKVA: Second.

11 CHAIRMAN KECKLER: The motion has been moved
12 and seconded. All in favor?

13 (A chorus of ayes.)

14 CHAIRMAN KECKLER: The agenda is approved.

15 You should now have a look at the meeting
16 minutes of the January 25, 2013 meeting of the
17 Committee, our last regular meeting.

18 Can I have approval of the minutes?

19 MS. MIKVA: Move to approve.

20 MR. LEVI: Second.

21 CHAIRMAN KECKLER: All in favor?

22 (A chorus of ayes.)

1 CHAIRMAN KECKLER: The minutes are approved.

2 MS. BROWNE: Charles, this is Sharon Browne.

3 CHAIRMAN KECKLER: Hi, Sharon.

4 MS. BROWNE: I have one correction on your
5 draft minutes.

6 CHAIRMAN KECKLER: Oh, okay.

7 MS. BROWNE: I was present by telephone for
8 the January 25th meeting.

9 CHAIRMAN KECKLER: Okay. Thank you, Sharon,
10 and please make an amendment to the minutes.

11 With that amendment, we will deem the minutes
12 to have been approved.

13 We'll now turn to our first item of
14 substantive business for the Committee's consideration,
15 which is to consider and act on proposed request for
16 information regarding representation of criminal
17 defendants in tribal courts.

18 As you may recall, we have initiated
19 rulemaking in this in response to a statutory change,
20 initiating rulemaking, a change in our regulations.
21 And the first step that we're now considering to move
22 that process forward is a request for information to

1 find out more about the situation on the ground
2 regarding representation of criminal defendants in
3 tribal courts.

4 And for a further presentation, I will turn it
5 over to Assistant General Counsel Kara Ward, and want
6 to introduce Kara to the members of the Committee that
7 haven't met her yet. I've been working with her by
8 phone extensively over the last couple of months, and
9 look forward to working extensively with you going
10 forward. Kara.

11 MS. REISKIN: Excuse me. Should we be looking
12 at the memo or the --

13 CHAIRMAN KECKLER: Well, Kara, we have two
14 things in the board book, a general memorandum
15 regarding the rationale for the rule and then the
16 document that we're proposing to have published, the
17 request for information.

18 So I have to kind of go back and forth myself,
19 Julie. But Kara, you can refer board members to where
20 to look as you do your presentation.

21 MS. WARD: Sure. Well, first, it's a pleasure
22 to be with you today. And I also want to especially

1 thank Professor Valencia-Weber for helping us out with
2 this Indian court tribal rulemaking. I hope I get it
3 right and that I've learned properly from you for the
4 last month.

5 But to answer your question, it might be
6 helpful if you direct your attention to the proposed
7 publication in the Federal Register. And I'll happily
8 cover what's in the cover memorandum.

9 To refresh your memory from the January
10 meeting, we've decided to initiate rulemaking on this
11 topic to address changes in the law to the LSC Act that
12 were made in 2010 under the Indian Arts & Crafts
13 Amendments Act. Embedded within that act are two
14 important changes to not only the LSC Act, but also the
15 way that tribal courts will be changing in the future.

16 There's the Tribal Law and Order Act, which is
17 part of that Indian Arts & Crafts Amendments, and what
18 that does is increases substantively the authority for
19 tribal courts to pursue more serious felonies in their
20 courts by extending the sentencing authority.

21 For tribal courts to take advantage of that
22 increased sentencing authority and to prosecute more

1 serious felonies than they currently have authority to
2 do so, they need to take affirmative actions, including
3 setting up public defenders, which are currently not
4 required under tribal court law, and doing other things
5 such as training a judiciary and making other typical
6 allowances for due process rights and the recordation
7 of these kinds of proceedings.

8 Now, that act was implemented in 2010. And in
9 the last summer, GAO did a study of a hundred tribes
10 and found that 30 percent have already taken steps to
11 affirmatively take advantage of this new sentencing
12 authority.

13 At this time, what we are looking to do is
14 gather more information about our grantees who are
15 active in tribal courts to see what it is that they are
16 concerned about in taking on these more serious
17 criminal offenses, our representation for these more
18 serious criminal offenses, and the sorts of concerns
19 they may have about court appointments for these same
20 sorts of cases.

21 As we do that, that's going to inform the way
22 we write this rule. And without this information, I

1 think our rule might be wrong-sized, or not fully
2 contemplate everything that our grantees are thinking
3 about. So we have five questions that Professor
4 Valencia-Weber helped us think about, and that's what
5 we hope to publish in the Federal Register.

6 I'll be happy to answer any questions you
7 might have about it.

8 CHAIRMAN KECKLER: Gloria, do you want to
9 comment at this point?

10 PROFESSOR VALENCIA-WEBER: Sure. We're
11 looking at a multi-layered piece of litigation. And as
12 is often the case when a Congress gets toward the end,
13 things get sandwiched into acts that have nothing to do
14 with it.

15 So the amendments going forth on the Arts &
16 Crafts Act, which is a whole 'nother matter, had added
17 into it the Tribal Law and Order Act. That's a major
18 piece of legislation that has been in the works for
19 over ten years, and Senator Dorgan, before he left the
20 Senate, managed to get it sandwiched into what was
21 already moving on the Arts & Crafts Act.

22 The legislation aims to correct problems that

1 occurred going back to the mid-1880s, when Congress
2 passed the Major Crimes Act and removed from tribes and
3 states the jurisdiction over the major crimes,
4 felonies. That act also has allowed tribes to have
5 jurisdiction over misdemeanor crimes within their
6 territory and in their tribal courts.

7 In between, there were intervening acts,
8 including acts that transferred for certain states the
9 criminal jurisdiction. So the end result, as we arrive
10 in 2013 in a crazy quilt of tribal, state and federal
11 jurisdiction, it is the checkerboarded problem.

12 The tribes have been pressing, and Senator
13 Dorgan and others, drafted this legislation to begin to
14 return to tribes the jurisdiction to prosecute those
15 who commit crimes within their boundaries, regardless
16 of whether they are Indian, non-Indian, or Indians who
17 are not members of that tribe.

18 So we want to focus on that. This is a major
19 shift. And likewise, accompanying it is a major shift
20 in the bylaw of the same kind. But both pieces, TLOA
21 and VAWA, are opt-in choices for the tribe. They must
22 choose to opt in and invest the resources to meet six

1 critical criteria to establish that they will provide
2 fair and equal protection to all those who they haul
3 into their courts for criminal prosecution.

4 I have spoken to the people in Indian Country,
5 including the Director of Tribal Justice in the
6 Department of Justice, which is a permanent desk
7 working with and in relationships to tribes and how to
8 use these new opt-in authorities.

9 And like much legislation, there are gaps.
10 One is the gap of how do we know which tribes have
11 fully developed, resourced, and met the requirements
12 and are now exercising criminal jurisdiction?

13 Near as I could tell, and I just left the
14 Indian Law Conference of the FBA on Friday, we know
15 that there's already one tribe that has met all the
16 requirements, and in fact convicted a prisoner, and has
17 transferred, under agreement, the convicted felon to
18 the Bureau of Prisons faculty. There are at least two
19 other tribes on the cusp, and one negotiating with BOP.

20 The difficulty, as Kara and I have discussed,
21 is knowing how and where we might face those kinds of
22 requests for our grantees.

1 For instance, in the law there is no
2 accreditation or requirement, some arm in the Federal
3 Government -- and remember, Congress has plenary power,
4 according to the Supreme Court, over Indian law and
5 Indian affairs -- but there is no centralized place
6 either to approve a tribe and saying, yes, you've met
7 all the requirements and now you may exercise criminal
8 jurisdiction over these major crimes, and no central
9 registry. And that is what they're coping with.

10 As Kara has reported, about a hundred have
11 indicated the interest to move forth and resource all
12 these. And these are critical resources, critical
13 decision for a tribe, because it's money that's going
14 to have to be invested they might otherwise invest in
15 clinics or housing or whatever else are the needs of
16 their community.

17 So right now, that office in DOJ is attempting
18 to figure out a way in which to acquire and develop a
19 full up-to-date list.

20 When we meet in Denver, I would like to
21 suggest that we invite the Director of the Office of
22 Tribal Justice in Department of Justice to be part of

1 the people who can bring us up to date on what we know,
2 so that we can then project, with the information
3 gathered by this request for information as well as
4 what the people most on the ground know, which of our
5 grantees and where those requests are likely to come
6 from.

7 CHAIRMAN KECKLER: Right. Thank you, Gloria.

8 I think that's something that is -- that invitation,
9 having somebody come in and speak to this Committee
10 about this, I think could be useful at that time, if
11 that's something that they would be open to.

12 Yes?

13 DEAN MINOW: Because this is going to open up
14 an area where we don't have at the board level and at
15 the central D.C. level a lot of expertise, I'm just
16 wondering what are the implications? So criminal
17 matters, especially the complexities of Indian land
18 jurisdiction, we'd build some kind of a consulting
19 relationship so that we can have some oversight. I
20 mean, there's going to be a set of questions where
21 there's no expertise here.

22 CHAIRMAN KECKLER: Right. And one of the

1 purposes of the request for information is to
2 understand the scale of this and to understand, to the
3 extent -- is this something that is just going to
4 happen occasionally, that there's an attorney who is
5 familiar with a tribal court -- it might be a small
6 tribal court system -- but happens to be a civil legal
7 aid attorney. And they're called in because something
8 has happened. And it's just something that's very
9 occasional.

10 Or is this going to be an ongoing, regular
11 part of it? In which case I think we do need to think
12 about our institutional competence, and if we are
13 tasked with this by Congress, we need to accept that
14 task but build up our competence in one way or another.

15 One of the things that I was raising, and
16 might be worth reaching out to in addition to that, has
17 to do with the federal public defender because this
18 is --

19 DEAN MINOW: Sure.

20 CHAIRMAN KECKLER: Probably for the reasons
21 that Gloria might have suggested, if they're going to
22 expand somebody's jurisdiction and it happened to be

1 the case that they expanded LSC's jurisdiction, but
2 could they have expanded the federal public defender's
3 jurisdiction --

4 DEAN MINOW: Right.

5 CHAIRMAN KECKLER: But even if they chose not
6 to do that, that's an entity that has some of this
7 institutional competence that I'd like to build upon in
8 some manner.

9 DEAN MINOW: Absolutely.

10 CHAIRMAN KECKLER: Laurie?

11 MS. MIKVA: Sort of along those lines, to what
12 extent has LSC been representing people in misdemeanor
13 cases? Do we know?

14 PROFESSOR VALENCIA-WEBER: As far as I know,
15 it's a very few tribes. So it's very selective. I
16 don't have an exact number. I'm sorry, I should have
17 looked it up. But I would be surprised if it's more
18 than five.

19 And it's in many instances because it arises
20 out of whatever else -- the issue that initially our
21 LSC went into the tribal court for. It could have been
22 something arising in family law that then results in a

1 domestic violence. That's a typical kind of thing.
2 And so, in a way, that's part of the data we certainly
3 should gather through this and whatever means we
4 already have.

5 Additionally, in Santa Fe, which I just left,
6 I met with Lavon Henry and some of our grantees that
7 receive our money, and they have concerns of their own
8 and questions they want answered. And I think for the
9 July meeting, we might consider bringing in some of
10 those NAILS grantees, the ones who have most
11 experience, including one of the grantees that has done
12 a few of the misdemeanor defenses in tribal courts.

13 The question that arises for the NAILS people
14 at the meeting in Santa Fe -- it was not a formally
15 called meeting, very informal, but this is the biggest
16 Indian law meeting in the United States; there were
17 over 500 attorneys there -- is that under the TLOA and
18 the VAWA, the tribe that wishes to opt in and exercise
19 the criminal jurisdiction, among those things, has to
20 provide law-trained, J.D.-licensed judges, prosecutors,
21 and defendants' attorneys for indigent people.

22 So then the question arises, are we going to

1 get requests to our LSC attorneys if whatever it is the
2 tribe has in place is inadequate for the demand?

3 That's another hanging-out-there question.

4 CHAIRMAN KECKLER: Yes. Father Pius?

5 FATHER PIUS: I'm sorry. Just a very quick
6 question. The grantees could be taking on any Indian
7 offenses now. They don't need to wait -- technically
8 speaking, do they need to wait for us to make
9 rulemaking? I know it's prudent for them to wait, but
10 is there any legal prohibition from them taking on
11 these cases right away?

12 CHAIRMAN KECKLER: They've been authorized by
13 statute, so the statute has trumped the regulations.
14 And we've published, which I think has been in
15 the -- it's attached to the memorandum in the board
16 book -- a program letter that has informed them of
17 these amendments, to the extent that they were not
18 already aware of them.

19 And so no. I think they can engage in this.
20 So in a way, we're in a situation which there will be
21 some data emerging, at least at some point, about how
22 often they're going to be using this authority.

1 But then we need to think a little bit more
2 about, is there a scope for regulating it so that we
3 are helpful and we do fulfill Congress's request of us,
4 in a sense, but it doesn't begin to overwhelm our
5 grantees' other work, I think. I think that's the
6 question we have.

7 Yes. Please go ahead.

8 PROFESSOR VALENCIA-WEBER: Father Pius, I'd
9 like to respond. Based on what was discussed in Santa
10 Fe, I asked Lavon and a couple of the others, given
11 that you have the statutory authority, has anybody
12 acted on this?

13 There seemed to be a reluctance for a number
14 of reasons -- first of all, the competency question,
15 because these are the major crimes. We're talking
16 about everything from all the
17 homicidal -- manslaughter, everything -- to the
18 big -- there's 14 that are listed in the Major Crimes
19 Act.

20 Then they said, we've already pushed. And
21 besides the resources, we know what's needed for a good
22 defense. And, for instance, we have no investigators

1 to do a decent job in a criminal felony defense.
2 You're going to have to have investigators and other
3 resources they don't have.

4 So they also, our grantees, are faced with the
5 same issue the tribes are. Do we want to expend these
6 resources for these kinds of prosecutions, or, in the
7 case of our grantees, defense?

8 CHAIRMAN KECKLER: Julie?

9 MS. REISKIN: This may be obvious to everyone
10 else, but that's what I didn't understand, is we're
11 saying -- or the Congress said, okay, you can do this.

12 But is there more money? Or who pays? Where does the
13 money come from to do this?

14 MR. LEVI: Only if you've provided it.

15 MS. REISKIN: I'll check my pockets.

16 (Laughter.)

17 CHAIRMAN KECKLER: Gloria, go ahead and
18 respond to her.

19 PROFESSOR VALENCIA-WEBER: I've had to do
20 training on TLOA. So I'm hoping that I don't add to
21 confusion in the way this whole thing became law.

22 The Congress has given them the authority.

1 They need the resources, and -- I'm sorry, Julie. What
2 was the focus there?

3 MR. LEVI: More money.

4 MS. REISKIN: Is there money?

5 PROFESSOR VALENCIA-WEBER: More money. Okay.

6 In both TLOA, VAWA, and three prior acts that Congress
7 passed to strengthen and build tribal courts, there
8 have been provisions for federal grants authorized to
9 build. And some have been funded and not funded.

10 There are some now in the last two years that
11 have reached the end of their time. But also at this
12 meeting in Santa Fe were the DOJ officials, who said,
13 sequestering has put everything on hold. And some of
14 the still-pending tribal law development programs from
15 prior acts -- because there were about three, and then
16 you had TLOA, and then you had VAWA -- without that
17 money, they have not been able to do that. And that is
18 part of the tribal governments' complaints.

19 Every year, the National Congress of American
20 Indians sends a reminder list to Congress: what you've
21 passed but have not appropriated for. And you
22 bad-mouth our courts, but then you don't deliver on

1 what you promised us. So at this point, the concern
2 for money is there on all sides, the federal arm that
3 works with the tribes, and the tribes themselves.

4 MR. LEVI: Do you think that you could pull
5 together a group, and we would have, I guess, either as
6 a part of -- it doesn't have to be a part of this
7 committee meeting, but maybe it should be -- a
8 90-minute panel or something?

9 If we're going to have people travel, then I
10 will be all in favor of it. It probably should be part
11 of the meeting, but --

12 CHAIRMAN KECKLER: I'm certainly open to have
13 it be part of this Committee, but it's also fine if you
14 want to elevate it. Ultimately, the Board will take
15 action on this; it can be a matter for the Board either
16 way.

17 Let me ask a more technical question. When
18 were we thinking of publishing this? And when were we
19 thinking of closing the comment period?

20 MS. WARD: That's a great question. So
21 considering that we would like to have an extended
22 discussion at the July meeting in Colorado, I would

1 hope to open the questionnaire, or this request for
2 information, shortly, soon, and have it open to run
3 through the July meeting, and then close just
4 afterwards. It would be an extended comment period.

5 MR. LEVI: I wouldn't close just after. I
6 think you have to leave -- for the July meeting to have
7 had some impact, or the discussions there, give people
8 30 days beyond it, something like that.

9 CHAIRMAN KECKLER: That sounds reasonable.
10 And in addition, we're just going to publish this in
11 the Federal Register and send it to grantees? Is that
12 the general plan? Or --

13 MS. WARD: The kind of marketing or publicity
14 campaign associated with this request for information
15 will be published in the Federal Register. We hope to
16 conduct some outreach with NAILS and the community that
17 receives Native funding. But also keep in mind that
18 this isn't just a native funding issue. It's all
19 grantees.

20 CHAIRMAN KECKLER: Yes. That's right. Our
21 grantees might -- Montana Legal Services, and so on,
22 might have that.

1 So that sounds fine. The way it's written,
2 the request for information is kind of directed at
3 grantees in the sense that, have you received these
4 requests, which is appropriate. I wonder, besides the
5 overall organizations, if any of the tribal courts or
6 tribal governments themselves would want to comment on
7 this.

8 Let the record show Gloria's nodding her head
9 that they might want to do that.

10 PROFESSOR VALENCIA-WEBER: Yes. And I can
11 give you some sources who have probably the best list
12 of tribal governments and who it should be sent to.

13 Additionally, I think we ought to invite
14 comments from the Association of States' Attorney
15 Generals because the whole enforcement of criminal law
16 and protection of everybody in Indian Country involves
17 those people. And a number of them do have
18 understanding with tribes about how criminal
19 jurisdiction is to be exercised so that, overall, you
20 protect everybody. I think an informed discussion is
21 in our interest.

22 CHAIRMAN KECKLER: I think I can agree with

1 that.

2 Are there other comments on the document
3 itself, which is the matter before the Committee, in
4 terms of amendments or changes to the document?

5 MS. BROWNE: This is Sharon. Can I just ask a
6 question?

7 CHAIRMAN KECKLER: Please do.

8 MS. BROWNE: There was a question on funding.

9 And I notice on Kara's memo that previously, tribes
10 were required to reimburse for, at the tribe's expense,
11 a public defender or the equivalent of a public
12 defender. Does that carry over into the new law? And
13 if so, should that be part of the question or the
14 information that the Federal Register notice will try
15 to elicit?

16 And the second question I had is the
17 misdemeanors -- I went on the BIA website, and it said
18 that tribes were limited to violations of tribal law.
19 Has that now been extended to include state and federal
20 felony laws? Or is it still limited to tribal laws?
21 Those are my two questions.

22 MS. WARD: This is Kara. With respect to your

1 first question about funding, the Tribal Law and Order
2 Act does indicate that there were not going to be
3 additional funds made available to the tribes to
4 provide free public defenders for the indigent.

5 Instead, what the congressional record
6 indicates is that's where LSC became -- the amendment
7 to LSC's Act came into play, saying that the civil
8 legal aid that's made available by the Legal Services
9 Corporation, that funding can be used to provide
10 the -- or to fill in the demand for public defenders.

11 So that is interesting. That same piece of
12 legislation doesn't have any additional funding for LSC
13 for that activity.

14 Then with respect to your second question,
15 that is an astute notice, that the tribal law is the
16 law of the tribal courts. So one of the affirmative
17 actions that these tribes must undertake in order to
18 access the increased sentencing authority is pass new
19 criminal laws in accordance with the Tribal Law and
20 Order Act that criminalize these more serious felonies
21 under their laws.

22 MS. BROWNE: Okay. So it is still going to be

1 limited to tribal law --

2 PROFESSOR VALENCIA-WEBER: Sharon, this is
3 Gloria.

4 MS. BROWNE: -- for LSC to participate in it?

5 PROFESSOR VALENCIA-WEBER: Sharon, this is
6 Gloria. The Major Crimes Act, as interpreted by the
7 Supreme Court, creates a fractionated jurisdiction such
8 that the big felonies, the federal attorney has to
9 prosecute. But a tribe may prosecute the same
10 defendant arising from the same facts of the crime
11 occurring on tribal territory, tribal jurisdiction.
12 And those would be the misdemeanors under tribal law.

13 Now, a typical thing might be that the federal
14 attorney is going to prosecute for the homicide. The
15 tribal court might prosecute for reckless endangerment
16 of firing firearms on the reservation, et cetera, et
17 cetera.

18 The Supreme Court has held that that does not
19 involve double jeopardy because these are seen as
20 distinct and different jurisdictions, much like federal
21 and state may prosecute for a similar act but under
22 different jurisdiction.

1 So that has been the retained pattern since
2 the 1880s Act has been interpreted and applied by the
3 Supreme Court and by amendments made by Congress.

4 MS. BROWNE: Okay. Just to clarify or make
5 sure I understand, then the tribal courts are still
6 going to adjudicate tribal law even if it includes a
7 greater crime than what would be classified as a
8 misdemeanor?

9 PROFESSOR VALENCIA-WEBER: Can you give me an
10 example? I'm not sure what you mean, "a greater
11 crime."

12 MS. BROWNE: Well, for example, in what you
13 just said, a homicide would be a violation, possibly,
14 of federal law. But then the tribe, under tribal law,
15 could bring an action against the defendant for
16 discharging a firearm based upon the same incident.
17 But the tribal court would be adjudicating the incident
18 under tribal law?

19 PROFESSOR VALENCIA-WEBER: That's pretty close
20 to it. And most of the time, it's not going to be that
21 different from whatever you would have in state law.
22 Now, there's also in this crazy quilt of criminal

1 jurisdiction that the feds can also prosecute not only
2 for the primary biggest charge, but also lesser
3 included offenses.

4 So in reality, let's talk about what's on the
5 ground. The tribal prosecutor talks with the federal
6 prosecutor, and they decide who's going to cover what.

7 And generally, unless you're in appeal any state, and
8 you in California are -- so what you've observed in
9 criminal jurisdiction there, California, by a
10 congressional act, Public Law 280, was given the
11 jurisdiction over the crime within the state
12 boundaries. So you're in a slightly different pattern.

13 MS. BROWNE: All right. That's probably
14 what's causing my confusion. Thank you.

15 CHAIRMAN KECKLER: Okay. So the current issue
16 before the Committee is -- and this is, as I understand
17 it, going to be a committee vote rather than a board
18 vote at this time -- but a committee issue to authorize
19 the request for information.

20 In terms of the schedule that we've talked
21 about for it, I believe it's something like if we could
22 publish it by May 15th and leave the comment period

1 open for 90 days?

2 MS. WARD: That's taking into account Chairman
3 Levi's suggestion to leave it open after the July
4 meeting for another 30 days. I have to run the math.

5 CHAIRMAN KECKLER: Well, that's why I'm trying
6 to time it out. We could have it be however
7 long -- the July meeting is --

8 MR. LEVI: The 20th.

9 CHAIRMAN KECKLER: -- the 20th. So if you
10 have it by -- we could leave it open for 120 days or
11 something. Publish it relatively soon and leave it
12 open for 120 days.

13 MS. WARD: That sounds good.

14 CHAIRMAN KECKLER: Okay. And so -- yes,
15 Father Pius?

16 FATHER PIUS: Just a quick couple questions.
17 One, in terms of the questions that we are asking, none
18 of them are really prospective. In other words, we
19 never ask them, do you have current plans to expand
20 your work to include these matters? Was that
21 deliberate or --

22 CHAIRMAN KECKLER: Well, we're gathering data.

1 But that's a good point, and I think that if you look
2 through these questions -- so, for instance, if you
3 look through the first question, "Does your
4 organization undertake representations of criminal
5 defendants?", you could put in, does your organization
6 undertake or plan to undertake -- or plan to do so? I
7 think that could be a good amendment.

8 FATHER PIUS: Yes. I think there should be
9 something there saying -- I mean, it should be stronger
10 than just, have you talked about it? But do you have
11 concrete plans, or are you developing plans? Something
12 just to catch to make sure, even if they're not doing
13 it now or they haven't in the past, that if there are
14 groups that are actively considering doing this,
15 whether or not they're doing that.

16 The only other thing is, there's a typo.
17 Number 3B, that "if" should be deleted, I think. "If
18 no, please indicate if the number" --

19 CHAIRMAN KECKLER: Yes. If rather than --

20 FATHER PIUS: There should be no if. "If no,
21 please indicate the number of matters your organization
22 has undertaken in criminal cases in tribal courts since

1 2010." Page 5.

2 MS. WARD: Sure.

3 FATHER PIUS: Just read that through and make
4 sure that there's not a typo there. That's it.

5 CHAIRMAN KECKLER: Right. Thank you, Father
6 Pius.

7 So Kara, that wouldn't be a problem to talk
8 about people's concrete plans, or some language to
9 indicate that or get that data?

10 MS. WARD: It's not a problem.

11 CHAIRMAN KECKLER: That would be good.

12 So with that, is there a motion to approve to
13 authorize the issuance of this request for information?

14 M O T I O N

15 MS. MIKVA: So move.

16 CHAIRMAN KECKLER: Seconded?

17 MR. GREY: Second.

18 CHAIRMAN KECKLER: All in favor?

19 (A chorus of ayes.)

20 CHAIRMAN KECKLER: Opposed?

21 (No response.)

22 CHAIRMAN KECKLER: Then the motion carries,

1 and we will authorize the request for information in
2 the Federal Register to gather information from the
3 public concerning grantee representation of criminal
4 defendants in tribal courts, as amended, and on the
5 scheduled indicated.

6 All right. We'll now turn to our second
7 topic, which is to consider and act on the proposed
8 notice of rulemaking workshop regarding potential
9 changes to the private attorney involvement rule in a
10 manner responsive to the recommendations of the Pro
11 Bono Task Force report. And I'll turn it back over to
12 Kara to go ahead and introduce this topic.

13 MS. WARD: Sure. This proposal moves forward
14 the PAI rulemaking that was initiated at the last
15 meeting. The plan here is to host two rulemaking
16 workshops that are roughly organized along the topics
17 in the Pro Bono Task Force report. There are three
18 topics for discussion there, and those are reflected
19 word for word within the current draft of the proposed
20 rulemaking workshops.

21 The workshops are anticipated to be planned as
22 panel discussions with public participation at points

1 therein from webinar, in-person, and telephone
2 participants. The first workshop will also include a
3 discussion of scope and what should be included if
4 there's anything in addition to these three topics or
5 to constrain the topics in any meaningful way.

6 CHAIRMAN KECKLER: Okay. Questions?

7 MR. LEVI: I'm wondering whether two workshops
8 in Washington is the best way to get the doors and
9 windows open. And we have, after all, a Denver
10 meeting. The ABA's meeting in San Francisco this year.

11 Why not have a couple of workshops out in the rest of
12 the country, where it's easier for people to come and
13 where you might get some other viewpoints?

14 This is an area in which the field has a great
15 deal to say, and I think we are being provincial in
16 limiting our workshops to Washington. Even though I
17 understand they're on the phone, it doesn't feel to me
18 much like we're out there seeking the rest of the
19 country's input. That's just an observation, but it's
20 a strongly felt one.

21 CHAIRMAN KECKLER: I certainly, in our initial
22 discussions, had wondered, if we were going to do two,

1 whether both of them certainly needed to be here in
2 Washington. And I think part of the reason is the
3 technical one, but I think that can be overcome in the
4 sense that we want to do it as a webinar and have the
5 technical capacity wherever we go to be able to
6 broadcast it more widely. But I think that's something
7 that --

8 MR. LEVI: Somehow, in San Francisco, they
9 ought to be able to --

10 CHAIRMAN KECKLER: Somebody out there knows
11 how to do that. Right?

12 (Laughter.)

13 MR. LEVI: I mean, maybe that's so far off.
14 That's not till August.

15 CHAIRMAN KECKLER: Well, then, that's the
16 other part is the scheduling, is when do we want these
17 rulemaking -- this phase to conclude? And what is the
18 basic timeline of these workshops? What are we
19 thinking?

20 MS. WARD: That's a great question. We were
21 anticipating over the summer. To maximize
22 participation, we queued it up for two, and we hoped

1 that they'd be almost identical.

2 And to address your exact question, the
3 webinar is the newest tool in federal rulemaking, and
4 people are pretty excited about the interactive nature
5 of it. But I appreciate that it doesn't replace
6 in-person participation.

7 MR. LEVI: Well, if it's really a webinar
8 where people can have give-and-take -- we've had a
9 couple of things at least a few years ago -- now, maybe
10 we've really gotten ourselves updated here. But it was
11 just you were looking at a small little box and you
12 weren't able to respond one to the other. There was
13 not interaction among the participants.

14 Is that possible in what you're envisioning?

15 MS. WARD: Sure. My preliminary research in
16 what the IT capabilities here at LSC are is that we
17 could have a live participation with a live video feed,
18 and also the PowerPoint kind of captions within.

19 CHAIRMAN KECKLER: If there's a way -- if it's
20 all the same, and there might be some expense involved,
21 but if it's all the same, we'd be better, in my view,
22 to do one someplace other than Washington, like in

1 Chicago.

2 MR. LEVI: I would suggest it. Denver,
3 Chicago or Denver or something.

4 CHAIRMAN KECKLER: Yes.

5 MR. LEVI: But Denver is where we're having a
6 meeting, and so it's --

7 CHAIRMAN KECKLER: If board members are going
8 to be a part of it, which is possible --

9 MR. LEVI: Well, and Pro Bono Task Force
10 members have a view, too.

11 MS. WARD: May I add just a detail that's
12 anticipated in the publication, is that we'd hope that
13 panelists would apply and make their desire known to
14 LSC to participate as a panel participant in the
15 rulemaking workshops. And that's why we'd have the
16 open comment period for a period of time before that.

17 The diversity of viewpoints is important to
18 make this workshop work. And the webinar
19 participation, we thought, would eliminate the burden
20 on LSC to pay for travel, and some of the other things
21 that can quickly increase costs.

22 MR. LEVI: There is another way, also, to

1 gather. And I don't know what Jim thinks about this,
2 but their project directors have meetings, regional
3 meetings, all the time. This is an issue of great
4 interest to them, and maybe it's something we could ask
5 them to put on their agendas. I don't know what Jim
6 thinks about that. I'm catching him with this.

7 PRESIDENT SANDMAN: I do think we need an
8 opportunity for formal input in a way that we can
9 capture for rulemaking. And that's what the workshops
10 are intended to do. I think it would be helpful to
11 have project directors thinking about these things as
12 they convene, but I'd want to be sure that their input
13 is recorded in a way that finds its way into the
14 rulemaking process.

15 CHAIRMAN KECKLER: Julie?

16 MS. REISKIN: A question and a comment. The
17 comment is, with absolutely no bias, if there's going
18 to be a workshop, I think Denver would be a wonderful
19 place to have it.

20 (Laughter.)

21 MS. REISKIN: The question is, I noticed in
22 the document there were questions about how can LSC

1 ensure against fraud, waste, or abuse relating to these
2 recommendations, and what caution. I'm wondering what
3 the concern is because this is more about the pro bono.
4 And so I guess I'm just wondering what kind of fraud
5 you're worried about.

6 MS. WARD: It's a more general concern that I
7 think is an appropriate question to ask in most
8 rulemaking options, is if we push this idea or this
9 innovation, is there something we should watch out for
10 in a way that it could -- an unanticipated consequence
11 that could be negative or lead to an observed
12 consequence.

13 MS. REISKIN: I'm just wondering if you might
14 want to just say unintended consequence, and maybe
15 including but not limited to fraud. Because at least
16 the way I read it was really looking at fraud. And if
17 you're really looking at unintended consequences, that
18 could be many things other than -- including but other
19 than -- I don't know.

20 CHAIRMAN KECKLER: Yes. You could put it that
21 way. Fraud, waste, and abuse is a generalized term of
22 art that gets into it. There are concerns that have

1 been raised about some of the pro bono recommendations
2 in terms of assuring compliance with all regulations
3 and so forth as we expand the scope of activities that
4 can be attributed to this pool of money. And we want
5 to get comments on that. But we can change it.

6 Laurie?

7 MS. MIKVA: Well, I just agree with Julie. It
8 jumped out at me. Why are we concerned about fraud,
9 waste, and abuse? And I agree, I'm not sure I know.
10 But in this particular context, is there
11 something -- we're not talking money somewhere.

12 The other thing is, I agree I'm not sure it
13 captures a broader -- any concerns. And so I like the
14 idea of a broader -- saying, including fraud.

15 CHAIRMAN KECKLER: Yes. Are there -- or could
16 there be -- well, go ahead.

17 PRESIDENT SANDMAN: I'd urge that the language
18 be kept as is. There are financial issues here because
19 of the requirement that grantees spend an amount
20 equivalent to 12-1/2 percent of their basic field grant
21 on PAI. How they account for that is an issue that
22 could implicit waste, fraud, and abuse issues.

1 So there's money at stake here, even though
2 we're talking about free services. For that reason, I
3 think the language proposed is appropriate.

4 MS. REISKIN: So the concern would be making
5 sure we don't have a rule where people can game it? Is
6 that -- okay.

7 PRESIDENT SANDMAN: Yes. Count things that
8 shouldn't be counted, yes.

9 MS. REISKIN: Okay. I just wasn't clear as to
10 what your concern was.

11 PRESIDENT SANDMAN: Yes. I don't mean to
12 suggest anyone would do anything inappropriate. But I
13 think that in LSC's oversight capacity, we always need
14 to be sensitive to the possibility.

15 CHAIRMAN KECKLER: Okay. So are there other
16 questions that should be added to this rule? Other
17 things that we should focus in in the rulemaking
18 workshop?

19 (No response.)

20 CHAIRMAN KECKLER: On the basis of the earlier
21 discussion -- I'm looking for the language here -- we
22 might want to -- as a compromise measure on the

1 location of the meetings, have we seen -- it says, "The
2 workshops will be held." And this is on page 2.

3 We might want to alter that language in some
4 manner in that I think the first workshop can be held
5 here in this room, and we might just want to leave it
6 open in some way whether and where and when we might
7 hold the next one, so it just says, the first workshop
8 will be held.

9 Because we don't have to designate the date of
10 the second workshop. Are we going to designate a date
11 for the first workshop?

12 MS. WARD: We would need to designate both
13 dates in this publication. Now, we could say that the
14 second location is to be determined and will be
15 separately noticed again as the date approaches.
16 There's an option there. But typically, rulemaking
17 workshops, for it to be an effective notice, would need
18 to have the date, time, and location for both.

19 CHAIRMAN KECKLER: Okay. Let's leave the
20 location open, but -- yes?

21 MR. GREY: I like that idea, actually. I
22 think that a second notice is not a bad idea and it

1 causes people who didn't see the first notice about the
2 second meeting to actually see it for the first time.
3 And it's a way of, I think -- it's a safety net
4 approach to it. But it also gives Kara some
5 flexibility to determining that second date.

6 MR. LEVI: We're noticing things all the time,
7 so that shouldn't stand in the way of -- and you'll
8 see, from the attendance and participation in the
9 first, whether or not people couldn't -- because that
10 time didn't work for them, or that you've got a lot of
11 people that haven't been heard from that really ought
12 to be heard from. And then you actually should make an
13 effort to find out when they are available for the next
14 one.

15 MS. MIKVA: That actually was -- I had a
16 question, then, about inviting people to participate as
17 panelists. It's unclear whether that's the first
18 workshop or the second workshop, and I think we should
19 clarify that. I guess we're at this point just looking
20 for participants for the first workshop.

21 MS. WARD: Sure. That clarity can be helpful.
22 The way that it's drafted and the intent behind my

1 drafting was that the panelists would seek to be
2 recognized by LSC, and we would make a judgment here,
3 for a diversity of viewpoints, of who to invite.

4 Ideally, in my mind, the two workshops would
5 parallel and be very similar to each other, with the
6 exception of the additional discussion in the first, so
7 that maximized participation. No one would be
8 disadvantaged whether they participated in the first or
9 the second, based on their availability.

10 CHAIRMAN KECKLER: Yes, Julie?

11 MS. REISKIN: One of the questions also was to
12 discuss your organization's ability to execute any
13 recommended approaches. Are you looking for both what
14 they could do right now versus what they might be able
15 to do? Again, are resources going to be allocated
16 for -- because I don't know.

17 Just thinking as an executive director, if
18 someone's answering this, they might be thinking, well,
19 if I had resources I could execute this, or maybe with
20 the resources I have I could execute a piece of it, and
21 do you have to be able to do all of it?

22 I don't know if they're going to understand

1 what you mean automatically because they've done this
2 before. But are you saying, can they do part of it?
3 There are a lot of questions here for me with that hat
4 on.

5 MS. WARD: I hear your question and I do
6 understand what you're asking. And my answer is going
7 to be unsatisfactory. It's both "and." It's the
8 paradox. I'd want both of those pieces of information
9 to help us right-size this rule.

10 So if you have a suggestion for more
11 appropriate drafting, I'm all ears. The wordsmithing
12 would be greatly appreciated. Perhaps we can discuss
13 it offline afterwards.

14 CHAIRMAN KECKLER: Okay. So what's the first
15 date of this? What day are we going to do this first
16 one?

17 MS. WARD: Well, I anticipated that we'd need
18 to have the comment period open for at least 30 days
19 beforehand, if not longer, maybe 45, to allow panelists
20 to think about the questions and their responses and if
21 they'd like to participate.

22 But I think we could also be collecting, at

1 the same time, written comments that will serve as an
2 organizing theory behind how the panelists will direct
3 their discussion for the webinar.

4 So that would mean if we were to publish May
5 15th, I would want the first workshop no sooner than
6 the end of June. And then we're talking a little bit
7 about holidays, the July 4th holiday. Summer timing
8 can be interesting.

9 MR. LEVI: Then why not have the first one in
10 Denver when we've got a board meeting there?

11 CHAIRMAN KECKLER: Okay. So that's --

12 MR. LEVI: I don't know.

13 CHAIRMAN KECKLER: It's about two and a half
14 hours. But there's a lot of people that are going to
15 be -- but as a technical matter, can we do a webinar
16 out of Denver?

17 MS. WARD: Good question. I don't know the
18 answer.

19 CHAIRMAN KECKLER: No. I know that we could.
20 But I'm just saying -- I'm not saying somebody could.
21 I'm saying, could we? That's what I'm -- yes. Let's
22 hear about -- if anybody has any comments at this

1 point, because I think that's a question. Is it within
2 the technical capacity of LSC to hold a webinar of the
3 type we're contemplating at the Denver board meeting?

4 Please, go ahead and state your name for the
5 record.

6 MR. SMITH: LaVon Smith, system engineer, LSC.

7 Sure. We have a GoToWebinar account that can travel
8 anywhere. You would just need the technical
9 capabilities. So if you're doing it at the board
10 meeting, we would talk to the IT staff at the hotel or
11 wherever you're having it at and arrange what would be
12 needed during that time.

13 But yes, it holds up to 500 people can call
14 in. So it really doesn't have to be done here. The
15 account can be signed in anywhere.

16 CHAIRMAN KECKLER: Thank you very much.

17 That's very helpful.

18 Well, with that, I will put that on the table
19 as the first sub-motion for the Committee, is should
20 the first day of these workshops be at the Denver
21 meeting?

22 MS. MIKVA: A question, which is what kind of

1 gap are we talking between the first and the second?

2 CHAIRMAN KECKLER: I'll turn back over to
3 Kara.

4 MS. WARD: Excellent question. No clear
5 answer.

6 (Laughter.)

7 MS. WARD: We had hoped they'd be relatively
8 close to each other so that the questions and the items
9 remained fresh in the minds of people who'd like to
10 participate. In my mind, I was putting them probably
11 about three to four weeks apart from one another.

12 I think there was one discussion we were going
13 to do it two weeks apart from one another. It kind of
14 depends on --

15 MR. LEVI: Well, the notion that you were
16 going to bring people down to Washington when it's 100
17 degrees, twice -- my goodness. At least give them a
18 chance to go somewhere where they might be able to
19 breathe.

20 (Laughter.)

21 CHAIRMAN KECKLER: Okay. So let's go ahead
22 and have it -- since we're going to be able to do the

1 remote meeting, the non-Washington meeting, first, we'd
2 reverse that idea. We can do that in Denver, and then
3 30 days from that day, 30 days from the July meeting,
4 have a second workshop here in D.C.

5 MS. MIKVA: Good.

6 MR. LEVI: That would be good. I do want to
7 make sure that logistically we could house -- in
8 Denver, I can't remember where we have made our
9 arrangements. And do we have the ability to extend,
10 for an afternoon or whatever, on the back end,
11 probably? The front end, I think, is a Sunday.

12 MS. FERTIG: I don't remember the name of the
13 hotel.

14 MR. LEVI: Becky, you need to come up and --

15 MS. FERTIG: This is Becky Fertig, special
16 assistant to the President. We're staying at the
17 Warwick, and we do have meeting space. So it should be
18 able to accommodate. We'll just have to work with the
19 AV folks we contract with to get everything set up.

20 PRESIDENT SANDMAN: Kara, do you have any
21 sense of the length of the workshop? Are we talking --

22 MR. LEVI: It's two and a half hours.

1 PRESIDENT SANDMAN: Two and a half hours?

2 MS. WARD: Two and a half hours, yes.

3 PRESIDENT SANDMAN: All right. Thank you.

4 CHAIRMAN KECKLER: All right. So after
5 imposing challenges on various LSC staff, various
6 mandates from the Committee --

7 MR. LEVI: Well, frankly, the way we run those
8 out-of-town meetings, if it's the way that I believe it
9 would be, then the board meeting would be the morning
10 of Tuesday and the workshop could be the afternoon.

11 But if a Tuesday is regarded as not
12 convenient, then we could do it on the front end. But
13 Sunday is probably not as convenient. I don't know the
14 answer to this. But you're envisioning most people
15 dialing into this, not flying in to it. Is that right?

16 MS. WARD: Correct. The only in-person
17 participants I would anticipate would be our panel
18 presenters.

19 MS. FERTIG: They don't even have to be in
20 person.

21 MR. LEVI: They don't have to be in person,
22 either, but there'll be some. If we have overlap of

1 presenters for that and panelists for the meeting, then
2 there would be an efficiency.

3 CHAIRMAN KECKLER: Go ahead, Robert.

4 MR. GREY: Mr. Chairman, webinars are a great
5 tool, and I think give us a reach that we haven't had
6 before. I think part of it is -- but it requires more
7 preparation on the front end. You really have to get
8 people synchronized on the questions and the issues,
9 and have them meet several times before you do it so
10 that you work a lot of the little wrinkles out of the
11 process and the timing and the expectation of how to
12 involve the audience.

13 It's not a bad idea to even do a trial run of
14 this, maybe among ourselves, just to see what it's
15 like. But I do think it becomes a very important tool,
16 particularly for the Pro Bono Implementation Task Force
17 to think about, and so this would be a good idea to
18 expose us to this process that I think we can use a lot
19 more.

20 MR. LEVI: And who would be hosting? Who
21 would be moderating the discussion?

22 MS. WARD: You can elect anyone you would

1 like. At this time, we were thinking Lynn Jennings.

2 MR. LEVI: We like that suggestion.

3 MS. REISKIN: Who has just volunteered.

4 (Laughter.)

5 MR. LEVI: She wore red for that purpose.

6 (Laughter.)

7 CHAIRMAN KECKLER: Gloria, go ahead.

8 PROFESSOR VALENCIA-WEBER: How would the
9 committees of the Pro Bono Task Force that's continuing
10 its work be involved in this? Because recall that
11 we're responding and attempting to develop something
12 that will increase the effectiveness of our pro bono
13 efforts with others.

14 MR. LEVI: Well, certainly at least I would
15 envision that the subcommittee that has this charge
16 ought to be paying attention in some way. Attending.
17 It doesn't all have to, but some of them will want to
18 listen in, certainly, I would think.

19 CHAIRMAN KECKLER: I don't believe that this
20 is within the identified responsibilities of any of the
21 subcommittees precisely because it's within the
22 jurisdiction of the Ops & Regs Committee, and we didn't

1 want to have too many cooks here.

2 Nevertheless, it is true that the people who
3 offered these recommendations from the Pro Bono Task
4 Force should certainly be made aware of this, and if
5 they have further comments and want to see this carried
6 forward, they certainly are more than welcome to
7 participate in these workshops.

8 MR. LEVI: That's what I meant.

9 CHAIRMAN KECKLER: Yes.

10 MS. WARD: I think that participation is
11 important. And naturally, as we think about our
12 panelists, that representation is essential.

13 PRESIDENT SANDMAN: Yes. I think we should do
14 very careful outreach to the subcommittee of the
15 original Pro Bono Task Force that made this
16 recommendation, invite their participation and be
17 proactive about it.

18 CHAIRMAN KECKLER: Exactly. So it's back to
19 the idea. We have the idea that we're going
20 to -- before we can figure out the exact day, we have
21 to figure out whether -- if it's going to be at the
22 Denver meeting, we have to figure out whether it's

1 going to be the front end or the back end. And that
2 has to be worked out with the whole board meeting.

3 So the sub-motion here for the Committee is to
4 recommend that we hold the first rulemaking workshop at
5 the time of the Denver meeting, and the second workshop
6 30 days after that in Washington. Okay? Does that
7 meet with the general approval of the Committee?

8 MR. LEVI: Approximately 30 days.

9 M O T I O N

10 CHAIRMAN KECKLER: Approximately 30
11 days -- well, again. Okay? So I'll go ahead and make
12 that motion from the Chair. And is there a second?

13 MS. MIKVA: Second.

14 CHAIRMAN KECKLER: All in favor?

15 (A chorus of ayes.)

16 CHAIRMAN KECKLER: All right. So that just
17 sets the dates that we're going to be working from.
18 And I got a note that there may be some public comment
19 regarding this before we take a vote on this matter, on
20 the overall rulemaking workshop structure. And I'd
21 invite public comment at this time.

22 MR. BROOKS: Hello. For the record, this is

1 Terry Brooks with the American Bar Association. And I
2 have one modest suggestion for a word change in the
3 Federal Register publication.

4 On page 40 of the public book, under topic 3,
5 it suggests as one of the questions, "LSC should
6 reexamine the rule that mandates adherence," and so on
7 and so forth. And I would like to suggest that the
8 word "rule" be changed to "interpretation."

9 I think when the Pro Bono Task Force adopted
10 this language, it was using the word "rule" in a more
11 generic or lay sense. In fact, there is no explicit
12 rule on this, but there has been an interpretation,
13 which has been controversial.

14 Just for purposes of clarity and not
15 misleading anyone into thinking that there is such a
16 rule, I'd suggest that that change be made. And I
17 thank you for taking the public comment out of order.
18 Thank you.

19 CHAIRMAN KECKLER: That's fine, Terry. Thank
20 you for your suggestion.

21 Are there any comments from the Board on this
22 suggestion?

1 MS. MIKVA: Can the Board overrule an
2 interpretation? I don't think that's really within our
3 purview. But maybe it is.

4 CHAIRMAN KECKLER: If we pass a new
5 regulation, then the answer is yes. If we don't pass a
6 new regulation, that's a more complicated answer. But
7 certainly, if we pass a new regulation, then we
8 certainly could do so.

9 DEAN MINOW: I'd welcome that suggestion, and
10 it's very well taken. Certainly, in a new regulation,
11 this should guide us. If we end up not with a new
12 regulation, we should bring this up again.

13 CHAIRMAN KECKLER: Okay. So if there are no
14 further comments, we'll make that change, which
15 is -- it's topic 3, LSC should reexamine the
16 interpretation of the rule -- or did you have a --

17 MS. BERGMAN: Yes. I'm sorry. This is Carol
18 for the record. I think Terry's point is well-taken.
19 And in my review of the Pro Bono Task Force, the issues
20 that they take is primarily with interpretations and
21 not necessarily the regulatory text.

22 But for the purposes of a rulemaking action,

1 rulemaking is confined to changing the rule, not the
2 interpretation. So as almost the intellectual
3 exercise, the idea is that we can't change an
4 interpretation through a rulemaking. We'd have to just
5 change the rule.

6 Now, this is not to say that the intention,
7 the OLA legal opinion, isn't on the table as we think
8 holistically about the way the PAI rule works. But for
9 these purposes, rulemaking cannot change an OLA
10 interpretation. It could only change the rule.

11 CHAIRMAN KECKLER: So is there suggested
12 language that you have rather than saying we should
13 reexamine the interpretation?

14 MS. WARD: One of the reasons I like what's
15 currently drafted, and there's no super pride of
16 penmanship here although I did write it, is that it
17 tracks very closely, if not word for word, for what's
18 in the Pro Bono Task Force. And I don't see a reason
19 to divert from that.

20 CHAIRMAN KECKLER: So how about this? How
21 about -- we can have comments from others about this
22 thought, which is LSC should reexamine the requirement?

1 Because the requirement isn't necessarily a rule. A
2 requirement could arise from either.

3 I mean, the requirement arises from an
4 interpretation of the rule. But if we reexamine the
5 requirement, our reexamining of it must necessarily be
6 regulatory.

7 MS. MIKVA: The requirement kind of equates to
8 the sentence.

9 CHAIRMAN KECKLER: Well, that's --

10 MS. WARD: We are digging into a substantive
11 issue here in this topic number 3. And I think
12 reasonable minds differ if the problem or the conflict
13 or the issue to be resolved exists in the rule or
14 solely in the interpretation.

15 Some people who have sat in my seat before me
16 might have said that the problem is the rule, not the
17 interpretation. The interpretation is the natural
18 consequence of the way the rule is written.

19 MR. GREY: Mr. Chairman, I may have
20 misunderstood Terry, but I thought his point was there
21 is not a rule. He said --

22 MS. WARD: That is his --

1 MR. GREY: So that's a different issue. If
2 there is a rule, then there is a rule. If there's not
3 a rule, there's not a rule. Which is it?

4 MS. WARD: Differing minds will come to
5 differing conclusions. I'm going to say that there's a
6 rule. I think the rule is, as interpreted by OLA,
7 clear on its face.

8 MR. GREY: Oh, I see what you're saying.
9 Well, I think that -- well, let me back up and say
10 this, that it might clarify this topic by making that
11 clear, that what we are considering is a rule that some
12 question its requirements, as Charles said, but in some
13 way putting the question to the public that what we are
14 faced with is a rule whose requirements are in
15 question.

16 So that may in fact bring in the notion that a
17 rule is in fact in question as opposed to not.

18 CHAIRMAN KECKLER: I like that. And one way
19 that -- here's another proposed language, which is
20 that, just to go back, "LSC should reexamine the rule
21 that, as currently interpreted, mandates adherence."
22 That's explicitly what it is, the rule as currently

1 interpreted. That's what we have.

2 MS. WARD: That's an elegant solution. I
3 think that works it out.

4 CHAIRMAN KECKLER: All right. And it's true.
5 Sometimes that's -- truth and elegance, those are --

6 FATHER PIUS: I've never heard you called
7 elegant before.

8 (Laughter.)

9 CHAIRMAN KECKLER: And it will never happen
10 again.

11 Good. All right. So with that, are there
12 further comments on the language of the rulemaking
13 workshop notice? This is a matter that will be taken
14 to the Board. It's a motion to recommend to the Board
15 that the Board authorize these under the rulemaking
16 protocol. So we'll have a chance to revisit at the
17 board level. But here at the Committee, are there
18 further comments on the language?

19 (No response.)

20 CHAIRMAN KECKLER: Hearing none, I will
21 then -- Chairman Levi?

22 MR. LEVI: The only board member who's not

1 here that's coming to the meetings is Vic Maddox. So
2 we can hear from him if he has any --

3 CHAIRMAN KECKLER: Yes.

4 MR. LEVI: But other than that, we've all had
5 our --

6 CHAIRMAN KECKLER: Right.

7 MR. LEVI: Harry's not coming?

8 CHAIRMAN KECKLER: Harry's on the phone.

9 MR. LEVI: He's on the phone?

10 CHAIRMAN KECKLER: All right. So the motion
11 would be the motion to recommend that the Board
12 authorize rulemaking workshops to consider rulemaking
13 options regarding private attorney involvement in a
14 manner responsive to the recommendations of the Pro
15 Bono Task Force report in this document, to publish
16 this document.

17 Is there such a motion?

18 M O T I O N

19 MS. MIKVA: So move.

20 CHAIRMAN KECKLER: Is there a second?

21 MR. LEVI: Second.

22 CHAIRMAN KECKLER: All in favor?

1 (A chorus of ayes.)

2 CHAIRMAN KECKLER: Opposed?

3 (No response.)

4 CHAIRMAN KECKLER: Okay. We will recommend
5 that the Board authorize these rulemaking workshops,
6 then, on the schedule indicated during discussion.

7 The third item of substantive business is to
8 consider and act on initiating rulemaking to conform
9 Part 1626, Restrictions on Assistance to Aliens, with
10 existing statutory authorizations.

11 I'll turn it over to Kara in a second. I just
12 wanted to point out the term "existing" in our motion,
13 which is that we are attempting to conform this
14 regulation to statute.

15 Go ahead, Kara.

16 MS. WARD: Sure. So this is a request to
17 initiate rulemaking consideration of what we see as
18 almost ministerial and updating work to be done on Part
19 1626.

20 It's worth noting as a factual matter that the
21 regulation itself has not been updated since 1998, and
22 the appendix was last opened up and updated in 2003.

1 Since then, three important laws have been enacted that
2 change the landscape a little bit.

3 The two that stick out and are most commonly
4 referenced are the Violence Against Women Act
5 amendments and the Trafficking in Persons. The third
6 is a limited representational eligibility, and it's for
7 H-2B forestry workers.

8 What we're looking to do at this point is
9 update the appendix, which lists documents that provide
10 a safe harbor and guidance to grantees with respect to
11 the citizenship attestation documentation. And then
12 the actual regulation itself, we're looking to insert
13 reference to these three important laws.

14 CHAIRMAN KECKLER: And just as a
15 clarification, was this updated since the time that the
16 Department of Homeland Security was created?

17 MS. WARD: Yes. So the table itself, which
18 accompanies the regulation in an appendix, has been
19 updated in 2003. But even since then, INS, as it
20 continues to adjust its new status in the world as
21 BCIS, has changed some of the names of these forms.
22 And while the legacy forms will always be able to be

1 recognized as long as they're unexpired, there are new
2 names for forms that we'd like to capture in this
3 table.

4 CHAIRMAN KECKLER: Right. So that's another
5 significant aspect, that the entire immigration has
6 been reorganized under our feet with that.

7 In addition, so the current expectation for
8 the rulemaking -- the next step is a rulemaking options
9 paper. Or what is the next step?

10 MS. WARD: The next step would be a rulemaking
11 options paper under our protocol. It would be, I
12 think, a fairly straightforward exercise, where we
13 insert the new language in the regulation to capture
14 the changes in the law.

15 Then the appendix, I think there should be an
16 extended discussion at that point whether or not the
17 appendix is its most useful as published as part of the
18 Federal Register and the regulation, or it would be
19 available as significant guidance, which would be also
20 available for notice and comment in the Federal
21 Register publication, but would be more flexible in its
22 updating to track to any changes.

1 CHAIRMAN KECKLER: Right. So that's part of
2 what we're considering from a rulemaking standpoint.
3 There's really two goals -- an immediate goal which is
4 to do the cleanup and get these documents, which I
5 understand grantees do use in some ways, but to put
6 them into regulatory form; that would be step one,
7 which we'd accomplish.

8 Then we would consider and discuss the idea
9 that the regulation, when we publish it, would indicate
10 that on a going-forward basis, the appendix itself, the
11 list of those, would be treated as procedural guidance,
12 significant guidance, but would be non-regulatory going
13 forward.

14 But in order to do that, we'd have to say that
15 in a regulatory context. And since we're going to
16 publish the regulation anyway, we might as well, right
17 now, fix the appendix for the last time at a regulatory
18 level, and then do it then.

19 We can discuss whether we're going to do that
20 or not. But that's the second step.

21 Go ahead, Julie.

22 MS. REISKIN: I just have to ask, is there any

1 way we can -- do we have to use the word "alien"? That
2 feels so offensive. Can we use like "undocumented"
3 or -- to me, that just feels -- I mean, I picture a
4 movie with some scary creature.

5 MS. WARD: I think your point's well-taken
6 that the term is anachronistic, and that is definitely
7 on the table in the rulemaking, to change it.

8 CHAIRMAN KECKLER: Yes. I hear you. The
9 question, really, would be -- we're trying to match
10 statutes. So the question would be, are we matching
11 the statute or not? So if it's in the statute, my
12 opinion is we would need to use it. And if it's not in
13 the statute, then I think we would have flexibility.

14 MR. FORTUNO: It's in the statute.

15 CHAIRMAN KECKLER: All right. What we could
16 do -- a thought is -- about that, if we're going to be
17 doing some kind of preamble to the regulation, we can
18 refer in some other manner. We don't necessarily have
19 to refer to that within the preamble always, in all
20 cases.

21 So where we would have some flexibility, we
22 can speak about -- whatever the generalized term is

1 within the federal government currently, "unlawful
2 migrant" or whatever you want.

3 MR. LEVI: Or drop a footnote at the end of
4 something, or an asterisk, so that they can quote the
5 statute.

6 CHAIRMAN KECKLER: Right. All right. Anyway,
7 we haven't had to decide that at this point yet because
8 we haven't written a preamble or written a rule. So
9 we'll address that going forward.

10 MS. MIKVA: Leave that to Kara.

11 CHAIRMAN KECKLER: Oh, yes. We'll leave it to
12 Kara, yes, and you can criticize her language. Yes.

13 Okay. Are there further questions about this
14 document? Yes, Gloria?

15 PROFESSOR VALENCIA-WEBER: Those who teach
16 immigration law categorize the people addressed by that
17 whole body of law as "immigrant/non-immigrant." And
18 that's really what you have in this table. You may
19 want to take that into account in whatever intro you
20 do.

21 Secondly, I think it's commendable that the
22 appendix be set up the way that Kara recommends. It's

1 impossible to keep up with the forms, and sometimes the
2 labels, that previously the INS and now CIS use for
3 different categories.

4 So, as a result, all of the materials in
5 teaching and practice of immigration law pretty much
6 stay on the same way where you have it, a changing
7 site, and you can get the latest.

8 If you look, in fact, at the DHS CIS site,
9 that's exactly what they're doing because they don't
10 publish anything any more in hard print with these
11 names and numbers because every month there is a notice
12 of revisions with new numbers.

13 CHAIRMAN KECKLER: Right.

14 MR. LEVI: And actually, you included the
15 statute. It's on page 50 of the board book. But in
16 footnote 8, you've got a long quote replete with the
17 use of the word "alien."

18 MS. WARD: Right. The statute and the
19 appropriations still use those terms.

20 CHAIRMAN KECKLER: Okay. So are there
21 further -- right now we just need to authorize
22 rulemaking. So this document, I guess the appendix

1 itself, we're not even authorizing the appendix as
2 written right there. When would you anticipate -- or
3 if we authorize a rulemaking options paper, what's the
4 timeline going forward, then?

5 MS. WARD: Sure. What you're looking at in
6 the appendix is many, many hours of work with a number
7 of folks, including our very capable interns, who have
8 been extraordinarily helpful at this time.

9 It is almost ready for prime time, I will say.

10 But I think it can't be reviewed too closely or for
11 too long. So I would like, ideally, considering the
12 bandwidth we have in our office, probably about another
13 month to review it before a rulemaking options paper
14 would be prepared.

15 So it might be teed up for the July meeting,
16 but that's ambitious. It might need to hold off until
17 the next.

18 CHAIRMAN KECKLER: Well, if the rulemaking
19 options paper would be available, then you would
20 have -- the next step is a proposed rule. Right? The
21 appendix would appear in a proposed rule, which is one
22 stage further.

1 MS. WARD: I think with the strategic nature
2 of this particular rulemaking, the rulemaking options
3 would be accompanied by a draft notice of proposed
4 rulemaking. So we would have the actual regulatory
5 text available.

6 CHAIRMAN KECKLER: All right. That seems
7 reasonable, and we seem to be further along, obviously,
8 than we are with some other rules in terms of the
9 statutory detail.

10 MR. LEVI: So you need a motion.

11 CHAIRMAN KECKLER: Yes. So we need a motion.
12 And the motion that we're authorizing is a motion to
13 recommend that the Board authorize -- we're initiating
14 rulemaking -- a motion to recommend that the Board
15 authorize the Committee to consider rulemaking options
16 to conform Part 1626, Restrictions on Assistance to
17 Aliens, with existing statutory authorizations.

18 Is there such a motion?

19 M O T I O N

20 MR. LEVI: Move it.

21 MS. MIKVA: Second.

22 CHAIRMAN KECKLER: All in favor?

1 (A chorus of ayes.)

2 CHAIRMAN KECKLER: The motion carries, need we
3 will recommend that the Board recommend rulemaking for
4 Part 1626.

5 Then, yes, we're going to have -- the next
6 topic is public comment. The next section is public
7 comment. And I will open it up.

8 MR. GREENFIELD: Great. Thank you, Charles.
9 Chuck Greenfield, chief civil counsel for NLADA. I was
10 trying to get in before the vote was done.

11 CHAIRMAN KECKLER: Oh, well --

12 MR. GREENFIELD: But I will say that NLADA is
13 fully in support of this, and would like to thank the
14 Legal Services Corporation for moving this issue. It's
15 been quite a while, actually, if you notice, with the
16 VAWA amendments in 2006 and also the Trafficking Act in
17 2005. So we're looking at seven, seven and a half
18 years now that it has not been within the regulations.

19 In my responsibility to advise legal aid
20 programs throughout the country that are LSC grant
21 recipients, this issue has come up because I read the
22 regulations sometimes. And many of them do know the

1 program letters and do know how to interpret the
2 program letters. They know them quite well.

3 But there are a number that do not, and so
4 then I have to point out, well, there's these program
5 letters. And you go back and -- you can't actually
6 rely upon the regulation; you've got to go back to a
7 program letter. So we're just fully in support of
8 this, and if it can be done as expeditiously as
9 possible.

10 With me today is Professor Leslye Orloff, who
11 has worked quite a bit on this issue. And she wanted
12 to talk to the Board about this.

13 CHAIRMAN KECKLER: Well, thank you. And I'm
14 sorry you didn't get in, but I'm glad that we're on the
15 same page with that. And hopefully it will be helpful
16 to the field.

17 Professor?

18 PROFESSOR ORLOFF: Thank you. I'm Leslye
19 Orloff. I direct the National Immigrant Women's
20 Advocacy Project at American University Washington
21 College of Law, and have been involved in helping draft
22 both the Kennedy amendment and the Durbin amendment in

1 2005.

2 And a large part of our work is I travel
3 around the country training lawyers all the
4 time -- legal services, non-legal services, advocates,
5 attorneys, police, prosecutors, judges. And about 20
6 percent of the time every year when I'm out on the
7 field, I train regularly on the policy guidance from
8 LSC from 2006.

9 I'm constantly surprised -- not constantly;
10 I'm now expecting it -- but people are constantly
11 surprised when I stand there and say, Legal
12 Services-funded programs can represent immigrant
13 victims of domestic violence, sexual assault, human
14 trafficking, and any U visa crime.

15 And they say, but they're not married to the
16 spouse. And so it's a huge problem. I got two
17 technical assistance calls last week on exactly the
18 same issue. I give them the statute. I give them the
19 policy letter. They go to the regulation, and they
20 say, but. And it's a huge problem.

21 It's a problem, just so you know, that we deal
22 with all the time with almost every part of DHS

1 implementation of VAWA, where it's all -- we have regs
2 in VAWA that are outdated from 1994, like original VAWA
3 overruled a reg, and they've never changed it.

4 So this is common, but it's a really big issue
5 in the field. I have my student with me from last
6 semester. We did a piece of research. We haven't
7 analyzed all the data yet, but we did a national
8 survey. We got feedback from 43 states, 189 domestic
9 violence, sexual assault, and legal services and other
10 kinds of legal organizations to get a sense of how big
11 the problem was.

12 And one of the things that we're seeing is
13 that what people are reporting to us is that the
14 regular categories of people who were eligible from the
15 Kennedy amendment consistently get access.

16 But the percentages people are reporting that
17 are getting access to legal services programs around
18 the country in different states is 10 percent of sexual
19 assault victims, which is the highest number we found
20 between sexual assault, domestic violence, and human
21 trafficking.

22 So the problem is that as a practical matter,

1 it's not happening. There are programs that are
2 absolutely fantastic and that are models that have
3 intake procedures in place that could be shared.

4 So I suggest that one of the things that you
5 look at is that the reg, or whatever appendices or
6 whatever preamble, et cetera, really gives some
7 direction. And then when you're talking about all the
8 kinds of documentation that are needed, here it's very
9 different. Here it's not documentation of status, it's
10 documentation of abuse, or a way to verify abuse.

11 So I'm here to encourage you to go as quickly
12 as possible. Anything you can do to expedite
13 this -- the statute has been in place and this reg has
14 been out of date for a long time. And people are being
15 harmed because these are the experts in the country on
16 domestic violence, in particular, that a lot of
17 immigrant victims are just not getting the access to
18 that they need.

19 So we're going to finish up this research,
20 provide it to you all, make some suggestions,
21 potentially, some thoughts from what we're seeing in
22 the field about what you might want to make sure is in

1 a rule.

2 And as to documentation, we actually have
3 something we prepared for HUD about how do you figure
4 out if somebody's a victim that we might want to share
5 with you to give you some ideas of the kinds of things
6 that you might recommend to programs to look for so
7 that they're screening for the victimization before
8 they start asking immigration questions. Because
9 that's the problem.

10 CHAIRMAN KECKLER: Well, thank you. We are
11 hoping to move forward on this, and hopefully it will
12 be, as I said, helpful.

13 PROFESSOR ORLOFF: If there's any way to
14 expedite in terms of any special processes or
15 procedures that would get it to go faster, that would
16 be fantastic. I just want to make that point. Thank
17 you.

18 CHAIRMAN KECKLER: Martha?

19 DEAN MINOW: I just have a question. Before
20 we actually go to something like a formal public
21 comment participation, is there a way that there can be
22 technical assistance or collaboration or discussion as

1 we do our own due diligence and development?

2 CHAIRMAN KECKLER: I'll let OLA handle that.
3 But in general, we get a lot of different information
4 at this stage before there's an NPRM. There's not a
5 particular restriction on our capacity to gather
6 legislative facts over time. And then we'll turn it
7 into an NPRM, and then we'll have a comment period.
8 But prior to that, no.

9 MS. WARD: Sure. What I'm hearing is that it
10 sounds like this is an issue that's ripe for additional
11 program attention and some public training. I don't
12 necessarily see a rulemaking solution, but I think it's
13 something that's worth considering in the other
14 offices.

15 PROFESSOR VALENCIA-WEBER: I second the
16 professor's comments on the difficulties when the law
17 changed because a number of service providers, not just
18 ours, preclude eligible clients by asking the wrong
19 first question.

20 I would urge that when we do the notice of
21 rulemaking, we be sure and include in AILA, the
22 Association of Immigration Law Attorneys, who

1 absolutely will have helpful information and input for
2 us.

3 CHAIRMAN KECKLER: Okay. Is there any further
4 public comment?

5 (No response.)

6 CHAIRMAN KECKLER: Hearing none, last, to
7 consider and act on any other business for the
8 Committee for today.

9 (No response.)

10 MS. WARD: Thank you very much.

11 CHAIRMAN KECKLER: Thank you.

12 Hearing no other business, I will make only
13 the comment from earlier that we have a pending matter,
14 which I assume somebody will take charge of, of
15 potentially getting a panel on the tribal courts issue
16 for this upcoming meeting.

17 And whether that will be within this Committee
18 or not, we'll certainly be involved with it, and
19 hopefully that will be -- please reach out to me. And
20 to the extent that I can be helpful or this Committee
21 can be helpful in developing that panel, please let me
22 know.

1 And with that, I will move to consider
2 adjournment of the meeting.

3 M O T I O N

4 MS. MIKVA: So moved.

5 MR. LEVI: Second.

6 CHAIRMAN KECKLER: All in favor?

7 (A chorus of ayes.)

8 CHAIRMAN KECKLER: The committee meeting is
9 adjourned.

10 (Whereupon, at 4:00 p.m., the Committee was
11 adjourned.)

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