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
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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CHAIRMAN KECKLER: I note the presence of a quorum, and will now call to order the noticed meeting of the Operations & Regulations Committee.
You should have before you an agenda. And I ask for approval of the agenda.

MOTION
MR. LEVI: So move.
MS. MIKVA: Second.
CHAIRMAN KECKLER: The motion has been moved and seconded. All in favor?
(A chorus of ayes.)
CHAIRMAN KECKLER: The agenda is approved.
You should now have a look at the meeting minutes of the January 25, 2013 meeting of the Committee, our last regular meeting.
Can I have approval of the minutes?
MS. MIKVA: Move to approve.
MR. LEVI: Second.
CHAIRMAN KECKLER: All in favor?
(A chorus of ayes.)
CHAIRMAN KECKLER: The minutes are approved.

MS. BROWNE: Charles, this is Sharon Browne.

CHAIRMAN KECKLER: Hi, Sharon.

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

CHAIRMAN KECKLER: Oh, okay.

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

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

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

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

As you may recall, we have initiated rulemaking in this in response to a statutory change, initiating rulemaking, a change in our regulations. And the first step that we're now considering to move that process forward is a request for information to
find out more about the situation on the ground regarding representation of criminal defendants in tribal courts.

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

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

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

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

MS. WARD: Sure. Well, first, it's a pleasure to be with you today. And I also want to especially
thank Professor Valencia-Weber for helping us out with this Indian court tribal rulemaking. I hope I get it right and that I've learned properly from you for the last month.

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

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

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

For tribal courts to take advantage of that increased sentencing authority and to prosecute more
serious felonies than they currently have authority to
do so, they need to take affirmative actions, including
setting up public defenders, which are currently not
required under tribal court law, and doing other things
such as training a judiciary and making other typical
allowances for due process rights and the recordation
of these kinds of proceedings.

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

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

As we do that, that's going to inform the way
we write this rule. And without this information, I
think our rule might be wrong-sized, or not fully contemplate everything that our grantees are thinking about. So we have five questions that Professor Valencia-Weber helped us think about, and that's what we hope to publish in the Federal Register.

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

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

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

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

The legislation aims to correct problems that
occurred going back to the mid-1880s, when Congress passed the Major Crimes Act and removed from tribes and states the jurisdiction over the major crimes, felonies. That act also has allowed tribes to have jurisdiction over misdemeanor crimes within their territory and in their tribal courts.

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

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

So we want to focus on that. This is a major shift. And likewise, accompanying it is a major shift in the bylaw of the same kind. But both pieces, TLOA and VAWA, are opt-in choices for the tribe. They must choose to opt in and invest the resources to meet six
critical criteria to establish that they will provide fair and equal protection to all those who they haul into their courts for criminal prosecution.

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

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

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

The difficulty, as Kara and I have discussed, is knowing how and where we might face those kinds of requests for our grantees.
For instance, in the law there is no accreditation or requirement, some arm in the Federal Government -- and remember, Congress has plenary power, according to the Supreme Court, over Indian law and Indian affairs -- but there is no centralized place either to approve a tribe and saying, yes, you've met all the requirements and now you may exercise criminal jurisdiction over these major crimes, and no central registry. And that is what they're coping with.

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

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

When we meet in Denver, I would like to suggest that we invite the Director of the Office of Tribal Justice in Department of Justice to be part of
the people who can bring us up to date on what we know, so that we can then project, with the information gathered by this request for information as well as what the people most on the ground know, which of our grantees and where those requests are likely to come from.

CHAIRMAN KECKLER: Right. Thank you, Gloria. I think that's something that is -- that invitation, having somebody come in and speak to this Committee about this, I think could be useful at that time, if that's something that they would be open to.

Yes?

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

CHAIRMAN KECKLER: Right. And one of the
purposes of the request for information is to
understand the scale of this and to understand, to the
extent -- is this something that is just going to
happen occasionally, that there's an attorney who is
familiar with a tribal court -- it might be a small
tribal court system -- but happens to be a civil legal
aid attorney. And they're called in because something
has happened. And it's just something that's very
occasional.

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

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

DEAN MINOW: Sure.

CHAIRMAN KECKLER: Probably for the reasons
that Gloria might have suggested, if they're going to
expand somebody's jurisdiction and it happened to be
the case that they expanded LSC's jurisdiction, but could they have expanded the federal public defender's jurisdiction --

DEAN MINOW: Right.

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

DEAN MINOW: Absolutely.

CHAIRMAN KECKLER: Laurie?

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

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

And it's in many instances because it arises out of whatever else -- the issue that initially our LSC went into the tribal court for. It could have been something arising in family law that then results in a
domestic violence. That's a typical kind of thing. And so, in a way, that's part of the data we certainly should gather through this and whatever means we already have.

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

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

So then the question arises, are we going to
get requests to our LSC attorneys if whatever it is the tribe has in place is inadequate for the demand?

That's another hanging-out-there question.

CHAIRMAN KECKLER: Yes. Father Pius?

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

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

And so no. I think they can engage in this. So in a way, we're in a situation which there will be some data emerging, at least at some point, about how often they're going to be using this authority.
But then we need to think a little bit more about, is there a scope for regulating it so that we are helpful and we do fulfill Congress's request of us, in a sense, but it doesn't begin to overwhelm our grantees' other work, I think. I think that's the question we have.

Yes. Please go ahead.

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

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

Then they said, we've already pushed. And besides the resources, we know what's needed for a good defense. And, for instance, we have no investigators
to do a decent job in a criminal felony defense. You're going to have to have investigators and other resources they don't have.

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

CHAIRMAN KECKLER: Julie?

MS. REISKIN: This may be obvious to everyone else, but that's what I didn't understand, is we're saying -- or the Congress said, okay, you can do this. But is there more money? Or who pays? Where does the money come from to do this?

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

MS. REISKIN: I'll check my pockets.

(Laughter.)

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

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

The Congress has given them the authority.
They need the resources, and -- I'm sorry, Julie. What was the focus there?

MR. LEVI: More money.

MS. REISKIN: Is there money?

PROFESSOR VALENZIA-WEBER: More money. Okay.

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

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

Every year, the National Congress of American Indians sends a reminder list to Congress: what you've passed but have not appropriated for. And you bad-mouth our courts, but then you don't deliver on
what you promised us. So at this point, the concern for money is there on all sides, the federal arm that works with the tribes, and the tribes themselves.

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

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

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

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

MS. WARD: That's a great question. So considering that we would like to have an extended discussion at the July meeting in Colorado, I would
hope to open the questionnaire, or this request for information, shortly, soon, and have it open to run through the July meeting, and then close just afterwards. It would be an extended comment period.

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

CHAIRMAN KECKLER: That sounds reasonable.

And in addition, we're just going to publish this in the Federal Register and send it to grantees? Is that the general plan? Or --

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

CHAIRMAN KECKLER: Yes. That's right. Our grantees might -- Montana Legal Services, and so on, might have that.
So that sounds fine. The way it's written, the request for information is kind of directed at grantees in the sense that, have you received these requests, which is appropriate. I wonder, besides the overall organizations, if any of the tribal courts or tribal governments themselves would want to comment on this.

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

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

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

CHAIRMAN KECKLER: I think I can agree with
Are there other comments on the document itself, which is the matter before the Committee, in terms of amendments or changes to the document?

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

CHAIRMAN KECKLER: Please do.

MS. BROWNE: There was a question on funding. And I notice on Kara's memo that previously, tribes were required to reimburse for, at the tribe's expense, a public defender or the equivalent of a public defender. Does that carry over into the new law? And if so, should that be part of the question or the information that the Federal Register notice will try to elicit?

And the second question I had is the misdemeanors -- I went on the BIA website, and it said that tribes were limited to violations of tribal law. Has that now been extended to include state and federal felony laws? Or is it still limited to tribal laws?

Those are my two questions.

MS. WARD: This is Kara. With respect to your
first question about funding, the Tribal Law and Order Act does indicate that there were not going to be additional funds made available to the tribes to provide free public defenders for the indigent. Instead, what the congressional record indicates is that's where LSC became -- the amendment to LSC's Act came into play, saying that the civil legal aid that's made available by the Legal Services Corporation, that funding can be used to provide the -- or to fill in the demand for public defenders. So that is interesting. That same piece of legislation doesn't have any additional funding for LSC for that activity.

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

MS. BROWNE: Okay. So it is still going to be
limited to tribal law --

PROFESSOR VALENCE-WEBER: Sharon, this is Gloria.

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

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

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

The Supreme Court has held that that does not involve double jeopardy because these are seen as distinct and different jurisdictions, much like federal and state may prosecute for a similar act but under different jurisdiction.
So that has been the retained pattern since
the 1880s Act has been interpreted and applied by the
Supreme Court and by amendments made by Congress.

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

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

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

PROFESSOR VALENCEA-WEBER: That's pretty close
to it. And most of the time, it's not going to be that
different from whatever you would have in state law.
Now, there's also in this crazy quilt of criminal
jurisdiction that the feds can also prosecute not only for the primary biggest charge, but also lesser included offenses.

So in reality, let's talk about what's on the ground. The tribal prosecutor talks with the federal prosecutor, and they decide who's going to cover what. And generally, unless you're in appeal any state, and you in California are -- so what you've observed in criminal jurisdiction there, California, by a congressional act, Public Law 280, was given the jurisdiction over the crime within the state boundaries. So you're in a slightly different pattern.

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

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

In terms of the schedule that we've talked about for it, I believe it's something like if we could publish it by May 15th and leave the comment period
open for 90 days?

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

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

   MR. LEVI: The 20th.

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

   MS. WARD: That sounds good.

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

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

   CHAIRMAN KECKLER: Well, we're gathering data.
But that's a good point, and I think that if you look through these questions -- so, for instance, if you look through the first question, "Does your organization undertake representations of criminal defendants?", you could put in, does your organization undertake or plan to undertake -- or plan to do so? I think that could be a good amendment.

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

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

CHAIRMAN KECKLER: Yes. If rather than --

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

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

CHAIRMAN KECKLER: Right. Thank you, Father Pius.

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

MS. WARD: It's not a problem.

CHAIRMAN KECKLER: That would be good.

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

MOTION

MS. MIKVA: So move.

CHAIRMAN KECKLER: Seconded?

MR. GREY: Second.

CHAIRMAN KECKLER: All in favor?

(A chorus of ayes.)

CHAIRMAN KECKLER: Opposed?

(No response.)

CHAIRMAN KECKLER: Then the motion carries,
and we will authorize the request for information in the Federal Register to gather information from the public concerning grantee representation of criminal defendants in tribal courts, as amended, and on the scheduled indicated.

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

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

The workshops are anticipated to be planned as panel discussions with public participation at points
therein from webinar, in-person, and telephone participants. The first workshop will also include a discussion of scope and what should be included if there's anything in addition to these three topics or to constrain the topics in any meaningful way.

CHAIRMAN KECKLER: Okay. Questions?

MR. LEVI: I'm wondering whether two workshops in Washington is the best way to get the doors and windows open. And we have, after all, a Denver meeting. The ABA's meeting in San Francisco this year. Why not have a couple of workshops out in the rest of the country, where it's easier for people to come and where you might get some other viewpoints?

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

CHAIRMAN KECKLER: I certainly, in our initial discussions, had wondered, if we were going to do two,
whether both of them certainly needed to be here in Washington. And I think part of the reason is the technical one, but I think that can be overcome in the sense that we want to do it as a webinar and have the technical capacity wherever we go to be able to broadcast it more widely. But I think that's something that --

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

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

(Laughter.)

MR. LEVI: I mean, maybe that's so far off.

That's not till August.

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

MS. WARD: That's a great question. We were anticipating over the summer. To maximize participation, we queued it up for two, and we hoped
that they'd be almost identical.

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

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

Is that possible in what you're envisioning?

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

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

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

CHAIRMAN KECKLER: Yes.

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

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

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

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

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

MR. LEVI: There is another way, also, to
gather. And I don't know what Jim thinks about this, but their project directors have meetings, regional meetings, all the time. This is an issue of great interest to them, and maybe it's something we could ask them to put on their agendas. I don't know what Jim thinks about that. I'm catching him with this.

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

CHAIRMAN KECKLER: Julie?

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

(Laughter.)

MS. REISKIN: The question is, I noticed in the document there were questions about how can LSC
ensure against fraud, waste, or abuse relating to these recommendations, and what caution. I'm wondering what the concern is because this is more about the pro bono. And so I guess I'm just wondering what kind of fraud you're worried about.

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

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

CHAIRMAN KECKLER: Yes. You could put it that way. Fraud, waste, and abuse is a generalized term of art that gets into it. There are concerns that have
been raised about some of the pro bono recommendations in terms of assuring compliance with all regulations and so forth as we expand the scope of activities that can be attributed to this pool of money. And we want to get comments on that. But we can change it. Laurie?

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

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

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

PRESIDENT SANDMAN: I'd urge that the language be kept as is. There are financial issues here because of the requirement that grantees spend an amount equivalent to 12-1/2 percent of their basic field grant on PAI. How they account for that is an issue that could implicit waste, fraud, and abuse issues.
So there's money at stake here, even though we're talking about free services. For that reason, I think the language proposed is appropriate.

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

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

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

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

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

(No response.)

CHAIRMAN KECKLER: On the basis of the earlier discussion -- I'm looking for the language here -- we might want to -- as a compromise measure on the
location of the meetings, have we seen -- it says, "The workshops will be held." And this is on page 2.

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

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

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

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

MR. GREY: I like that idea, actually. I think that a second notice is not a bad idea and it
causes people who didn't see the first notice about the second meeting to actually see it for the first time. And it's a way of, I think -- it's a safety net approach to it. But it also gives Kara some flexibility to determining that second date.

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

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

MS. WARD: Sure. That clarity can be helpful. The way that it's drafted and the intent behind my
drafting was that the panelists would seek to be recognized by LSC, and we would make a judgment here, for a diversity of viewpoints, of who to invite. Ideally, in my mind, the two workshops would parallel and be very similar to each other, with the exception of the additional discussion in the first, so that maximized participation. No one would be disadvantaged whether they participated in the first or the second, based on their availability.

CHAIRMAN KECKLER: Yes, Julie?

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

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

I don't know if they're going to understand
what you mean automatically because they've done this before. But are you saying, can they do part of it? There are a lot of questions here for me with that hat on.

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

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

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

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

But I think we could also be collecting, at
the same time, written comments that will serve as an organizing theory behind how the panelists will direct their discussion for the webinar.

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

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

CHAIRMAN KECKLER: Okay. So that's --

MR. LEVI: I don't know.

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

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

CHAIRMAN KECKLER: No. I know that we could. But I'm just saying -- I'm not saying somebody could. I'm saying, could we? That's what I'm -- yes. Let's hear about -- if anybody has any comments at this
point, because I think that's a question. Is it within
the technical capacity of LSC to hold a webinar of the
type we're contemplating at the Denver board meeting?

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

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

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

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

CHAIRMAN KECKLER: Thank you very much.

That's very helpful.

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

MS. MIKVA: A question, which is what kind of
gap are we talking between the first and the second?

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

MS. WARD: Excellent question. No clear answer.

(Laughter.)

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

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

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

(Laughter.)

CHAIRMAN KECKLER: Okay. So let's go ahead and have it -- since we're going to be able to do the
remote meeting, the non-Washington meeting, first, we'd reverse that idea. We can do that in Denver, and then 30 days from that day, 30 days from the July meeting, have a second workshop here in D.C.

MS. MIKVA: Good.

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

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

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

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

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

MR. LEVI: It's two and a half hours.
PRESIDENT SANDMAN: Two and a half hours?

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

PRESIDENT SANDMAN: All right. Thank you.

CHAIRMAN KECKLER: All right. So after

imposing challenges on various LSC staff, various

mandates from the Committee --

MR. LEVI: Well, frankly, the way we run those

out-of-town meetings, if it's the way that I believe it

would be, then the board meeting would be the morning

of Tuesday and the workshop could be the afternoon.

But if a Tuesday is regarded as not

convenient, then we could do it on the front end. But

Sunday is probably not as convenient. I don't know the

answer to this. But you're envisioning most people

dialing into this, not flying in to it. Is that right?

MS. WARD: Correct. The only in-person

participants I would anticipate would be our panel

presenters.

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

person.

MR. LEVI: They don't have to be in person,
either, but there'll be some. If we have overlap of
presenters for that and panelists for the meeting, then
there would be an efficiency.

CHAIRMAN KECKLER: Go ahead, Robert.

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

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

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

MS. WARD: You can elect anyone you would
like. At this time, we were thinking Lynn Jennings.

MR. LEVI: We like that suggestion.

MS. REISKIN: Who has just volunteered.

(Laughter.)

MR. LEVI: She wore red for that purpose.

(Laughter.)

CHAIRMAN KECKLER: Gloria, go ahead.

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

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

CHAIRMAN KECKLER: I don't believe that this is within the identified responsibilities of any of the subcommittees precisely because it's within the jurisdiction of the Ops & Regs Committee, and we didn't
want to have too many cooks here.

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

MR. LEVI: That's what I meant.

CHAIRMAN KECKLER: Yes.

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

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

CHAIRMAN KECKLER: Exactly. So it's back to the idea. We have the idea that we're going to -- before we can figure out the exact day, we have to figure out whether -- if it's going to be at the Denver meeting, we have to figure out whether it's
going to be the front end or the back end. And that has to be worked out with the whole board meeting.

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

MR. LEVI: Approximately 30 days.

MOTION

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

MS. MIKVA: Second.

CHAIRMAN KECKLER: All in favor?

(A chorus of ayes.)

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

MR. BROOKS: Hello. For the record, this is
Terry Brooks with the American Bar Association. And I have one modest suggestion for a word change in the Federal Register publication.

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

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

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

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

Are there any comments from the Board on this suggestion?
MS. MIKVA: Can the Board overrule an interpretation? I don't think that's really within our purview. But maybe it is.

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

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

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

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

But for the purposes of a rulemaking action,
rulemaking is confined to changing the rule, not the interpretation. So as almost the intellectual exercise, the idea is that we can't change an interpretation through a rulemaking. We'd have to just change the rule.

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

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

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

CHAIRMAN KECKLER: So how about this? How about -- we can have comments from others about this thought, which is LSC should reexamine the requirement?
Because the requirement isn't necessarily a rule. A requirement could arise from either. I mean, the requirement arises from an interpretation of the rule. But if we reexamine the requirement, our reexamining of it must necessarily be regulatory.

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

CHAIRMAN KECKLER: Well, that's --

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

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

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

MS. WARD: That is his --
MR. GREY: So that's a different issue. If there is a rule, then there is a rule. If there's not a rule, there's not a rule. Which is it?

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

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

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

CHAIRMAN KECKLER: I like that. And one way that -- here's another proposed language, which is that, just to go back, "LSC should reexamine the rule that, as currently interpreted, mandates adherence."

That's explicitly what it is, the rule as currently
interpreted. That's what we have.

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

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

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

(Laughter.)

CHAIRMAN KECKLER: And it will never happen again.

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

(No response.)

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

MR. LEVI: The only board member who's not
here that's coming to the meetings is Vic Maddox. So we can hear from him if he has any --

CHAIRMAN KECKLER: Yes.

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

CHAIRMAN KECKLER: Right.

MR. LEVI: Harry's not coming?

CHAIRMAN KECKLER: Harry's on the phone.

MR. LEVI: He's on the phone?

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

Is there such a motion?

MOTION

MS. MIKVA: So move.

CHAIRMAN KECKLER: Is there a second?

MR. LEVI: Second.

CHAIRMAN KECKLER: All in favor?
(A chorus of ayes.)

CHAIRMAN KECKLER:  Opposed?

(No response.)

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

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

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

Go ahead, Kara.

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

It's worth noting as a factual matter that the regulation itself has not been updated since 1998, and the appendix was last opened up and updated in 2003.
Since then, three important laws have been enacted that change the landscape a little bit. The two that stick out and are most commonly referenced are the Violence Against Women Act amendments and the Trafficking in Persons. The third is a limited representational eligibility, and it's for H-2B forestry workers.

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

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

MS. WARD: Yes. So the table itself, which accompanies the regulation in an appendix, has been updated in 2003. But even since then, INS, as it continues to adjust its new status in the world as BCIS, has changed some of the names of these forms. And while the legacy forms will always be able to be
recognized as long as they're unexpired, there are new
names for forms that we'd like to capture in this
table.

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

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

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

Then the appendix, I think there should be an
extended discussion at that point whether or not the
appendix is its most useful as published as part of the
Federal Register and the regulation, or it would be
available as significant guidance, which would be also
available for notice and comment in the Federal
Register publication, but would be more flexible in its
updating to track to any changes.
CHAIRMAN KECKLER: Right. So that's part of what we're considering from a rulemaking standpoint. There's really two goals -- an immediate goal which is to do the cleanup and get these documents, which I understand grantees do use in some ways, but to put them into regulatory form; that would be step one, which we'd accomplish.

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

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

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

Go ahead, Julie.

MS. REISKIN: I just have to ask, is there any
way we can -- do we have to use the word "alien"? That feels so offensive. Can we use like "undocumented" or -- to me, that just feels -- I mean, I picture a movie with some scary creature.

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

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

MR. FORTUNO: It's in the statute.

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

So where we would have some flexibility, we can speak about -- whatever the generalized term is
within the federal government currently, "unlawful migrant" or whatever you want.

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

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

MS. MIKVA: Leave that to Kara.

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

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

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

Secondly, I think it's commendable that the appendix be set up the way that Kara recommends. It's
impossible to keep up with the forms, and sometimes the labels, that previously the INS and now CIS use for different categories.

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

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

CHAIRMAN KECKLER: Right.

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

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

CHAIRMAN KECKLER: Okay. So are there further -- right now we just need to authorize rulemaking. So this document, I guess the appendix
itself, we're not even authorizing the appendix as
written right there. When would you anticipate -- or
if we authorize a rulemaking options paper, what's the
timeline going forward, then?

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

It is almost ready for prime time, I will say. But I think it can't be reviewed too closely or for too long. So I would like, ideally, considering the bandwidth we have in our office, probably about another month to review it before a rulemaking options paper would be prepared.

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

CHAIRMAN KECKLER: Well, if the rulemaking options paper would be available, then you would have -- the next step is a proposed rule. Right? The appendix would appear in a proposed rule, which is one stage further.
MS. WARD: I think with the strategic nature of this particular rulemaking, the rulemaking options would be accompanied by a draft notice of proposed rulemaking. So we would have the actual regulatory text available.

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

MR. LEVI: So you need a motion.

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

Is there such a motion?

MOTION

MR. LEVI: Move it.

MS. MIKVA: Second.

CHAIRMAN KECKLER: All in favor?
(A chorus of ayes.)

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

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

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

CHAIRMAN KECKLER: Oh, well --

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

In my responsibility to advise legal aid programs throughout the country that are LSC grant recipients, this issue has come up because I read the regulations sometimes. And many of them do know the
program letters and do know how to interpret the program letters. They know them quite well.

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

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

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

Professor?

PROFESSOR ORLOFF: Thank you. I'm Leslye Orloff. I direct the National Immigrant Women's Advocacy Project at American University Washington College of Law, and have been involved in helping draft both the Kennedy amendment and the Durbin amendment in
And a large part of our work is I travel around the country training lawyers all the time -- legal services, non-legal services, advocates, attorneys, police, prosecutors, judges. And about 20 percent of the time every year when I'm out on the field, I train regularly on the policy guidance from LSC from 2006.

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

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

It's a problem, just so you know, that we deal with all the time with almost every part of DHS
implementation of VAWA, where it's all -- we have regs
in VAWA that are outdated from 1994, like original VAWA
overruled a reg, and they've never changed it.

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

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

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

So the problem is that as a practical matter,
it's not happening. There are programs that are absolutely fantastic and that are models that have intake procedures in place that could be shared. So I suggest that one of the things that you look at is that the reg, or whatever appendices or whatever preamble, et cetera, really gives some direction. And then when you're talking about all the kinds of documentation that are needed, here it's very different. Here it's not documentation of status, it's documentation of abuse, or a way to verify abuse. So I'm here to encourage you to go as quickly as possible. Anything you can do to expedite this -- the statute has been in place and this reg has been out of date for a long time. And people are being harmed because these are the experts in the country on domestic violence, in particular, that a lot of immigrant victims are just not getting the access to that they need. So we're going to finish up this research, provide it to you all, make some suggestions, potentially, some thoughts from what we're seeing in the field about what you might want to make sure is in
a rule.

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

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

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

CHAIRMAN KECKLER: Martha?

DEAN MINOW: I just have a question. Before we actually go to something like a formal public comment participation, is there a way that there can be technical assistance or collaboration or discussion as
we do our own due diligence and development?

CHAIRMAN KECKLER: I'll let OLA handle that.

But in general, we get a lot of different information at this stage before there's an NPRM. There's not a particular restriction on our capacity to gather legislative facts over time. And then we'll turn it into an NPRM, and then we'll have a comment period. But prior to that, no.

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

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

I would urge that when we do the notice of rulemaking, we be sure and include in AILA, the Association of Immigration Law Attorneys, who
absolutely will have helpful information and input for us.

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

(No response.)

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

(No response.)

MS. WARD: Thank you very much.

CHAIRMAN KECKLER: Thank you.

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

And whether that will be within this Committee or not, we'll certainly be involved with it, and hopefully that will be -- please reach out to me. And to the extent that I can be helpful or this Committee can be helpful in developing that panel, please let me know.
And with that, I will move to consider adjournment of the meeting.

MOTION

MS. MIKVA: So moved.

MR. LEVI: Second.

CHAIRMAN KECKLER: All in favor?

(A chorus of ayes.)

CHAIRMAN KECKLER: The committee meeting is adjourned.

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

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