

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE OPERATIONS
AND REGULATIONS COMMITTEE

OPEN SESSION

Monday, July 22, 2013

1:56 p.m.

Warwick Hotel
Millennium Ballroom
1776 Grant Street
Denver, Colorado 80203

COMMITTEE MEMBERS PRESENT:

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

OTHER BOARD MEMBERS PRESENT:

Sharon L. Browne
Victor B. Maddox
Martha L. Minow (by telephone)
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, Special Assistant to the President
Rebecca Fertig, Special Assistant to the President
Ronald S. Flagg, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary
Mark Freedman, Senior Assistant General Counsel,
Office of Legal Affairs
Charles Martel, Assistant General Counsel, Office of
Legal Affairs (by telephone)
Atitaya Rok, Staff Attorney, Office of Legal Affairs
David L. Richardson, Comptroller and Treasurer,
Office of Financial and Administrative Services
Carol A. Bergman, Director, Office of Government
Relations and Public Affairs
Carl Rauscher, Director of Media Relations, Office of
Government Relations and Public Affairs
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
Lora M. Rath, Deputy Director, Office of Compliance
and Enforcement
Herbert S. Garten, Non-Director Member, Institutional
Advancement Committee
Frank B. Strickland, Non-Director Member,
Institutional Advancement Committee
Howard Belodoff, Associate Director and Indian Law
Unit Director, Idaho Legal Aid Services, Inc.
John Dossett, General Counsel, National Congress of
American Indians
Troy Eid, Chair, Indian Law & Order Commission
Carole Goldberg, Commissioner, Indian Law & Order
Commission
Tracy Toulou, Director, Office of Tribal Justice,
U.S. Department of Justice
Colline Keely, Executive Director, Oklahoma Indian
Legal Services
Jonathan Asher, Executive Director, Colorado Legal
Services
Anne Milne, Executive Director, Utah Legal Services
Justice Allison H. Eid, Colorado Supreme Court

Chuck Greenfield, National Legal Aid and Defender
Association (NLADA)
Don Saunders, NLADA

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John Dossett, General Counsel, National Congress of American Indians	
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1 P R O C E E D I N G S

2 (1:56 p.m.)

3 CHAIRMAN KECKLER: Noting the presence of a
4 quorum, I will now call to order the duly noticed
5 meeting of the Operations and Regulations Committee.
6 Before we get to our distinguished guests before the
7 Committee, just a few items of business.

8 I ask for the approval of the agenda.

9 M O T I O N

10 MS. MIKVA: So moved.

11 MR. LEVI: Second.

12 CHAIRMAN KECKLER: All in favor?

13 (A chorus of ayes.)

14 CHAIRMAN KECKLER: The agenda is approved.

15 I also we would like to ask for approval of
16 the minutes. I'm not sure why we have September 20,
17 2012 minutes. Is there an explanation for that? Oh,
18 all right. Well, now, let's go ahead and take care of
19 that belated business. We will consolidate the
20 approval of the minutes.

21 Is there a motion to approve this set of
22 minutes?

1 M O T I O N

2 MS. MIKVA: So moved.

3 MR. KORRELL: Second.

4 CHAIRMAN KECKLER: All in favor?

5 (A chorus of ayes.)

6 CHAIRMAN KECKLER: The minutes are approved.

7 The next item of business is a discussion, and
8 it's very much an opening discussion of this Committee,
9 of 45 CFR Part 1613, which restricts LSC in its
10 capacity to provide representation in criminal
11 proceedings.

12 There is contained within that currently in
13 regulation an exception for misdemeanors and lesser
14 offenses in tribal courts. And that exception has been
15 statutorily affected by the Tribal Law and Order Act.

16 What the Committee then is charged with doing
17 is examining our regulation in light of that statutory
18 change, but also in light of the reality on the ground
19 of changes that are occurring in Indian Country and
20 with our grantees and the interaction between our
21 grantees and the tribal courts.

22 So we are very much at the beginning of that

1 process, so today is not a discussion of the rule
2 itself or we're not at the stage of crafting language
3 for the regulation and deciding how to proceed
4 precisely with that, but we're at the time in which we
5 want to get a clear understanding of the facts so that,
6 going forward over the course of the next several
7 months, the Committee can make a thoughtful decision
8 about how to change our regulation and consider how our
9 grantees will be representing clients in tribal courts
10 going forward.

11 So today is the beginning of that fact-finding
12 process, and we are assisted by a distinguished panel
13 and helped organized by our distinguished colleague,
14 Professor Valencia-Weber, to whom I would now turn to
15 introduce the panel and our discussion. Thank you.

16 PROFESSOR VALENCIA-WEBER: I want to first
17 thank the panel for being willing to make the trip and
18 come into all of this "what happens next" discussion
19 because that's what this is about.

20 What we have, and in your materials, Board
21 members, are the explanatory materials that Mark
22 Freedman, Atitaya Rok, and Charles and I and Tim Wilson

1 worked on since before March, trying to put together
2 what was it that was happening in the statutes as well
3 as where and how do we get information to plan our
4 regulatory process.

5 So we're really be confluence of three basic
6 statutes: the Tribal Law and Order Act, passed in
7 2010, which had been a long-time project for tribes and
8 their advocates; similarly, the Violence Against Women
9 Act that was renewed, reauthorized, in 2013, which had
10 many advocates and was an interesting coalition of all
11 kinds of groups, and tribes were involved in that too.

12 So we know there is possible impact because of
13 specific parts of those laws. And basically, we're
14 also here because of a certain historical point. That
15 is, since 1885 when the federal government took away
16 the criminal jurisdiction from tribes and states over
17 the major felonies, that took away criminal
18 jurisdiction.

19 Then there were subsequent acts, primarily
20 P.L. 280, where the Congress delegated, if you want to
21 use that term, but in any case transferred what had
22 been federal authority over crimes, major crimes, in

1 Indian Country. And Indian Country is a statutory term
2 of art. It is real legal meaning.

3 That would now be done by states, six of them,
4 quite large in the case of California. And then we
5 have a decision from the Supreme Court of the United
6 States called Oliphant which removed or denied to
7 tribes any criminal jurisdiction over non-Indians
8 committing crimes on the reservation.

9 So we come to that. As a result of this
10 historical set of acts, decisions, you have that crazy
11 quilt chart of criminal jurisdiction in Indian Country.

12 As I, not with just for humor but in fact, begin my
13 Indian law classes telling students are terrified, I
14 say, "Don't worry. If you can answer one question, you
15 have it. It's who did what to who on what land?"

16 Grammatically perhaps not so sound, but that
17 is all that every Indian law practitioner has to answer
18 ever time -- where it occurred, so whether you'll know
19 if the tribe has any jurisdiction; if it's state or the
20 feds, or if it's concurrent.

21 So it's that crazy quilt that's on the charts,
22 if you want to look at it, because our panel members

1 will be using those kinds of terms -- major crimes,
2 P.L. 280, other kinds of terms that for us are everyday
3 talk.

4 So that's how we got here. And tribal courts
5 are those that are set up, authorized by tribes, but we
6 also want to take account that the federal government
7 funds some courts, for shorthand called CFR courts,
8 that is, Code of Federal Regulations, and they also
9 will be impacted by what happens.

10 So then we have to clarify that some people,
11 some defendants, will be affected more than others.
12 VAWA was specifically to recover some of that criminal
13 jurisdiction taken away in Oliphant. We are talking
14 about non-Indians who commit acts of domestic violence
15 within the reservation and who meet the parameters of
16 somebody with significant ties and presence on the
17 reservation.

18 Additionally, we have that both the Tribal Law
19 and Order Act and VAWA expanded the protection of
20 criminal defendants with core constitutional rights,
21 most of what we recognize from the Bill of Rights, and
22 they amended the Indian Civil Rights Act. And so both

1 are affected. ICRA applies to the Tribal Law and Order
2 Act and VAWA.

3 We want to keep clear that the Tribal Law and
4 Order Act and VAWA are opt-in choices for tribes. It
5 is not a mandate. Tribes must qualify for the criminal
6 jurisdiction, and that includes how they set up their
7 courts, the criminal code, and having law-trained
8 judges; and, as it says in both acts, that the tribe
9 provide at tribal expense a licensed attorney for the
10 indigent criminal defendant.

11 So we have that to somehow connection to the
12 change in our LSC statute. And the LSC statute says
13 that we are now permitted -- again, not a mandate -- to
14 provide legal assistance to a person charged with an
15 offense in an Indian tribal court. "Offense" will
16 encompass much more than misdemeanors. That raises
17 other questions.

18 So with that, I will quickly move to
19 introductions of the panel. And if we can start, then,
20 with the first big thing that we need to know is what
21 you folks know about the status of the tribes now that
22 you know of that are opting in under VAWA or TLOA that

1 will give us some idea of where in Indian Country our
2 grantees might be asked to provide representation to a
3 criminal defendant.

4 We provide funding that's been there since the
5 1974 organic act setting up Legal Services Corporation,
6 designated money for indigent Native Americans by the
7 federal poverty standard. We currently have those
8 grants operating for Native Americans in 26 states. So
9 it is not a small matter for us.

10 So I'll start over here with Troy Eid, who's
11 chair of the Indian Law and Order Commission that was
12 established after the Tribal Law and Order Act was
13 passed. Troy Eid is the former U.S. Attorney here in
14 the District of Columbia, appointed by President Bush,
15 and for his appointment to the Indian Law and Order
16 Commission, he was appointed by Senator Reid. Am I
17 correct? And elected as chair of this commission,
18 which I hope that Troy and Carole will explain the
19 charge of that commission. That commission is engaged
20 in some of what we want to know.

21 The next person is Tracy Toulou, who is the
22 director of the Office of Tribal Justice in the U.S.

1 Department of Justice, which is now a permanent entity
2 within Department of Justice. Basically, Tracy is the
3 primary point of contact for DOJ's
4 government-to-government relationship, that which has
5 been in the almost 400 treaties of nation-to-nation
6 relationship between the tribes and the federal
7 government.

8 Tracy is the person who sees over that point
9 of contact, but also, as the issues emerge, especially
10 after Congress has acted. Tracy served as assistant
11 U.S. Attorney in Montana, and I'm very proud to say
12 that Tracy is a graduate of the University of New
13 Mexico Law School I had the pleasure to help train.

14 Next we have Carole Goldberg. Carole is also
15 on the Indian Law and Order Commission. She's a
16 long-time respected in the area of P.L. 280. If you go
17 on looking at the Lexis or Westlaw, she has been the
18 person we have looked to to inform us about how P.L.
19 280 affects justice systems in those states.

20 She also is a justice of the Hualapai Court of
21 Appeals, and all of these people have distinguished
22 biographies I urge you to read in your materials. But

1 we're reserving time for discussion.

2 John Dossett. John has served as general
3 counsel for the National Congress of American Indians
4 since 1997. NCAI, for those of you who do not know it,
5 is the leading body that represents the tribes across
6 the United States, that presents its voice to the
7 government, and was a primary actor, led the fight, to
8 pass the Tribal Law and Order Act and the Violence
9 Against Women Act.

10 So we're very happy to have John here, as I
11 know NCAI has been holding, like Tracy and others,
12 meetings across the United States with tribes trying to
13 find out what they're thinking of doing in order to do
14 the opt-in and develop their criminal justice systems.

15 Then we have Howard Belodoff, who has been a
16 career legal services attorney since 1978. He's
17 currently the associate director of the Idaho Legal Aid
18 Services, and for a long time has been involved in the
19 Indian law unit of that grantee.

20 He was a Reginald Heber Smith fellow, and we
21 have talked about restoring that program. And if it
22 gets us more people like Howie, we certainly know why

1 we have to do it.

2 He has covered, in the course of his whole
3 career as a legal services attorney with Idaho, a whole
4 range of topics of every kind, every subject.
5 Specifically, he does provide services to Idaho's five
6 Indian reservations, which you know from this morning's
7 program, widely spread, a lot of empty space, and not
8 enough resources.

9 So with that, I will turn to the panel. And
10 can we start with Troy and go on down? And then I
11 would ask about what do you know at this point about
12 the tribes that are considering, have taken steps, to
13 opt in, to have this increased sentencing authority?

14 MR. EID: Well, thank you, Professor
15 Valencia-Weber. And thank you so much for your many
16 contributions to our profession, and those of us who've
17 studied you and worked with you and admire you. I
18 really appreciate the chance to be here.

19 I'd be remiss if I didn't thank Jim Sandman,
20 who was one of my wife's first bosses -- my wife,
21 Justice Allison Eid, is here -- and was a good boss,
22 too, as I recall. Congratulations on all you've

1 achieved. And everyone else I can say nice things
2 about, including Julie, who I've worked with, and
3 especially this whole panel. I've had the privilege of
4 serving with just about everybody on the panel, and
5 have great respect for everyone.

6 Let me just very briefly say a couple things
7 to put it in context to help with the discussion.
8 We're really dealing with two federal laws here, if you
9 think about it. One was the Tribal Law and Order Act
10 that was passed in 2010, and the amendments, these
11 Indian Arts and Crafts amendments.

12 That's the authority that now provides that
13 Legal Services Corporation grantees may be provided
14 money to represent indigent defendants in "any and all"
15 criminal proceedings, I think is the phrase, any and
16 all criminal proceedings in tribal courts. So I'll put
17 that into context here with these two laws.

18 That was also the legislation that created our
19 commission. The Indian Law and Order Commission was
20 created in 2010. There are nine of us. We were all
21 appointed by the President and the leadership of the
22 Congress. We serve as volunteers, as you all do, and

1 we appreciate the public service opportunities we have.

2 Our charter is to look at the implementation
3 of the Tribal Law and Order Act, and then we were
4 extended by the Violence Against Women Act amendments
5 this year to look at the implementation of the VAWA for
6 jurisdiction over non-Indians that I'll talk about in a
7 second. And we are to look also beyond the horizon and
8 figure out what should this criminal justice system in
9 Indian Country look like in the future.

10 We have a report to Congress and the President
11 that is our final report. It's going to be out this
12 fall. It will be subject to both White House and
13 congressional oversight, and I don't know the exact
14 timing, but I'm going to say September or October.

15 So we're very far along in our
16 recommendations. Our report is essentially written.
17 So I can't really talk about what our recommendations
18 are, but I can certainly speak to some background here
19 that I hope will be helpful.

20 The Tribal Law and Order Act, as you know,
21 provided for enhanced sentencing authority for tribes.

22 Back in 1968, Congress passed the Indian Civil Rights

1 Act, and that limited the kinds of sentences that
2 tribal courts could impose on Indians.

3 The term Indian, again it's a term that's a
4 legal term. It refers to citizens of a tribe, and then
5 other Indians that are from other tribes. But there's
6 a distinction, as you know, in federal law between
7 Indians and non-Indians, so that's the terminology.

8 So with respect to tribal courts, in 1968
9 Congress said, you, the tribal courts, can only impose
10 certain sentences. And over time, what ended up
11 happening was it equated to misdemeanor jurisdiction.
12 Tribal courts could impose up to a year in jail, and
13 they could impose fines ultimately that went up to
14 5- and 10- and now, with this Tribal Law and Order Act,
15 \$15,000. But you can impose sentences of up to three
16 years.

17 Not only that, the law says you can stack
18 them. Stacking means you could add successive terms of
19 incarceration for different counts. So for the first
20 time, tribes are now dealing with the issue -- since
21 1968, at least -- they're dealing with the issue of
22 felony jurisdiction and how to impose that. So that's

1 the first set of issues that we'll talk about on the
2 panel.

3 The Violence Against Women Act took it another
4 step. Recall that in 1978, the U.S. Supreme Court in
5 the *Oliphant v. Suquamish Tribe* case held that tribes
6 lack all criminal jurisdiction over non-Indians. And
7 that was the law of the land until the Violence Against
8 Women Act amendments were passed just earlier this
9 year.

10 Now there's a category of offenses that tribes
11 can prove up in their courts, and they can assert
12 criminal jurisdiction over non-Indians for the
13 commission of those offenses. They all deal with
14 offenses related to domestic violence.

15 It's a fairly narrow set of scope, if you
16 will, in terms of you have to show not just domestic
17 violence has occurred, but you have to prove that
18 there's an intimate relationship between the two, and
19 that there was not just a casual or no connection
20 there. It has to be proven that there was either a
21 marriage or some sort of an intimate relationship.

22 The prosecutor is also going to have to prove

1 that the offense was connected to the Indian nation
2 where it occurred. It's not enough to work there,
3 necessarily. You'd have to be there for a long time
4 and be present in that jurisdiction as a citizen, or at
5 least living there.

6 But I will just tell you that in our
7 experience in the commission, this is what happens
8 every day that's not being addressed in so much of the
9 justice systems, whether they're federal or state in
10 the Public Law 280 situations.

11 A Professor Barbara Perry has done a lot of
12 research on this and there are others, but we think
13 that only between 5 and 10 percent of all the domestic
14 violence-related crimes that occur within Indian lands
15 are even reported.

16 So you start with the assumption that 85 to 90
17 percent are not reported at all, and that's consistent,
18 certainly, with the more than 25 years' experience that
19 I have working in the field.

20 You take that, and then you add the fact that
21 overwhelmingly, these offenses have not been prosecuted
22 in the past. And I want to just say for the record

1 just an experience to kind of illustrate it, perhaps,
2 in Colorado, because this is where we were when I
3 served as U.S. Attorney from 2006 to 2009.

4 We have two Indian nations in Colorado. Both
5 of them are in federal jurisdiction, the Southern Ute
6 Indian Nation and the Ute Mountain Ute Indian nation in
7 Southwest Colorado. Ute Mountain Ute is what Professor
8 Valencia-Weber was describing as a Bureau of Indian
9 Affairs, or a CFR, Code of Federal Regulations,
10 jurisdiction.

11 That is to say, it does not have its own
12 tribal court. It does not have its own tribal police.

13 It's in federal, if you will, last resort
14 jurisdiction. It's a very poor tribe. I actually
15 represent them as special counsel these days.

16 The Southern Ute Indian tribe has its own
17 police department, its own tribal judges, and has been
18 able to achieve a level of parity that certainly
19 comports with any state jurisdiction in Colorado,
20 including with the Metro area.

21 And I'm not just saying it. The federal
22 government puts the federal detainees on the Western

1 Slope of Colorado -- if we pick somebody up with a
2 federal offense, we do not use jails, typically, in
3 Colorado with county sheriffs for those offenses west
4 of the Continental Divide. They go to the Southern Ute
5 detention center.

6 We trust the tribe. We contract with the
7 tribe to hold those inmates because that jail is such a
8 good jail. They run it so professionally. They're
9 certainly on a par with any jurisdiction in this state,
10 and frankly, in many of the states, if not most of the
11 states, in our country.

12 At Southern Utes, when I took office in 2006,
13 I did what any new U.S. Attorney would do, is I looked
14 to try to see where are the domestic violence cases. I
15 started going through the stats for the last several
16 years. We had very few that had been prosecuted. Very
17 few convictions. And I wondered what that was about.

18 We began to look at who the offenders might
19 be, and we found that in many instances they were
20 non-Indian perpetrators and Native victims. And not
21 only that, but there was plenty of evidence, at least
22 anecdotally, particularly from arresting officers and

1 so on, that non-Indians felt they were untouchable in
2 that jurisdiction, that they could abuse their victim
3 with virtual impunity because no one was legally
4 empowered to respond.

5 What do I mean? Under federal law, as
6 Professor Valencia-Weber said, since 1885, the Major
7 Crimes Act and then the Indian Country Crimes Act, two
8 federal statutes that have been imposed -- that one is
9 even older, goes back 1810, I think -- those statutes
10 say that if a non-Indian commits a crime against an
11 Indian, that is exclusive federal jurisdiction.

12 So if you're a tribal cop at Southern Utes,
13 you can't arrest that person. You can't do anything
14 unless you get a federal permission, what's called a
15 Special Law Enforcement Commission, a card that enables
16 you to make a federal arrest. Your tribal arrest is no
17 good.

18 You can see the offense happen in your
19 presence and you still can't arrest because that's a
20 non-Indian person. That's what happened with the
21 operation of the federal law and then, over time, the
22 Supreme Court determination that tribes lacked any

1 criminal jurisdiction at all over non-Indians.

2 So I started to look at this, and our office
3 reassessed all the cases on both reservations. We
4 looked at Southern Ute because we knew we could do
5 something about it. We started deputizing officers
6 down there. And our training program became the model
7 for the Tribal Law and Order Act's field training
8 program now that's done around the country by U.S.
9 Attorneys' offices.

10 We ended up training several hundred officers
11 to make federal arrests -- tribal cops; we've trained
12 state troopers, county sheriffs, anybody who is
13 requested to make an arrest. And you know what? Two
14 years later we were able to keep a second Assistant
15 U.S. Attorney down there busy just with these cases
16 that were not being prosecuted at all. They weren't
17 being investigated at all because no one could have the
18 federal toolkit they needed to deal with the
19 jurisdictional issue.

20 I tell you this just by way of an illustration
21 of one relatively small Indian nation. It's about the
22 size of Rhode Island. The population only of tribal

1 citizens is about 1800, and there are about 9,000
2 non-Natives living within the boundaries of that
3 reservation. It's about 50 percent tribal land, 50
4 percent other land, most of it private fee property.

5 That's the reality of a lot of places that we
6 go. It's a huge problem that is not being addressed,
7 and it bears on your work because a couple
8 things -- and I know that the other panelists will
9 address this, but just a couple to get it going.

10 Number one, this is a moving target. I have
11 been around the country, from Alaska to the East Coast,
12 with my fellow commissioners, with John Dossett, with
13 Tracy Toulou, with a lot of people. And I know that a
14 lot of tribes have said they want to implement these
15 enhanced authorities.

16 The Tribal Law and Order Act was looked at by
17 the GAO in May of 2012, the General Accounting Office,
18 and at that time the tribes surveyed, of all 566
19 federally recognized tribes at the time, said that 36
20 percent of them wanted to implement the Tribal Law and
21 Order Act.

22 That means 36 percent, more than a third,

1 wanted to have enhanced sentencing, felony
2 jurisdiction. They'll need to have, of course,
3 full-blown protection of defendants' federal
4 constitutional rights.

5 But that was before the Violence Against Women
6 Act was implemented. And my sense is that many more
7 tribes are interested in implementing VAWA because it
8 isn't just about being able to impose more punishments.

9 Some tribes will tell you they either can't, because
10 or a lack of resources, or they don't want longer
11 prison sentences. They don't see it as their role.
12 There's a lot of alternatives that are being used in
13 Indian Country.

14 But what you will see is that this domestic
15 violence problem, it's endemic all around, everywhere
16 that we have been. Carole and I were talking about
17 being on a bush plane in Alaska last October, and a
18 young attorney, the only attorney who'd come out of
19 that whole Yukon basin -- we were coming back north of
20 the Arctic Circle.

21 It's 2:00 in the afternoon. It's dark. It's
22 Alaska. In October, it's dark already. And she said,

1 "Troy, tell them all. Every one of us has been raped.
2 We have all been raped. Every person you met
3 today" -- we met people everywhere -- "every woman you
4 met. I grew up here. They've all been raped. It's
5 not just a high percentage. It's everybody. I know
6 they won't believe me. You can tell them that this is
7 true."

8 That's the reality of so much of what we have
9 to contend with. Once tribes are able to start to
10 assert this authority, they will overcome tremendous
11 obstacles.

12 We've been to tribes in some very distant
13 places, and they tell us, "Yes, it's expensive to
14 record proceedings. It's expensive to have perhaps a
15 state-barred -- we'll see how that is
16 adjudicated -- but certainly a licensed attorney with a
17 very credible tribal bar exam, like in the Navajo
18 Nation, which I belong to -- it's an eight-hour exam.
19 It's very much like the Colorado bar exam.

20 But they know that they have to meet these
21 requirements, and the federal judges are going to
22 scrutinize them on habeas corpus. So they're going to

1 take that step if they can in many instances.

2 It was a little different with the enhanced
3 sentencing provisions for the Tribal Law and Order Act.

4 Some tribes can say, "Well, look. We're not sure we
5 want to incarcerate longer. We don't have anyplace to
6 put them, anyway."

7 There's a way to put them in the Federal
8 Bureau of Prisons, but not everybody wants to send
9 their loved one to a distant place, needless to say,
10 even in a terrible situation, sometimes, where the
11 victim needs protection. They don't necessarily want
12 to do that.

13 But it's different with -- I'm just here to
14 say for domestic violence cases, my sense, what I've
15 heard, is different. A lot more tribes are going to
16 want to implement that. It's really early in the
17 process.

18 I know Tracy will talk about how the Justice
19 Department is implementing it. They have a special
20 role right now, between now and 2015. But in 2015, any
21 tribe can implement. And I have a sense that many of
22 them will. And I think it'll be higher than the 36

1 percent that was stated.

2 So I'm going to just leave it there for now,
3 and I appreciate your time. Thank you.

4 MR. TOULOU: Yes. Thank you for the
5 opportunity to speak with you here today. It's a
6 privilege -- though I have to say I'm a little
7 concerned that I'm going to end up with a grade from
8 Professor Valencia-Weber here at the end. And that
9 never went well for me, so --

10 (Laughter.)

11 MR. TOULOU: Let me talk to you a little bit
12 about the background in Indian Country. I think Troy's
13 done a very good job. But there are some things I
14 really wanted to hammer down on a little bit, and that
15 is, I'm not sure that everyone understands the key role
16 tribal governments play in their communities. They are
17 the government in the community.

18 Where I was an AUSA in Montana, it was six
19 hours for the U.S. Attorney's Office to go up and do a
20 case like Troy's talking about. And in a fast-moving
21 domestic violence situation, that's too far. We
22 weren't the investigator.

1 We need to take care of those cases, and who
2 can do it best -- and this has been shown across the
3 country -- is the local community, the local police
4 working in conjunction with advocacy shelters, groups
5 like that. So it's very important that this
6 legislation came through on domestic violence.

7 The stats aren't real good for Indian Country
8 because, as Troy mentioned, people often aren't
9 forthcoming, particularly traditional people. Also,
10 when you're isolated and you're a victim of violence,
11 the chances of you reporting that violence are greatly
12 diminished because if you don't know you're going to
13 get a response, you're likely to be a victim again.

14 But we do know that Indian women are the
15 victims of violence at about three times the rate of
16 women generally across the country. We also know that
17 about 50 percent of Indian women are married to
18 non-Indian men. Now, a lot of that isn't on the
19 reservation because that's people in a place like
20 Denver. But still, there's a substantial non-Indian
21 population.

22 Troy talked a lot about the Tribal Law and

1 Order Act, and I think it's important. But I think as
2 far as impact on you all that the Violence Against
3 Women Act provisions will be greater. So I'm going to
4 focus more on the Violence Against Women Act
5 provisions.

6 We look at who's out there are who has asked.

7 There are two different processes in the Violence
8 Against Women Act. There is a process after March of
9 2015 where any tribe can assert jurisdiction over
10 non-Indians. Right now, as everybody explained, the
11 tribe cannot assert jurisdiction over a non-Indian.

12 I don't know if any of you saw the signing
13 ceremony for the Violence Against Women Act that the
14 President was at, but there was a very moving
15 presentation by one young woman who talked about the
16 fact, when she was abused by her then-husband, he would
17 actually pick up the phone -- he was a non-Indian, of
18 course -- he would pick up the phone and call the
19 tribal police and tell them what he had done and ask
20 them if they wanted to respond. And they would tell
21 him, no, we can't. We don't have jurisdiction over
22 you. So this is important. This is very, very

1 important.

2 So in the first stage of the Violence Against
3 Women Act assertion of jurisdiction by tribes over
4 non-Indians, we, the Department of Justice, the
5 Attorney General, has the ability to recognize tribes
6 who will assert that jurisdiction.

7 We just published and have received response
8 to a Federal Register notice for tribes who are
9 initially interested in exploring and asserting that
10 jurisdiction. When I say "initially interested in
11 exploring," we at the Department try not to mandate
12 things for tribes. We try to have a conversation and
13 work with them and get to the point where they need to
14 be because these communities are all different.

15 So more than 24 tribes came to us and said, we
16 want to start looking at this jurisdiction. Now, my
17 best guess is most of them will not assert that
18 jurisdiction before March of 2015. But we have tribes
19 that are interested enough in that jurisdiction that
20 they're going to send people to an inter-tribal working
21 group who will start working through the processes that
22 will be necessary.

1 Contrast that to the Tribal Law and Order Act.
2 The Tribal Law and Order Act enhanced sentencing that
3 Troy described. I think probably less than a
4 half-dozen tribes have decided to assert that
5 jurisdiction.

6 Now, I don't know exactly because unlike the
7 first part of the Violence Against Women Act, they
8 don't have to report in to the Department of Justice.
9 But my office is the primary point of contact for
10 tribes coming into the Department on a justice issue,
11 so I would tend to know.

12 So far I'm only aware of two tribes that have
13 actually sentenced people to more than three years, and
14 I notice that why or why they might opt in is a
15 question later, so I'll reserve that.

16 But I think where you're likely to see an
17 increased pressure on your resources is with domestic
18 violence. And just in closing on that, I know you guys
19 generally don't think of yourselves in the criminal law
20 sense.

21 One of the best summers of my life I spent as
22 an intern at DNA Legal Services at Navajo, so I have

1 some sense -- small sense -- on your thoughts around
2 these things. But this is an important community
3 response, and it's not punitive. It can be, but that's
4 not what it's about.

5 If we can get a handle on domestic violence in
6 Indian Country, we will greatly help those communities,
7 not only the woman who is abused, but the child who
8 sees the abuse and goes on to be either an abuser or
9 abused later on. So your role in this is critical.

10 But I'll pass to Carole.

11 MS. GOLDBERG: Thank you all for inviting me
12 here as well. I'm a long-time law school legal
13 scholarly colleague and collaborator with Professor
14 Valencia-Weber and greatly respect her work, and have
15 enjoyed that collaboration for many years. So I'm glad
16 to have been invited here.

17 I'm really here in three capacities -- first,
18 as one of the commissioners of the Indian Law and Order
19 Commission, a presidential appointee. In that capacity
20 I will defer to our outstanding leader, Troy Eid.

21 But I'm here in two other capacities, one as a
22 long-time teacher and scholar in the field of Indian

1 law, with a special emphasis on work on Public Law 280,
2 and third, as a tribal court appellate justice. I
3 serve on the Court of Appeals, the highest court of the
4 Hualapai Tribe in Arizona. And I'm going to focus on
5 those two other capacities today.

6 I first want to talk about the potential
7 implications of Public Law 280 for the expanded
8 authority of the Legal Services Corporation in the
9 realm of criminal defense. It's my understanding that
10 that expanded authority is not specifically tied to
11 enhanced sentencing under the Tribal Law and Order Act
12 or expanded jurisdiction under VAWA.

13 Those developments could indeed increase the
14 demand for services, but I want to focus on Public Law
15 280 because I see some developments in Public Law 280
16 jurisdictions that may very well also put some new
17 demands on criminal defense for Indian Country.

18 First let me say a bit about Public Law 280
19 itself. It was enacted in 1953, part of a general
20 federal policy at that time of terminating the
21 government-to-government relationship between the
22 United States and Indian nations.

1 Public Law 280 itself did not terminate that
2 relationship, but it was designed as a stepping stone
3 on the way to termination. This stepping stone was to
4 accustom citizens of tribal nations to the civil and
5 criminal jurisdiction of the states.

6 Six states were singled out for jurisdiction
7 under Public Law 280 -- California, where I serve on
8 the faculty and as vice chancellor at UCLA, was one of
9 those six mandatory states. In addition, there was
10 authorization given for all other states to opt in to
11 this jurisdiction, and several did during the period
12 immediately following enactment of Public Law 280.

13 In 1968, along with passage of the Indian
14 Civil Rights Act, Congress said that no further opting
15 in to Public Law 280 jurisdiction could occur by states
16 without the consent of the tribes. Initially, Public
17 Law 280 had imposed state jurisdiction and allowed
18 states to opt in regardless of tribal consent.

19 In 1968, Congress said, no future opting in by
20 states could occur unless tribes agreed. And perhaps
21 you will not be surprised to hear that no tribe has
22 agreed to the option of state jurisdiction since that

1 time.

2 In 1968, Congress also authored states that
3 had Public Law 280 jurisdiction to retrocede or return
4 it to the federal government. It did not give the
5 tribes control over this process. So only the states
6 could request the return of this jurisdiction. Tribes
7 could negotiate with states. They could request it.
8 But they could not demand it.

9 Since 1968, there has been quite a bit of
10 retrocession in some of the states. So, for example,
11 Nevada, an opt-in state after 1953, retroceded all of
12 the jurisdiction that it had opted for under Public Law
13 280. You may ask why. Well, Public Law 280 was an
14 unfunded federal mandate. Nevada said, take our
15 jurisdiction, please, because we can't afford it.

16 Nebraska was one of the mandatory six Public
17 Law 280 states. The jurisdiction of the state has been
18 returned to the federal government for nearly all of
19 the tribes in Nebraska. It was not so easy a process.

20 The tribes had to really fight over this, and
21 eventually they were able to prevail.

22 In my home state of California, there have

1 been no retrocessions at all. There are 107, or -8
2 now, federally recognized tribes in California. No
3 retrocession. In Wisconsin, Oregon, and Minnesota,
4 there have been, but most of the tribes in those states
5 are still under state jurisdiction.

6 In fact, 51 percent of all the tribes in the
7 lower 48, and 70 percent of all federally recognized
8 tribes, including Alaska, which is one of the mandatory
9 six Public Law 280 states, are affected by Public Law
10 280. So it is a very widespread provision in Indian
11 Country.

12 There's a lot of misunderstanding about the
13 scope of Public Law 280 jurisdiction, and I cannot use
14 this occasion to dispel all of it. I will refer you to
15 a book that I published with my colleague Duane
16 Champagne called "Captured Justice: Native Nations and
17 Public Law 280."

18 It's the result of a nationwide study of
19 Public Law 280 that we conducted with funding from the
20 U.S. Department of Justice -- thank you -- the National
21 Institute of Justice.

22 But there are some places where there is

1 belief that Public Law 280 jurisdiction exists but it
2 doesn't, like Arizona, where it was attempted on a
3 partial basis and never was valid. But suffice it to
4 say that it is widely applicable.

5 Now, how prevalent is tribal criminal
6 jurisdiction among the tribes affected by Public Law
7 280? The answer is, not very prevalent. But you could
8 be seeing it coming soon. Initially there was some
9 belief, particularly on the part of the attorney
10 general of my state, that Public Law 280, by
11 authorizing states to exercise criminal jurisdiction,
12 had thereby barred tribes from doing so.

13 While the U.S. Supreme Court has never finally
14 pronounced on this issue, there are lots of federal
15 appellate decisions and even state appellate decisions,
16 and opinions from the Departments of Interior and
17 Justice, and certainly quite a bit of scholarly
18 commentary, all of it coming to the same conclusion,
19 that tribes retained their inherent criminal
20 jurisdiction notwithstanding the passage of Public Law
21 280.

22 So you might think, well, maybe tribes have

1 been asserting this, especially because our research
2 has documented a great deal of concern on the part of
3 Public Law 280 tribes about the effectiveness of state
4 criminal justice in Indian Country and the fairness of
5 that jurisdiction.

6 And if you take a look at the results of our
7 more than 300 interviews in our book, you will see
8 widespread concern that local county sheriffs and court
9 systems are not responsive when there's crime that is
10 committed in Indian Country, and furthermore, great
11 concern that there is discrimination against Indian
12 defendants and victims when cases do get within the
13 state justice systems.

14 But funding has been a huge obstacle to the
15 development of tribal courts under Public Law 280. You
16 may be aware that one of your grantees, California
17 Indian Legal Services, has litigation pending right now
18 before the Ninth Circuit.

19 Dorothy Alther and her outstanding team were
20 successful before the Federal District Court. I'm
21 proud to say that some of my own research was cited and
22 beneficial in her work. But currently before the Ninth

1 Circuit, in the case of Los Coyotes against the
2 Department of the Interior is a challenge under the
3 Administrative Procedure Act and various other federal
4 legal doctrines to a Department of Interior policy that
5 has been denying funding to most tribal courts in
6 Public Law 280 jurisdictions. There are a couple of
7 exceptions, and that makes it almost worse because then
8 when they do deny, it looks really arbitrary.

9 One of the things that we've been doing in our
10 research is trying to document the prevalence of the
11 exercise of criminal jurisdiction by Public Law 280
12 tribes. There are now quite a few tribal courts in
13 Public Law 280 jurisdictions, including a growing
14 number in my home state of California, some of them
15 inter-tribal in nature. But very few of these Public
16 Law 280 tribes with their courts are exercising
17 criminal jurisdiction.

18 I can name a few -- Siletz in Oregon,
19 Metlakatla Indian Community in Alaska, Mille Lacs band
20 of Chippewa in Minnesota, also Lac du Flambeau in
21 Wisconsin. There are more tribes that are exercising
22 juvenile or traffic jurisdiction. But full-on adult

1 criminal jurisdiction is a rarity.

2 Now, if again your outstanding attorney
3 Dorothy Alther, now, I understand, the directing
4 attorney of California Indian Legal Services, is
5 successful in her litigation in the Ninth Circuit, what
6 that will mean is that the Department of the Interior
7 will be under some obligation to consider contracting
8 with California tribes for law enforcement services,
9 which may very well trigger the growth of tribal
10 criminal jurisdiction in those locations.

11 Another helpful precipitating force has been
12 the advent of tribal gaming. And in Southern
13 California, where we have an inter-tribal court system
14 now, there are gaming tribes that are in a position to
15 provide funding.

16 Now, for some of these tribes, the per capita
17 distributions to their citizens will probably render
18 them disqualified for legal services representation.
19 But that will not be true of everyone who appears
20 before these courts.

21 So we are fortunate, I believe, in that many
22 of the outstanding legal services programs serving

1 Indian Country are in states that were either mandatory
2 or opt-in Public Law 280 jurisdictions. We have one of
3 them represented here, from Idaho, which is an opt-in
4 partial Public Law 280 jurisdiction.

5 But California Indian Legal Services,
6 Wisconsin Judicare, another outstanding Indian law
7 program, these are attorneys who are well-versed in
8 Indian law. And they can make the transition to doing
9 criminal representation, I believe, with at least the
10 understanding of the Indian law dimension to it.

11 That leads me to my final set of points in my
12 capacity as justice of the Hualapai Court of Appeals.
13 The tribal court system in which I function is operated
14 at the trial court level almost entirely by lay
15 persons. Okay? The judges, the prosecutors, the
16 defense advocates, none of them attorneys.

17 The first time a case may be heard by someone
18 who is law-trained is when it comes to us before the
19 Court of Appeals. I can tell you, there is a
20 tremendous need for legal representation.

21 The folks who operate the system are doing a
22 splendid job, in my estimation. They come up with some

1 really creative arguments that I think law-trained
2 folks might be hesitant to make, some of them a little
3 wacky to the law-trained ear, some of them really
4 creative and interesting.

5 But there is a tremendous need for this
6 service. Now, providing it in a place like Hualapai is
7 no simple matter. For me to get there is a flight to
8 Vegas, followed by a two and a quarter-hour drive. And
9 for the law professors in Tempe and Tucson, it's no
10 picnic, either. It's four, four and a half hours for
11 them on the road as well.

12 Now, the program that inspires me, in addition
13 to the wonderful one at the University of New Mexico
14 Law School, is one that has been established in a
15 Public Law 280 partial jurisdiction state -- actually
16 really complicated and partial jurisdiction
17 state -- the state of Washington.

18 At the University of Washington Law School,
19 their Indian Law Clinic has established a criminal
20 defense project which initially was exclusively with
21 the Tulalip Tribes, only an hour away, and they are a
22 tribe that were successful in getting retrocession of

1 the state's Public Law 280 jurisdiction for most, but
2 not all, matters.

3 But they're also working with the MacArthur
4 Foundation on a grant to provide distance
5 representation in juvenile matters to tribes that are
6 further away. And I would urge you to consider more
7 and more partnerships with law schools.

8 Law schools are under a lot of pressure these
9 days to do more training of lawyers through clinical
10 programs. They have access to funding sources through
11 their universities that may be helpful in augmenting
12 the resources of Legal Services grantees. And they can
13 support the appointment of faculty who would supervise
14 the students. I am not here arguing that we want more
15 law students going unsupervised into tribal courts, but
16 there are opportunities, and I would urge you to
17 consider them.

18 Thank you very much, and I will pass the baton
19 of John Dossett, my long-time friend and colleague.

20 MR. LEVI: Before you do that, I just want to
21 remind our Board that we visited the Tulalip. And I
22 believe that one of the individuals who was on that

1 panel was from the University of Washington.

2 PROFESSOR VALENCIA-WEBER: Yes. Over a year
3 ago, an onsite visit with the Tulalip at the homeland.

4 And we had people from the different tribal courts
5 around Washington state, and one of the people there
6 was also from the Washington clinic, a young professor.

7 MS. GOLDBERG: Ron Whitener?

8 PROFESSOR VALENCIA-WEBER: Yes. A very fine
9 presentation. And Tulalip is certainly one that's
10 equipped to do VAWA and TLOA. They recruited away from
11 our Northwest Justice grantee the attorney that they
12 have, and they have representation for indigents in
13 their tribal court.

14 MR. DOSSETT: Hello. My name is John Dossett.

15 I'm general counsel at the National Congress of
16 American Indians.

17 I first want to say thanks so much for
18 inviting me. I really enjoyed today. It's very
19 inspiring to hear all of you talk about access to
20 justice. Sometimes when you go to work every day, you
21 kind of forget why you're doing this. But it was nice
22 to hear it, so thank you for that.

1 NCAI comes to this -- has been very involved
2 in the passage of both TLOA, the Tribal Law and Order
3 Act, and the Violence Against Women Act amendments, and
4 comes from a victim's rights perspective.

5 It was really initiated by women within the
6 organization back in the '90s, when they were really
7 suffering from a lot of crime on reservations. Very
8 little attention paid to it, even among tribal council
9 members.

10 These weren't tribal council members or tribal
11 leaders who brought this issue up. It was women's
12 advocacy groups, in some ways maybe related to the
13 original passage of the Violence Against Women Act and
14 the creation of the shelters.

15 The shelters created this forum for women to
16 get together and talk about the violence problem, and
17 it kind of grew out of that. And we saw that within
18 NCAI. And these women have now -- many of them have
19 gone on to become leaders within their own tribes.
20 They are now elected leaders. They're elected within
21 NCAI. NCAI used to be much more male-oriented. Maybe
22 all institutions were. But it's been really

1 interesting to watch that develop over time.

2 But in 2003, they passed a resolution through
3 NCAI calling for, among other things, the expansion of
4 tribal sentencing authority to deal with domestic
5 violence and sexual assault, and also for tribal
6 jurisdiction over non-Indian offenders. So the group,
7 the Task Force Against Violence Against Women in Indian
8 Country, they've been very effective so far and they've
9 gotten a lot done.

10 One of the questions you asked was what would
11 cause tribes not to opt in, or maybe I would put it not
12 to opt in yet. The Tribal Law and Order Act passed only
13 three years ago, and that was after, if you remember,
14 the Affordable Care Act. And we're still implementing
15 the Affordable Care Act, right? It takes a while.

16 Tribes first have to budget for these things.
17 We talk to every tribe, and they've got to go through
18 a budgeting process and they've got to work on their
19 staffing. There are a lot of other issues within the
20 Tribal Law and Order Act, including the authority of
21 tribal police and detention facilities and other things
22 that they had to work with within the same law.

1 Many tribes went through a community process
2 where they involved the community in this. A lot of
3 tribes found out that they had criminal codes that
4 dated back to -- they were written by the Bureau of
5 Indian Affairs in 1968.

6 So they're not only updating their sentencing
7 structure, but their entire codes don't address things
8 like domestic violence or child sexual assault or any
9 number of things that their codes have to be brought up
10 to speed on.

11 So a lot of tribes -- there's a great recent
12 article by Judge Yazzie from Navajo about how Navajo
13 Nation is really going through this extended process of
14 updating their entire system, in some ways precipitated
15 by the Tribal Law and Order Act and the Violence
16 Against Women Act.

17 But I did want to point out that even though
18 it may take a little while, it'll come together. The
19 example I often think of is the Indian
20 Self-Determination Act. In the early '90s, there were
21 just a trickle of tribes who were getting involved in
22 self-determination and self-determination contracting,

1 and I used to go to the meetings and it would be like
2 this room.

3 But if you go to the self-determination annual
4 meeting these days, there's 350 tribes in the room.
5 It's become a really big deal. But it took 20 years
6 for that to develop, and I think this will also develop
7 over time.

8 Access to counsel is a really big deal, I
9 think particularly for the larger tribes who have a lot
10 of tribal members. If they start providing counsel to
11 non-Indians, they will be politically compelled within
12 their tribal governments to provide that same right to
13 tribal members.

14 I think that also creates some misuse. It's
15 not just a matter of the money. It's also that they
16 have existing systems in place with lay judges and lay
17 advocates, and you can't immediately replace those
18 folks and fire them all. That's not going to be a very
19 popular idea.

20 So slowly integrating trained law counsel and
21 trained law judges into the system, it's just going to
22 develop over a few years. It's not going to be

1 instantaneous.

2 I did want to mention two things just to think
3 about as you do that. One is that I know that many of
4 the legal services offices are providing services to
5 victims. And you may want to think about how it fits
6 together to represent both the defendant and the victim
7 in the same tribal court system.

8 There may need to be a little bit of thought
9 as to doing both of those things because, like I said,
10 NCAI comes from a victim's perspective. And if you
11 took away the victim's -- what you're already doing for
12 victims is extremely important, and we'd hate to see
13 that reduced in order to provide more services for the
14 accused.

15 Then finally, the technologies that you guys
16 were discussing earlier, I thought that the Idaho
17 discussion was really interesting. We are particularly
18 looking at video arraignments because you have to
19 provide law-trained judges as well, and that maybe
20 difficult to do on a remote Indian reservation.

21 We've looked at outside jurisdictions that are
22 getting more and more into video arraignments as a way

1 of making that happen more quickly and more
2 cost-effectively.

3 Anyway, with that, I'll turn it over to --

4 PROFESSOR VALENCIA-WEBER: Howie, could I ask
5 you to address, in your experience, using Native
6 American grant money, what you have run into in terms
7 of requests from tribes and what you might, let's say,
8 speculate will happen with the kind of work that you
9 do, given what you've heard across this panel.

10 MR. BELODOFF: First I want to thank the Board
11 and President Sandman for inviting me today. I was
12 selected by my colleagues in the other 26 LSC-funded
13 Native American programs to to address some of the
14 issues, and I think I'm going to have a little
15 perspective, although John actually presented a lot of
16 how I view our role in Indian Country as a legal
17 services attorney.

18 First I want to put on the record Idaho is the
19 14th largest state.

20 (Laughter.)

21 MR. BELODOFF: So we'll get that one solved
22 today.

1 As Professor Valencia-Weber said, I've been a
2 legal services attorney since I was very young, and I
3 went to a law school -- we didn't have an Indian
4 course. So everything I learned -- we do now in Idaho.

5 I think it's taught by a student of Professor Weber.

6 When I got involved, I was the go-to guy, the
7 handyman. I did everything. And so you get these
8 issues -- they didn't teach you this in law school, at
9 least in my day -- and you just go hit the books, you
10 read the cases, and you go into court and fight like
11 hell. Right? That's what you do.

12 And we still do the same today. We have
13 better tools, more technology. But my perspective is
14 going to be from, really, the person who's going to go
15 into tribal court and the person who's going to work
16 with tribal governments and tribal judges going to
17 varying degrees of tribal facilities, justice systems.

18 I have been in tribal courts which were in
19 buildings that used to be the Indian agent's warehouse,
20 where they did the grain. The grain came in, they
21 showed me, in the basement to give to the tribal
22 members a hundred years ago.

1 There's a lot of issues that have to be
2 addressed, I think from the tribal perspective, but
3 also from the legal services perspective. And many of
4 my colleagues here -- I agree. These are great things
5 about expanded jurisdiction, sovereignty issues, making
6 tribal courts more effective.

7 But if you go around the country to Indian
8 reservations, they're different. They have different
9 resources. Some of them don't have, as was mentioned,
10 attorney judges or attorney public defenders.

11 I spoke to the Board in Seattle, and I
12 mentioned -- we talked about funding, and
13 unfortunately, I can report that we have less funding,
14 Native American funding, now than we did two years ago.

15 But for \$63,000, I don't see us taking a huge
16 role in implementing the requirements of the Tribal Law
17 and Order Act. And I know my colleagues, many of them,
18 are in the same place. We're spread so thin with so
19 few resources, and many of the tribes just wouldn't be
20 able to do it anyway.

21 So I don't believe that is actually something
22 that the Corporation has to have a regulation on

1 because I do believe we had flexibility in any
2 regulation to implement what the tribal governments
3 want and what we can actually help them do.

4 But the VAWA part, as John mentioned, we
5 represent victims. That's what we do, Indian and
6 non-Indian. And we can't take money to represent
7 defendants who beat up our clients. It just can't
8 happen. And so it's a real issue.

9 Give me a choice who I want to represent? We
10 know what that choice will be. There's all sorts of
11 conflicts. Small reservations, you represent people in
12 the families. You may have represented individuals
13 before.

14 So you have all these conflicts. There's some
15 political consequences going that happen sometimes,
16 too, if you take sides with one group versus another.
17 You heard this morning that some reservations have more
18 than one tribe. They were brought together. Those
19 things create issues.

20 I went to Wyoming for LSC when they were
21 looking at those programs there, and I had never been
22 to the Arapahoe-Shoshone reservation. And one side of

1 the street was Arapahoe and one side of the street was
2 Shoshone. I'd never seen that before.

3 They had separate buildings. They had one
4 tribal court. But they had separate councils and
5 separate buildings. There's a lot of issues that arise
6 on the reservations that you just -- one size is not
7 going to fit all. One regulation won't fit all.

8 So it's going to be difficult for us to
9 provide the resources and do, if we are selected to
10 provide that representation to criminal defendants.
11 And we don't represent non-Indians with our money. We
12 represent Indians. They have huge needs.

13 And if I have to prioritize, and we have
14 priorities, that isn't our priority, representing
15 non-Indians against Indians. So again, there's a
16 disconnect here. These things are all good, but I
17 think we have to be careful of the unintended
18 consequences as we go down this road.

19 I think all my colleagues support tribal
20 sovereignty. We support taking jurisdiction and
21 protecting victims and prosecuting those who commit
22 crimes against tribal members, or anybody, for that

1 matter, because that's what we do.

2 I only know in Idaho about 40 percent of our
3 cases we represent victims of domestic violence in
4 custody and divorce and protective order cases. And we
5 do that on reservations now as best we can within the
6 tribal justice system.

7 We have had some, especially in the last few
8 years, opportunities to be public defenders. But we've
9 got some money from the DOJ to do criminal work. But
10 our focus in those cases, our primary focus, is to help
11 the courts. We write codes.

12 I think somebody mentioned that there's these
13 archaic codes. So we wrote a new juvenile code. We do
14 training of the lay advocates. We're always looking
15 for those things. We do guardian ad litem in juvenile
16 delinquency cases.

17 And sometimes we do conflict cases if the
18 system that they have, there's an internal conflict
19 with either the existing public defender or some of the
20 witnesses. We'll do those with the resources that
21 we've been provided.

22 But without additional resources, at least

1 from my perspective -- and I can only speak from what I
2 know, and it's our five tribes in Idaho; I know
3 certainly about some other tribes -- but in my years,
4 we have very common problems.

5 We're not like the Navajo Nation for sure in
6 Idaho. We have even different reservations. We have
7 some reservations, and it's so different. Oklahoma is
8 different than Idaho or Montana. But we have some
9 reservations where the reservation is 98 percent trust
10 land. That means it's Indian-owned, tribally owned,
11 and held in trust by the United States government.

12 But we have some that, due to the history of
13 the Allotment Act, that they're checkerboard -- fee,
14 Indian, and that creates all these jurisdictional
15 issues. So some of our reservations there is more of
16 the non-Indian who are there.

17 Like on the Duck Valley reservation, which is
18 in the desert on the Idaho/Nevada border, there isn't
19 very many non-Indians. There isn't very many
20 non-Indians at Fort Hall in Eastern Idaho. But there's
21 a lot of non-Indians on the Coeur d'Alene and the Nez
22 Perce reservations.

1 So there's all these difficulties. And I
2 personally can see it, and maybe the other panel
3 members can speak to this. When Indian tribes start
4 exercising jurisdiction over matters that have been
5 concerns more of the non-Indian governments and
6 non-Indian individuals, there are political
7 consequences to that, and it raises temperatures of
8 people.

9 So I don't know if that's been thought of in
10 terms of what the effect is because they're not used
11 to -- as Ms. Goldberg has said, they're not used to
12 prosecuting non-Indians. Maybe in the federal courts
13 they do, but not in tribal courts.

14 So I would think that would be an interest
15 that would create some problems for the Indian
16 communities, which has also been mentioned. Native
17 Americans don't feel they're treated fairly in the
18 state justice systems. They are represented probably
19 five times in the Idaho criminal justice -- in the
20 prison population than in general.

21 So there's a lot of issues here that we face
22 on the ground that I don't know if they can be

1 addressed in any LSC regulation. I know that's what
2 you're here to do. And so I would urge that we go slow
3 if we're going to head down this path and ask the
4 question, well, how is Idaho going to pay for that?
5 How is Oklahoma going to pay for that?

6 Sometimes we get tribal contracts -- we don't
7 have any now -- and we get requests on individual
8 cases. So that would be good to do. But being the
9 go-to right now? I don't think we can do the go-to.

10 So I think maybe I've covered what I needed to
11 say.

12 MR. DOSSETT: Maybe just one comment related
13 to this. We talked to Umatilla about their experience,
14 and they're probably the most advanced tribe with
15 extended sentencing so far. They've already prosecuted
16 two individuals for very severe domestic violence
17 offenses and put them in federal prison.

18 What they said was that they wanted to make a
19 statement in their community that if you commit these
20 crimes, you're going to be prosecuted. And things have
21 quieted down quite a bit since then.

22 And I think the tribes are hopeful that the

1 same thing will happen with this non-Indian
2 jurisdiction, that there may be a handful of
3 high-profile cases that will very much need criminal
4 defense attorneys to help out with those cases.

5 But then, after that, the idea is that
6 hopefully these crimes will occur much less in the
7 future once an effective justice system has been put in
8 place. That's it.

9 CHAIRMAN KECKLER: I just want to thank all
10 the panelists for very excellent presentations. Very
11 helpful. As time is going on, I want to make sure that
12 the members of the Committee and the Board had an
13 opportunity to ask any questions that they might have
14 at this time.

15 Laurie, please go ahead.

16 MS. MIKVA: Actually, I have two questions.
17 The first one is pretty easy. It is do we have
18 statistics about how much LSC money is used for
19 criminal defense at this point?

20 PRESIDENT SANDMAN: Virtually none because we
21 had authority for misdemeanors in the past, but I have
22 never seen any statistics indicating that that was any

1 significant -- Howard would know best.

2 MR. BELODOFF: I know that we've done it. We
3 did it. We had a contract with the Nez Perce, and they
4 folded some civil representation and criminal
5 representation together. And that's why we took it.

6 Then we have the DOJ money, which is a little
7 bit of money, civil and criminal. Not all of the LSC
8 programs actually opt into the DOJ money because they
9 don't want to do it, for probably the same reasons that
10 I have said.

11 But we did not do it unless we had outside
12 monies. We use that exemption for tribal contracts.

13 PROFESSOR VALENCIA-WEBER: Laurie, in my
14 conversations with our grantees that have Native
15 American money, that is, LSC money, it seems to be very
16 exceptional. It may arise because they took
17 representation, civil representation, and as a result
18 of what happens there, there may be a misdemeanor
19 related to it, most often in the family law cases. But
20 that's a narrow exception.

21 MS. MIKVA: I guess my next question is also
22 maybe -- which is, what do you see the problem with

1 this sort of broad regulation, letting the grantees do
2 whatever the new law allows? And won't the grantee
3 just continue to do as they've always done, which is
4 set their priorities and decide probably that they
5 don't want to do it?

6 MR. BELODOFF: Well, I think that's true.
7 They probably don't want to do it. But it's probably
8 related to just the lack of funding. You can't be
9 going down to the courthouse every time they're going
10 to arraign somebody to do that and then have any kind
11 of -- deal with the other issues that are presented.

12 I think more than half the programs get less
13 than \$200,000, and especially out West, as you heard,
14 we don't even fly. We just drive. There are hundreds
15 of miles. And the Coeur d'Alene are 400 miles -- well,
16 actually, you've got the Kootenay, so they're 500 miles
17 north of Boise, and the Shoshone-Bannock are 235 miles
18 from where I am in Boise.

19 So if we have an attorney in Pocatello, which
20 is 15 miles away in Coeur d'Alene, and Lewiston, we
21 have offices near there, but you can't do that with
22 \$63,000 and be -- unless you want to buy me a plane and

1 teach me how to fly it, I don't think I can get there.

2 MS. MIKVA: I understand. I guess my question
3 again is, do you see a problem with a broad regulation
4 that lets the grantees decide what they want to do or
5 not do?

6 MR. BELODOFF: No. I think it's
7 fine -- flexibility, let local priorities take shape.
8 If there is funding available and if a program decides
9 that it's important because there are no other
10 resources available, they're very isolated, we may be
11 the only attorney for a couple hundred miles.

12 So maybe that is something that we could do;
13 if we could work out all the conflicts that previously
14 mentioned, maybe that is something. I'm all for
15 representation of somebody accused of a crime. But we
16 have to deal with these difficulties.

17 CHAIRMAN KECKLER: Jim?

18 PRESIDENT SANDMAN: One concern I've heard
19 expressed is that now that there is no statutory
20 prohibition on an LSC-funded lawyer handling a criminal
21 case beyond misdemeanors, that tribal courts might
22 appoint LSC-funded lawyers to represent defendants in

1 cases in their courts.

2 If the program can't point to a statute that
3 says we can't do that, that notwithstanding the
4 priorities they've set and the decisions they've tried
5 to make about how they want to allocate their
6 resources, that they might be compelled by a tribal
7 court to take on the representation.

8 Can any of you respond to that?

9 MR. TOULOU: I can't respond directly to the
10 compelling of the attorney in a representational role.

11 But I don't think the change from misdemeanor to
12 felony or open-ended really is that big a change.

13 Misdemeanor reflected what the Indian Civil
14 Rights Act allowed tribes to sentence before. There is
15 a very narrow, as we've discussed, exception now that
16 allows up to three-year sentences, which I've said only
17 six tribes at best have exercised.

18 I don't think you're going to see the switch
19 from misdemeanor to open-ended sentencing -- open-ended
20 being three years -- having a huge impact. But I'll
21 let Troy, who's very active in the Navajo bar, talk
22 about that point.

1 MR. EID: Yes. I think this is a very
2 important question that you raise. And my suggestion
3 would be that you keep the regulation broad, but you
4 also considering raising this issue and making it clear
5 that it would not be appropriate to be appointed in a
6 situation like that.

7 I was for many years the chairman of the
8 training committee of the Navajo Nation's Bar
9 Association. NNBA is the largest bar association that
10 directly serves an Indian tribe; we have about 500
11 members. The bulk of our members are tribal advocates,
12 but we have about 230, I think now, licensed attorneys.

13 We have an annual pro bono requirement. In
14 order to have our CLE, every year every member of the
15 bar has to accept court appointments. So it's not
16 every three years and it's something, by the way, you
17 can't get out of.

18 You are privileged to be appointed by the
19 courts to serve, especially when the criminal case
20 backlog at Navajo is about 7,000 cases, according to
21 the chief prosecutor, who I met with last Thursday at
22 Twin Arrows on the reservation.

1 We get court appointments that are not like
2 court appointments you typically get when you're a big
3 firm lawyer like me in commercial practice. You get
4 murder cases. You get all sorts of heavy duty stuff
5 that, while it is not subject to felony sentencing by a
6 tribal court, it is still -- having someone convicted,
7 say, of homicide, even if it's not punished by more
8 than a year, it's still, to the outside world, to
9 anyone, that's a significant matter. How could it not
10 be?

11 We've had a very long debate in the bar
12 association about what it would take for us to not be
13 appointed to these kinds of cases. We don't do
14 criminal law. Now, I have, because I've been a United
15 States Attorney. But I don't practice criminal law
16 these days.

17 But it doesn't matter. Our judges have been
18 very clear: When you're appointed, you serve, and
19 that's the end of the matter. And you're not going to
20 be able to get out of it, also, if you want to keep
21 your bar license.

22 That's their right, and I respect the fact

1 that they can do it. I also would point out we have 20
2 judges. Our chief justice has a state bar license, and
3 he is a graduate of a law school. We have one other of
4 our judges who has a law degree and no state bar
5 license. And the rest of them are not lawyers, and
6 they're not licensed apart from our Navajo Nation bar.

7 We're proud of our bar. But the bottom line
8 is that it would be good to provide some clarity in
9 this area because you're absolutely right. This is a
10 sovereign. It's in the constitution. It talks about
11 Indian tribes in Article I in the commerce clause and
12 that they're a sovereign along with the states.

13 So if you don't make clear in your
14 regulations, believe me, the tribes will say that they
15 have this power, and they will make the appointments in
16 that regard.

17 CHAIRMAN KECKLER: Let me ask a question as to
18 some extent a followup to the last couple, which is the
19 question of the alternatives. You pointed out LSC
20 could be a sort of backup if sometimes there's nobody
21 else.

22 Who else is there, is my question, who can

1 fulfill this role besides LSC attorneys? What other
2 systems are in place to provide indigent defense?

3 MS. GOLDBERG: I want to speak to this as a
4 tribal c applicant justice. There is a real need, if
5 you're going to be representing defendants in a tribal
6 court system, to have some understanding of the tribal
7 community, of the distinctive features of the tribal
8 legal system.

9 That is not something that comes along with
10 garden-variety criminal law and criminal procedure
11 training in American law schools. And that's why, when
12 I was referencing who might be available to provide
13 representation, my first thought was to turn to the
14 folks at the outstanding Legal Services grantees that
15 serve Indian Country because they will walk into this
16 expanded realm of responsibility with that basic
17 understanding.

18 I don't want to take up too much of your time.

19 But I can recite instance after instance where the
20 standard U.S. criminal procedure and criminal law
21 doctrine was inadequate to contend with the issues that
22 were before us in the court.

1 I'm particularly aware of this because at UCLA
2 we created something called the Tribal Court Appellate
3 Clinic, and our studies were serving as the law clerks
4 to the high courts of the Hopi and Hualapai tribes.

5 I was involved in the teaching of this clinic,
6 and the very first thing we had to do, before we could
7 even entrust the beginning of a draft of a bench memo
8 to one of these students, is to make it really clear to
9 them that their every instinct as a law student needed
10 to be controlled under these circumstances.

11 We have had issues, for example, about whether
12 the relationship of tribal police to tribal community
13 warrants the application of Miranda warnings when
14 tribal police arrest or detain a defendant in the
15 tribal community.

16 We have some really interesting questions that
17 come up all the time about who ought to be disqualified
18 from service on a tribal jury in a small community
19 where the definition of the tribe has to do with
20 interconnections of relatedness. So who gets to serve
21 and who cannot serve?

22 You can't just walk in with your standard

1 American criminal law training and do this kind of
2 work. Now, it's also true that Legal Services grantees
3 have been serving in civil justice capacities. They've
4 been representing victims, as was quite appropriately
5 pointed out.

6 There would need to be some expansion there.
7 But I actually think it would be easier to take people
8 who understand Indian Country and add on the criminal
9 work than it would to take your average state or
10 federal public defender and add onto them doing the
11 Indian Country work.

12 My co-panelists may feel otherwise, but --

13 MR. LEVI: But now, are our LSC folks admitted
14 in the tribal courts? Some of them are, I believe.

15 MR. BELODOFF: Well, not every tribe. Like
16 there are five tribal courts in Idaho; only one has a
17 bar exam, and you've got to take it and you get a
18 certificate. The other ones, you go in there, you show
19 you're an attorney, you're basically admitted.

20 MR. LEVI: And are you a member of their bar?

21 MR. BELODOFF: If they have one, yes. I know
22 I'm a member of --

1 MR. LEVI: What I'm trying to get at is --

2 MS. GOLDBERG: In Hualapai, all you have to do
3 is pay some money.

4 MR. LEVI: Yes. So once you're a member of
5 their bar, there is no regulation we can write, I don't
6 think, that would stop them from appointing you to --

7 MR. BELODOFF: No. That's true. I was
8 thinking the same. And they could very well do that.
9 I don't think the issues that are raised by the Navajo
10 are present in the tribal courts that I'm familiar
11 with. They just don't do that kind of work, and they
12 don't have hundreds of people at the bar.

13 Most of the people who are members of the bar
14 are non-Indians, and so they always can find somebody
15 to appt. And so they wouldn't necessarily appoint a
16 legal aid attorney. Complex cases, yes. I have seen
17 that. But that's on an occasional basis.

18 CHAIRMAN KECKLER: Well, I don't know exactly
19 whether the exact interaction between a federal
20 regulation that we write and -- that would be a
21 question later for Carole and Gloria.

22 I do want to -- do you have another question?

1 MS. MIKVA: Well, I just thought your question
2 wasn't answered, which is, who's doing it now?

3 MR. LEVI: You have a little more time.

4 PROFESSOR VALENCIA-WEBER: I'll give you one
5 answer.

6 MR. DOSSETT: I can answer that question, if
7 you like. I'm very familiar with like at Warm Springs
8 and Umatilla. They hire very experienced -- often
9 they're retired district attorneys from the area who
10 wind up serving. So they're very competent criminal
11 counsel that they just hire directly on contract.

12 MR. TOULOU: But I have to caveat that.
13 That's not true everywhere. There's 566 federally
14 recognized tribes, and the span is tremendous. And
15 while we're working hard to make sure that there are
16 defense counsel in place, public defenders, that is not
17 true across the Board.

18 Maybe half, and in the other half, it's going
19 to be you guys because you're the professionals. And
20 as Carole said, your people are the best on the ground.

21 PROFESSOR VALENCIA-WEBER: Yes. I would join
22 Carole's caution about going into the tribal courts.

1 We've seen tribes, for instance, that will contract and
2 hire outside attorneys for defense purposes because
3 they don't have them and they're trying to keep very
4 clean whatever procedure they go through for the
5 prosecution.

6 Additionally, this becomes a down-the-road
7 question, and it's been litigated and is still being
8 litigated. If later that defendant is charged in a
9 federal court, is the tribal court conviction going to
10 count in the sentencing enhancement process in the
11 federal court? And that's another "gotcha" down the
12 road.

13 But right now, for instance, at University of
14 New Mexico we have the Southwest Indian Law Clinic,
15 which does get requests and does represent defendants
16 in some pueblo and tribal courts. But then those
17 people have already been trained. There is a requisite
18 to go into that clinic that you must have had the basic
19 Indian law course.

20 So additionally, at UNM, our students have a
21 criminal prosecution in Indian Country course because
22 of this crazy quilt kind of jurisdiction and how they

1 have to weave their way through which jurisdiction
2 you're in, tribal, state, or federal.

3 CHAIRMAN KECKLER: Julie, go ahead. And then
4 I also want to -- after the Board concludes its
5 questions, I'm going to open this up for public comment
6 of the panelists.

7 Go ahead, Julie.

8 MS. REISKIN: I don't even know if this is a
9 question or comment or just a thought. I was really
10 taken -- one of the things in the client community
11 that's been talked about a lot, especially around the
12 access to justice issue and the lack of lawyers, is why
13 can't we use more non-lawyers for some things so that
14 we can save the lawyers' time for what only a lawyer
15 can do.

16 The best reference I have is, for example,
17 using non-attorneys to do like the first level of an
18 administrative law judge hearing so that lawyers are
19 available for things like judicial review.

20 It sounds like you guys have a great model,
21 and it sounds like there might be some issues with it,
22 but it's a model that seems to have worked. And is

1 there something there that could be taken and learned
2 other places?

3 MR. EID: Let me take a shot at that. It is
4 really good to see you again, Julie. I'm glad you've
5 done so well. I'm not at all surprised.

6 I would just say that every place is
7 different. We do this all the time. I'm on the
8 road -- I think last year it was 42 weeks. I was on an
9 Indian reservation at least 42 weeks out of last year,
10 and that's typical for what we do.

11 Every place is different. Our Navajo model is
12 very different because we have 11 judicial districts,
13 and a supreme court, and as I mentioned, it's a big
14 operation. And it's very different than what Carole
15 described at Hualapai. I'm a member of the Hualapai
16 bar; I paid my money, and I'm proud to practice in
17 their courts. But I didn't take a test to do it, and
18 so it's all very different.

19 I would tell you that at Navajo, because I
20 think it's a good example of what you're describing, we
21 could not run a civil society at Navajo without our
22 tribal advocates. It would be absolutely impossible.

1 They are overwhelmingly Navajo people. They
2 are the problem-solvers. They live in the communities.
3 The rest of us are guests. We're privileged to be
4 guests there, but we could not run that system.

5 It's nice to have the lawyers. I think we add
6 some real value sometimes. I do, and I'm not
7 minimizing it. But it's not an option there. On
8 matters involving particularly the protection of crime
9 victims and children, we just literally would not have
10 a justice system without tribal advocates. And we
11 would deprive ourselves of the main talent pool on the
12 Navajo Nation if we didn't have that ability.

13 Having said that, I want to answer your
14 question. We have a heck of a time training our
15 advocates to pass the Navajo bar exam. They have to
16 sit for an eight-hour exam that a lawyer finds
17 challenging. And it's hard.

18 We've worked very hard in the bar for years to
19 try to raise the passage rates, and the passage rates
20 are not very good. Most of the candidates who want to
21 be advocates and go into our courts and be licensed as
22 bar members are not able to pass the exam.

1 We've struggled for decades. And I mentioned
2 I chaired the training committee for a number of years
3 to try to get the rates, passage rates, up. We partner
4 with -- there's a set of Navajo Nation colleges, Diné
5 College being the main one; they have a certification
6 program. University of New Mexico Gallup Extension.

7 There are others. There's one that's
8 affiliated with ASU Law School that goes beyond Navajo.

9 But there are advocate training programs, extension
10 programs, but it's a tough nut to crack because we want
11 to, on the one hand, raise professional standards; on
12 the other hand, we really have difficulty -- the more
13 we make them like lawyers, the fewer we get passing.

14 I'm really just framing the issue for you
15 because I think it's fair to say, with all due respect
16 to my colleagues, we've not solved it. We have a lot
17 of really great people who try to help as assistants to
18 tribal advocates now. They're almost like
19 paraprofessionals, if you will.

20 So you're absolutely right. I don't know if
21 it's the model or not. But I want to just point out
22 that a lot of times in my experience, attorneys do not

1 appreciate the role that advocates play.

2 But I've never in my career worked more
3 closely with advocates on a daily basis than I do in
4 Indian Country, and we literally could not function
5 without them. And to the extent that that's what
6 you're looking at, I think it's key.

7 The other thing I wanted to say, just to
8 close, is that I thought a lot about what am I going to
9 say to you today in terms of what I'm asking you to
10 consider to do? The more power you leave with these
11 legal aid directors, the better the system is going to
12 be.

13 They already work extensively with tribes.
14 You heard the testimony hear. I know Jon Asher is
15 here. He's done a fantastic job with our two Colorado
16 Indian nations. He's never hesitated to reach out and
17 work with them, and they trust him.

18 So with all due respect, let the grantees who
19 have the experience -- these Indian nations are not new
20 to them. There are a lot of relationships there.
21 They'll work better if they have flexibility.

22 The other part is, keep the options open for

1 the tribes. Yes, at our baseline right now we can look
2 at the way Indian Country is today. But I am endlessly
3 surprised by what we see.

4 I see tribal courts, as I've mentioned, that
5 are on a par if not better than a lot of the county
6 district courts I see around the United States. You
7 can't go to a place like Tulalip or Salt River or Gila
8 River or the Southern Ute Indian tribe, and I could go
9 on and on. It's not just a few.

10 And there are places like Tulalip that if you
11 go back 15 years ago, it was a disaster. It was the
12 so-called murder capital of Washington state. And it's
13 one of the safest jurisdictions in the whole Puget
14 Sound region now.

15 So tribes, regardless of the obstacles put
16 before them, they will rise to the occasion. And they
17 do surprise people constantly. The one thing that any
18 of us shouldn't do is assume that they can't do it
19 because they do it all the time. Encourage them.

20 And the people who can help them are these
21 legal aid directors, legal services directors, who
22 really know them, and they can really be a great asset

1 to them as long as they're not told what they
2 absolutely can and cannot do.

3 CHAIRMAN KECKLER: Thank you very much to you,
4 Troy, and to all the panelists.

5 Is there any public comment for this section?
6 Oh, and any questions on the phone?

7 (No response.)

8 CHAIRMAN KECKLER: One of the reasons to have
9 this fact-finding session, besides for our benefit, is
10 to have it to get out the record on this issue as
11 people go forward. And as we look at this as a
12 Committee, today has been an extremely helpful start
13 about it. And we have a challenge here to look at the
14 complexities of empowering grantees and empowering
15 courts at the same time.

16 Gloria, do you have any final thoughts on
17 this?

18 PROFESSOR VALENCIA-WEBER: Only that the
19 Federal Register notice asking for comments,
20 information, suggestions, closes 30 days after we
21 finish this meeting. If there's something that you
22 have thoughts after you leave the panel that you think

1 would be helpful to us, please do send them in. We'd
2 be glad to get any comments.

3 And you're all somewhere involved in Indian
4 Country if you know people who have information and
5 insights for us. Please ask them to send it in to us.

6 We have sent a notice to all of the tribal
7 courts that we could get a verified list for, so I
8 don't know how many hundreds. But thanks to the
9 American Indian Law Center. They sent it with a letter
10 from Jim Sandman telling why we wanted their help. If
11 you know of any other people in Indian Country who
12 could help us, please encourage them to send their
13 comments.

14 MS. REISKIN: And please make sure that the
15 non-attorney advocates get the RFI and response because
16 I think their input would be really important. Thank
17 you.

18 CHAIRMAN KECKLER: Can we all thank our
19 panelists for coming to help us today?

20 (Applause)

21 CHAIRMAN KECKLER: We are going to now turn to
22 the next business of the Committee today, which will be

1 to consider and act -- and we are much further along in
2 this particular regulatory process than in the one we
3 just heard about -- for 45 CFR part 1626, which is the
4 Corporation's restriction on legal assistance to
5 aliens.

6 The Committee, in your book, and other members
7 of the Board, should have a copy of a memorandum
8 regarding this, if you recall from last time, as well
9 as a new markup that's being handed out right at the
10 moment.

11 FATHER PIUS: Is this different?

12 MR. FREEDMAN: The same. Correct.

13 CHAIRMAN KECKLER: We are looking at the
14 notice of proposed rulemaking with a request for
15 comments. And there also should be a cover memorandum
16 that is in your Board book, and that memorandum -- it
17 is entitled "Rulemaking Options Paper." It's beginning
18 at page 164 of the Board book, and goes through in
19 detail what the changes are.

20 If you recall from last time, the Board has
21 authorized the Committee to engage and begin a
22 rulemaking process to update this rule, which has been

1 overtaken by statutory events over the last several
2 years and by other changes in documentation.

3 The general overall plan, and I'll turn this
4 over to Ron and Mark in a moment, has been to update
5 the rule substantively based on the statutory changes,
6 and then also to change part of the rule, the nature of
7 the rule, so that as far as future documentary changes
8 in terms of what documents are required for eligibility
9 and other purposes, those documents change rather
10 frequently by various departments of government,
11 primarily Department of Homeland Security.

12 In order for us to keep pace with them in a
13 more expeditious fashion, those documentary
14 requirements, that aspect of the rule, would be in the
15 future treated as guidance and we would not have to
16 engage in rulemaking to update that portion.

17 So that is the overall plan that we've
18 developed. And I'll turn it over to Mark to clean up
19 whatever I said and begin your presentation.

20 MR. FREEDMAN: Thank you, Mr. Chairman. For
21 the record, this is Mark Freedman, Senior Assistant
22 General Counsel in the Office of Legal Affairs. And on

1 the telephone I believe we have Charlie Martel,
2 Assistant General Counsel, also with the Office of
3 Legal Affairs.

4 Charlie did the heavy lifting on drafting this
5 reg, picked up the work from Kara, dug his nose into
6 the statutes and the immigration laws, and drafted
7 these documents in front of you. It was a team effort,
8 but Charlie did the heavy work. Both Charlie and I
9 will be available for questions after a brief
10 presentation.

11 I've handed out to you, and there are also
12 some copies on the table in the back for members of the
13 public and I have a few extra copies, of a revision to
14 the document that was in your Board book. And that's
15 what was emailed to you on Friday. We have put in
16 redline what the changes are, presuming that you had
17 already read what we had provided in the Board book, so
18 you can easily see the updates.

19 The reason for the updated version is we
20 realized that the draft had conflated provisions of the
21 Trafficking Act and provisions of VAWA which overlap
22 but are not identical. So these revisions more clearly

1 state those differences, and I'll get into that in the
2 substance. There are a few wording corrections we
3 caught.

4 Procedurally, the Board authorized this
5 rulemaking at the last meeting and has empowered the
6 Committee to go ahead with drafting this rule and
7 publishing a draft rule. You have before you a
8 proposed rule and a rulemaking options paper.

9 If the Committee approves published this
10 proposed rule, we'll publish it in the Federal
11 Register, probably in early August. We recommend a
12 60-day comment period both so that the folks reviewing
13 it can take a look at all the technical details, and
14 also acknowledging we're published in August and not
15 everyone's in the office for the entire month of
16 August.

17 And once we have comments back, of course, we
18 will process the comments and review them; we will
19 conduct our own internal review of what we're drafted,
20 take a fresh look at it, and then we'll provide to the
21 Committee a draft final rule for your consideration and
22 hopefully for adoption.

1 As the Chairman mentioned, we have been
2 operating under these changes to the statutes for many
3 years. As the changes came out to the statutes, LSC
4 issued program letters saying, here's what you can do
5 grantees, notwithstanding contrary provisions of 1626.

6 We're going to update it, but here's some guidance so
7 that you can make sure you can do what Congress wants
8 you to be able to do.

9 Substantively, we're incorporating changes to
10 the current law. We're updating the regulation to
11 conform with existing practice. We have kind of a
12 luxury here of instead of writing a rule and guessing
13 what people are going to do, people have been really
14 doing this for quite some time.

15 As the Chairman mentioned, we recommend
16 removing the Appendix to make it a program letter so
17 that we can update it more frequently, and it's
18 something that really doesn't require Committee and
19 Board action.

20 The major work here is in Section 1626.4.
21 That was the domestic violence provision of the
22 existing rule, and we are renaming that the anti-abuse

1 provision so that we can put into it the Victims of
2 Trafficking Act provisions and the Violence Against
3 Women Act provisions in one spot because those are the
4 provisions that really focus on what happened to
5 someone rather than the core provisions of the rule in
6 1626.5, which has to do with what is an individual's
7 alienage status.

8 We're implementing these anti-abuse statutes,
9 and while we refer to it the Violence Against Women
10 Act, it really lists a number of different types of
11 activity. There's battery, extreme cruelty, sexual
12 assault, human trafficking, and also eligibility for a
13 U visa. And the U visas are even broader because the U
14 visas include victims of these crimes. It's got a
15 laundry list of crimes ranging from rape to perjury,
16 and also witnesses, people who are cooperating in
17 prosecution.

18 Overall, these laws were enacted as part of
19 major initiatives by DHS and Department of Justice to
20 prosecute this criminal activity where the primary
21 victims are aliens. The LSC provisions are a small
22 part of this, making sure that the LSC restrictions

1 don't get in the way, and if anything, that the LSC
2 recipients can be a part of these law enforcement
3 efforts.

4 This is different from our usual situation,
5 where we have statutory provisions that are all about
6 what LSC recipients do or can't do. Here Congress was
7 trying to say, let's make sure that LSC recipients can
8 be a part of this overall system for prosecuting these
9 crimes and assisting these victims of crimes.

10 The statutory provisions include both visas
11 and eligibility for primary victims, and also for
12 family members and for others who are assisting with
13 government prosecution. And again, this is how
14 Congress laid it out to make sure that they were
15 getting at everyone who might be involved.

16 Congress also is permitting this
17 representation with both LSC funds and non-LSC funds.
18 That's a distinction from the Kennedy amendment, which
19 the current regulation reflects, when Congress said our
20 recipients could represent other ineligible aliens who
21 were victims of domestic violence, but they could only
22 use their non-LSC funds. That was eliminated with VAWA

1 in 2006.

2 In addition, there are some issues involving
3 implementation and compliance that are specifically
4 identified in the proposed rule for comments. And I
5 want to make a note about the scope of the rule because
6 I think the one major substantive difference between
7 the victims of trafficking and VAWA is the scope of
8 available representation.

9 Normally, the alienage provision is just a
10 simple threshold eligibility. Either you're an
11 eligible alien, and you're available for whatever
12 services the recipient can provide, or you're not, and
13 you're not eligible. That's true for the Victims of
14 Trafficking Act provisions.

15 The Violence Against Women Act provisions are
16 a little more narrow, and this is true of the Kennedy
17 amendment provisions as well under the existing reg.
18 The statute only provides for authorization for related
19 legal assistance.

20 We've interpreted that and applied it both in
21 the existing rule and in additional guidance we've
22 provided. And that continues into the current rule,

1 where we've expanded that a little bit.

2 "Related legal assistance" can be fairly
3 broad. For example, a victim of domestic violence may
4 need help with child custody matter, with housing
5 matters, that all relate to the domestic violence.

6 But there are some things -- for example,
7 consumer action involving a credit collection
8 matter -- that might in fact be unrelated. And if the
9 only standard for eligibility is the Violence Against
10 Women Act provisions, the LSC recipient may not be able
11 to provide assistance in that completely unrelated
12 matter, whereas if the person is eligible under a
13 normal alienage provision -- say they become a
14 permanent resident -- the LSC recipient could provide
15 any assistance.

16 The 1626.5 provisions, which are the regular
17 provisions for alien eligibility, are basically
18 unchanged. There's no change to the structure there.
19 There's just two updates. One is adding H-2B forestry
20 workers, which Congress added by statute in 2008, and
21 the other is updating a statutory reference for certain
22 kinds of asylum cases.

1 Congress moved the statute that was referenced
2 in our statute as part of a consolidation of the
3 immigration law, and so we are doing a little catch-up
4 so that our reg refers to the right statute.

5 So with that brief overview, we respectfully
6 request that the Committee approve the proposed rule
7 for publication. And I and Charlie would be pleased to
8 take any questions you have.

9 CHAIRMAN KECKLER: Julie?

10 MS. REISKIN: Thank you. I read this a bunch
11 of times, and there are a couple things I didn't
12 understand. One of them is the extreme cruelty piece.

13 Does that include cruelty -- or all of this, actually,
14 the sexual abuse, the battery, and cruelty -- does that
15 include when the perpetrator is an employer?

16 MR. FREEDMAN: Does it include when the
17 perpetrator is an employer?

18 MS. REISKIN: You're an alien here and you're
19 being abused by an employer.

20 MR. FREEDMAN: Let me answer that in a couple
21 of different ways. The first is, it could, depending
22 on what the situation is. What first comes to my mind

1 is trafficking situations; often those involve
2 employers.

3 Primarily, in addressing questions like that,
4 we look to the definitions as they're used in the
5 immigration laws. So the statute, and then our
6 regulations mirroring the statute, looks to the
7 definitions that are provided in the trafficking laws,
8 in the Violence Against Women Act, implementation and
9 regulations by Department of Homeland Security.

10 So I don't know off the top of my head what
11 are the scenarios in which abuse by an employer with or
12 without qualify. I don't think it would be
13 categorically excluded. And I think if the question
14 came in, what we would do is look to the definitions
15 and their usage by Department of Homeland Security to
16 be able to say yes, this is a scenario where this is
17 considered to be the kind of abuse that's covered, or
18 no, this is a kind of abuse that's outsource of the
19 scope here.

20 Our default is to look at the broad intent of
21 Congress to really capture the exploitation of
22 individuals, and I would expect that probably if there

1 are scenarios involving abuse by employers, it's
2 something that at some point has come up for the
3 Department of Justice to look into as part of their
4 programs addressing these kinds of abuse. And so
5 hopefully we would be able to follow their lead as to
6 saying, yes, this is covered, or no, it's not.

7 MS. REISKIN: Okay. A followup question
8 is -- I have a feeling I'm not going to get another yes
9 or no answer -- the related piece, is who ultimately
10 determines the related piece? So you have someone who
11 maybe is a victim of trafficking or something, and
12 they're here and they have -- or they're battered or
13 whatever and they have a problem. You get a protection
14 order or whatever.

15 Why would a consumer issue be related?
16 Because these things pile, and you can't -- for a lot
17 of low income people, you can't separate -- it doesn't
18 work to separate everything. It is all connected and
19 interconnected.

20 So what wouldn't be related that Legal
21 Services does? Because Legal Services doesn't do stuff
22 that isn't bread-and-butter --

1 MR. FREEDMAN: It's an excellent question, and
2 it's an awkwardness about the statute. And it's
3 exactly as Congress has provided it. So let me answer
4 the question in two aspects.

5 One is, to provide an additional concrete
6 example, when we implemented this provision in the
7 current rule, we discussed in the preamble some
8 examples. And one of the examples we gave was family
9 law, where a protective order or custody of children is
10 clearly related.

11 But if the individual is then trying to adopt
12 someone and the adoption doesn't have anything -- is
13 not at all related to the abuser, the abuse, that
14 potentially would be an unrelated legal issue that the
15 grantee could not assist with under this provision.

16 It's a very fact-specific question. So in the
17 existing rule and in the current rule, we provide a
18 list of examples that are relatively broad in order to
19 encourage grantees to carefully think about this. We
20 don't want them to have a chilling sense of, well, I
21 don't want to go there.

22 Fundamentally, what grantees can do is what

1 they can do in most situations where they've got a
2 question that doesn't neatly fall into one or two
3 categories -- give us a call. It's one of the things
4 that not only do we do at LSC, but also especially in
5 the Office of Legal Affairs, is provide answers to
6 questions like that and be able to say, okay, under
7 this fact pattern, this is related or this is not
8 related.

9 MR. FLAGG: Ron Flagg. I just want to make
10 one point clear. The relatedness issues that you've
11 been asking about and that Mark has been commented on
12 are all in the statute.

13 We have not, in drafting and proposing to you
14 a regulation, created a set of distinctions for our own
15 policy reasons or because we thought we had a better
16 idea, but have literally just tried to permit our
17 grantees to represent victims of abuse and violence in
18 related matters to the extent that they're permitted to
19 do so under the statute.

20 So there is awkwardness, but it was not
21 introduced by us.

22 CHAIRMAN KECKLER: I mean, it's within our

1 purview in the Committee if there's some clarification
2 we can make of a term like "relatedness" in some
3 thought. And again, as people look over this
4 transcript and people commenting on this regulation
5 have thoughts on something like relatedness, which is a
6 term of art, a term of use, a rule of reason, that's
7 helpful to the Committee.

8 Are there other questions from the Board or
9 Committee? Yes, Mr. Maddox?

10 MR. MADDUX: Just for clarity, I haven't
11 followed this as closely as the Committee has, Mark.
12 But in essence, under the anti-abuse provisions in the
13 regulation we're proposing, if the abusive activity
14 occurs anywhere in the world and it can be considered
15 to violate U.S. laws if that person finds him- or
16 herself in the United States, then they would be an
17 eligible client? Is that what it comes down to?

18 MR. FREEDMAN: Essentially, yes, in that we
19 are looking to Department of Homeland Security and also
20 the exact language of the statutes as to what is the
21 scope, and discussed a little bit in the preamble, in
22 the draft preamble, that Homeland Security has taken

1 that exact broad view of, if U.S. law is being
2 violated, we care.

3 So if you have someone where it's a scenario
4 where the Department of Homeland Security would say,
5 yes, this is what's covered here, then since it's the
6 same statute, it's the same definitions, our feeling is
7 that then our grantees are able to provide
8 representation in that matter.

9 Does that answer the question?

10 MR. MADDOX: Thank you.

11 CHAIRMAN KECKLER: But Vic, I just want to add
12 one more thing about your question, though, which is
13 that if you look at 1626.4(d)(2), the alien does not
14 have to be in the United States. Okay? So that
15 follows directly from the U visa, ultimately. It's
16 part of the U visa provisions.

17 It's a little startling. It certainly
18 startled me a little bit and make me think about it.
19 And the Office of Legal Affairs, that's one of the
20 items, not having a geographic presence requirement,
21 that they're specifically soliciting comment about.

22 Law enforcement and DHS, they have a reason

1 for that, that people flee into other countries and so
2 on. But it's a little unusual. Right? As you say,
3 things can happen abroad that they violate a law of the
4 United States, and the alien can be abroad.

5 So it's worth thinking about, and it's worth
6 getting comments about. Our grantees have service
7 areas, and none of those service areas are beyond the
8 realm of the United States. That doesn't mean that
9 there couldn't be a client of theirs that they
10 encounter that may end up fleeing abroad or may have
11 children abroad that they need visa help with. But
12 it's still an issue to think about, I think.

13 MR. FLAGG: Yes. I'd just like to underscore
14 the two examples which the Chairman just identified.
15 And we've certainly asked for comments, but I think
16 these are very, to my understanding, frequent fact
17 patterns, which is, one, where you have somebody in the
18 United States who is seeking assistance here because
19 they were a victim of violence abroad.

20 Typically it's a woman and she's left her
21 children, often in some jeopardy, still abroad. And
22 Congress has permitted us and our regulations permit

1 our grantees to represent not only the person who is in
2 the service area seeking the assistance that they're
3 allowed to permit under the statutes, but also on a
4 derivative basis these children who are not physically
5 in the jurisdiction but face, often, the same jeopardy
6 that the principal applicant faced.

7 The second scenario which the Chairman also
8 alluded to, which again we're seeking comment on but to
9 my understanding is not an infrequent situation, is
10 where you have people in border areas who are subject
11 to violence in the United States and flee from that
12 violence out of the United States.

13 They may have been represented or began to be
14 represented while in the United States, the question
15 being, they fled the violence by leaving the country.
16 Does that mean that the grantee can no longer represent
17 them?

18 Congress has spoken directly to that issue and
19 said to us that they were not putting a limitation on
20 that. So the issue is whether, in that circumstance,
21 we in the exercise of our own discretion want to tell
22 our grantees, no, you cannot continue to represent the

1 victim of violence under that circumstance.

2 CHAIRMAN KECKLER: Well, my own thought about
3 this is that I certainly don't want to exclude the
4 possibility of protecting these people, and also
5 remembering that the U visa is ultimately -- although
6 it's protective of particular persons and is helpful
7 for victims, its ultimate goal is law enforcement.

8 It has a law enforcement purpose, and I
9 certainly don't want to infringe on that. The only
10 question for me as I've thought about this, and this is
11 the part that I've just been thinking hardest about
12 about the regulation, is whether there is a role or
13 there's some kind of language that we may ultimately
14 want to put in that requires some kind of not
15 necessarily continuous presence or presence at all for
16 people like children, but some kind of nexus to a
17 service area that ties that person to that service area
18 for which the grantee is responsible.

19 They're responsible for all kinds of clients,
20 including U-eligible clients, in that service area.
21 And so if they're -- but it's a rather delicate and
22 difficult matter, and whether we want to do something

1 like that either in the regulatory language or in the
2 preamble that's explanatory of that concern is
3 something we'll have to think about going forward.

4 But as it is, I think we're reflecting the
5 statute in the NPRM, and the statutory authorizations
6 for the Corporation. So I don't think it needs to be
7 altered in terms of its presentation for comment
8 because of that reason.

9 Are there other questions or thoughts?

10 (No response.)

11 CHAIRMAN KECKLER: If there are not, we've
12 also scheduled a public comment on this rule. Go
13 ahead.

14 MR. GREENFIELD: Thank you, Mr. Chairman.
15 Chuck Greenfield from NLADA. We have reviewed the
16 proposed notice of rulemaking and are completely
17 supportive of this. As we said in the last Committee
18 meeting, we think it's a great idea to put this in
19 regulatory form, which has been heretofore in a type of
20 policy form.

21 I wonder a little bit about taking the
22 appendix out and put it in the nonregulatory form,

1 doing both things, of making regulatory and then taking
2 part of it and making it nonregulatory. So maybe Mark
3 or Charlie can answer the question. I haven't had a
4 chance to see whether it's in there, whether within the
5 notice of proposed rulemaking we have a specific
6 reference to the program letter or something like so
7 somebody reading the regulation would then know to look
8 to the program letter for further guidance on that
9 issue.

10 MR. FREEDMAN: Let me doublecheck right now.

11 CHAIRMAN KECKLER: I noticed something, Chuck.

12 In 1626.7, it suggests that there's going to be a list
13 of -- that we may publish examples. Is that that
14 reference?

15 MR. FREEDMAN: That is correct, Mr. Chairman.

16 And allow me to explain why we say it that way. The
17 original rule, or the existing rule, says that you can
18 look to the appendix for a list of acceptable
19 documentation, and then in addition to that, any
20 authoritative document issued by DHS or a court or a
21 government agency is acceptable that provides evidence
22 of alienage status.

1 So as a functional matter, we have a rule
2 which is, if you've got an official government document
3 or court document, something that seems sufficiently
4 authoritative, that's good enough. And then we
5 specifically reference that we have an appendix that
6 lists, at the time the appendix was published, what
7 some of those documents would be.

8 Instead, by taking it out of the appendix, we
9 have this general rule and we say we publish a list of
10 examples of such documents from time to time, which,
11 while not a specific reference to a specific document
12 like an appendix, is meant to be a pointer to say, go
13 look to LSC or the LSC's website for where we have
14 those lists.

15 And I should note here that in 2003 when we
16 had this as an appendix, our website was still growing
17 and the notion that we would have a single place where
18 people could easily go to find these documents still
19 led us to say, well, the place to do that is in the
20 CFR. We want to have something that really exists and
21 everyone knows about.

22 Ten years later, I think we can say with real

1 confidence our grantees know to look for materials on
2 our website, like program letters and obviously the
3 accounting guide, the audit guide. So I think that
4 there shouldn't be a problem with them being able to
5 find what those examples are, and there's a general
6 rule here in the regulation that any acceptable
7 documentation that's sufficiently authoritative will be
8 sufficient.

9 CHAIRMAN KECKLER: Although, taking Chuck's
10 point a little bit -- I notice this when I'm rereading
11 it now -- it seems like -- and this is about
12 1626.7 -- we talk about the publication in two places.

13 LSC may publish lists of examples of such documents
14 from time to time, and the recipient shall, upon
15 request, furnish each person seeking legal assistance
16 with any list of documents established eligibility
17 under this part as is published by LSC.

18 It seems like we might want to make a
19 more -- phrase that in a way where it designates that
20 there will be a list and that they'll furnish the most
21 recent list. You see what I'm saying? That we will
22 publish and update a list of examples of such documents

1 from time to time, and under 2(b) you'll furnish the
2 person seeking legal assistance with the most recent
3 list of documents, or something like that, some phrase.

4 Would that be acceptable?

5 MR. GREENFIELD: Mr. Chairman, I think the
6 only additional -- I think that's in the right
7 direction. The only additional suggestion I might
8 have -- if the plan is to make it a program letter,
9 just state that the appendix, or whatever you want to
10 call it, will be in program letter form so that the
11 reader is then directed to the program letter. And I
12 think that would be helpful.

13 The appendix is actually the pragmatic
14 document that you apply, that folks cut and paste for
15 their intake workers and things like that. And so it's
16 actually something that's a living, referred-to
17 document perhaps more than the actual 1626 language
18 because it's how it's applied in an individual case and
19 what proof is necessary. So I would suggest it make a
20 specific reference.

21 And the last thing, if I could, Mr. Chair, is
22 Professor Leslye Orloff from American University, who

1 addressed this Committee last time, sent me an email.
2 She apologized for not being able to make it here; she
3 has an illness in the family, but is generally
4 supportive. I think she provided additional
5 documentation, too, and met with OLA prior to this as
6 well.

7 MR. FLAGG: I just want to make one -- Ron
8 Flagg for the record -- one point to make it clear.
9 The reason we're proposing this is not to remove it
10 from the public domain or in any way make it difficult,
11 but to more easily update this list.

12 These are documents, forms, and these forms
13 change frequently. And we'd like our list to keep up
14 with these changes in forms. And if we do it as a
15 program letter, we can do that relatively easily. If
16 for some reason either Management or the Board or this
17 Committee wants to take public comment on the change,
18 we can do that.

19 But otherwise, we can do it on a more frequent
20 basis without having to go through a more complicated
21 process simply to keep our list updated.

22 CHAIRMAN KECKLER: Right. That's the purpose,

1 although one thing that you might -- another way that
2 you might want to fiddle with that language or consider
3 it is when we talk about publication, we say "publish."
4 We might say "publish in the Federal Register." So
5 that's it.

6 I don't necessarily see harm how it can take
7 comments by instead of saying "a list," "a program
8 letter that lists." The field understands the term the
9 program letter that regulates -- so yes.

10 MR. GREY: Mr. Chair, I think that Chuck
11 raises a good point. I think that this is an
12 opportunity for us to be sure that whatever change we
13 make is one whose terminology is understood by the
14 field, and that we maintain a consistency with that
15 terminology.

16 But clearly, this idea of being able to have
17 more flexibility is something that inures to the
18 benefit of the field. And I know that's where you were
19 going, Mr. Chairman, is if we're going to do it, let's
20 use terminology that people are familiar with. Let's
21 not create a new word, like, this is the list. What
22 was that? But that's, I think, very helpful. Thank

1 you.

2 CHAIRMAN KECKLER: Yes. I think that with
3 those changes -- Julie?

4 MS. REISKIN: There's two things that we're
5 giving out. What you're all talking about is you're
6 going to have some kind of list for the programs,
7 whether it's a list or program letter, whatever.

8 But then it said something that the programs
9 should furnish to potential clients. That we should
10 leave a little bit better so that they can do it in a
11 culturally appropriate way for their communities
12 because giving clients a list of government documents
13 isn't particularly helpful.

14 CHAIRMAN KECKLER: So what you're saying, and
15 I think this is an interesting thought and a good one,
16 is that when we talk about what is for the recipient,
17 we're talking about the program letter. LSC is
18 publishing in the Federal Register a program letter
19 that lists examples of such documents. And that's
20 under (a)(1).

21 And then under (b), when we are doing it to
22 the client, right, not necessarily hand them the

1 program letter. Okay?

2 MS. REISKIN: Exactly.

3 CHAIRMAN KECKLER: We can just say, the most
4 recent list of documents, or a list.

5 MS. REISKIN: They should be expected to be
6 able to explain it appropriately and in the right
7 reading -- again, I think that's part of their job.
8 But we don't want to tell them -- we don't want to
9 mandate that they give the client some legalistic
10 letter that the clients aren't going to understand and
11 are going to think, oh, well, now I'm not eligible.
12 They should be able to say to the clients, here's what
13 you need.

14 CHAIRMAN KECKLER: Well, they can hand -- the
15 idea would be that -- I'm not sure -- well, I'm
16 thinking about language. But if we just say "the
17 list," if we say "the program letter" above and we say
18 "the list" below and then they hand the list, they can
19 hand -- it'll be translated and have a context and
20 things like that.

21 MS. REISKIN: Right.

22 CHAIRMAN KECKLER: Okay. That's good. Any

1 more thoughts?

2 (No response.)

3 CHAIRMAN KECKLER: If not, we can move to make
4 a motion to approve the publication of the notice of
5 proposed rulemaking, as amended during Committee
6 discussion.

7 MR. FREEDMAN: Mr. Chairman, since some
8 different language has been popping around about these
9 provisions, I'd like to -- what we've often done in
10 these cases is rather than try to hammer out each and
11 every word right here, if as part of your motion staff
12 will submit to the Chairman some language that tries to
13 capture this discussion for the Chairman's approval,
14 and that's what we publish.

15 Since this is a draft rule for comment, if we
16 don't quite get exactly what every Committee member
17 wanted, we still have lots of time and room to get that
18 right in the final rule. That's my recommendation.

19 M O T I O N

20 CHAIRMAN KECKLER: Okay. So we'll change the
21 motion to approve the publication of the notice of
22 proposed rulemaking with changes that reflect the

1 substance of the Committee's conversation, as
2 determined by technical revision following.
3 Complicated, but -- that would be the motion. Is there
4 a second?

5 MR. GREY: Second.

6 CHAIRMAN KECKLER: All in favor?

7 (A chorus of ayes.)

8 CHAIRMAN KECKLER: Opposed?

9 (No response.)

10 CHAIRMAN KECKLER: The motion carries, and the
11 NPRM will be published after consultation with the
12 Office of Legal Affairs.

13 Is there any other public comment? We've had
14 public comment on both the substantive items of the
15 Committee's business.

16 (No response.)

17 CHAIRMAN KECKLER: We can then turn to
18 consider and act on any other business that anyone
19 wishes to bring before the Committee. Is there such
20 business?

21 (No response.)

22

1 CHAIRMAN KECKLER: Seeing none, I can now
2 consider a motion to adjourn the meeting.

3 M O T I O N

4 MR. KORRELL: So moved.

5 MR. GREY: Second.

6 CHAIRMAN KECKLER: All in favor?

7 (A chorus of ayes.)

8 CHAIRMAN KECKLER: The Committee meeting is
9 adjourned. Thank you very much.

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

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