

LEGAL SERVICES CORPORATION

BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE MEETING

Open Session

Tuesday, July 9, 1996

Legal Service Corporation  
750 First Street, N.E., 11th Floor  
Board Room  
Washington, D.C. 20002

COMMITTEE MEMBERS PRESENT:

LaVeeda Morgan Battle, Chair  
Hulett "Bucky" Askew  
F. William McCalpin  
Ernestine P. Watlington  
John G. Brooks  
Thomas F. Smegal, Jr.

STAFF PRESENT:

Alexander D. Forger, President  
John Tull, OGC  
Suzanne Glasow, OGC  
Martha Bergmark, Executive Vice President  
Laurie Tarantowicz, OIG  
Renee Szybala, OIG  
John Meyer, OPR

ALSO PRESENT:

Linda E. Perle  
Center for Law and Social Policy  
Alan Houseman  
Center for Law and Social Policy  
Richard B. Teitelman  
Legal Services of Eastern Missouri  
Michael Ferry  
Legal Services of Eastern Missouri

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

(10:20 a.m.)

1  
2  
3 MS. BATTLE: Good morning. And we're happy to  
4 have with us this morning John Brooks, who has joined  
5 us via a flight that started at 7 o'clock last night  
6 and got here at 12:00. So we are very glad that you  
7 were able to weather the storm of last night and join  
8 us this morning.

9 MR. BROOKS: Thanks.

10 MR. McCALPIN: Were you on Value Line,  
11 Valujet?

12 MR. BROOKS: They're not flying.

13 MS. BATTLE: They're not flying.

14 MR. BROOKS: No. I was on what they used to  
15 call Agony Airlines, USAir.

16 MS. BATTLE: Yeah.

17 MR. BROOKS: It was Allegheny.

18 MS. BATTLE: Okay. And good morning to  
19 everyone this morning. I think we were very productive  
20 yesterday in getting through six regulations that we  
21 had on our agenda. So this morning, what we will do is  
22 start up at No. 7 on the agenda with a discussion of

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1 part 45 CFR Part 1626, Restrictions on assistance,  
2 legal assistance to aliens.

3 Before we get into a real discussion about  
4 this, something that Bill and I both talked about in  
5 looking at this particular reg, because we are only  
6 amending parts of it it seemed difficult to do a  
7 comparative reading of this reg with what is contained  
8 in the existing regulation.

9 And some of the sections don't seem to fit in.  
10 So my suggestion as we go through this editing process  
11 is that when we present it to our committee next time,  
12 that we publish it in toto.

13 And somehow, I don't know with all of these if  
14 we're going to have, if it's an additional expenditure  
15 of resources for us to redline a copy so that we really  
16 can just focus our attention on the changes, rather  
17 than having to go back and reread, you know, every  
18 single thing.

19 But it would be helpful if you could bold,  
20 once we republish an entire reg, just bold out the  
21 sections that have been adjusted so that we know  
22 exactly what we need to be looking at is. Is that

1 feasible, or is that --

2 MS. GLASOW: It wasn't a cost consideration  
3 that we didn't do the normal cross-out underlining. It  
4 was really a matter of the speed with which we had to  
5 work.

6 MS. BATTLE: Sure.

7 MS. GLASOW: And we were constantly revising  
8 after negotiating with interested parties that we  
9 simply would not have had these before you in time if  
10 we had been constantly having to undo, redo that. So  
11 we can certainly attempt to, and I certainly will give  
12 you the entire regulation next time.

13 MS. BATTLE: Sure. What if we just bold the  
14 changes. Is that possible, the sections that are  
15 changed?

16 MS. PERLE: The problem is that -- that when  
17 you do that, I guess you could bold new language, but  
18 then you don't see what's been taken out.

19 MS. BATTLE: Well, that's okay.

20 MS. PERLE: The problem is, when you try to do  
21 the cross-outs and the underlines or whatever, it gets  
22 very confusing for people to read.

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1 MS. BATTLE: Oh, yeah, sure. Well, just bold  
2 the new stuff. Just -- you know, whatever we're  
3 adding, whatever we're changing, if you just bold it.

4 MS. PERLE: You mean like if there's a  
5 paragraph where there's a change, just bold the  
6 paragraph?

7 MS. BATTLE: Yeah, yeah.

8 MS. GLASOW: Or underline.

9 MS. PERLE: I think bolding is better.

10 MS. BATTLE: Bolding, so you can just take the  
11 bolding off when you do your final.

12 MS. PERLE: That's easier for me to what we  
13 call redline it.

14 MS. GLASOW: Oh, bold it instead of redlining?  
15 Okay.

16 MS. PERLE: No, it's just if there is a change  
17 --

18 MS. GLASOW: Okay, okay, I'm sorry.

19 MS. PERLE: If there's a change in the  
20 paragraph, you don't have to indicate what the specific  
21 changes are. Just that that's --

22 MS. BATTLE: Just bold that one.

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1 MS. PERLE: -- the paragraph you have to look  
2 at.

3 MS. BATTLE: Yeah, so that we know which ones  
4 to look at and which ones not to look at as we go into,  
5 you know, republishing the entire reg in order to put  
6 the changes in context.

7 MS. GLASOW: Okay.

8 MS. BATTLE: Okay? Is that going to be --  
9 that would be real helpful to us.

10 MS. PERLE: That will be easy, okay.

11 MS. BATTLE: If that's also easy to work with  
12 for the staff, I think it would work for us, okay?  
13 1626.

14 MS. GLASOW: Basically, we advised this  
15 regulation to implement the new statutory restriction  
16 that applies now to providing legal services to  
17 ineligible aliens regardless of the source of funding  
18 that was used.

19 Prior to the new statutory restriction, the  
20 restriction on providing legal services to ineligible  
21 aliens only applied to LSC funds and there is nothing  
22 in the LSC Act on provision of legal assistance to

1 aliens.

2           So we advised in essence the substantive  
3 changes to this were done to the funding provisions.  
4 We thought it would be an easy thing to do. As it  
5 turned out, there were several provisions that referred  
6 to funds so we had to make that type of technical  
7 change in several different sections.

8           We also made a few changes to definitions just  
9 to simplify it. There's no substantive change in  
10 meaning. We found some provisions which are circular  
11 and just redundant, and so we just made few revisions  
12 there.

13           MS. BATTLE: Okay. Are there any just brief  
14 editing changes to the comments before we go into the  
15 rule by anyone? Let's start with the rule itself, the  
16 purpose. The purpose has been revised. Is that  
17 correct?

18           MS. GLASOW: That is correct. We revised it  
19 to indicate that recipients are prohibited from  
20 providing legal assistance for on behalf of ineligible  
21 aliens. And we just took out the language that said  
22 with LSC funds. So now they just can't do it, period.

1 MS. BATTLE: Okay.

2 MS. GLASOW: And we left in language talking  
3 about it's also designed to assist interim -- in  
4 assisting recipients in determining eligibility  
5 immigration status of aliens, provide guidelines for  
6 all of ineligible persons, and of course to protect the  
7 confidentiality of information obtained from clients  
8 and prospective clients.

9 MS. BATTLE: Okay. Now, the ineligible -- I'm  
10 sorry, the next section -- did you have something on  
11 purpose?

12 MR. McCALPIN: Are we at one?

13 MS. BATTLE: We're on purpose, if you've got  
14 something.

15 MR. McCALPIN: I'm looking at the last part of  
16 the protected confidentiality of information obtained  
17 from clients. How do we square that with the new  
18 requirements about access to information and how is  
19 this different from any other client being served?

20 MS. GLASOW: You're saying why don't we have  
21 this language in some other rules?

22 MR. McCALPIN: Well, either that or what --

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1 why is it here specifically when I would assume that we  
2 have the same principles and the same restrictions with  
3 respect to information given us by alien clients as we  
4 do citizen clients?

5 MS. GLASOW: It's really just here because it  
6 was already in the rule and we just were not making too  
7 many changes to current rules. But, I mean, your  
8 question is correct. It does not conflict with the new  
9 509 section of the Appropriations Act because we would  
10 interpret this to be inconsistent with that. So there  
11 is no conflict with the new law. It's not necessarily  
12 needed. It really is just a statement of purpose.

13 MR. McCALPIN: Well, let me ask you this.  
14 What provision in the body of the regulation implements  
15 that statement in the purpose?

16 MS. BATTLE: Section 1626.9, Use and  
17 confidentiality of records pertaining to determining of  
18 eligible alien status seems to address the issue of --

19 MR. McCALPIN: That's not one of the ones changed.

20 MS. GLASOW: That's correct.

21 MS. BATTLE: No, it's one of the existing  
22 sections.

1 MS. GLASOW: That's correct.

2 MR. McCALPIN: That's part of the problem.

3 MS. BATTLE: Yeah. And it gives the time  
4 frame for the retention of the record, it gives some  
5 parameters as to who it can be released to and what for  
6 and the fact that Congress can get it, but that some of  
7 the information in determining eligibility may be  
8 confidential.

9 MR. McCALPIN: My recollection is that that  
10 first sentence in 9 may conflict with what we did in  
11 the eligibility regulation a year or two ago.

12 MS. PERLE: We never changed the eligibility  
13 regulation.

14 MR. McCALPIN: A year or two ago when we  
15 modified it.

16 MS. PERLE: But we never published it as a  
17 final rule, so it was --

18 MS. GLASOW: It was tabled.

19 MR. McCALPIN: Oh, okay.

20 MS. PERLE: The only one in that round that  
21 was ever passed was 1607 on governing bodies.

22 MR. McCALPIN: Well, it says such records

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1 shall not be released by the corporation or by a  
2 recipient to any third party. A third party, I  
3 suppose, could be the monitors, couldn't they? Except  
4 in statistical form, which would not be consistent with  
5 509.

6 MS. BATTLE: Well, let's see. The first part  
7 of that requires that the name and personal  
8 identification be deleted but the rest of the  
9 information be maintained.

10 MR. McCALPIN: Where are you?

11 MS. BATTLE: I'm in (a). I'm in 1626.9(a).

12 All records pertaining to --

13 MR. McCALPIN: Must be available with the -- I  
14 see.

15 MS. BATTLE: Yeah.

16 MR. McCALPIN: But you can't -- then you can't  
17 do that under 509.

18 MS. BATTLE: You can't delete the names?

19 MR. McCALPIN: Right.

20 MR. TULL: No, I think it's -- I think under  
21 509 you can have access to the names. It doesn't  
22 prevent deletion of the names. It just says you can --

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1 MR. McCALPIN: Well, deletion turns out to  
2 be --

3 MR. TULL: We did part of the second wave of  
4 regs review that should hit sometime in January. The  
5 conversations we've had with the Inspector General's  
6 office have been to do a sweep of all the regs because  
7 there are a number of places where there's issues that  
8 relate to confidentiality that were not addressed this  
9 first time.

10 And simply we just didn't have time to work  
11 through, first understanding what 509 means and coming  
12 to agreement around that and then applying it to each  
13 of these. So I think you're correct, Bill, that this -  
14 - this is language which probably does need to be  
15 changed to make it consistent with 509 because the  
16 corporation -- the corporation now --

17 MS. BATTLE: But at the time that we consider  
18 all of the regulations pertaining to the changes that  
19 need to be made on 509, we can consider this issue, it  
20 seems to me.

21 MR. TULL: That was the thought that was in  
22 the conversation we had with Inspector General's

1 office, is how to approach this particular issue.

2 MS. BATTLE: Okay, all right.

3 MR. TULL: I think while this is inconsistent  
4 with it, it's not illegal because 509 expands the  
5 rights of the corporation to access but doesn't mandate  
6 that expansion. So the Inspector General has been  
7 comfortable with our doing a study to look at the regs  
8 and addressing those issues.

9 MS. BATTLE: Okay. Are there any other  
10 questions on the purpose? Let's move down to the  
11 definitions, 1626.2, definitions. Eligible alien is  
12 defined differently. We've now got three, four  
13 sections as opposed to one that set the parameters for  
14 eligible alien.

15 MS. GLASOW: Now, the extra provisions had been  
16 added on over time as Congress passed legislation that  
17 allowed us to serve different types of aliens. And so  
18 I felt it was appropriate to list them in this to make  
19 it user friendly for the field.

20 MS. BATTLE: Okay. Ineligible alien, instead  
21 of being, is defined in the negative. Either you're  
22 eligible or your ineligible.

1 MS. GLASOW: That is correct. Both terms are  
2 used. I want to add some language to the definition of  
3 ineligible alien.

4 MS. BATTLE: Okay.

5 MS. GLASOW: It's somewhat redundant, but  
6 everybody seems to feel more comfortable it's in there.  
7 Ineligible alien means an alien who, and then add: Is  
8 not a United States citizen.

9 MR. McCALPIN: Who is not a what?

10 MS. GLASOW: United States citizen or. And  
11 then it goes on: Does not meet the requirements of.

12 MR. McCALPIN: Or who does not?

13 MS. GLASOW: Or does not meet the  
14 requirements.

15 MS. BATTLE: And.

16 MR. McCALPIN: Or who does not?

17 MS. GLASOW: Yeah.

18 MR. McCALPIN: I would think.

19 MS. BATTLE: Is it "or" or is it "and?" I  
20 would think it's "and."

21 MR. McCALPIN: And.

22 MS. GLASOW: Yes, and. It's and.

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1 MR. FORGER: Can an alien be a U.S. citizen?

2 MR. McCALPIN: No.

3 MR. FORGER: Can a U.S. citizen be an alien?

4 MR. McCALPIN: No.

5 MS. GLASOW: The definition of an alien is  
6 someone who is not a United States citizen. That is  
7 why I took it out. But there seems to be some  
8 consensus that somehow that's causing confusion and we  
9 should put it back in.

10 MR. FORGER: It certainly does as amended.

11 MR. McCALPIN: Yeah, I think it causes more  
12 confusion to have it in.

13 MR. FORGER: Because then I want to know what  
14 aliens are U.S. citizens.

15 MR. McCALPIN: This is only those from outer  
16 space.

17 MS. BATTLE: That's what Ernestine said this  
18 morning.

19 MR. TULL: The inclusion of this language is  
20 something that the Inspector General's office in their  
21 comments had stated they would like to have put back  
22 in, so Suzanne is seeking to accommodate them.

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1 MS. BATTLE: Is there something from the  
2 Inspector General's office here?

3 MS. PERLE: No, we just asked if there is  
4 somebody.

5 MR. TULL: But I think it's self-executing.

6 MR. McCALPIN: Right.

7 MS. PERLE: How about if we said in (a) an  
8 eligible alien means a person who is not a U.S.  
9 citizen, but who -- but who meets the requirements of.

10 MR. McCALPIN: Right.

11 MS. PERLE: In other words --

12 MS. BATTLE: Eligible alien?

13 MS. PERLE: Eligible alien means a person who  
14 is not a U.S. citizen, but who meets the requirements  
15 of.

16 MR. McCALPIN: That makes more sense.

17 MS. BATTLE: All right. Eligible is a  
18 person --

19 MS. PERLE: Means a person who --

20 MR. TULL: It's kind of like raising the flag.

21 MS. PERLE: -- is not a U.S. citizen.

22 MS. BATTLE: But who meets.

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1 MS. PERLE: But who.

2 MS. BATTLE: Yeah.

3 MS. PERLE: So then you don't use client  
4 again.

5 MS. BATTLE: Because you're not using the term  
6 that you're defining in your definition, that's why  
7 it's better. I think it makes sense.

8 MR. McCALPIN: Well, it's eligible that you're  
9 really defining.

10 MS. PERLE: Yes.

11 MR. McCALPIN: Not alien.

12 MS. PERLE: And you can actually do the same  
13 thing under ineligible. You could say ineligible alien  
14 means a person who is not a U.S. citizen, but who does  
15 not meet the requirements -- and who does not meet the  
16 requirements.

17 MR. FORGER: And is alive and isn't dead.

18 MS. PERLE: An alien is an alien.

19 MS. BATTLE: Right. Means a person who is not  
20 a U.S. citizen and who does not meeting the  
21 requirements of.

22 MR. FORGER: And is of any race or ethnicity.

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1 MR. McCALPIN: I'm going to bring some of the  
2 Star Trek folks in just to see what they do with that.

3 MR. FORGER: I just think that's silly to put  
4 that term in. It just -- it's gobbledy-gook.

5 MS. GLASOW: Well, it's your call.

6 MS. BATTLE: Which term are you talking about?

7 MR. FORGER: Putting the term U.S. citizen in  
8 relation to an alien. An alien is not a U.S. citizen.

9 MS. GLASOW: No, but that's what this says.  
10 This says --

11 MR. FORGER: Yeah, well, okay, sure.

12 MS. BATTLE: But the definition is --

13 MR. FORGER: And this is America. I mean, I  
14 don't know why we have to say, you know, truisms.

15 MS. BATTLE: Well, what it does, for a person  
16 that doesn't know what an alien is, when you start to  
17 read this reg from the beginning to the end you never  
18 really get a clear sense of what an alien is. You --

19 MS. PERLE: Yeah. I mean, there are people  
20 who think that just because someone has an accent or  
21 was not born in the U.S., that means that they're an  
22 alien.

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1 MS. BATTLE: Yeah.

2 MS. PERLE: And I think that is --

3 MS. BATTLE: And you can be a U.S. citizen.

4 MR. FORGER: I hope our grantees are better  
5 informed than that.

6 MS. PERLE: But this is not simply to inform  
7 our grantees. It's also to inform others who might  
8 question what our grantees do.

9 MR. FORGER: All right. I surrender.

10 MS. BATTLE: I actually think the less we use  
11 the word alien, the better. Eligible alien means a  
12 person who is not a U.S. citizen but who meets the  
13 requirements of, I think makes good sense. And  
14 ineligible alien means a person who is not a U.S.  
15 citizen and who does not meet the requirements of. And  
16 then we have those same sections.

17 MS. GLASOW: And we would like to add a  
18 definition.

19 MS. BATTLE: Okay.

20 MS. GLASOW: Which is currently down below  
21 under Section 3, paragraph C, if you want to pull it up  
22 to be a definition.

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1 MR. McCALPIN: Which?

2 MS. GLASOW: It's paragraph C under Section 3.

3 MR. McCALPIN: C?

4 MS. BATTLE: Yeah.

5 MS. GLASOW: And we'll just have to reword it  
6 on behalf of means to provide --

7 MR. McCALPIN: Will you explain to me what  
8 that means? I have a hard time figuring out what that  
9 means.

10 MS. GLASOW: The statute prohibits  
11 representation for or on behalf of an ineligible alien.  
12 For an ineligible alien is to have a person who has a  
13 claim or a case, and if you provide legal assistance to  
14 that ineligible alien, you're providing legal  
15 assistance for that person.

16 On behalf of an ineligible alien means you get  
17 a client who is eligible but really the case is for  
18 someone else. So you're doing a case on behalf of an  
19 ineligible person but you're sort of doing it through  
20 someone else.

21 For instance, if you had a parent who was  
22 eligible but their child was ineligible and the case is

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1 really to get something for the child and not the  
2 parent, then you are providing legal assistance on  
3 behalf of the child. And this rule says you cannot do  
4 that. The client who is eligible must be the person  
5 whose case you are taking.

6 MR. TULL: The statute uses the word for on  
7 behalf of, and it's to address what is a unique problem  
8 in immigration circumstances, not law, which is, it's  
9 actually probably more often the other way where you'll  
10 have a child who will be a citizen by virtue of having  
11 been born in the United States to parents who were  
12 ineligible.

13 The question arises for programs and Congress  
14 answered in the negative whether you could represent  
15 the child as the client who is an American citizen,  
16 where the true beneficiaries is the entire family, and  
17 principally the parents. And the reason that they used  
18 that language presumably in the statute is to make  
19 clear that in that circumstance you could not represent  
20 the --

21 MS. BATTLE: Do we adequately explain that in  
22 the commentary?

1 MR. TULL: You couldn't benefit the ineligible  
2 client by nominally not being eligible.

3 MS. BATTLE: Do we adequately address that in  
4 the commentary so that it's clear that that's --

5 MS. GLASOW: If we don't, I can expand upon  
6 that.

7 MS. BATTLE: Yeah, I think --

8 MS. GLASOW: We probably should do something  
9 about this.

10 MS. BATTLE: I think that would be helpful  
11 because that explanation helped me. I wasn't really  
12 clear on this distinction between "for" and on behalf.

13 MS. PERLE: "For" really means just to.

14 MS. BATTLE: Yeah.

15 MR. BROOKS: I think it's pretty well set out  
16 on page 3 in the commentary. Maybe an example there  
17 would help.

18 MS. BATTLE: Yes, an example would help.

19 MS. PERLE: Okay. But I think that John's  
20 example was a little bit too broad because, I mean, if  
21 it does -- if the person who is being represented has a  
22 legal right or a legal interest in the outcome, then

1 you can represent them. It's when they're really just  
2 standing in for the other person and the person who is  
3 the client doesn't have a legal interest. In other  
4 words, something that benefits in a legal sense the  
5 whole family, you could represent the children.

6 MS. GLASOW: Then it's -- then they are true  
7 clients. So --

8 MS. PERLE: Correct. It's this instance where  
9 you're trying to get around all --

10 MS. BATTLE: If we could come up with a clear-  
11 cut example that distinguishes for and on behalf of, I  
12 think it would be helpful.

13 MR. McCALPIN: And you're going to pick up  
14 this whole (c) and put it up under 2.

15 MS. GLASOW: Yes. And we'll reword it to make  
16 it more like a definition.

17 MS. BATTLE: And it really won't become (c),  
18 because you already have a (c) which is rejected in the  
19 Definition section. Does that stay or does that go?  
20 Rejected refers to an application adjustment of status  
21 that has been denied by the Immigration and  
22 Naturalization Service and is not subject to further

1 administrative appeal.

2 MS. PERLE: That would probably become (d).

3 MS. BATTLE: Okay, so what is now (c) would  
4 become (d)?

5 MS. PERLE: I think what is now (c) would  
6 become (c) and -- oh, yes, yes. In the definitions,  
7 yes.

8 MS. BATTLE: Right.

9 MS. PERLE: I think that's sort of --

10 MR. McCALPIN: But you intend to keep that  
11 paragraph, but rejected?

12 MS. PERLE: You intend to keep rejected, don't  
13 you?

14 MS. GLASOW: Yes, if it's used in this rule.

15 MS. PERLE: Yeah, it is. It is.

16 MS. GLASOW: I believe I do.

17 MS. BATTLE: Yeah, okay.

18 MR. McCALPIN: I'm glad your share our  
19 problems.

20 MR. TULL: She absolutely does.

21 MS. GLASOW: Yes, okay. We will keep this in.

22 MS. BATTLE: Okay. All right.

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1 MS. GLASOW: This is one of those rules I  
2 thought was going to be easy.

3 MR. TULL: I remember you saying that.

4 MS. BATTLE: Do we have anything else on  
5 definitions? We can move on then to Prohibition,  
6 1626.3. General is now different, because of course  
7 we're not just talking about LSC funds, we're talking  
8 about no provision whatsoever with any funds.

9 Anything on (b)? I notice that (b) --

10 MS. GLASOW: (b) we have a suggested change.

11 MS. BATTLE: Okay.

12 MR. TULL: The thought on (b) was simply to  
13 state what it means, instead of what it says here,  
14 which is extremely difficult to read. What it's  
15 designed to say is that the prohibition does not apply  
16 to normal intake and referral of persons who might  
17 otherwise be ineligible.

18 MS. BATTLE: And I had a problem --

19 MR. TULL: And we didn't come up with  
20 language, but it seemed like just stating that as one  
21 declarative sentence rather than --

22 MS. BATTLE: Yeah.

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1 MR. TULL: -- these three, which really are --

2 MS. BATTLE: And I also had a problem with the  
3 inconsistency of saying ineligible alien and then  
4 client. If this person is a client, then you have  
5 determined that they have an attorney-client  
6 relationship, when we're at the same time saying  
7 they're ineligible, which means that they're not a  
8 client.

9 MS. PERLE: The language that is in here is  
10 basically the language that is in the current reg and  
11 the effort originally, as I understood it, was that  
12 they weren't going to make any changes unless they  
13 needed to. But there's so many places in this current  
14 reg where the language is impenetrable, like this one.

15 MS. BATTLE: Yeah.

16 MS. PERLE: That there really -- I think there  
17 needs to be some effort to make it clearer.

18 MR. McCALPIN: I would repeat what I said  
19 yesterday.

20 MS. BATTLE: While we're here.

21 MR. McCALPIN: Let's not rely on our redoing  
22 this in six months.

1 MS. BATTLE: Yes.

2 MS. GLASOW: Yes. It looks like whoever did  
3 this rule way back when was trying to make several  
4 points over and over again and so they were -- for  
5 instance in the current Section 3(b) when they were  
6 trying to define prohibited legal assistance for an  
7 ineligible alien, they tried to make the point that  
8 legal assistance for an ineligible alien was legal  
9 assistance to an ineligible client.

10 And they kind of went around in circles and  
11 got you back and said, "By the way, you can't do this."  
12 And we felt that this circular definition was just --

13 MS. BATTLE: Yeah, more difficult.

14 MS. GLASOW: -- unnecessary, and all we had to  
15 do is define what an ineligible alien was and say you  
16 cannot provide legal assistance to an ineligible alien.

17 So, you know, we're finding all kinds of places in  
18 this rule where we've got that type of --

19 MS. BATTLE: Problem.

20 MS. PERLE: That's one of the reasons why it  
21 would have been very helpful to have the whole rule  
22 written out.

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1 MS. BATTLE: Yeah.

2 MR. McCALPIN: Right.

3 MS. PERLE: But this certainly is one of those  
4 places which -- which needs to be just set in a more  
5 straightforward way.

6 MS. BATTLE: Yeah.

7 MR. McCALPIN: I have a notion that this one  
8 is going to take extra time when we get to it on the  
9 19th, because we will in effect be seeing it for the  
10 first time.

11 MS. BATTLE: First time as a total rule, yeah.

12 MR. McCALPIN: Right.

13 MS. BATTLE: Well, can we take out the word  
14 "client" and put "person?"

15 MS. GLASOW: Yes.

16 MS. BATTLE: I mean, just that --

17 MS. GLASOW: This is in paragraph (b).

18 MS. BATTLE: In paragraph (b). Paragraph  
19 (b) --

20 MS. GLASOW: We're going to be rewording  
21 paragraph (b) and greatly simplify it.

22 MS. BATTLE: Okay. So that's just basically

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1 to be edited.

2 MS. GLASOW: Yes.

3 MR. McCALPIN: You could just take out the  
4 word "clients," period.

5 MS. GLASOW: Yes.

6 MR. McCALPIN: Referral of ineligible aliens  
7 by the same -- actually, I started at the end of my  
8 round. This prohibition does not apply to.

9 MS. PERLE: Or the recipient's name, use  
10 normal intake and referral, or hopefully. Something  
11 like that.

12 MS. BATTLE: Okay. So we're going to redo  
13 (b). What about (c)? In the original reg, we had  
14 bolded titles that distinguished for and on behalf of.  
15 Are we going to do that again or are we going to just  
16 take that out?

17 MS. GLASOW: No. We've moved the definition  
18 of legal assistance on behalf of up to the Definition  
19 section. And the general prohibition now is, you  
20 cannot provide legal assistance for or on behalf of an  
21 ineligible alien. So it greatly will simplify this  
22 entire Section 3.

1 MR. McCALPIN: Well, as I understand, you are  
2 revoking the present three and substituting what's on  
3 page 7.

4 MS. GLASOW: Correct. And even that's going  
5 to be edited.

6 MR. McCALPIN: When we say at the beginning  
7 this completely replaces the existing reg, it will  
8 help.

9 MS. BATTLE: Okay.

10 MS. GLASOW: Okay.

11 MS. BATTLE: Let's move on then to 1626.4,  
12 Alien status and eligibility.

13 MS. GLASOW: We have not changed anything to  
14 paragraph (a), which basically cites all the statutory  
15 provisions and Immigration and INA -- is it  
16 Naturalization Act?

17 MR. TULL: Immigration and Naturalization Act,  
18 yes.

19 MS. BATTLE: INA?

20 MS. GLASOW: Yes, that -- and it's also in our  
21 appropriations act. These are the categories of aliens  
22 that our recipients can represent.

1 MS. BATTLE: Okay.

2 MS. GLASOW: And that has not changed.

3 MS. BATTLE: But we do make a change to (b).

4 MS. GLASOW: Yes.

5 MS. BATTLE: Okay. Tell us what the  
6 distinction is.

7 MR. McCALPIN: Add the additional sections.

8 MS. GLASOW: We're not even sure (b) is  
9 necessary. It states in the negative what (a) says in  
10 the affirmative and we could just delete it.

11 MR. TULL: And the prohibition.

12 MS. GLASOW: Yes.

13 MS. BATTLE: Well, you've already said the  
14 exact same thing.

15 MS. GLASOW: Yes.

16 MS. PERLE: Correct.

17 MS. BATTLE: Yeah. So I think we can delete  
18 it.

19 MS. PERLE: This is another example --

20 MR. TULL: I just want to remind them in case  
21 they forget from one section to the next.

22 MS. PERLE: This is just another example of

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1 how this reg was originally written, like Suzanne said.

2

3 MS. BATTLE: Yes.

4 MS. PERLE: This reg is about three times as  
5 long as it needs to be, the current reg, because it  
6 just keeps repeating. It's sort of like you wanted to  
7 hammer it into everybody's head.

8 MS. GLASOW: Yeah, in case you didn't get it  
9 first.

10 MS. PERLE: In case you didn't get it.

11 MS. BATTLE: In Section 1. Here it is in  
12 Section 2 and Section 3.

13 MR. FORGER: Even if they are persons,  
14 classes, attorneys.

15 MR. TULL: Even if they are U.S. citizens,  
16 they'll be at aliens

17 MS. BATTLE: Okay. We're going to delete (b)  
18 completely.

19 MR. TULL: Making (a) not happen.

20 MS. GLASOW: Yes.

21 MS. BATTLE: Okay. And now we're down to  
22 1626.6, Changes in circumstances.

1 MR. McCALPIN: Wait a minute. Does that mean  
2 you're keeping five in toto?

3 MS. GLASOW: Yes. Section 5 simply gives  
4 guidance to the recipients as to what type of  
5 verification and documents they need to look at to  
6 determine eligibility of possible clients.

7 MS. BATTLE: I looked at five and it was just  
8 a bit curious to me because it says, "A citizen seeking  
9 representation shall attest in writing in a form  
10 approved by the corporation to the fact of his or her  
11 United States citizenship. So --

12 MR. McCALPIN: But it says verification not  
13 required unless there is reason to doubt.

14 MS. BATTLE: That that person is a U.S.  
15 citizen. Okay. So instead of person, we're really  
16 saying citizen. So you're presuming citizenship when a  
17 person says they're a citizen.

18 MS. GLASOW: Yes. Most of our recipients have  
19 just a little line somewhere on the retainer agreement  
20 or their intake form. And it just -- it's something  
21 that a person signs --

22 MS. BATTLE: Yeah, you check it.

1 MS. GLASOW: -- and says, I'm a U.S. citizen."  
2 So unless they have some reason to doubt that, they  
3 don't look behind the --

4 MR. FORGER: Do you add "not an alien?"

5 MS. GLASOW: We could ask them to.

6 MS. BATTLE: Okay, all right. So that was  
7 just --

8 MR. McCALPIN: Let me suggest to you that  
9 there's one item missing of which I have some personal  
10 knowledge, since it's my wife's situation. And that  
11 is, she was born in Antwerp and her birth was  
12 registered at the American Embassy.

13 MS. BATTLE: Counsel Smegal joins us. Good  
14 morning.

15 MR. McCALPIN: She has a registration at the  
16 embassy in -- what's it, Brussels, as proof of her  
17 citizenship. That's not one of the things that's  
18 listed here.

19 MS. PERLE: I think we need to get somebody  
20 from one of -- who knows a lot about this, but I know  
21 that there was some discussion over the years that some  
22 of these things that they're talking about are out of

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1 date and that there may be other situations such as  
2 your wife's which are not covered by this.

3 MR. McCALPIN: What I mean --

4 MS. PERLE: And there was an effort, I seem to  
5 recall, when this rule was done in 1989, there was some  
6 effort to put in a category to cover other situations.  
7 And there was a lot of resistance by the corporation.

8 MR. McCALPIN: My mother-in-law became a  
9 citizen by virtue of her marriage in 1920. She became  
10 a citizen by virtue of marriage to a citizen.

11 MS. PERLE: Well, that's in there. That's in  
12 the law.

13 MS. BATTLE: Marriage certificate is ii under  
14 subsection 2. Under in five.

15 MR. McCALPIN: Oh, I see.

16 MS. PERLE: There are people who have  
17 expertise in immigration law who could give you some  
18 language that would kind of -- you know, cover that.  
19 The problem, of course, is that those other  
20 categories -- well, no, I -- no. Excuse me. I was  
21 going to say the categories wouldn't be covered by the  
22 statute.

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1           The statute doesn't say what kind of  
2 documentation you need, it just lists the categories.  
3 We could certainly ask them if there is some kind of  
4 general position.

5           MR. McCALPIN: Well, it's a relatively minor  
6 point.

7           MS. PERLE: Well, I'm not so sure. I mean,  
8 for some people it might be an insuperable barrier.

9           MS. BATTLE: Okay. Can we look into that and  
10 see if there's some provision that we need to cover  
11 that issue?

12           MS. GLASOW: I know that Charles Wheeler out  
13 in California.

14           MS. BATTLE: Charles Wheeler also --

15           MS. GLASOW: He's an expert on immigration  
16 law.

17           MS. BATTLE: So we can call him and find out.

18           MS. GLASOW: So we can send him a copy of our  
19 rule and say, you know, please provide us assistance on  
20 this section and what documentation is not covered  
21 here, et cetera.

22           MS. BATTLE: Okay.

1 MS. GLASOW: I'm sure he'd be happy.

2 MS. BATTLE: Help us, okay. So now we are  
3 down to 1626.6, Change in circumstances.

4 MR. McCALPIN: Well, what happens to the old  
5 .6?

6 MR. TULL: Delete it.

7 MS. GLASOW: It's deleted.

8 MR. McCALPIN: Disposition of cases involving  
9 ongoing representation of ineligible aliens.

10 MS. BATTLE: It's deleted.

11 MS. GLASOW: Yeah, 6 and 7 --

12 MR. McCALPIN: Oh, current 6 is deleted.

13 MS. GLASOW: Right.

14 MR. McCALPIN: It is replaced by 7, okay.

15 MS. GLASOW: And they're renumbered because  
16 basically they --

17 MS. BATTLE: Because this had to do with just  
18 the transition issue? Is that what 6 is?

19 MS. GLASOW: Well, 6 allowed -- because you  
20 can use no LSC funds to represent ineligible aliens, 6  
21 allowed a situation where you had an ineligible alien  
22 or an ongoing case that you -- it tells you basically

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1 what you can do. You can no longer use LSC funds, so  
2 what can you do?

3 Well, you can start using non-LSC funds or you  
4 can -- I mean, they just gave a whole variety of  
5 alternatives that you could do. And 7, really it  
6 reached a very similar issue, but not exactly the same.  
7 It's if you already had a client and suddenly their  
8 circumstances changed.

9 And so, we just merged the whole idea because  
10 now the law says you cannot serve an ineligible alien  
11 regardless of the source of funds. And -- but we do  
12 recognize that you may have a client who is an eligible  
13 alien who suddenly becomes ineligible. And what do you  
14 do? And that's what this section is trying to --

15 MS. BATTLE: When you say as expeditiously as  
16 possible in 1626.6, what about the circumstance where a  
17 person becomes ineligible but the court won't let you  
18 out?

19 MS. GLASOW: Actually, we suggest change to  
20 that wording.

21 MS. BATTLE: Okay.

22 MS. GLASOW: The way we have a change to this

1 whole provision, which should not be lettered (a).

2 MS. BATTLE: Yeah, because it's by itself.  
3 That's right.

4 MR. McCALPIN: Except that --

5 MS. GLASOW: Let me see, are we keeping (b)?

6 MR. McCALPIN: Do you intend to keep the  
7 present .7(b)? If so, then (a) is appropriate.

8 MS. GLASOW: I don't believe so.

9 MS. BATTLE: No. All of that comes out.

10 MS. GLASOW: All of it comes out. So we don't  
11 have an --

12 MS. BATTLE: Change in circumstances is  
13 completely replaced by what you have proposed.

14 MS. GLASOW: Yes. And we should get rid of  
15 that paragraph (a). We wanted to reword this provision  
16 to say if a client who is an eligible alien becomes  
17 ineligible through a change in circumstances, a  
18 recipient must discontinue representation of the client  
19 consistent with professional responsibilities.

20 MR. BROOKS: That still doesn't pick up what's  
21 in the old rule about the recipient discovers that its  
22 determination of eligibility is erroneous, or there

1 have been false statements by the applicant. And I  
2 think that ought to be in -- reading the present  
3 language, if an eligible alien client becomes  
4 ineligible through a change in circumstances or a  
5 recipient discovers that its determination of  
6 eligibility was erroneous, whether from error or false  
7 information, then the recipient must --

8 MS. GLASOW: The reason I didn't leave that  
9 was because the remedy if a person had given you  
10 erroneous information was to just immediately get out  
11 of the case. And whereas if it was a -- you know, a  
12 mistake that was not the fault of the client it gave  
13 you other alternatives such as to use non-LSC funds, or  
14 whatever.

15 Now we have to use the same alternative with  
16 all of them, regardless of the fault of the client.  
17 You have to get out of the case. And the only reason  
18 we put in consistent with professional responsibility  
19 is that sometimes the court just won't let you out.

20 MS. BATTLE: Yes.

21 MS. GLASOW: And, you know, we have to  
22 recognize that that's the case and those are cases

1 we'll have to handle on a case-by-case basis. So, I  
2 mean, we -- it was really a punishment in essence to  
3 say if you gave us false information, we found out  
4 you're ineligible because you gave us false information  
5 on purpose, then we're not going to use any of these  
6 nicer alternatives for you. We're just going to get  
7 out of the case and get rid of you as a client. We  
8 have to do that anyway now, so --

9 MR. BROOKS: Well, shouldn't there still be  
10 something either in the reg or in the commentary about  
11 what happens if the recipient made a mistake? That's  
12 not a change of circumstance, that's a discovery of an  
13 error.

14 MS. BATTLE: Well, what you're really getting  
15 at is change in circumstances being further defined in  
16 the commentary to include either receiving some false  
17 information or an error on the part of the --

18 MS. PERLE: Discovery of erroneous.

19 MS. BATTLE: Yeah, discovery. Discovery.

20 MR. BROOKS: Which isn't a change, but just  
21 looking at it literally, that's not a change.

22 MS. BATTLE: Change in circumstance.

1 MS. GLASOW: I can discuss it in the  
2 commentary.

3 MR. BROOKS: Why not mention it?

4 MS. BATTLE: Okay.

5 MS. GLASOW: The change of circumstance would  
6 cover a variety of situations and we can just talk  
7 about what would happen because a lot of these cases,  
8 whatever the reason, you have to get out now.

9 MS. PERLE: I mean, it is a change of  
10 circumstances, not circumstances that relate directly  
11 to the client. But you now see information that you  
12 didn't see before or you made a mistake. Those are  
13 changes in circumstances as well. I think it could be  
14 read that way.  
15 I mean, if it's explained in the commentary, would that  
16 --

17 MR. BROOKS: All right, if it's explained. It  
18 could, as I went through this and other, to wonder  
19 whether there was any virtue in having a regulation or  
20 some general statement as to how -- what the duties of  
21 the recipient are in relation to a ineligibility  
22 turning up at one point, whether it's by statute or a

1 change or anything else.

2 And as far as I could find, this 1626.6, the  
3 old one, was the only one which spelled it out. I may  
4 be wrong on that. There may be other specifics. But  
5 it seems to be particularly in view of the  
6 Appropriations Act, there are a lot of situations where  
7 withdrawal becomes necessary.

8 And I just wondered if there wouldn't be -- it  
9 wouldn't be helpful to have a general --

10 MS. BATTLE: Something to spell it out.

11 MR. BROOKS: -- statement as to the duties of  
12 the recipient and maybe modified for particular  
13 situations in particular regs.

14 MS. PERLE: The corporation issued in November  
15 -- when was it, the letter?

16 MR. BROOKS: November.

17 MS. PERLE: No, there was a early -- the  
18 earlier one.

19 MR. TULL: Oh, November 12th.

20 MS. PERLE: A program letter which -- in  
21 anticipation of the impositions, restrictions,  
22 suggested things that programs needed to do to prepare

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1 themselves to get out of cases. And I think in fact,  
2 most program people have been following those  
3 suggestions.

4 MR. BROOKS: That's just helpful instructions  
5 on it, suggestions.

6 MR. TULL: We're going to have a need to  
7 address the issue you raised with all of the  
8 instructions. We're coming up to end of the transition  
9 period for the kinds of cases which were permitted to  
10 be carried on until July 31st or August 1st.

11 And you are correct that we're going to have  
12 to develop a way of addressing circumstances where a  
13 claim is made that a court just won't let a program  
14 out. And you've made a judgment that, rather than  
15 trying to do it piecemeal with each reg that we need to  
16 -- because of the need among other things to  
17 communicate with various committees in Congress about  
18 the issue, that we would approach that as a whole issue  
19 and not try to address it in any of the regs. But it  
20 certainly is an issue we know is coming upon us.

21 MR. BROOKS: Well, I think the transition  
22 process is probably too temporary to get into any

1 permanent reg, yet instructions and suggestions is --

2 MR. TULL: Yeah, we started to put language  
3 about the transition and realized that this wouldn't be  
4 published until -- since the board won't actually adopt  
5 this as an interim reg until the 19th. By the time it  
6 was published, the transition would be over. So we  
7 decided in the interest of production and paperwork --

8 MS. BATTLE: And in part, that's what 1626.6  
9 was all about. It was a reg that allowed for the  
10 transition of the use of LSC funds to other funds and  
11 other alternatives available once there was a  
12 prohibition restricting use of LSC funds.

13 So I think that your point is well taken that  
14 there needs to be something communicated to programs  
15 which allows them to understand the appropriate way to  
16 do the transition. But with what John has said, the  
17 transition will have to have taken effect so quickly  
18 that to memorialize it in a reg probably isn't the most  
19 effective way to do it.

20 MR. BROOKS: But there still is the long-term  
21 problem of how to extricate --

22 MS. BATTLE: Once you're in a case, how do you

1 get out, yes.

2 MR. BROOKS: Yes.

3 MS. BATTLE: Uh-huh. I think that's right.

4 MR. McCALPIN: Where do you put that, is the  
5 problem?

6 MR. BROOKS: Well, do you put it in a separate  
7 withdrawal reg? I raised the question because I think  
8 it needs to be in either a lot of different places in  
9 the regs or it may be possible to have a general reg  
10 that would cover it.

11 MS. BATTLE: Why not in 16 -- instead of  
12 completely deleting 1626.6 as it relates to change in  
13 circumstances, put in another section which addresses  
14 the issue that John has raised about once you find --  
15 you're in a case, you're in it because at the onset  
16 when you did your intake everything was appropriate.

17 You later find out either that the application  
18 was fraudulent or that there was an error made in the  
19 application a second section under change in  
20 circumstance which addresses the withdrawal process.  
21 Is that feasible?

22 MS. PERLE: I early on in this process urged

1 the corporation to do that. But I think I have become  
2 persuaded that, first of all, as John just said, this  
3 is not the only situation where you're going to have  
4 these withdrawal issues. You're going to have it with  
5 respect to all of these restrictions and --

6 MS. BATTLE: So you're saying just someplace  
7 we need to due a rule that says if, under any  
8 circumstance, an issue comes up regarding a restriction  
9 and you've got to get out, then this is the way you do  
10 it?

11 MS. PERLE: Well, I think the corporation is  
12 giving us guidance on what you have to do. I think  
13 that the issue they're going to have to address at some  
14 point, as John said, are those situations where they  
15 have done what they're supposed to do and they can't  
16 get out. But I don't think that necessarily is --

17 MS. BATTLE: The situation we had yesterday, a  
18 class action where you're the repository for  
19 information and the judge is gone and you're still  
20 getting it and you're trying to decide what you need to  
21 do.

22 MR. McCALPIN: I would suggest we look at

1 1611.9. If an eligible client becomes ineligible  
2 through a change in circumstances, the recipient shall  
3 discontinue representation if the change is  
4 sufficiently likely to continue for the client to  
5 afford traveling discontinuances not inconsistent with  
6 the attorney's professional responsibilities. That, it  
7 seems to me, covers any change in circumstance.

8 MR. BROOKS: Should that be a general reg or  
9 should it be in each reg as needed?

10 MR. McCALPIN: Well, I think it may be general  
11 simply by the language employed here.

12 MS. BATTLE: It's general, but it really is in  
13 the reg pertaining to qualification and eligibility.

14 MR. McCALPIN: Financial.

15 MS. BATTLE: Financial eligibility.

16 MR. McCALPIN: It's in that reg but it doesn't  
17 specifically say it becomes financially ineligible.

18 MS. BATTLE: Why not use that same language  
19 that you have in 1611.9 in 1626.6 because it really  
20 deals with change in circumstances in the very same --

21 MS. GLASOW: Actually, I patterned this  
22 language on that, but I took out the language that said

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1 if the change in circumstances is sufficiently likely  
2 to continue. I didn't think that was applicable here.

3 MR. McCALPIN: Yeah. I think you're right.

4 MS. GLASOW: Because what we're talking about  
5 in 1611 is financial and we have a client who maybe got  
6 some unusual lump sum of money for a month, but you  
7 know that next month they're going to be down to zero  
8 again. That's what that language is trying to meet.

9 MS. BATTLE: Right, yes.

10 MR. SMEGAL: The lottery case.

11 MS. GLASOW: We have two regulations that meet  
12 eligibility requirements. It's 1611, which is  
13 financial eligibility, and the one on alien  
14 eligibility. All the other restrictions are really you  
15 can't be involved in this type of case.

16 MR. TULL: Except for prisoners.

17 MS. GLASOW: Except for the prisoners.

18 MR. TULL: And prisoners we do --

19 MS. GLASOW: That's true.

20 MR. TULL: When we get to that though, there  
21 is a change in certain -- because there -- change in  
22 circumstances with regard to incarceration is so unique

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1 because of the sets of issues we'll get into when we  
2 talk about that. That is a very --

3 MS. BATTLE: Tom?

4 MR. SMEGAL: If I understand what's going on  
5 here, 1626.6, change in circumstances as it currently  
6 exists is gone, the whole thing.

7 MS. GLASOW: Yes.

8 MR. SMEGAL: (a) and (b) and all the parts.  
9 So we're down to, is there an (a) part or is there a  
10 (b) part to this new --

11 MS. GLASOW: No, we took out the (a),  
12 reference  
13 to (a).

14 MS. BATTLE: And John, let me just ask this  
15 question. Using --

16 MR. SMEGAL: Because we're talking now about  
17 what would be in it.

18 MS. BATTLE: Yeah. Using this language  
19 consistent with the rules of professional  
20 responsibility, does that address the withdrawal  
21 question in your view sufficiently, or are you saying  
22 there needs to be more?

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1 MR. BROOKS: I think there needs to be more.

2 MS. BATTLE: And tell me -- give me a little  
3 bit more about what it is that you think we need to  
4 add.

5 MR. BROOKS: Well, I think it should be  
6 addressed, for example, if a court refuses to permit  
7 withdrawal. That sometimes happens. The professional  
8 responsibility is there always, but should be stated  
9 somewhere. The timing may require a little regulation,  
10 what does expeditiously as possible mean?

11 MS. BATTLE: Well, we're going to take that  
12 expeditiously as possible out and just say consistent  
13 with the rules of -- applicable rules of professional  
14 responsibility. So really, the whole withdrawal  
15 process is to be guided by whatever that attorney's  
16 professional responsibility rules are.

17 And I would venture to say that most rules  
18 address a situation where the court doesn't let you  
19 out. If the court doesn't let you out, the court  
20 doesn't let you out.

21 MR. FORGER: But do you think that will  
22 persuade Congress to permit us to continue to fund?

1 MS. BATTLE: If the court doesn't let you out,  
2 what do you do?

3 MR. FORGER: Well, you stop funding. That's  
4 certainly one alternative. Because I suspect that what  
5 we will hear is now you're evading these by -- the  
6 court knows it, the court says, "No, it's better for me  
7 to keep you in. I don't want the nuisance of new  
8 counsel," or whatever. It's better for the court to  
9 keep the same lawyer in place.

10 And so he says, "According to your  
11 professional responsibility you are going to keep  
12 representing this illegal alien or this prisoner, or  
13 whatever." And I would suppose in time, Congress would  
14 say, "Now, wait a minute. You'll find another way.  
15 Get a pro bono lawyer or take a leave of absence or  
16 whatever." I just don't think it's an irreconcilable  
17 conflict with the answer, "Of course we'll keep funding  
18 the program."

19 MR. TULL: It's the uncertainty about what --  
20 we could have a problem, a practical problem to  
21 address.

22 MS. BATTLE: Yeah, but I almost think you have

1 to case by case address the point that you're raising.  
2 If you're talking about the court not letting someone  
3 out because it's one month before the end of the case  
4 and the court says, "For me to try to appoint someone  
5 else to get into this case, you know, to finish it out  
6 and it's going to be over with in a month is just going  
7 to be an unreasonable expenditure of everybody's time  
8 and effort. You finish it."

9 That's one thing. It's another instance when  
10 the court says on a case that's continuing, that's  
11 going to go on for five years, "Tough. I'm not letting  
12 you out." Then I think we're going to have to, through  
13 our own Office of General Counsel, give some  
14 instructions to that program as to how to extricate  
15 itself from that situation, you know.

16 However, with additional motions, maybe other  
17 injunctions and some other things to get the judge to  
18 understand that we've got to get out, but I really -- I  
19 almost think it's very difficult at this juncture for  
20 us to come with anything other than to have as guidance  
21 the Rules of Professional Responsibility on the issue  
22 of withdrawal.

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1           Because to have a regulation that says you  
2 must give out without giving an accounting for that  
3 places the individual attorneys in conflict with their  
4 professional responsibilities and their legal  
5 responsibilities as it relates to our rules.

6           So what we might do to address this is, in the  
7 commentary speak to the case-by-case issue and the  
8 guidance that the Office of General Counsel must give  
9 on those issues as they come out, if a person for some  
10 reason, an attorney is unable to immediately get out of  
11 the case based on circumstances that arise.

12           MR. SMEGAL: Alex, aren't all the cases you're  
13 talking about getting out of going to occur on July 31?  
14 Everybody going to have to go forward at that point?

15           MR. FORGER: No. I mean, there can be a  
16 change in circumstance with somebody who was eligible  
17 becomes ineligible.

18           MS. BERGMARK: We asked for Congress to give  
19 us a transition period, which I believe Congress  
20 thought was the time period during which these  
21 transitions were to be made and the end was to come on  
22 August 1. So in particular with reference to alien

1 cases, prisoner cases and class actions, I think I  
2 would just remind the committee that Congress probably  
3 thinks they provided that --

4 MS. BATTLE: Transition period.

5 MS. BERGMARK: -- measure of time by giving  
6 until August the 1st.

7 MR. BROOKS: Well, there is also the issue of  
8 when the recipient can stop using LSC funds and use  
9 private funds.

10 MS. BATTLE: No longer.

11 MR. BROOKS: Public funds.

12 MS. BATTLE: No longer on this issue.

13 MR. BROOKS: But not on this issue.

14 MS. BATTLE: No.

15 MR. BROOKS: But there are situations where  
16 the recipient can no longer use LSC funds but --

17 MS. BATTLE: Across the board.

18 MS. PERLE: Very few. I mean, there are a few  
19 exceptions.

20 MS. BERGMARK: Every once in a while there is  
21 one that would relate to this. That would really only  
22 be Cohen-Bumpers situations which aren't, you know,

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1 really pending cases.

2 MS. PERLE: Right. There are certain  
3 legislative administrative advocacy, and that's dealt  
4 with specifically under the draft here.

5 MS. BATTLE: So what we're envisioning is that  
6 over the period between now and August 1st, that by and  
7 large all cases that fall in the situation created by  
8 1626.6 where people moved their representation from LSC  
9 funds to non-LSC funds, that they will transition out  
10 of those cases completely by August 1st.

11 But what we're really talking about in 1626.6  
12 now is a circumstance where that transition has  
13 occurred and later on down the line there is some  
14 change in circumstance. Somebody has a green card,  
15 they lose it. Somebody has status and they lose their  
16 status and you've got to figure out what to do.

17 MR. FORGER: Somebody goes to jail.

18 MS. BATTLE: Somebody goes to jail, you know.  
19 We've got to transition people out of being represented  
20 by programs once one of these restrictions kick in.

21 MS. PERLE: Well, I think that clearly is the  
22 situation that you have to deal with in these regs, but

1 I don't want to suggest that just because there is a  
2 three-month transition period that necessarily in every  
3 instance is going to take care of the problem for  
4 programs. I think the corporation is still going to be  
5 faced with that. I don't think we should put it in the  
6 reg. I think we have to deal with it on a case-by-case  
7 basis.

8 MR. FORGER: I guess my only point was, I  
9 don't think the Code of Professional Responsibility is  
10 the definitive answer to all of these problems.

11 MS. PERLE: I think it's as close as we're  
12 going to get.

13 MS. BATTLE: Do you have another suggestion  
14 that we could use to impress upon programs the  
15 importance of --

16 MR. FORGER: No. I think we're seeking to do  
17 that. I just -- I'm not sure that you're going to win  
18 the day with Congress when you say the court would  
19 relieve this attorney.

20 MS. BATTLE: But that's when I guess my  
21 suggestion is, those situations that do occur where  
22 you've got a court that makes that kind of

1 determination, it becomes incumbent upon our staff at  
2 that point to work with that program to come up with  
3 other ways to try to extricate the program from that  
4 case and to work on that directly.

5 MS. GLASOW: There have been a few instances  
6 in the past where one of our recipients was trying to  
7 get out of a case or a certain situation. The court  
8 was telling them they had to do something and the  
9 corporation helped by writing a letter to the court and  
10 saying our recipient by law cannot do this. And  
11 sometimes that was enough.

12 MR. FORGER: Yeah, you'll jeopardize the  
13 funding for this program.

14 MS. GLASOW: Right, right.

15 MS. BATTLE: Uh-huh. This program will lose X  
16 number of millions of dollars if they continue in this  
17 case.

18 MR. TULL: We've not yet seen what state bar  
19 ethics committees are going to do when they're asked  
20 the question, "What do I do under the Code of  
21 Professional Responsibility where I can't continue to  
22 represent this person legally, but I am in the case and

1 I have a professional obligation to them?"

2 That's an issue that the ABA has started to  
3 address, although I think that whether their answer is  
4 a final one is up in the air and I don't believe any  
5 state court -- I'm sorry, any state bar committee has  
6 yet been asked to endorse that question.

7 MR. FORGER: That won't affect our  
8 responsibility as funders.

9 MS. BATTLE: Yeah, and that's what --

10 MR. TULL: Well, under the act, one of our  
11 obligations is to ensure compliance with the Code of  
12 Professional Responsibility in each state, and that's  
13 settled. What the meaning of that language is in the  
14 act where it runs into a restriction that would appear  
15 to be in conflict with it is something that has not  
16 been resolved as a legal issue.

17 MS. PERLE: Right. And the corporation is  
18 going to have to decide about the situations that  
19 LaVeeda mentioned where the court says there's a month  
20 left or three months left till this case is over.

21 You know, I was given -- somebody gave me an  
22 example where the court entered an order last December

1 31st saying that they were going to relinquish  
2 jurisdiction on December 31st of 1996 and that they  
3 won't let the program out. But on December 31st it  
4 will be over.

5 So the corporation is going to have to make  
6 some determination about whether -- you know, whether,  
7 if they get out on December 31st whether that kind of a  
8 situation sort of forever says that they are in  
9 violation because they were in violation for those  
10 three months, four months, whatever it was.

11 MR. FORGER: Well, does the Inspector  
12 General --

13 MS. PERLE: I don't think they have really  
14 addressed that issue, have they?

15 MR. FORGER: -- given guidance on this issue?  
16 Because they will be the ones responding to the  
17 auditors out there.

18 MS. TARANTOWICZ: Just insofar as we didn't  
19 see a problem with this provision, I mean, it seems  
20 appropriate under the circumstances to certainly allow  
21 attorneys to abide by their professional  
22 responsibilities.

1 MS. GLASOW: We certainly would work with the  
2 recipient and require confirmation, documentation,  
3 whatever, that they have made every --

4 MS. BATTLE: Effort, absolutely.

5 MS. GLASOW: -- effort, right. They're not  
6 just --

7 MS. BATTLE: To get out.

8 MS. GLASOW: -- you know, saying, well, you  
9 know, can't deal with this. They would have to show us  
10 that they, you know -- that's why working with them on  
11 a case-by-case basis --

12 MS. BATTLE: Is all that we can do.

13 MS. GLASOW: Yeah. I don't think we expect a  
14 lot of these. I mean, we've been telling them for some  
15 time to get out.

16 MS. BATTLE: Well, it seems to me, John, that  
17 the language --

18 MS. GLASOW: They're well on their way.

19 MS. BATTLE: Yeah. The language that we're  
20 proposing for 1626.6 is essentially the same language  
21 that is contained in the financial eligibility reg that  
22 addresses this whole issue of withdrawal. And given

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1 the transition period that Congress has given most  
2 programs to get out, this reg dealing with change in  
3 circumstances is very narrow and doesn't cover the  
4 entire transition.

5 It only covers change in circumstances. And I  
6 think it's probably set out in the best way that we can  
7 at this point. And I think the further guidance can be  
8 given in the commentary on stressing the importance of  
9 taking very possible effort to get out with the  
10 conflicts to be resolved with communications with our  
11 offices.

12 MR. BROOKS: I just think it would be wise to  
13 keep an eye on the issue.

14 MS. BATTLE: Yeah.

15 MR. BROOKS: If you see that it is going to be  
16 a recurring problem in various contexts other than  
17 1626.

18 MS. BATTLE: Right.

19 MR. FORGER: What I would hope that we could  
20 avoid here is the IPA in the field saying this program  
21 is representing an illegal alien, contrary to the act,  
22 and maybe makes inquiry and the program says well, we

1 weren't able to get out of the case, and some dispute  
2 as to how aggressive that effort was and whether it  
3 really is simply a pretense or whether it is a real  
4 issue.

5 MS. BATTLE: Real effort, yeah.

6 MR. FORGER: And then, what is it that  
7 management does? Does the management invoke sanctions  
8 or not? So in some measure, you know, I would -- from  
9 that point of view I think I would be happy to see some  
10 kind of relief in every reg that is going to have a  
11 transition or a possible professional responsibility  
12 issue, rather than just a -- so when the IPA is reading  
13 reg on illegal aliens he sees that --

14 MS. BATTLE: Well, what about documentation?  
15 Are you suggesting that discontinue representation of  
16 the client consistent with the Rules of Professional  
17 Responsibility providing documentation of those efforts  
18 or something to the effect so that --

19 MR. FORGER: I suppose somebody would want to  
20 know, did you try to get out?

21 MS. BATTLE: Yeah. Does that help?

22 MS. GLASOW: Say that again, the

1 documentation?

2 MS. BATTLE: Yeah, consistent -- well, just  
3 add to the end of consistent with the Rules of  
4 Professional Responsibility providing documentation of  
5 the efforts for discontinuation or discontinuance.

6 MR. TULL: That suggested language implicates  
7 the next section, which implicates a whole larger  
8 conversation about record-keeping and how documentation  
9 requirements should be reflected in the regs.

10 We met this morning with the Inspector  
11 General's office on the whole -- the issues we  
12 discussed yesterday regarding policies and procedures  
13 and the set of issues they had raised with us about  
14 record-keeping requirements as they are reflected  
15 throughout the regs, including 1626.7.

16 And I have a proposal to make to the committee  
17 about how to address that, which actually -- I mean,  
18 address as a general principle issues of record-  
19 keeping, which would actually reduce the specifics of  
20 what kinds of records we would ask for, but would make  
21 clear areas where we believe records should be kept in  
22 order to document clients.

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1           And it may be that the -- if the committee --  
2 when we have that discussion, because it does involve  
3 not just this reg, but others --

4           MS. BATTLE: We do that, okay. I agree.

5           MR. TULL: I think that would make sense.

6           MS. BATTLE: Probably it makes more sense if  
7 you are going to do separate sections on record-keeping  
8 than any documentation or record-keeping that we  
9 require should come under that section, as opposed to  
10 under another section because it would be easily  
11 missed.

12          MR. TULL: I think that's correct.

13          MS. BATTLE: Yeah, uh-huh.

14          MR. McCALPIN: In connection with this, but  
15 more broadly with the others as well, 508(c) requires  
16 us every 60 days to file a report with the committees  
17 on appropriations, setting forth the status of cases in  
18 matters referred to in (b)(2). And that is whether or  
19 not people have extricated themselves from the  
20 prohibited types of representation, which I guess  
21 necessarily means that every 60 days we have to have  
22 the programs report those matters to us.

1 MS. BERGMARK: We filed that report, the first  
2 judicial report in January -- December --

3 MR. McCALPIN: Where is the requirement that  
4 every 60 days -- where do we lay on the recipients the  
5 requirement that every 60 days they report to us the  
6 instances in which they are still involved in  
7 prohibited activities?

8 MS. BERGMARK: We did that immediately after  
9 the adoption of the act.

10 MR. TULL: It's not a 60-day --

11 MS. BERGMARK: It's not a separate.

12 MR. TULL: It's not every 60 days forever. It  
13 is every 60 days until the transition period is over  
14 and we report on the --

15 MS. BERGMARK: Is over. So we'll file the  
16 final report in August, reporting on --

17 MR. FORGER: Through August 1.

18 MS. BERGMARK: Through August 1.

19 MR. McCALPIN: So basically, we will have the  
20 knowledge, to go back to what you were talking about,  
21 Alex, we will have the knowledge of all existing  
22 circumstances in which a program has not been able to

1 extricate itself and we can --

2 MS. BERGMARK: We hope that we will have the  
3 knowledge that they don't -- that they have gotten out.  
4 I mean, my concern with this discussion about creating  
5 a situation which simple -- you know, just reliance on  
6 the Rules of Professional Responsibility somehow, you  
7 know, gets one out of -- gets the corporation off the  
8 hook of enforcing this restriction is that it leaves  
9 the corporation in a pretty difficult spot. I mean,  
10 this --

11 MS. BATTLE: Yeah.

12 MR. McCALPIN: I think we have to require that  
13 they tell us every instance where they are still in.

14 MR. FORGER: Yeah. We will know by August 1  
15 what they've gotten out of and that what remains we  
16 will be aware of the cases in which they are still  
17 participating and we can pursue them as to the reasons  
18 for that continued --

19 MS. BERGMARK: If there are any.

20 MR. McCALPIN: It just seems to me what they  
21 ought to tell us is the cases they're in, not the ones  
22 they've gotten out of.

1 MR. FORGER: Well, one way or the other we'll  
2 get all that information.

3 MS. BATTLE: It's helpful to know what they've  
4 gotten out of because we need to know how many of these  
5 cases have been affected by the restrictions, I mean,  
6 how many --

7 MR. TULL: What we have asked for is a list of  
8 all the cases in the proscribed areas and the status of  
9 it. And that's the first report which was submitted to  
10 us on January the 8th.

11 MS. PERLE: June.

12 MR. TULL: I mean June the 8th. And then a  
13 report was submitted to Congress on June 26th. We are  
14 about to send out a follow-up report asking for current  
15 status of all those cases, which would indicate all  
16 those that have been referred and would -- the degree  
17 to which there are any which have not been referred, if  
18 you would get a report on that as well.

19 So we've asked -- we've asked both. We have a  
20 listing of the cases which are in proscribed areas,  
21 status of it, and we will have an indication of those  
22 that have been referred to us.

1 MR. McCALPIN: So then we'll be able to  
2 address to instances and which programs they're still  
3 in.

4 MS. BATTLE: Yeah.

5 MR. McCALPIN: And we can get to them.

6 MS. BATTLE: Yeah, we should be able to,  
7 right.

8 Okay, now to pick up on 1626.7, Record-  
9 keeping, and the issue that John just raised.

10 MR. TULL: The Inspector General's audit staff  
11 would like to participate in the discussion --

12 MS. BATTLE: Okay. Are they here?

13 MR. TULL: -- when we have the overall  
14 discussion. They are not here, but are --

15 MS. BATTLE: Okay.

16 MR. TULL: -- awaiting our signal. If you  
17 want to discuss that now, or if you want to discuss  
18 this issue, it does involve not just this regulation,  
19 but others. So if you want to set that for some other  
20 time?

21 MS. BATTLE: All record-keeping? I think we  
22 ought to have just one discussion. There is no sense

1 in going through this twice. So why don't we do that?  
2 When are they going to be here, because we --

3 MR. TULL: Oh, they'll come whenever we ask.

4 MS. GLASOW: We can call them. We just have  
5 to call them.

6 MR. TULL: They just -- we weren't certain  
7 when you would want them.

8 MS. BATTLE: Why don't we -- let's finish this  
9 reg, which is just one more paragraph, take a break,  
10 then have them come on up. And let's get it out of the  
11 way and then we can start the next one. The only other  
12 section left is this last one that Mr. McCalpin has  
13 raised an issue about that we plan to discuss.

14 MR. TULL: And the conversation we had this  
15 morning with the Inspector General's office involves  
16 both --

17 MS. BATTLE: Both of these, okay.

18 MR. TULL: -- the policy and procedures  
19 question and the reporting and the record-keeping  
20 question as a sort of a mix of --

21 MS. BATTLE: Why don't we take a break now  
22 then, and that will give them an opportunity to come

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1 up. We can discuss both the record-keeping and the  
2 policy issue with the staff of the Inspector General.

3 We are now in recess for five minutes.

4 (A brief recess was taken.)

5 MS. BATTLE: We have completed the sections of  
6 1626 with two exceptions, Section 1626.7 on record-  
7 keeping --

8 (Hubbub)

9 MS. BATTLE: I don't think anybody heard me  
10 the first time around, but we are now back on the  
11 record and we have completed all of the sections of  
12 1626 with two exceptions, one being the section on  
13 record-keeping and the other being the section on  
14 developing a policy by the governing body.

15 We wanted to have the discussion on these two  
16 sections inclusive of members of the Inspector  
17 General's staff who will have the responsibility for  
18 auditing compliance with the provisions of this as well  
19 as other regs.

20 So if there are representatives from the Inspector  
21 General's staff who will be able to aid us in the  
22 discussion, I would like for you to come to the table

1 now.

2 And we are joined by Renee on behalf of the  
3 Inspector General's staff. The first -- let's go ahead  
4 and take them up as they appear in the regulations,  
5 record-keeping first, 1626.7. This section is a new  
6 section, an all-new section providing for record-  
7 keeping on this restriction which has now been extended  
8 from LSC funds to all funds in representation of  
9 ineligible aliens.

10 Can we have some background first, Suzanne,  
11 from you as to this section and its utility in this  
12 particular regulation?

13 MS. GLASOW: Basically, when I wrote this  
14 record-keeping provision I was trying to take into  
15 account provisions in the new appropriations act,  
16 509(h) and (i). And this pretty much repeats those  
17 requirements. And it basically talks about who should  
18 have access to the records and what type of records  
19 because 509 applies to certain types of records. And  
20 eligibility records is one type of record to which 509  
21 applies.

22 MS. BATTLE: Okay, so it's 509(h) and (i).

1 MR. TULL: Well, that would be --

2 MS. BATTLE: John?

3 MR. TULL: It might be useful to introduce the  
4 conceptual way that we thought it would be useful to go  
5 forward on issues around record-keeping which also does  
6 involve the question we discussed yesterday, which is  
7 the policies and procedures question.

8 We met this morning with the Inspector  
9 General's office to talk about the -- they had raised  
10 with us a set of issues around record-keeping because  
11 of their concern, which is one that we share, making  
12 certain that the program -- the recipients are properly  
13 notified of areas where they should keep records in  
14 order to facilitate the process of reviewing compliance  
15 by their independent auditors in the course of their  
16 annual audit.

17 And we had two principles that we talked about  
18 this morning as being important. One was that we do  
19 advise programs of areas where they should keep records  
20 and give them as much guidance as possible so that  
21 their auditors, the process of auditing will be  
22 facilitated by having records accessible, easily

1 available, covering the kinds of issues an auditor  
2 needs to look at.

3 But a second principle that we should not  
4 overstate those requirements in a regulation but should  
5 -- should clarify in the regulations the areas where we  
6 believe it's particularly important that records be  
7 kept but not prescribe what those records ought to be,  
8 that that -- that the process for notifying programs of  
9 what we believe is appropriate is one that we can do  
10 even without regulatory authority under the act.

11 But that we should -- we should maintain as  
12 much flexibility as possible in being able to send --  
13 to tailor record-keeping requirements to what is going  
14 to work, what we learned over time is important with  
15 auditors getting back to the Inspector General and to  
16 us about what works for them. So what we would  
17 propose, and Renee may want to speak as well to their  
18 perspective on this, but my understanding of our  
19 conversation this morning was that what we would  
20 propose is, rather than having a lengthy record-keeping  
21 requirement such as is stated here, 1626.7, would be to  
22 put together with what we continue to recommend

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1 strongly, which is a requirement of a recipient  
2 adopting policies and procedures where appropriate and  
3 add to that, and record-keeping appropriate to  
4 establish compliance with this part and not prescribe  
5 further than that.

6 And that would give us an opportunity then  
7 to -- with the Inspector General not only now, but over  
8 time, to advise programs of what kind of record-keeping  
9 we deem to be appropriate.

10 MS. BATTLE: Okay. If I heard what you said,  
11 you're really talking about revamping 1626.7.

12 MR. TULL: Correct.

13 MS. BATTLE: And making it a simple statement  
14 that goes along with the policy statement and keep  
15 records on this and develop a policy on this, period.  
16 And --

17 MS. SZYBALA: You're talking about something  
18 that would be generalized throughout the regs, I mean,  
19 that that would be LSC's basic -- basic guidance in  
20 regulations, with the key policies and procedures on  
21 this inadequate record-keeping to bring to compliance,  
22 nothing more detailed than that.

1 MS. BATTLE: Okay.

2 MS. SZYBALA: Because the details are for the  
3 particular grantee to decide this. To take this all  
4 the way back or just to give an OIG kind of conceptual  
5 framework to this and given the place we're at, it's  
6 maybe easier to work backwards instead of forward.

7 So going backwards, we want to -- you just all  
8 got handed something that looks like this. This is a  
9 little excerpt from government auditing standards. On  
10 the second page, we are all now -- the subject of  
11 government auditing standards, they were under  
12 government auditing standards, based on our audit guide  
13 last year, which was prior to this legislation.

14 But now the legislation mandates that as well.  
15 In any case, on the second page there's a little noted  
16 paragraph. And if you read that, what it says to the  
17 auditor is that in order to check compliance with laws  
18 and regulations, the auditor has to go look at the  
19 auditee's policies and procedures.

20 What page?

21 MR. ASKEW: No, the next page, Bill, the third  
22 page.

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1 MS. SZYBALA: I'm sorry.

2 MS. BATTLE: It reads: Controls over  
3 compliance with laws and regulations include policies  
4 and procedures that management has implemented to  
5 reasonably assure -- ensure that resource use is  
6 consistent with laws and regulations.

7 Is this from whence the requirement for a  
8 policy on several of these regulations springs?

9 MS. SZYBALA: Well, no. That's why I'm saying  
10 we're working backwards. You can just see from this  
11 that this is kind of the guiding bible on government  
12 standards audits, and the auditor is going to be  
13 looking for policies and procedures.

14 And therefore, it's going to facilitate the  
15 audit, if you can find them. And then what his job is,  
16 to test whether those policies and procedures were  
17 complied with by sampling some cases instead of  
18 interviewing staff. I don't even know how, exactly, an  
19 auditor would go about it if there were no policies and  
20 procedures.

21 But the auditor would have to figure out what  
22 the control mechanism is in the particular auditee to

1 prevent lack of compliance with laws and regulations.  
2 I mean, the policies and procedures is just a leg up.  
3 But taking a step back from there, because this is the  
4 tail wagging the dog, the importance of the policies  
5 and procedures is to assure that the laws are complied  
6 with.

7 I mean, this is your -- this is your control  
8 mechanism. The second report an auditor has to do  
9 under government auditing standards, and I think the  
10 second report an auditor has to do under 509 of this  
11 legislation is a report on compliance with laws -- I'm  
12 sorry, a report on controls over compliance with laws  
13 and regulations.

14 I mean, the auditor has to specifically do a  
15 report on whether there are controls in place to  
16 prevent lack of compliance with the regulations. The  
17 policies and procedures is that control.

18 And moving backwards further from that is not  
19 just to make the auditor's job easier and to make it  
20 cheaper for the grantee to have the audit, although  
21 that is a byproduct, the point is to really prevent  
22 lack of compliance.

1           If you are a grantee and you have -- you have  
2 a written policy on how you can accept a fee-generated  
3 case and it requires somebody to sign off on this form  
4 at the end, then the odds are you're going to have less  
5 lack of compliance with fee-generating case regulations  
6 because you have this control in place.

7           And that's the point of the control. And the  
8 auditor simply finds that the controls are there. You  
9 don't put the controls in place for the auditor. You  
10 put the controls in place to assure control. And  
11 moving a step backwards from that, the government  
12 generally doesn't give grants to person, people or  
13 places that don't have controls or will not institute  
14 controls to assure the proper use of that money.

15           So this is -- this is all the way back to good  
16 management and good grant management. And it follows  
17 through and the auditor reaps the benefits of it -- not  
18 the auditor, the grantee. The grantee as auditee reaps  
19 the benefits of it. But what it can do is have a whole  
20 system that is better able to ensure compliance, which  
21 is the point here.

22           MS. BATTLE: Okay, that explains to us the

1 idea of why policies and procedures should be in place  
2 to assure that each of the grantees then is cognizant  
3 of and has a control mechanism in place to assure that  
4 the regulations are followed.

5 The second issue was how we get to record-  
6 keeping being a simple statement as opposed to what we  
7 have here. And as I look at 1626.7, it has -- it sets  
8 out to whom records can be available. It has several  
9 facets to it beyond just proscribing how the records  
10 should be kept.

11 And so my question is, when we eliminate these  
12 provisions, what are we doing?

13 MR. TULL: I think -- I suspect this is one on  
14 which Renee and I would say the same thing. This would  
15 be a test. Section 509 has specific language in it  
16 that pertains to access to records and disclosure of  
17 those records to others.

18 It really is issues -- it's a control on us,  
19 on the corporation and what we do with records, which  
20 is not necessary as a part of a regulation which  
21 provides guidance to the field, other than advising  
22 them of how we will treat records that we get from

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1 them.

2 But that's not -- I mean, this is another  
3 provision that may indeed be self-executing in that  
4 we're completely guided by the statute. We have not  
5 had the conversation about what -- what we might do  
6 internally to establish clarity around our own policies  
7 and procedures to assure that we comply with 509.

8 That's one of the processes we're going  
9 through together, but one of the issues with that is  
10 the question of access to records and our treatment of  
11 those records internally to make sure -- certain who it  
12 consists of in the act. Is that --

13 MS. SZYBALA: 509 has this access provision  
14 and this confidentiality provision. That's not  
15 specific to any regulation. I'm not sure why it popped  
16 up in aliens except maybe there is special sensitivity  
17 about access in alien eligibility records.

18 But the provision in 509 is not specific here  
19 and I don't see the need for it here any more than  
20 anywhere else. I thought we would deal with it when we  
21 come to 41. 1641 I think is the reserve number for a  
22 reg on audit-type matters coming off 509 of this

1 legislation.

2           And we put that on a slower track and I think  
3 that the date we had set was January 1st have a draft  
4 published. So we would have to start working on that  
5 reg sometime this fall to get it out in that time.  
6 That was a time picked based on all kinds of strategic  
7 planning about the audit guide. But --

8           MS. BATTLE: Okay. Now, I can understand what  
9 John has said and what you say as it relates to (d)  
10 because that really has to do with how the corporation  
11 decides to either disclose or not disclose records.  
12 And maybe we don't need to tell the field what our  
13 obligations are under the statute.  
14 To whom these records should be available --

15           MS. SZYBALA: Right. That's what comes of  
16 509.

17           MS. BATTLE: That's 509, so --

18           MR. SMEGAL: It's 509(i), in fact. It's  
19 almost the same language.

20           MS. SZYBALA: Right. It's just a repeat from  
21 that statute, and that statute will be dealt with I  
22 guess in 1641. I don't think that -- what I was saying

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1 was, I don't see a need to repeat it in this particular  
2 reg when we haven't repeated it in other regs. It  
3 applies to all the regs.

4 MS. BATTLE: Okay, Suzanne?

5 MS. GLASOW: So I think we're suggesting that  
6 we basically delete Section 7 and put some general  
7 mention of record-keeping in the policies and procedures  
8 section. Is that correct?

9 MR. TULL: Right.

10 MS. SZYBALA: Uh-huh.

11 MS. BATTLE: Okay. All right, so that's the  
12 suggestion. Okay, any questions about that from any of  
13 the board members?

14 MR. McCALPIN: Well, let's talk generally  
15 about this recurrent provision on policies and  
16 procedures. It strikes me initially as kind of a  
17 bureaucratic move imposing an unnecessary obligation in  
18 many instances on the program.

19 And I point particularly to those instances  
20 where the statute has a flat prohibition --

21 MS. SZYBALA: I agree.

22 MR. McCALPIN: -- on taking a particular kind

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1 of case. And that would be true of redistricting. It  
2 was also true, I think, in solicitation where the  
3 present drafts before us require policies and  
4 procedures. It is also true in class actions where the  
5 draft before us does not require policies and procedures.

6 I would suggest to you that the important  
7 thing is compliance with the regulation, not whether or  
8 not there is a particular policy or procedure. And it  
9 seems to me that if a recipient is not soliciting  
10 cases, is not taking on redistricting cases, that's all  
11 that's required.

12 And whether or not they have a policy or  
13 procedure is immaterial and should not be a cause for a  
14 sanction against the program if in fact they are  
15 honoring the regulation but do not have a policy or  
16 procedure.

17 MS. SZYBALA: Can I -- you said a lot of  
18 things that -- I didn't take notes, so I don't want to  
19 miss anything. But moving backwards again, sanctioning  
20 is not the bottom line on the audit. I mean, that's  
21 not what audits are about.

22 So if you were to get an audit back that says

1 this recipient did this problematical thing, you would  
2 bounce immediately into the corrective action mode.  
3 Follow-up. What if follow-up corrects the problem? An  
4 audit follow-up institutes the controls that would be  
5 needed to prevent the problem from recurring. It's not  
6 a matter of sanctioning. But if --

7 MS. BATTLE: I've got a question about that.

8 MR. McCALPIN: But if the regulation says you  
9 must have a policy and procedure and you don't have it,  
10 then the auditor has got to say you have (sic) not in  
11 compliance with the regulation.

12 MS. SZYBALA: Right. And you would fix that  
13 by getting into compliance. That's the nature of  
14 audits.

15 MR. McCALPIN: Why?

16 MS. SZYBALA: Well, let me back to the  
17 beginning. You said it makes no sense to have policies  
18 and procedures where the audit -- where the regulation  
19 is a flat prohibition. I agree completely. Where we  
20 said to management -- and I'm just reading, because  
21 it's easier -- for the most part the areas in which  
22 record-keeping would be most helpful are those

1 activities which are generally proscribed, are none the  
2 less permissible in certain circumstances.

3 Now, you can say the job for the recipient is  
4 to follow the reg. But most of these regs are not  
5 self-executing. And if you tell a recipient in your  
6 reg that you may not take fee-generating cases unless  
7 you do this, this, and that, then they need a procedure  
8 that says we have to do this, this, and that before we  
9 can accept it.

10 Even -- and I have to say -- even on a general  
11 -- we had this discussion this morning -- on a general,  
12 just blanket proscription, it is worthwhile for the  
13 recipient to have the policy that says you may not take  
14 this kind and this kind and this kind of case.

15 How do you make sure that your new lawyer  
16 entering your office is up to date on all this? Do you  
17 hand him the act and say, you know, just memorize this?  
18 I mean, you need a little cheat sheet: Here's what we  
19 can do, here's what we can't. It's useful for the  
20 recipient. It's not a useless exercise, is what you  
21 called it I think, and it's not.

22 But on those that are simply a proscription,

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1 you can't do -- you can't do abortion cases, obviously  
2 we don't say anything on that. We have no reg on it.  
3 You need more where there is more verbiage in the reg,  
4 where there is more that you need to do in order to  
5 accept certain cases. Where there are exceptions you  
6 need more.

7 And, you know, I don't know what else to say.  
8 I think --

9 MS. BATTLE: There is one issue that Bill  
10 raised that I do want a response to because I think  
11 that the whole idea of how the audit is done and the  
12 fact that you should have a policy in place and that  
13 the guide -- the audit,  
14 government auditing standards basically say one of the  
15 things that an auditor does is to look at policies  
16 first and then test them is fine.

17 But the second step that we're taking is  
18 putting this policy development requirement in a  
19 regulation. So once you have a program that has not  
20 followed a regulation, then he is asking you a separate  
21 question from what you find in an audit that needs to  
22 be corrected. But what happens to a program that for

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1 some reason has not followed the regulation.

2 MS. SZYBALA: Okay, just there's a lot of  
3 answers to that and none of this stuff that's found on  
4 an audit is like by rote, has a particular response,  
5 you find this, it's a knee-jerk reaction; that's the  
6 reaction.

7 If an auditor were to report a lack of  
8 compliance with a regulation requirement that it had  
9 policies, there would be no -- no reaction based on  
10 that. The reaction is based on the fact that they have  
11 no policies; therefore, the audit report goes further.  
12 We could not test; therefore, we cannot tell you  
13 whether they have complied with laws that require them  
14 not to accept certain kinds of cases. That's the  
15 problem in the audit report that will be dealt with.

16 MR. McCALPIN: Why can't you test under the  
17 regulation as easily as under the policy?

18 MR. TULL: Because I think the issue is that  
19 they  
20 -- the reason it's a part of the auditing standard is  
21 that the fact of the policy describing to staff the  
22 procedures to follow is considered by auditors to be an

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1 internal which is evidence of compliance. And the  
2 lack of having that internal control itself, even if it  
3 weren't in our regulation, might well be a reason for  
4 them to find violation of the article.

5 MR. McCALPIN: Then if you follow that all the  
6 way through, you ought to have them for flat  
7 prohibitions, too.

8 MS. SZYBALA: Well, you can't have the  
9 procedures really for flat prohibitions aside from your  
10 regular intake. But to the extent that it's helpful  
11 for a program to have -- I said this this morning. I'm  
12 going to backtrack here. I think we are -- we are like  
13 white tower and we don't really know what goes on in  
14 the real world.

15 These recipients have had government audits,  
16 most of them, for a long time for other funding. I can  
17 assure you they have polices and procedures. I can  
18 assure you that in managing a law office you find that  
19 it's useful to have policies and procedures.

20 I would imagine most of yours have policies  
21 and procedures about conflicts and acceptance of  
22 conflicts and finding conflicts and determining that

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1 there are conflicts. If they don't, they probably  
2 should because you'll end up with more conflicts if you  
3 don't have those kinds of policies and procedures.

4 Policies and procedures happen naturally. You  
5 are, on the other hand, the funding source, and you  
6 have the right to tell them what you think is required  
7 to safeguard this money. If you don't think you're  
8 required to tell them to safeguard this money this  
9 money this way, then the auditor won't find that  
10 they're safeguarding the money this way.

11 And whatever the consequences are from that,  
12 it's going to be that the money is left safeguarded. I  
13 mean, that is the real point here, not the audit.

14 MS. BATTLE: Alan?

15 MR. HOUSEMAN: I want to try to address Bill's  
16 question, but first I want to say I've talked about  
17 this issue with a number of field people and I think  
18 the basic view is that field programs feel they're  
19 better protected by having a policy in place and the  
20 question to me comes, are they effectively implementing  
21 the policy than by having just a question of whether  
22 they are complying with the reg or not.

1           This is over a number of years that a number  
2 of us worked with field programs on this. And  
3 specifically I raised this with a number of people when  
4 this set of regs came out. And while it's a small  
5 group of people, that was the general prevailing view,  
6 that it's better off.

7           And secondly, in the history of regulations  
8 between the corporation and the field, we have found  
9 that when a program has a policy in place and it's  
10 effectively being implemented, that that goes a long  
11 way towards dealing with questions that may come up and  
12 complaints and otherwise about whether they are in  
13 compliance or not.

14           If they have a policy, it's clear, it's  
15 correct, it's consistent with the regulation. They  
16 have an effective way of implementing that policy.  
17 Then that's a lot easier situation from a point of view  
18 of a field program to deal with questions about whether  
19 they are violating the act or the regulations.

20           This is not a simple kind of matter.  
21 Obviously, some of these policies, some of these issues  
22 seem to be clear-cut. Let's take prisoners. We're

1 going to get the prisoners. It isn't so clear-cut.  
2 There are issues there. There's issues in virtually  
3 all of these.

4 Maybe redistricting is clear-cut, but even  
5 there, there may be an issue or two. It's fairly  
6 simple to write a policy that says we will not take  
7 redistricting cases, define it, and that's part of your  
8 policies and procedures. This is not a hard task.

9 In fact, already a number of programs have  
10 written polices like this. And the final point I would  
11 make is, we're doing -- Linda and I and a number of  
12 people -- some training with programs all over the  
13 country. One of the parts of our training is to show  
14 them the kind of policies they ought to consider  
15 implementing to conform to these regulations.

16 And we're using model policies that have been  
17 developed in real life by real programs operating in  
18 the real word to show them how to do that. And we're  
19 encouraged then -- if you require them, then you  
20 require them. But we're essentially pushing them,  
21 every program, large, small, middle-size, whatever,  
22 that they ought to have in place a set of policies and

1 procedures providing the guidelines and forms that they  
2 can use for programs that have thought this out.

3 So that, I think on balance we're better off  
4 in this to have a regulation that clearly sets out an  
5 obligation than not. I know it sounds bureaucratic,  
6 but I think overall we'll be better off if we do it  
7 that way.

8 MS. SZYBALA: I would also think that in your  
9 competitive bidding you would want to see the policies  
10 and procedures that they have, or at least a statement  
11 that they intend to put in place policies and  
12 procedures to safeguard these funds and ensure that  
13 they're going to be used in accordance with law and  
14 reg. I mean, you should want that as funders. It's  
15 what protects your money. It's what keeps the program  
16 out of trouble.

17 MS. BATTLE: Bill, did you have anything  
18 further?

19 MR. McCALPIN: I may vote against some of  
20 these regulations.

21 MS. BATTLE: Okay. Well, why don't we do  
22 this. We tabled your motion on this provision

1 regarding governing body policies on yesterday, right?

2 MR. McCALPIN: Yeah.

3 MS. BATTLE: You had a motion that we strike  
4 it. Secondly --

5 MR. McCALPIN: I can't remember. That was  
6 with respect to a particular regulation.

7 MS. BATTLE: Yes.

8 MR. McCALPIN: I don't remember which one it  
9 was. I have -- we have --

10 MS. BATTLE: It was the first one that we  
11 considered.

12 MR. McCALPIN: --- three, four, five, six,  
13 seven -- in seven of the proposed regulations, this  
14 requirement shows up, you know. We have -- we have had  
15 the redistricting on the books for how many years, six,  
16 eight, ten years. We have never had the requirement of  
17 a policy on that.

18 We've had a prohibition on Selective Service  
19 cases and school desegregation cases for more than 20  
20 years and we have never required a policy on that. And  
21 it seems to me we've gotten along well without this in  
22 a number of instances for a number of years.

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1 MS. BATTLE: I think that your motion  
2 pertaining to 1636, the provision that we had in 1636  
3 for the development of a policy, and as we bound it, I  
4 think you showed me a list during the break -- we had  
5 that same provision in at least six --

6 MR. McCALPIN: Seven.

7 MS. BATTLE: Seven. Seven regs, so --

8 MR. TULL: And it was actually not in some  
9 regs inadvertently. It was intended to be. The  
10 principle we were operating with was consistent with  
11 what's been stated here, that it would be better as a  
12 matter of corporation policy and for program management  
13 to have policies adopted implementing the regulation in  
14 each case. So the fact it was not in 1617  
15 was actually -- was an oversight.

16 MR. McCALPIN: You may just have increased the  
17 number of them. I know that.

18 MS. BATTLE: I think that having heard, I  
19 think, a thorough discussion from various vantage  
20 points, from the corporation's vantage point on  
21 assuring that all of the programs, number one, are not  
22 only cognizant of the regulations, but have taken some

1 action to implement those regulations on a local basis.

2 So that, they can do desk audits to assure  
3 that that's been done is relevant to our discussion,  
4 hearing that the field has, at least in the testing and  
5 the conversations that have been had in the field that  
6 there is a willingness to do this because of the  
7 complexity of the number of restrictions that there  
8 are, that it would be more simple for programs to have  
9 an internal control present to guide its own staff on  
10 that issue and that they're cognizant of it.

11 And also, from the point of view that Renee  
12 has pointed out, when an auditor goes in to look at  
13 this whole process and to see whether or not the  
14 program is abiding by all of these regulatory  
15 requirements, a policy is one form of internal control  
16 which gives the auditor the sense that the program is  
17 cognizant of and has something in place to assure that  
18 it's being done.

19 From that vantage point it makes sense. It  
20 seems to make sense to me that there be the development  
21 of a policy. The only remaining issue is whether it  
22 ought to be regulatory, whether this development of a

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1 policy is something that ought to be regulatory or  
2 whether there is some way for the corporation to  
3 address getting this done in another way.

4           And I'd like some discussion about that  
5 because I'm pretty much convinced at this point that it  
6 makes sense, that it certainly will facilitate audits,  
7 both desk audits from the corporation's vantage point  
8 and when auditors go out it will facilitate their being  
9 able to recognize that a particular program, any  
10 program in the field, is aware of and has an internal  
11 control on these restrictions.

12           And I think I understand that point on it.  
13 Ernestine?

14           MS. WATLINGTON: All of this is making me feel  
15 like -- when I used to -- out there, always disliking  
16 the corporation's always mandating you to do all these  
17 things. And what you're doing now is -- look like  
18 we're doing more so based on what we have to do, is  
19 putting all these restrictions and all these  
20 regulations.

21           And no one is really concerned about this  
22 taking away time that should be going for services.

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1 MS. BATTLE: Yeah.

2 MS. WATLINGTON: And it's not increasing the  
3 quality of service. It's just making it more  
4 encumbrances, so --

5 MS. BATTLE: I agree, Ernestine. But when  
6 Alan said that they were working on draft policies,  
7 that was a point that I brought up to John. I think  
8 that this is complex. We look at the amount of time  
9 that we have had to spend just interpreting the  
10 statutes and trying to give definition to some of the  
11 terms in the statute so that we can inform the field of  
12 what their requirements are under these new statutory  
13 provisions in the 1996 Appropriations Bill.

14 To go further, the programs then are going to  
15 have to take the language that we have in our  
16 regulations and the statute to try to put together a  
17 policy that it makes sense that as a part of this  
18 process that there be draft policies or some examples  
19 of what works along these lines made available so that  
20 this process isn't something that is cumbersome and  
21 time-consuming for all of the various programs because  
22 they are going to be looking at all the same regs and

1 attempting to implement them.

2 Some of the specific issues are going to be  
3 different, given whatever the priorities are for a  
4 particular program as to how they do it. But  
5 certainly, they are going to have to look at the same  
6 issues and come up with something that works for the  
7 programs.

8 And so I think your point, Ernestine, is well-  
9 taken. This is cumbersome and it is going to be a  
10 burden. And I think that we have to take into account  
11 as we look at this issue how we're going to assist  
12 programs in being able to implement.

13 MR. McCALPIN: At a time when the major thrust  
14 of government is to reduce the impact of regulations on  
15 the economy generally, we are swimming against the tide  
16 in imposing additional restrictions.

17 MS. BATTLE: But I think, Bill, we have been  
18 given  
19 additional restrictions and regulations. We have -- I  
20 mean,  
21 this is the first time I've been involved in trying to  
22 promulgate 15 regulations to implement an

1 appropriations bill.

2 And I don't know that there's ever been a time  
3 before in the history of the corporation that just  
4 based on  
5 the funding we have had as many restrictions and  
6 provisions.

7 And we aren't even finished. We've got the additional  
8 ones  
9 that will come from the Inspector General that we've  
10 got to  
11 promulgate.

12 So I think that the internal control of a  
13 program  
14 acknowledging and putting in place something that says  
15 I know  
16 about all of these things does make some sense in this  
17 process. John?

18 MR. TULL: I'm sorry. Go right ahead.

19 MS. BATTLE: I'm sorry. Alex?

20 MR. FORGER: I was going to say, I would agree  
21 with Bill in respect of something that is an outright  
22 prohibition.

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1 I don't know what more you have to say about abortion  
2 litigation. But an issue such as priorities and  
3 departing from your priorities, I could see -- I would  
4 like to see a process in place in a grantee as to its  
5 own view of emergency and under what circumstance can  
6 the director go ahead and authorize some departure from  
7 the priorities depending upon how often the board meets  
8 and the nature of the issues that they face.

9 I would just think the staff there could use  
10 some more guidance, and we're not going to spell it all  
11 out in a regulation. So I could seem in some of these  
12 areas where I would like to see the program think about  
13 the process and document it in some way. Whether or  
14 not that helps the auditor or not, I suppose it helps  
15 the auditor. But it certainly would bring for a more  
16 orderly management process.

17 Because in most of these issues, and in that  
18 one,  
19 too, I know that we're going to get a request  
20 periodically  
21 from Congress to -- all those programs that have  
22 departed from the stated priorities and the reasons

1 why, and what  
2 procedures did they have in place, and did they really  
3 get  
4 the approval, and so on. So I think defensively it is  
5 helpful in those instances, and also from a positive  
6 management point.

7 MR. McCALPIN: We didn't include it in the  
8 priority regulation.

9 MR. FORGER: But I would.

10 MR. TULL: The prior regulation has -- is all  
11 built  
12 around a assumption of -- and a specific requirement of  
13 board adoption of priorities and sending a report to  
14 us. It's stated differently because it's not stated at  
15 the end as it is elsewhere. But the core of the  
16 priorities regulation is a governing body, an explicit  
17 governing body of requirement of adoption of  
18 regulations, which is a reflection of what the staff  
19 should require.

20 MR. BROOKS: And I think as far as Ernestine's  
21 point of time, this is pretty much a one-shot  
22 proposition for the recipients and if Renee is right --

1 and she seems to be plausible -- it will save time on  
2 the audit. So overall, it seems to me it would make  
3 for more efficiency, rather than less.

4 And there are many regulations that, it seems  
5 to me, need it. The ones that don't, like abortion and  
6 redistricting, it will be a one-sentence prohibition,  
7 period, easy enough to do, and make the whole picture  
8 more complete. So it seems to me it makes sense to  
9 require it.

10 MS. BATTLE: Are we ready? My suggestion is  
11 that we now address both of these issues because they  
12 will recur in the regs that we have to deal with on a  
13 prospective basis and they have occurred on the six or  
14 seven that we already addressed today.

15 So we had a motion that was tabled. Do we  
16 need to vote to take it off the table so that we can  
17 consider it now?

18 MR. McCALPIN: Parliamentarily speaking, it  
19 takes a two-thirds vote to take it off the table.

20 MR. BROOKS: I so move.

21 MR. McCALPIN: Since you tabled the --

22 MS. BATTLE: All right. It's been moved. Do

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1 we have a second?

2 MR. McCALPIN: Second.

3 MS. BATTLE: Okay, it has been properly moved  
4 and seconded that we take off the table the tabled  
5 motion regarding how we will address this issue of  
6 policies. Are you ready for the vote? All in favor.

7 (Chorus of ayes.)

8 MS. BATTLE: All opposed?

9 (No response.)

10 MS. BATTLE: The motion carries. Okay, so  
11 it's now before us. Now that it is before us, is there

12 --

13 MR. McCALPIN: And it's only addressed to  
14 1636.

15 MS. BATTLE: That's right. Is there a  
16 friendly amendment to that motion which will give us  
17 the opportunity to address this issue as it recurs  
18 throughout our regulations?

19 MR. BROOKS: I move that amendment.

20 MS. BATTLE: Okay, all right. Now -- so we  
21 now have before us the issue --

22 MR. McCALPIN: The amendment has not been

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1 seconded.

2 MS. BATTLE: Okay, is there a second?

3 A PARTICIPANT: Second to the amendment.

4 MS. BATTLE: Do you accept it, or?

5 MR. McCALPIN: No.

6 MS. BATTLE: No? Okay, well let's then vote  
7 on the amendment. It's been moved and seconded that we  
8 amend the provision of the original motion which only  
9 pertained to 1636, so that the issue can be resolved as  
10 it relates to all of our regulations on whether we  
11 ought to have a provision  
12 addressing the adoption of a policy to implement these  
13 restrictions.

14 All in favor?

15 (Chorus of ayes.)

16 MS. BATTLE: All opposed?

17 MR. McCALPIN: No.

18 MS. BATTLE: Okay, motion carries.

19 Now we have before us the issue of whether we  
20 will have in regulations as have been presented to us  
21 and that we will consider later where appropriate a  
22 provision for the development of a policy or adoption

1 of a written policy and procedure to guide the  
2 recipients director in ensuring compliance with the  
3 requirements that we are undergoing the development of  
4 regulations on now.

5 All in favor of that?

6 MR. BROOKS: I so move.

7 MS. BATTLE: Okay, I'm sorry.

8 MR. McCALPIN: No, no, it's your -- she is now  
9 moving, acting on the amended motion.

10 MS. BATTLE: That's right. So it's before us.

11 MR. McCALPIN: It's already been moved.

12 MS. BATTLE: It's before us.

13 All in favor say aye.

14 (Chorus of ayes.)

15 MS. BATTLE: All opposed?

16 MR. McCALPIN: No, simply because it applies  
17 to everything indiscriminately.

18 MS. BATTLE: I said as appropriate. I did  
19 make the statement as appropriate.

20 MR. McCALPIN: Well.

21 MS. BATTLE: It's in the record.

22 MR. TULL: Can I just ask a clarifying

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1 question about that, which may get to one of Bill's  
2 concerns. The redistricting restriction, for instance,  
3 is not one which would call for any procedure because  
4 it is a flat prohibition, and presumably the guidance  
5 that we would provide -- either the board would provide  
6 or that Inspector General and management would provide,  
7 the programs would be something to the effect of that  
8 all you need at this stage is the prohibition.

9 Where procedures are appropriate are in those  
10 regulations which reflect restrictions or requirements  
11 which themselves are complicated and call for what  
12 auditors will look for, which is some evidence of  
13 internal control, some set of processes to make certain  
14 that they properly --

15 MS. BATTLE: Yeah. I think, Bill, you had  
16 actually a list of the ones. And we can amend, if that  
17 was your only objection, so that it is specific to the  
18 ones that we actually have before us.

19 I mean, I used the word "as appropriate," but  
20 I know that the regulations that we have before us  
21 already do reflect in some a provision for the adoption  
22 of written policies and in others they are not.

1 MR. McCALPIN: Let me say this. I would agree  
2 that there may be some instances in which it is  
3 appropriate for us to suggest, if not require, policies  
4 or procedures, in other instances not appropriate.

5 I am reluctant at this stage of the game to  
6 agree to that since John has said by inadvertence this  
7 requirement was left out of a number of the regulations  
8 we have already seen. And presumably, when they come  
9 back to us at the end of next week, it will be in other  
10 places as to which I am not prepared to make a judgment  
11 with respect to their propriety at this point.

12 MR. BROOKS: Possibly we could have that  
13 answer, if not today, tomorrow, if you could run  
14 through the regs that we have under consideration.

15 MS. BATTLE: That would be helpful.

16 MR. BROOKS: And suggest to us.

17 MS. BATTLE: I think that would be real  
18 helpful. I think it does make sense because I do agree  
19 that particularly where there is a flat-out prohibition  
20 and there's no -- there's no need to go through an  
21 exercise there. There may be instances in which it's  
22 not needed and it would be helpful to the committee if

1 we knew specifically where there is a proposal for a  
2 provision to adopt a written policy.

3 MR. TULL: Okay.

4 MR. FORGER: Just for clarification, were you  
5 saying that you would have a policy in respect of every  
6 regulation but not require procedures except in those  
7 where there is more than a prohibition?

8 MS. BATTLE: Well, there are certain specific,  
9 I think seven -- did you say seven? -- regs before us  
10 where there is a specific provision in the regulation  
11 for the governing body of a recipient to adopt written  
12 policies. We have 15 regs, so it's not even envisioned  
13 in every case that there would be a policy adopted for  
14 every reg that we have. There are only certain  
15 specific ones.

16 MR. McCALPIN: Well, John has said by  
17 inadvertence that he was --

18 MS. BATTLE: It may be more than 7, but not  
19 necessarily 15 still.

20 MS. GLASOW: I think we need to make a list  
21 for you that would show those rules that only need  
22 policy but not procedures. The policy would simply be,

1 we don't take abortion cases, we don't take  
2 redistricting cases. They don't need procedures  
3 because it's very simple.

4 MR. FORGER: I would think every reg would  
5 have a policy statement.

6 MS. GLASOW: We have other rules. We would  
7 give you a list of those that need both policies and  
8 procedures. There may be some rules that don't need  
9 either, I'm not sure. But we will bring that list to  
10 you tomorrow. We'll go through the list of rules and  
11 make our recommendation.

12 MS. BATTLE: Okay. That would be helpful.

13 MS. PERLE: You might make that same set of  
14 recommendations with respect to documentation.

15 MR. TULL: Yes.

16 MS. BATTLE: Record-keeping.

17 MR. TULL: Yes, that some have record-keeping  
18 requirements and some won't.

19 MR. FORGER: My point was, if you -- if the  
20 grantee adopts a set of policies that omits some of the  
21 regulatory restrictions because they are, quote, self-  
22 executing, then the employees, the staff, everybody

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1 else doesn't have in one place what the ground rules  
2 are in respect of taking cases and functioning with  
3 them.

4 And therefore, you would have to supplement  
5 it, I suppose, by here is a list of all of the  
6 restrictions. And I don't know why it isn't easier to  
7 tack on the wall: These are the policies. Thou shalt  
8 not do abortion or redistricting.

9 It doesn't need any further amplification.  
10 And then when you get into something where a procedure  
11 is required, you have a procedure. But at least there  
12 is in one unitary spot all of the no-nos.

13 MS. BATTLE: Yeah.

14 MR. McCALPIN: I'm not at all sure that we  
15 need to tell programs how to communicate with their  
16 employees.

17 MR. FORGER: I'm sure we don't.

18 MR. McCALPIN: That's kind of micro-managing.

19 MS. BATTLE: Well, I think what Suzanne is  
20 suggesting makes sense because it will help us to  
21 understand where there is work to be done. And it  
22 seems to me the work to be done is where there has to

1 be a procedure developed to implement a particular  
2 restriction that we have in place.

3 And we need to be aware of that so that we can  
4 take that into account in how we construct our  
5 regulations, it seems to me.

6 MS. WATLINGTON: I agree a lot with Bill, but  
7 I just want to expedite this and try to make it at  
8 least as possible for programs to have to deal with,  
9 because like I stated earlier, all of this is just  
10 making it more difficult for programs to really provide  
11 service on the limited amount of resources that they  
12 have now.

13 So I am very uncomfortable with this, but I  
14 have no -- I do want the program to -- you know,  
15 provide the service in the community and I am real  
16 concerned with quality service, the best that can be  
17 done.

18 MS. BATTLE: Okay. Is there anything else  
19 that we need to undertake in our consideration of 1626?  
20 Okay, let's move on to -- Rick, did you have a  
21 question, a point?

22 MR. TEITELMAN: Yes, just one question is if

1 these beginning rules that become effective upon the  
2 date of publication, I might add, I'm going to be a  
3 better we'll have the best policies in the world. But  
4 if this is going to be in our --

5 A PARTICIPANT: Is this marketing?

6 MR. TEITELMAN: No, no. If this is going to  
7 be in our rule and it's going to be effective the day  
8 it's printed, then the programs may need a little time  
9 in order to draft the policies after the day it's  
10 printed. We may need --

11 MS. BATTLE: That was the very first question  
12 I asked, Rick, which was about the time for  
13 implementation of this policy.

14 MR. TEITELMAN: This part of it. The others  
15 may be effective the date of the printing, but, you  
16 know, as far as the regulations. But as far as the  
17 policies, that almost would be --

18 MS. PERLE: You might want to add something in  
19 there.

20 MS. GLASOW: In the commentary, at least,  
21 about --

22 MS. PERLE: That you need to give them a

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1 certain period of time after the effective date of the  
2 ruling.

3 MR. FORGER: Twenty-four hours.

4 MS. BATTLE: I think we do need -- I think  
5 that's a good point, Rick. That was the first point  
6 when I first saw this that I thought we needed to  
7 address, so we do need to address that, yeah, in the  
8 commentary.

9 Okay, now we are going to move on to 1633,  
10 restriction on representation in certain eviction  
11 proceedings. Do we have someone from the Inspector  
12 General's office here? Okay.

13 MS. GLASOW: I think they're okay.

14 MS. BATTLE: Okay. All right, 1633,  
15 restriction on representation in certain eviction  
16 proceedings. We have very recently adopted a final  
17 rule on restrictions on representation in certain  
18 eviction proceedings. The original rule applied to LSC  
19 funds.

20 After the 1996 appropriations law, it was  
21 clear that this restriction now applies to all funds.  
22 And it's my understanding that what we have before us

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1 now simply does that, and that is, to extend the  
2 application of the existing rule to all funds. Is that  
3 correct? Suzanne?

4 MS. GLASOW: Very simple changes to this rule.  
5 We simply took out references that would have applied  
6 it only to LSC funds. And those changes were done in  
7 the Purpose section and in the Prohibition section.

8 The Purpose section now reads: This part is  
9 designed to ensure that recipients refrain from  
10 providing representation in certain public housing  
11 eviction proceedings to persons charged with or  
12 convicted of illegal drug activities.

13 And in the Prohibition section now says:  
14 Recipients are prohibited from providing representation  
15 to any person in a proceeding to evict that person from  
16 a public housing project if -- and I didn't go into all  
17 the categories. It's just the introduction phrase that  
18 was changed.

19 MS. BATTLE: Okay.

20 MS. GLASOW: And again, when I bring this back  
21 before you, I will have the whole rule for you.

22 MS. BATTLE: Okay.

1 MR. BROOKS: What was the rationale for  
2 changing the statutory language from defending to  
3 providing representation? And you see 1633.3.

4 MS. GLASOW: I may have been looking at -- I'm  
5 not sure. I may have been looking at this 504(a) and  
6 maybe that's something that needs to be fixed.

7 MS. PERLE: Or maybe that you were basing it  
8 on the -- originally the language may have been based  
9 on the corporation's resolution. I'm not really sure  
10 what that says.

11 MS. GLASOW: I'm sorry. I'm not sure. That  
12 may have just been a technical mistake.

13 MR. BROOKS: I don't see any benefit of  
14 changing this guidance for language.

15 MS. GLASOW: No. We can change it right back.

16 MS. BATTLE: To defending?

17 MS. GLASOW: Yes.

18 MS. BATTLE: Okay. Is there anything else on  
19 this particular reg?

20 MR. McCALPIN: Yes.

21 MS. BATTLE: Okay.

22 MR. McCALPIN: A very -- on the basis of

1 comments that this was a rule that came to us very  
2 early and we had comments by -- it struck me that there  
3 was a significant point made that after we acted upon  
4 this regulation several months ago, the administration  
5 announced a separate policy with respect to drugs in  
6 public housing projects.

7 I would not recommend any change in the  
8 regulation itself. But it seemed to me, and I  
9 communicated this earlier, that it would be useful to  
10 us as we consider comments to point to this expanded,  
11 really, administration policy, and ask for comments  
12 with respect to the policy set forth in the statute and  
13 the policy set forth by the administration.

14 And whether we are to stay where we are,  
15 adhering strictly to the statute, or whether we ought  
16 to move any distance at all in the direction of the  
17 administration policy, and there are at least three  
18 important differences between the administration policy  
19 and what is in the statute.

20 One has to do with respect to the nature of  
21 the violation. And the administration, for instance,  
22 would go to possession, rather than distribution and

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1 sale and so on. And I would point out to you that  
2 earlier, when we were considering this regulation in  
3 one of the earlier drafts, we had actually expanded to  
4 possession and then backed off from that position.

5 And I think it's open to question whether we  
6 were wise in doing that. Secondly, the administration  
7 position makes the lease-holder responsible for the  
8 conduct of members of the household, whereas the  
9 statute says only we are prohibited from defending the  
10 person in charge.

11 And I don't know whether in the interests of  
12 clients in public housing projects we ought to move in  
13 the direction of the administration position or not.  
14 Third, the administration position would invoke  
15 sanctions for inappropriate, illegal drug use on or off  
16 premises, which is quite a dissention and of course  
17 gets into that question of whether it affects the  
18 health and safety of the other tenants.

19 I don't at this point have any feeling as to  
20 whether we ought to move or not. But when we publish  
21 this, I would certainly like to -- specifically to  
22 invite comments with respect to these contrasting

1 positions between the administration on the one hand  
2 and the Congress on the other.

3           And I think that unless we say something in  
4 the commentary, we are not likely to get that area of  
5 comment and that's why I wrote out a paragraph and sent  
6 it up here simply to be included in the commentary to  
7 invite comment after publication on whether or not we  
8 should move off the strict statutory language in the  
9 direction of the administration position.

10           MS. BATTLE: Suzanne?

11           MS. GLASOW: Basically, because -- and I think  
12 you've recognized that because this is an interim rule,  
13 we are doing something that is required on an interim  
14 kind of an emergency basis, so it wasn't appropriate to  
15 get into those type of changes to the rule on this.

16           Because we have focused so much staff resource  
17 on all these regulations, I am not prepared to come  
18 before you this morning and say, because I didn't work  
19 on that rule especially so I don't have the background  
20 in it to say whether the differences in the HUD  
21 guidelines either require us to make changes in our  
22 drug eviction rule or whether it's just a matter of

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1 good policy to make changes.

2 If this committee directs staff to look into  
3 that and come back with a recommendation, we can do  
4 that. I'm not sure at this point -- that would be your  
5 decision, whether it's even wise to ask for public  
6 comment on something that we're not well-grounded in  
7 and of ourselves what the differences are to define  
8 what we want comment on at this point.

9 And we can come back to you with a  
10 recommendation at some point. I'm just not sure  
11 because I'm not well-grounded in the rule whether this  
12 is the right place or time to elicit public comment or  
13 whether to take some time and go back and study the  
14 rule and the new HUD guidelines and come back to you  
15 with a recommendation. That's your call.

16 MS. WATLINGTON: We did get comments, didn't  
17 we, from the start of business?

18 MS. GLASOW: Yes, and the board made decisions  
19 and passed the rule.

20 MS. WATLINGTON: A decision based on those  
21 comments.

22 MS. GLASOW: After you passed the rule, HUD

1 guidelines came out that appeared to be more  
2 restrictive in some areas. But whether that even  
3 affects this rule, I am not prepared to tell you at  
4 this point because we focused so much attention on just  
5 getting these other rules before you.

6 MS. BATTLE: It seems to me we've got two  
7 procedural issues. I think that Bill's point is well-  
8 taken, that there are some things that happened  
9 subsequent to our issuance of this rule that may have  
10 an effect on this rule. And at some point we need to  
11 take up and examine that effect. And we need to  
12 solicit comments from the public before making some  
13 sort of ultimate determination on that issue. And the  
14 question is whether we do it now as a part of this  
15 interim rule or once this is issued as a proposed rule.

16 MS. WATLINGTON: We were just being more --  
17 one of the reasons that it was -- that ours was -- that  
18 is, that when you say in possession and that the lessor  
19 is the person responsible. And a lot of the comments  
20 we got from them and which I'm very familiar with is  
21 that you are hurting -- it was a lot of -- you know,  
22 with hurting the grandparents and the other people who

1 were not even aware of these things.

2 And you're putting -- making a lot of people  
3 homeless based on action that they have no control  
4 over. So that was one of the things that I pointed out  
5 then, and that -- so how we want to deal with this, you  
6 know, your thing that I'm going to give you that input.

7 MS. BATTLE: The other thing is that I think,  
8 Suzanne, and maybe you need to correct me. Is there  
9 someone from the Inspector General's office here? That  
10 issue was raised in some of their commentary and they  
11 are not prepared at this point to go forward on it.

12 MS. GLASOW: I think we have recognized that  
13 this rule is not the place to deal with it. And they  
14 certainly have these concerns. They've laid them  
15 before us but we just simply haven't had the time to  
16 deal with it and we've lost the attorney who did work  
17 on this rule. And so we just don't have anybody that's  
18 prepared to come before you with any recommendations  
19 today.

20 MR. McCALPIN: Let me say this. It's clear  
21 that we are not required to move beyond this. And it's  
22 a matter of policy, of whether we should or not. It

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1 seems to me that what you are really saying is that we  
2 need to have two additional bites at this apple instead  
3 of just one. And I think that that is unnecessary.

4 I think that the differences between the  
5 statute and the HUD view are fairly simple. They were  
6 outlined in the paragraph which I sent up here. I  
7 think it could be done without much difficulty.

8 And I think to say that, you know, we ought to  
9 do this now and ask for comment without referring to  
10 that and then adopt a final rule and then ask another  
11 time for comments on that is just a waste of time.

12 MS. GLASOW: What I'm saying is really more of  
13 a statement of my unpreparedness to deal with this at  
14 this time. I simply haven't had the change, so --

15 MS. BATTLE: I am reluctant for us to put out  
16 to comment at this point something that our staff  
17 hasn't looked at. That's my only concern. I'm not  
18 saying that we shouldn't do it or that it's not an  
19 appropriate issue for us to take up and look at the  
20 underlying policies and whether or not we need to think  
21 more broadly about what we've implemented.

22 But, you know, until our staff has looked at

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1 it and has a clear grasp of it, I'm just a little bit  
2 reluctant for us to put it out and gain comment on it.

3 MR. BROOKS: Can we put this off until the  
4 19th? Would you be prepared by then, do you think?

5 MS. BATTLE: I could certainly try.

6 MR. McCALPIN: I don't think so. I don't  
7 think it's that big a deal.

8 MS. WATLINGTON: States have even gone even  
9 further than what HUD has in that, so it's been  
10 addressed and still a hardship, you know, the people.  
11 But, you know, they have to go by it, but --

12 MS. BATTLE: I really wish now, the Inspector  
13 General raised this issue in their comments and they  
14 have been invited to participate in all of our  
15 proceedings. If they had someone here, we could hear  
16 from them. They have, at this point, I think deferred  
17 raising it and our staff has not had a chance to look  
18 at it.

19 And I would -- I think we do need to look at  
20 the issue, and I agree with Bill that we do, since it's  
21 been raised. But I think we need to do it at a point  
22 that we have -- our staff has had an opportunity to

1 prepare it.

2 MR. McCALPIN: One other -- go ahead.

3 MS. GLASOW: I would be happy to say that if I  
4 can have it ready by the 19th, you know, I can bring it  
5 before you at that point.

6 MR. TULL: And you proposed a paragraph. Is  
7 that correct, Bill?

8 MR. McCALPIN: Yeah, I have. I sent it here  
9 two or three weeks ago.

10 MS. PERLE: Can I just clarify something? You  
11 are not suggesting that in the interim -- that there be  
12 any change in the interim reg.

13 MR. TULL: Right. This is just --

14 MR. McCALPIN: Absolutely not.

15 MS. PERLE: You are just simply suggesting --

16 MR. TULL: It's a request for comment.

17 MS. PERLE: -- that there is a request for  
18 comment and the --

19 MR. McCALPIN: That's all.

20 MS. PERLE: And I think that my understanding  
21 is the same as Bill's, which there is nothing in the  
22 HUD regulations or in the president's statement that in

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1 any way would suggest that LSC is required to prohibit  
2 representation in the broader range of cases.

3 And I don't think the I.G. really said that  
4 either. And so what we're really only -- we're saying  
5 as a matter of policy, when we do the final reg should  
6 the corporation expand this restriction?

7 MR. McCALPIN: That's right.

8 MS. BATTLE: And you know what? I guess the  
9 other concern I have is on the possession issue that  
10 you pointed out. We actually had possession in one of  
11 the regs that went out for comment and we got comment  
12 on it, didn't we?

13 MR. McCALPIN: I don't remember whether we --  
14 it was in what was published for comment or whether we  
15 took it out before that.

16 MS. PERLE: I'm not sure. I think it was  
17 before.

18 MR. McCALPIN: I don't remember.

19 MS. BATTLE: Was it? Did it go out with that  
20 as an issue? I remember getting some comments back on  
21 that possession issue but I don't know whether or not  
22 we expressly asked for it. So, okay.

1 MS. GLASOW: It's a controversial rule. I  
2 mean, we got a lot of comments from housing  
3 authorities, comments from recipients and a variety of  
4 entrants out there.

5 MR. McCALPIN: Obviously, it's a very live  
6 issue in the political world.

7 MS. GLASOW: Yes, yes.

8 MS. PERLE: Right. I mean, and the point is -  
9 - my point is that just because HUD says that it has --  
10 that these things should be grounds for eviction  
11 doesn't necessarily mean that we should say, and  
12 therefore people shouldn't have representation. But I  
13 think that's an issue that you can decide.

14 MR. McCALPIN: I agree. I don't think that we  
15 need necessarily follow what HUD's doing, but I think  
16 we ought to be aware of it and decide for ourselves  
17 what our policy ought to be. I think there's another  
18 question that underlies this whole thing, and that is,  
19 as I recall, the HUD policy requires many of these  
20 provisions be included in leases.

21 And if there is a proceeding by a public  
22 housing authority to cancel a lease because of the

1 violation of one of these provisions, what kind of  
2 position are our programs in to represent the tenant in  
3 a claim of lease violation if it doesn't meet the  
4 requirements of this particular problem.

5 Suppose that they attempt to break a lease  
6 because of possession. Now, can we represent the  
7 client in that case or not?

8 MR. FORGER: I think even HUD recognizes that  
9 they are entitled to due process.

10 MR. McCALPIN: Yes, they do.

11 MS. PERLE: That's really my point.

12 MR. McCALPIN: They do. So the question is,  
13 in that due process can we represent the client who is  
14 charged with a breach of the lease for a matter which  
15 is not in our present regulation.

16 MS. PERLE: And the answer to that is yes  
17 under this regulation. And I would probably argue --

18 MR. McCALPIN: I think that's right.

19 MS. PERLE: I think that it should remain that  
20 way.

21 MR. McCALPIN: And then we get in all kinds of  
22 trouble because here we go again representing drug

1 dealer.

2 MR. FORGER: I would point out that this reg  
3 was adopted before the appropriation statute.

4 MS. BATTLE: Right, yeah.

5 MR. FORGER: And the regulation goes further  
6 than the statute would require.

7 MR. McCALPIN: Already.

8 MS. BATTLE: Already.

9 MR. FORGER: And we might therefore in our  
10 comment ease up. There is the conviction issue in here  
11 that isn't in the statute. So, I mean, we've gone  
12 beyond the statute.

13 MS. WATLINGTON: Right.

14 MR. FORGER: And it may have been in  
15 contemplation of what the statute was going to say.

16 MS. BATTLE: Well, let me say this. I think  
17 that this is the kind of issue that certainly when we  
18 looked at drug evictions the first time we spent a  
19 considerable amount of time deliberating how we ought  
20 to construct the provisions for it.

21 It went before the board. There were some  
22 issues that came up when it went before the board. It

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1 came back to our committee. We examined again. And my  
2 thoughts are that if we are to look at these issues as  
3 well, that it is going to be -- it's going to take some  
4 time for us to distill and go through it.

5 And as Alex has pointed out, to even go back  
6 and look at the statute as it was enacted because at  
7 the time that we adopted this provision, the statute  
8 had not been adopted. So --

9 MR. McCALPIN: I think this is one of those  
10 where we do 60 days instead of 30 days.

11 MS. BATTLE: Yeah. We are going to need to  
12 take time on it. There is no question about it.

13 MS. WATLINGTON: It's an awful lot of -- all  
14 of those regulations based on a lot of -- just one or  
15 two cases. I do that every day, manage, and I've had  
16 to do an awful lot of evictions in the past month for  
17 drug-related situations. And it's so many leases.

18 And our state went even farther that the  
19 tenants, you know, have a lesser time for appealing and  
20 all of the other process. So what I'm trying to say,  
21 no matter what our regulation is, states and everything  
22 has gone so far that it's -- they really -- it's very

1 difficult for those type of things.

2 And he say it's happened before, it will  
3 happen again, even if it ever happened at all. And we  
4 went further, you know, on --

5 MS. BATTLE: We are in the midst of discussing  
6 on the drug eviction regulation. Bill McAlpin brought  
7 up one of the comments made by the Inspector General in  
8 pointing out the fact that after we adopted our reg  
9 there were additional policies and regulations adopted  
10 by HUD in this area and the administration.

11 There are differences between the two, and  
12 whether we ought to at this point put out for comment  
13 just the issue of whether or not our regulation ought  
14 to take note of what those distinctions are between our  
15 statute, HUD regulations and the administration policy  
16 on this issue.

17 And my understanding, from Suzanne at least, I  
18 said on the record was that at this point since we are  
19 trying to just implement an interim reg, the Inspector  
20 General's position was to defer this for a later date.  
21 But you were raising the issue and I wanted to find out  
22 just on the record where you are.

1 MS. SZYBALA: We are?

2 MS. BATTLE: Yes. Renee, you can respond.

3 MS. SZYBALA: I don't think we have anything  
4 further to say. I mean, we're not pushing the issue.  
5 We made our comments and this is an interim reg and we  
6 have said that.

7 MS. BATTLE: Okay, all right.

8 MR. McCALPIN: What I said was that I thought  
9 that we ought specifically to invite in the comment  
10 part comments on the Congressional statutory language  
11 as compared with the administration's HUD position and  
12 invite comments as to how we ought to deal in that --  
13 with those two or the area in between them.

14 MS. SZYBALA: Yeah, we fully would like to see  
15 that. I mean, that would be a very good way to handle  
16 it, I think, as opposed to -- the problem for the OIG  
17 was that reg is -- makes no notice of the fact that  
18 there has been a presidential memorandum on the subject  
19 and a whole new executive branch policy here, a whole  
20 new project.

21 It takes no notice of it. It's like it didn't  
22 happen. It's like we live in a different country.

1 MS. BATTLE: Well, but it was subsequent. I  
2 understand the HUD regulations were subsequent to our  
3 adoption of the reg.

4 MS. SZYBALA: I think that's right.

5 MS. BATTLE: So we couldn't have taken notice,  
6 yeah.

7 MS. SZYBALA: Yeah, they were very -- they're  
8 very close in time.

9 MS. BATTLE: Yeah, but we couldn't have taken  
10 notice of something we didn't know about at that time.

11 MR. McCALPIN: You're right.

12 MS. SZYBALA: Exactly, exactly.

13 MS. BATTLE: But at this point the question is  
14 whether we ought to at least invite some comment to see  
15 if there ought to be some movement.

16 MS. SZYBALA: Right, right, I agree with that.

17  
18 MS. BATTLE: So this is where we are. Bill,  
19 do you have your paragraph?

20 MR. McCALPIN: Sure.

21 MS. BATTLE: Why don't you tell us what it is.

22 MR. McCALPIN: Well, this doesn't have to be

1 inserted as it is. I think it could go in several of  
2 the paragraphs already in the commentary, but this is  
3 what I think we ought to do.

4 In addition, on March 27, 1996, after the  
5 current Part 1633 was approved by the board, the  
6 administration announced it's "one strike and you're  
7 out" policy for public housing. Several elements of  
8 that policy impact drug-related evictions from public  
9 housing and their consideration by recipients.

10 One element requires public housing  
11 authorities to include in all tenants' leases  
12 provisions holding the leaseholder responsible for the  
13 actions of all members of a household and guests.

14 Another authorizes eviction for all drug-  
15 related activity whether on or off premises. In  
16 Section 504(a)(17) of the appropriation, the Congress  
17 expressly prohibited representation in an eviction  
18 proceeding only of the person charged with the illegal  
19 sale or distribution of an illegal substance, and then  
20 only if the illegal drug activity threatens the health  
21 or safety of another tenant or employee of the public  
22 housing agency.

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1           This rule generally adheres to the narrower  
2 provisions of the Appropriations Act, but LSC  
3 particularly solicits comments on the proper role for  
4 recipients in light of these somewhat differing policy  
5 positions.

6           MS. BATTLE: Okay.

7           MR. FORGER: The Appropriations Act was  
8 enacted after the "one strike and you're out" was  
9 publicized.

10          MR. McCALPIN: Yes.

11          MR. FORGER: By quite some time. So Congress  
12 had the benefit of that.

13          MR. McCALPIN: A month.

14          MS. BATTLE: A month.

15          MR. FORGER: Congress had the benefit of that  
16 before it enacted this restriction for us.

17          MR. SMEGAL: And didn't change its restriction  
18 based upon that.

19          MS. WATLINGTON: But that's then only your  
20 leases anyway.

21          MS. BATTLE: Yes. So what we have here --  
22 let's just see if we can -- I'd like to get some

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1 committee response to Bill's proposed language to go in  
2 the comments at this point. And one response that  
3 we've got is --

4 MR. McCALPIN: That's not necessarily  
5 complete. Alex has raised a -- two points, really, one  
6 about the fact that the regulation currently goes  
7 beyond the statute and the other that the statute came  
8 after the administration's position. So that, you  
9 know, this was written three weeks --

10 MR. FORGER: But I think it's a board issue,  
11 Bill, and I would hope that there's a lot of discussion  
12 at the board level on this matter of policy, whether  
13 you are seeking  
14 to get public comment or not. I think there's  
15 certainly a  
16 diversity of views on the board and that can -- ought  
17 to be a  
18 discussion of a policy issue.

19 MR. McCALPIN: I don't think the board ought  
20 to consider it without having input from the public, however.

21 MR. FORGER: Well, presumably they are going  
22 to respond as to whether this goes far enough. But

1 maybe you can induce them to.

2 MS. BATTLE: Suzanne.

3 MS. GLASOW: Even if we ask for comments at  
4 this point on this and we are all in some general  
5 policy issues and then the committee decided to insert  
6 or change language, that changed language is going to  
7 have to go back out --

8 MS. BATTLE: Go back out.

9 MS. GLASOW: -- for public comment.

10 MS. BATTLE: That's what my suggestion --  
11 really.

12 MS. GLASOW: Without proposed language, you  
13 cannot finalize a rule. So you can do it twice. I  
14 mean, that's okay.

15 MS. BATTLE: WE're going to have to do it  
16 twice in any event. That was why my initial suggestion  
17 was, let's do it all at once. And we are going to have  
18 to have some language that the public is commenting on  
19 as to whether or not by giving account of these two  
20 things that took place subsequent to our original rule  
21 we are either going beyond the statute, we're including  
22 a policy that's well received or -- you know, I think

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1 that what you're suggesting makes sense.

2 MR. McCALPIN: Unless you do it now though,  
3 you're losing three, six, nine months.

4 MS. PERLE: I mean, it seems based on what  
5 Suzanne said, if you do something along the lines of  
6 what Mr. McAlpin is suggesting in this and the response  
7 that you get back suggests that the public thinks you  
8 ought to expand it and/or members of the board think  
9 you ought to expand it, then what you do is republish  
10 this as a proposed rule with the additional standards  
11 for the 30-day --

12 MS. BATTLE: Or if we get back from the  
13 public, no, you're going further. Congress spoke after  
14 the White House and obviously this --

15 MS. PERLE: Right. And the board agrees.

16 MS. BATTLE: Yeah, and the board agrees.

17 MS. PERLE: Then you don't do anything. Then  
18 you just adopt the interim rule.

19 MS. BATTLE: Okay. Is there any question  
20 about the language that -- I mean, we can work the  
21 language up.

22 MS. GLASOW: And the staff can, I think, work

1 the language --

2 MS. BATTLE: Okay, the staff can work on that.  
3 Why don't we -- what's the sense of the board? Do we  
4 want to go ahead and go forward with it? Now that  
5 we've just kind of outlined how this might work, the  
6 one leg up of putting it out now so that we know  
7 whether we need to deal with it at all from the public  
8 perspective.

9 Certainly, the board is going to have to make  
10 a policy decision on it; probably does make sense. So  
11 what's the sense of the board? John?

12 MR. BROOKS: Well, I think, point it out now  
13 to get the comments.

14 MS. BATTLE: And then -- okay.

15 MR. BROOKS: With Bill's paragraph seems to be  
16 quite adequate. I would suggest putting the -- noting  
17 the timing of the --

18 MS. BATTLE: Statute.

19 MR. BROOKS: -- Appropriations Act in relation  
20 to the administration positions.

21 MS. BATTLE: Right. I think we need to note  
22 all of the distinctions and the time.

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1 MR. McCALPIN: I wasn't attempting to draft  
2 the commentary. I was just trying to include that they  
3 were --

4 MS. BATTLE: To make it clear that these are  
5 issues that were not before us when we implemented the  
6 original rules so that these issues came subsequent to  
7 that. Therefore, we want some comment from the public  
8 before we reexamine them in light of these issues.

9 All right. Anything else on drug eviction?

10 We are now on to -- do we need to take a break  
11 or are we -- everybody is --

12 MR. McCALPIN: Just as long as we change  
13 files.

14 MR. FORGER: Which time zone are you working  
15 on?

16 MS. BATTLE: It's a quarter to 12:00. I'm  
17 with everybody else now. Why don't we take a five-  
18 minute break.

19 (A brief recess was taken.)

20 MS. BATTLE: Okay, the next reg up is 1627,  
21 Subgrants, fees and dues. And as I understand it, this  
22 particular reg has to do with the payment of dues.

1 There's a section in 504 which has to do with -- is it  
2 the use of any funds for payment of dues. And we've  
3 substantially revised this regular to address that  
4 provision in 504. Is that correct? Suzanne?

5 MS. GLASOW: That is correct.

6 MS. BATTLE: Okay, give us the background on  
7 this one.

8 MS. GLASOW: Basically, this regulation deals  
9 with two distinct issues. One is subgrants and one is  
10 fees and dues. So we have not addressed any of the  
11 subgrant issues in this regulation. We plan on doing  
12 that at a later date because we do need to deal with  
13 that.

14 So the provisions we addressed were those that  
15 are under the current section in the rule which I just  
16 lost. It is Section 4 on fees and dues. And we have  
17 renamed it dues.

18 The first change we made was to the definition of fees  
19 and dues.

20 We've made it just a definition of dues  
21 because that is what the legislation restricts, payment  
22 of funds for dues. And we pointed out in the

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1 supplementary info that the prior definition of fees  
2 and dues was really just a definition of dues as it's  
3 currently defined and understood generally.

4 So if we just make it reflect the statutory  
5 language, we just are calling it dues and not fees and  
6 dues. And the new definition of dues means payments to  
7 an organization on behalf of a program or individual to  
8 be a member thereof, or to require voting or  
9 participatory rights therein.

10 It also includes dues required by a  
11 professional licensing body. So that's the new  
12 definition. It's in the Definition section of this  
13 part.

14 MS. BATTLE: So should the names be Subgrant  
15 and Dues?

16 MS. GLASOW: that was a suggestion we're going  
17 to make is take out that fees up there in the heading  
18 for the rule.

19 MS. BATTLE: All right.

20 MS. GLASOW: It doesn't flow as well, but --

21 MS. BATTLE: It's okay.

22 MR. TULL: The poets among us are sad to see

1 Subgrants, fees and dues go.

2 MS. GLASOW: Maybe that's why they did that,  
3 right? And then we revised a section for -- almost  
4 entirely. We took out all sorts of provisions that  
5 dealt with using other funds that are no longer  
6 applicable and it now reads in paragraph (a),  
7 corporation funds may not be used to pay dues to any  
8 private or non-profit organization, whether on behalf  
9 of recipient or an individual.

10 This restriction in the appropriations act  
11 only applies to LSC funds. It is Section 505 of the  
12 appropriations act. And we stated that in paragraph  
13 (b) of Section 4, paragraph (a) of this section does  
14 not apply to the payment of dues.

15 Well, excuse me, this number is here. Does  
16 not apply to the payment of dues to a governmental  
17 organization or to the payment of dues from non-LSC  
18 funds. There's two issues in paragraph (b).

19 The restriction only prohibits payment of dues  
20 to any private or non-profit organization, so we  
21 clarify in paragraph (b) that dues may be paid to a  
22 governmental organization with LSC funds and that non-

1 LSC funds are not restricted by this section.

2 MS. BATTLE: Okay. And --

3 MS. GLASOW: When I bring this rule back to  
4 the committee, I would suggest that, rather than  
5 bringing the entire rule we will just bring those  
6 sections of the rule that apply to fees and dues.  
7 We'll probably have the Definition section, but leave  
8 out the sections on subgrants because those are really  
9 inapplicable.

10 MR. McCALPIN: As long as you point out up  
11 front that you are only including certain portions of  
12 the regulation in the amendment.

13 MS. GLASOW: Okay. I'll make it really clear.

14 MS. BATTLE: Are there any questions about the  
15 background for this? Really, you have walked us  
16 through.

17 MS. GLASOW: There is two more minor points.  
18 We took out Section 7. We are deleting that because  
19 that is covered in Section -- in part 1612, I believe.

20 MR. McCALPIN: Right.

21 MS. BATTLE: And Section 7 has to do with  
22 Training and education activities?

1 MS. GLASOW: Yes.

2 MS. BATTLE: Okay.

3 MS. GLASOW: And we renumbered Section 8.

4 MS. BATTLE: And Section 8 remains as is set  
5 out in the rules, out.

6 MR. TULL: Just renumbered it.

7 MS. BATTLE: Okay. Are there any questions  
8 about this rule, Bill?

9 MR. McCALPIN: Explain to me the meaning of  
10 the last sentence before 1627.4 on page 3. Any  
11 expenditure of LSC funds for such payment may be made  
12 with corporation funds, provided they are made in  
13 accordance with applicable regulations. What does that  
14 mean?

15 MS. GLASOW: It should be non-corporation  
16 funds. It's a typo.

17 MR. McCALPIN: That does make a difference.

18 MS. GLASOW: Otherwise, it's internally  
19 inconsistent.

20 MS. BATTLE: Read that one back again. I  
21 missed that. It's on page 3.

22 MR. McCALPIN: Yeah.

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1 MR. TULL: He's talking about the commentary,  
2 right?

3 MR. McCALPIN: The last sentence in the  
4 paragraph that starts at the top of the page.

5 MS. BATTLE: Okay.

6 MR. McCALPIN: Why don't you read it, Suzanne?

7 MS. GLASOW: I almost hate to read it. I'll  
8 embarrass myself. I didn't edit this very well. This  
9 needs to be rewritten. Basically, what we're trying to  
10 say is, for those instances where LSC funds can be made  
11 for dues, they still have to be made in accordance with  
12 other applicable regulations.

13 So, in other words, this isn't a blanket. But  
14 I don't even know if we need to say that.

15 MR. McCALPIN: What other regulations would  
16 there be?

17 MS. GLASOW: I would suggest deleting that  
18 sentence. I don't know why it's in there.

19 MR. McCALPIN: Well, that certainly clarifies  
20 the meaning.

21 MS. BATTLE: Yeah, let's delete it.

22 MR. TULL: It's kind of like an appendix. It

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1 doesn't serve any purpose.

2 MS. BATTLE: All right, Bill?

3 MR. McCALPIN: Let me ask another question.

4 Following just below that, the next -- the two  
5 sentences below that. This prohibition includes  
6 payment of dues for employees. Is there any  
7 possibility that programs pay dues for pro bono senior  
8 lawyers, for instance, who render pro bono service?

9 There are a number of senior programs around  
10 the country that render pro bono, and I wonder --  
11 sometimes there are emeritus attorney rules and  
12 sometimes there are not. And I just wondered -- I'm  
13 focusing on the words "for employees." And I suspect  
14 that such a senior pro bono attorney would not be an  
15 employee. Would it apply there as well?

16 MR. TULL: It would apply. The prohibitions,  
17 the restriction would prevent payment of dues on behalf  
18 of a senior emeritus attorney who is a pro bono lawyer.

19 MR. McCALPIN: So it was the for employees  
20 that I was wondering if that was too restrictive.

21 MR. TULL: So it's just payment of dues.

22 MS. BATTLE: Now, in your explanation on dues,

1 if the bar association is not a governmental entity but  
2 it is the entity delegated the responsibility for  
3 oversight of the practice of law in that jurisdiction -  
4 - I'm trying to understand how, if you're delegated  
5 that state responsibility you are not a governmental  
6 entity.

7 In other words, it says even if the membership  
8 in the bar association is a requirement for practice in  
9 the jurisdiction, that that prohibition applies. So  
10 that means that there are lawyers who have to pay  
11 membership dues to a particular bar in order to  
12 practice in that jurisdiction.

13 And it seems to me if a state grants an  
14 association that authority to either restrict a person  
15 from being able to practice in a particular  
16 jurisdiction or not, that that entity has state action.  
17 And I'm just wondering, how does that work?

18 MR. BROOKS: Well, isn't there -- I'm sorry,  
19 excuse -- in the distinction between bar association  
20 and state bars, now, a state bar is a compulsory  
21 membership. Bar association is voluntary.

22 MS. BATTLE: But in Alabama your state bar

1 dues are mandatory.

2 MR. BROOKS: Yes, it's a state bar, not a bar  
3 association.

4 MS. BATTLE: It's the Alabama Bar Association,  
5 is what it's called?

6 MR. BROOKS: Is that what they call it?

7 MS. BATTLE: Yes, it is.

8 MR. BROOKS: Even though it's --

9 MR. ASKEW: The names vary.

10 MR. TULL: The problem is created by the  
11 language in the restriction in Section 505. The  
12 restriction is a restriction against payment of LSC  
13 funds for members of dues-paying private or non-profit  
14 organization, so that the governmental/non-governmental  
15 distinction is really based on a -- the actual  
16 prohibition is that you can't go to a non-profit  
17 corporation.

18 So the fact that the state supreme court may  
19 have delegated to the bar association a non-profit  
20 corporation responsibility for collecting the dues, it  
21 puts us in a position of having a regulation and  
22 recommending to you a regulation which really results

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1 in an inconsistent result based on the jurisdiction.

2 But it is -- we couldn't see a way around the  
3 precise language in the restriction. Since it is on  
4 the nature of the organization that is what triggers  
5 the prohibition.

6 MS. BATTLE: Linda?

7 MS. PERLE: There are some bars, for example,  
8 the D.C. bar, which are not non-profit organizations,  
9 they are arms of the court and they are created -- the  
10 D.C. bar was created by the court.

11 And there was and still is a voluntary bar  
12 association in the District of Columbia. That,  
13 clearly, you could not use LSC funds to pay those dues.  
14 But in D.C. because of the kind of entity that the bar  
15 is, you could use LSC funds to pay bar dues here.

16 Of course, then you wind up with the situation  
17 where some states you can pay them and some states you  
18 can't pay them, and that's one of their anomaly.

19 MR. McCALPIN: And they depend on whether  
20 there is a so-called integrated bar.

21 MS. PERLE: Not always. I think that what  
22 LaVeeda has suggested is that in Alabama it's an

1 integrated bar. But as far as you know, the bar, which  
2 is a non-profit organization, has been delegated the  
3 authority.

4 MS. BATTLE: The regulatory responsibility  
5 over the practice.

6 MS. PERLE: And it depends -- it may depend on  
7 the nature of another remaining --

8 MR. McCALPIN: Do you have to belong to that  
9 bar to practice?

10 MS. BATTLE: Yes. You have to pay \$100.

11 MR. ASKEW: Then it's an administrative arm of  
12 the Supreme Court, I would imagine.

13 MS. BATTLE: And so -- yeah, and if it is --

14 MR. ASKEW: And that makes it a state agency.

15 MS. BATTLE: Yeah, and that's my point. There  
16 are entities that are both, that have this state  
17 authority to either decide whether you can or cannot  
18 practice law, but they are also the Alabama Bar  
19 Association.

20 MR. HOUSEMAN: Is it a private or non-profit  
21 organization? I guess that's the language of the statute.

22 MS. PERLE: What Bucky suggests is, it may be

1 both.

2 MR. ASKEW: May be both. The State Bar of  
3 Georgia and many state bars are administrative arms of  
4 the supreme court. They are entities created by and  
5 every rule has to be approved by the supreme court.

6 MS. BATTLE: Right, right.

7 MS. PERLE: That's the way it is in D.C. as  
8 well.

9 MR. ASKEW: So they are, I would say in that  
10 sense, not a private or non-profit corporation.

11 MS. BATTLE: So that's why I asked this  
12 question about if they are in fact delegated the  
13 responsibility for regulating whether you get to  
14 practice law or not, I think that aspect of it, whether  
15 they have a not-for-profit aspect, splits it.

16 Because I'm not sure that what Congress was  
17 attempting to do is to say stop lawyers at legal  
18 services from being able to pay to practice, you know.  
19 This is one of those things you've got to have if  
20 you've got to be able to practice law in that  
21 jurisdiction. I think it has to do with  
22 voluntary associations, purely voluntary associations.

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1 MR. McCALPIN: Well, maybe what we've got to  
2 do is point out that there may be some entities which  
3 are both, not-for-profit, and governmental.

4 MS. BATTLE: And so the split is to pay the  
5 licensing fee, which is a requirement for practicing  
6 law, but not the association dues which may have to do  
7 with belonging to sections and some other things.

8 MS. PERLE: In D.C. you have both. There is -  
9 - the D.C. bar has dues, which -- and the D.C. bar is  
10 an administrative arm of the court, not a separate non-  
11 profit corporation. In addition, the D.C. government  
12 imposes a licensing fee. So lawyers in D.C. have to  
13 pay \$100 to the bar -- \$105 this year -- and \$250 to  
14 the D.C. government.

15 MS. BATTLE: Well, but I pay a licensing fee  
16 to the county as well. So I'm saying that's no  
17 different. But what we're trying to figure out is how  
18 to split this regulation in such a way that we don't  
19 preempt lawyers from being able to practice because  
20 their dues cannot be paid by their employer, they've  
21 got to pay them out of their pocket.

22 MR. McCALPIN: Well, but they can be paid with

1 non-LSC funds.

2 MS. BATTLE: Well, some grounds don't have any  
3 non-LSC funds and the non-LSC funds that they have may  
4 be specifically restricted as to what they can do.

5 MR. FORGER: I suppose they can do it in a  
6 salary schedule, too.

7 MR. HOUSEMAN: A couple of points on this.  
8 This is a point I'm going to make later in a different  
9 context. I'm a little reluctant to rely on the little  
10 legislative history that exists on this because by and  
11 large the legislative history often doesn't track the  
12 statutory language.

13 However, the only legislative history that  
14 exists on this provision was the House report language  
15 on the original appropriation bill back last summer.  
16 And that language said you can't use LSC funds to pay  
17 membership dues or fees to advocacy or professional  
18 membership organizations, may or may not advance this a  
19 bit

20 But it's clear in thinking of the history of  
21 this what -- the examples that were pointed to that led  
22 to this were allegations that programs paid dues to the

1 ABA and that the ABA was out trying to -- you know,  
2 battle with Congress over the future of legal services.

3 There was a number of allegations in the  
4 debates last year about payment of dues to the ABA,  
5 which actually is a myth. But that's -- who cares.

6 MR. McCALPIN: NLADA was involved.

7 MR. HOUSEMAN: The second one was NLADA and  
8 PAC. And that's the advocacy or professional, you  
9 know. So it's clearly trying to get at entities like  
10 that. And the dilemma comes around the very point  
11 we're discussing which is, the language of course  
12 didn't say that. It said private or non-profit  
13 organization.

14 This is again a problem. The history says one  
15 thing, the language says another. Maybe they mean the  
16 same thing, maybe they don't. But it's not --

17 MS. BATTLE: Yeah, and I think --

18 MR. HOUSEMAN: We've got a little bit of --  
19 there's room here for a regulatory interpretation. And  
20 part of what was done here was trying to track the  
21 language and stay within a framework that tracked the  
22 language. But it may not be -- you know, we may have

1 to go beyond that.

2 MS. BATTLE: Yeah.

3 MR. HOUSEMAN: And it's a difficult issue.  
4 We've been wrestling with it. All of us have been  
5 wrestling with it.

6 MS. BATTLE: Yeah. I am inclined to think --

7 MR. HOUSEMAN: Just trying to figure out where  
8 to draw that line.

9 MS. BATTLE: -- that the line should be drawn  
10 where there is a requirement. Now, if it is voluntary  
11 and if you can choose or choose not to participate in  
12 an association, I think that the voluntariness of it is  
13 what is restricted here. You can choose to be a part  
14 of the county bar. If it's not a requirement of  
15 practice, then we can't pay those dues.

16 But if the state, in order for you to practice  
17 in that jurisdiction, mandates that you pay dues to a  
18 particular bar association or state bar arm of the  
19 supreme court, then I don't think that the intent,  
20 given that legislative history, was to restrict  
21 program's ability to do that.

22 Tom?

1 MR. BROOKS: Can we say it shall not apply to  
2 the payment of dues mandated by a governmental  
3 organization? In other words, the Alabama bar --

4 MS. BATTLE: Bar, yes.

5 MR. BROOKS: -- fees are mandated by the  
6 supreme court as they are in Georgia.

7 MS. PERLE: Can you say that again, please?

8 MR. BROOKS: I said payment of dues mandated  
9 by --

10 MS. BATTLE: Mandated as a requirement for  
11 practice.

12 MR. BROOKS: Yes.

13 MR. McCALPIN: Of dues mandated by --

14 MS. BATTLE: As a requirement of practice.

15 MR. McCALPIN: By a governmental organization.

16 MR. ASKEW: But unified bar is not a trade  
17 association. And it's subject to the Keller decision,  
18 the Supreme Court decision. They can't use those  
19 mandatory dues to do things that are not related  
20 directly to the practice of law.

21 And so, if you -- in our state, if you want to  
22 contribute to the legislative advocacy fund, you have

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1 to make a voluntary contribution over and above your  
2 bar dues to do that. And I think we're safe in the  
3 sense that this is not violative of the spirit, I  
4 think, of what they were trying to restrict here.

5 MR. McCALPIN: I don't think there is any such  
6 separate fund in Missouri.

7 MR. BROOKS: Well, some states do and some  
8 states don't.

9 MR. ASKEW: Do you have a unified bar?

10 MR. McCALPIN: We pay our dues to the Supreme  
11 Court.

12 MS. BATTLE: Is that Rick? Did you have  
13 something? Okay.

14 MR. TEITELMAN: To amplify on what Bill says,  
15 I'm on the board of governors of the Missouri bar, and  
16 what they do with color is, we don't have a separate  
17 fund. If someone objects, has a -- sends a complaint  
18 in or something to the Missouri bar, the Missouri bar  
19 refunds their \$6.12.

20 (Hubbub)

21 MS. BATTLE: Now, if we changed the language  
22 in (b), we need to change the language in the

1 commentary because the commentary said --

2 MS. GLASOW: That's really the problem.

3 MS. BATTLE: Yeah. The commentary really said  
4 even if it's a requirement of practice. And that's why  
5 I highlighted it and raised the issue. And we need to  
6 point out, if it is a requirement in order to practice  
7 in a jurisdiction, we may pay that portion of the dues  
8 that relates to that requirement.

9 Okay, is there anything else in our new  
10 section, Subgrants and dues that we need to address?  
11 Anything from the Inspector General on this?

12 MS. TARANTOWICZ: No.

13 MS. BATTLE: No? All right, we are 15 minutes  
14 ahead of schedule. We are going to take a lunch break.  
15 Let's take a lunch break and then we'll resume after a  
16 45-minute lunch break.

17 (Whereupon, a luncheon recess was taken.)

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A F T E R N O O N S E S S I O N

(1:10 p.m.)

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MS. BATTLE: Okay, we're back on the record and pick up with where we left off. We're on 1640, which is the application of federal law to LSC recipients. 1640 is -- let's just take a moment to find it.

MS. GLASOW: It's a brand new rule.

MS. BATTLE: It's a brand new rule, okay. It's a brand new rule, so give us the background on this.

1 MS. GLASOW: There is a new restriction in our  
2 appropriations act that requires that recipients use  
3 their LSC funds in accordance with federal law relating  
4 to the proper use of federal funds.

5 They must enter a contractual agreement with  
6 the corporation before they get a grant to be subject  
7 to that law. If they violate that agreement, it in  
8 essence means they violated the law. Then Congress  
9 expects us to terminate their grant.

10 And so, this rule deals with all that. We  
11 worked very closely with the Office of Inspector  
12 General on this because it certainly is their area of  
13 experience in federal law, related to the proper use of  
14 federal funds. This provision has a lot of legislative  
15 history which helped us in defining just what law the  
16 grantees would be subject to and what the intent of  
17 Congress was behind that.

18 And I believe we're in full agreement with the  
19 Office of Inspector General on this rule and we've  
20 worked very closely with them in defining that.

21 MS. BATTLE: We don't have anyone from the  
22 Inspector General's office here right now. But I would  
23 expect that someone should be joining us shortly.

1 MS. GLASOW: I think -- I mean, they may come  
2 but I think their feeling was that we're in consensus  
3 with this and they weren't going to sit through  
4 regulations or sit through the meeting where they have  
5 no comment beyond the fact that they --

6 MS. BATTLE: My concern is this, that if they  
7 do have any concerns at all, now is the time to raise  
8 it. So if they want to have input, they do need to  
9 have someone present. And my position is at all times  
10 so that they can participate fully in the discussions  
11 and raise any concerns that they have.

12 Okay, why don't we, with that background,  
13 begin first if there are any editing concerns with the  
14 comments that we raise them. I have one. Let's take  
15 page 1 first. are there any on page 1?

16 MR. McCALPIN: Yeah. You've got a split  
17 infinitive.

18 MS. BATTLE: Okay. Let's find that split  
19 infinitive and unsplit it.

20 MR. McCALPIN: The next to the last line.

21 MR. BROOKS: Furthermore, I think regards  
22 ought to be singular.

1 MS. BATTLE: Thank you.

2 MR. BROOKS: In regards to? Is that right?

3 MS. BATTLE: I got it.

4 MR. BROOKS: That appears twice.

5 MR. McCALPIN: I assume that you are regularly

6 eliminating the quote marks before 5 USC on page 2.

7 This happens lots and lots of time. But in the more  
8 recent drafts I see those quote marks are eliminated.

9 MS. GLASOW: No, I don't know where that's at.

10 MR. McCALPIN: Well, that happens frequently.

11 MS. PERLE: I think actually that quote mark  
12 was probably supposed to be closed quote around  
13 impracticable, unnecessary.

14 MR. McCALPIN: Well, if so, then there is no  
15 opening quote.

16 MS. PERLE: Right.

17 MS. BATTLE: There isn't.

18 MS. PERLE: I think that's what it is.

19 MS. GLASOW: I'm not sure, but I will check  
20 that out and make sure it's corrected in all the regs.

21 MS. BATTLE: Okay.

22 MR. McCALPIN: I'm not sure that it's -- I

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1 would suggest to you that in the supplementary place  
2 the second full paragraph on page 2, the end of the  
3 first sentence it relates over to the front of Section  
4 2. That is, this is not only LSC funds, it's all  
5 federal funds.

6 MS. BATTLE: Yeah, and --

7 MR. McCALPIN: For instance, Title 3 funds  
8 that come to a program are all federal funds. And I  
9 would think that this regulation applies to all federal  
10 funds that come to a program, not just LSC.

11 MS. GLASOW: We talked to the OIG about that,  
12 and the restriction, statutory restriction, we  
13 interpret the restriction for our grantees for the  
14 purposes of our grant to only apply to LSC funds. That  
15 is why further down in this statutory requirement it  
16 says for this -- for such purposes the corporation  
17 shall be considered a federal agency and all funds  
18 provided by the corporation shall be considered federal  
19 funds.

20 So for the purposes of this -- now, we know  
21 that our grantees get other federal funds, but it will  
22 be their federal grantors. For instance, if they get a

1 HUD fund.

2 A PARTICIPANT: Who will regulate that?

3 MS. GLASOW: That they will be subject to that  
4 law, but it will be up to their grantors to take care  
5 of that.

6 MR. McCALPIN: Look at 19.

7 MS. GLASOW: However, we did point out that  
8 our Inspector General always has authority to go in and  
9 look to see how they are handling other funds. But for  
10 purposes of this particular restriction, we have  
11 interpreted it only applying to LSC funds.

12 MR. McCALPIN: Oh, but that's not what 19  
13 says. It says enters into a projected agreement to be  
14 subject to all provisions of federal law relating to  
15 the proper use of federal funds. It seems to me that's  
16 all federal funds. It's not just LSC funds.

17 MS. GLASOW: That's why below it is important  
18 that it says --

19 MS. BATTLE: What page is that on, so I can  
20 find it, Bill? The law?

21 MR. McCALPIN: The law is 11.

22 MS. GLASOW: It's 504(a)(19)

1 MR. McCALPIN: It's 19. It's (a)(19).

2 MS. BATTLE: Okay.

3 MS. GLASOW: We have a definition of federal  
4 law relating to the proper use of federal funds and it  
5 is seemingly a very broad statement and rather vague.  
6 And we had to look the legislative history to see what  
7 Congress meant by that.

8 And you have to look below and say that for  
9 such purposes, for purposes of complying with this law,  
10 the corporation shall be considered a federal agency  
11 and all funds provided to the corporation shall be  
12 considered federal funds.

13 MS. BATTLE: So it's really, if you were to  
14 take that statute and flip it and they gave the  
15 qualifying language first --

16 MS. GLASOW: Right.

17 MR. McCALPIN: -- then you would know that in  
18 the later language they were really relating to the  
19 fact that for these purposes they have deemed the LSC  
20 funds to be federal funds and LSC to be a federal  
21 agency.

22 And therefore, any entity must enter into a

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1 contractual agreement that this -- that all the  
2 provisions of federal law relating to fraud, waste and  
3 abuse will apply to these funds because they are  
4 federal funds.

5 MS. GLASOW: Yes, because normally, I mean,  
6 Congress created us a private, non-profit corporation.  
7 Our funds are normally not considered to be federal  
8 funds once the corporation receives them, nor are we a  
9 federal agency. So for the purposes of the  
10 requirement in this restriction and for the law that  
11 they mean under this restriction, it was necessary for  
12 Congress to clarify that for these purposes LSC funds  
13 are federal funds and the corporation is a federal  
14 agency for the purpose of requiring grantees to be  
15 subject to this law.

16 MR. McCALPIN: There is no disagreement with  
17 any of that, but are you suggesting that if somebody  
18 embezzles Title III funds it isn't a violation of  
19 federal law?

20 MR. HOUSEMAN: No, no.

21 MS. GLASOW: No.

22 MR. HOUSEMAN: It's a question of who has the

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1 responsibility to enforce it.

2 MR. TULL: Would our contract then be null and  
3 void because of something that happened in another  
4 program?

5 MR. McCALPIN: Seems to me what Congress was  
6 saying is that all federal funds that go to one of our  
7 grantees are subject to the federal statutes.

8 MS. BATTLE: The problem becomes, it seems to  
9 me, if that were true, you would have cross, over  
10 cross, and double enforcement. You would have the  
11 agency responsible for granting the funds with this  
12 enforcement mechanism in place to determine how that  
13 embezzlement ought to be treated.

14 And you would have LSC then reaching over to  
15 those funds, saying we are also in place and we are  
16 going to do something about how these federal funds are  
17 treated. And you may have differing results. I mean,  
18 it may be that that agency decides, based on the  
19 information it has and its -- and what it has in place  
20 in order to monitor compliance with this same provision  
21 relating to the proper use of federal funds that one  
22 result ought to occur.

1           And then, if we come in, we may decide some  
2 other result ought to occur. You know, it seems to me  
3 that as I read Section 19, the reason for the second  
4 part of that section was to clarify what federal funds  
5 were being referred to in the earlier part.

6           It made more sense if the statute had flipped  
7 and the definition had been given first before the  
8 actual language setting out the application of it were  
9 given. But I don't think that there's an intent here  
10 that LSC reach over into other jurisdictions for other  
11 federal funds and do some sort of enforcement for that.

12  
13           MS. GLASOW: That doesn't mean we're not  
14 interested if we find out one of our grantees has  
15 embezzled their HUD grant funds or something. And we  
16 certainly have all kinds of provisions in our act that  
17 deal with efficiency and effective use.

18           And, I mean, that would be a good reason for  
19 us to go in and make some sort of sanction or action or  
20 just say -- make that process for competitive bidding  
21 or whatever. I mean, we have other ways to handle  
22 that.

1 MS. BATTLE: But there are flip sides to each  
2 one of these. Is it our obligation? If for some  
3 reason we don't do it, have we fallen down on our  
4 obligation to investigate a Title III usage of funds?

5 MR. McCALPIN: Well, putting it another way,  
6 if they misuse Title III funds, does that make their  
7 contract null and void?

8 MS. GLASOW: Not in our interpretation  
9 according to this provision because we are there to  
10 enforce the use of LSC funds as they are determined to  
11 be federal funds and to make sure that they are used  
12 properly.

13 MR. McCALPIN: I would have read this as  
14 relating to the proper use of federal funds, including  
15 LSC funds.

16 MS. BATTLE: Well, it doesn't say that.

17 MR. McCALPIN: I would read it that way.

18 MR. BROOKS: I agree. I think the plain  
19 reading of the statute is just that. It's sort of a  
20 parenthetical, appositive clause that identifies  
21 corporation funds provided by the corporation as  
22 federal funds, not to limit the service clause, but to

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1 underscore the fact that they really are.

2 MR. HOUSEMAN: Two things trouble me about  
3 that. One, just look at the history of this. This  
4 started with McCollum-Stenholm in 1989. And it's been  
5 in McCollum-Stenholm, revised slightly, up until the  
6 current bill, last year's, and this Kassebaum bill,  
7 which the committee just put out of the Senate earlier.

8 And both of those bills, if you read the text  
9 of their language, which is what this is based on, talk  
10 about making LSC funds federal funds for the purposes  
11 of federal fraud, abuse and waste laws. And that's  
12 what they were all about.

13 And the argument was that LSC funds weren't  
14 subject to federal laws on fraud, waste, and abuse.  
15 And so, we have to make them subject to these federal  
16 laws because they are getting away with murder out here  
17 because they are not subject like any other federal  
18 grantee to these laws.

19 Aside from whether that's true or not, that  
20 was the allegation that was made that led to this and  
21 that's what the committee report said that relate to  
22 this.

1           Secondly, if you look at, again, the questions  
2 about on line 1 on legislative history, but the  
3 December conference report language talks about the  
4 conference agreement includes provisions proposed by  
5 the House that the corporation be considered a federal  
6 agency, all funds provided by the corporation be  
7 considered federal funds, and all grantees be subject  
8 to all federal laws regarding the proper use of federal  
9 funds.

10           If you read it that way, it seems to me that  
11 what we're talking about is exactly consistent with the  
12 history of trying to impose federal waste, fraud and  
13 abuse criminal provisions and the False Claims Act  
14 provisions on LSC funds, which arguably before wasn't  
15 clear.

16           So that seems how, when we looked at this  
17 first blush, this language, that's how we interpreted  
18 it. And I think that's a framework that's consistent  
19 with its history and consistent with the explanation  
20 that goes with why this is being put in.

21           MS. BATTLE: Renee?

22           MR. HOUSEMAN: I don't know if that's helpful

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1 or not.

2 MS. BATTLE: I think that is helpful, because  
3 again, as I said, it seems that the conference report  
4 flips it and first gives an explanation of federal --  
5 of LSC funds being deemed federal funds for purposes of  
6 being subject to the laws relating to proper use.

7 And then they go on to make the statement  
8 about the proper use of these funds which, once you  
9 flip the two statements, it gives a qualification that  
10 you don't have if you do it in the opposite direction.

11 MR. BROOKS: Well, I was just going to follow  
12 up on Alan's comment that legislative history certainly  
13 is significant to me. But I think it ought to be  
14 spelled out in the commentary rationale to rebut the  
15 impression that Bill and I both have from the plain  
16 reading of the words.

17 MR. McCALPIN: I don't think you go to  
18 legislative history unless it's unclear. And I don't  
19 think it's that unclear.

20 MS. SZYBALA: The problem is, this is not a  
21 correct interpretation that these basically fraud and  
22 abuse statutes are not what they meant. I don't have

1 any idea what they meant and I don't know that anybody  
2 in LSC would have an idea what they meant.

3 The statutes that relate to proper use of  
4 federal funds are more or less in Title 31. They are  
5 Financial Management Act and the Chief Financial  
6 Officers Act and all kinds of things that end up being  
7 implemented through OMB circulars, which are kind of  
8 mandatory to the grantees on how to use federal funds.

9 I don't see a suggestion here that that's what  
10 Congress was talking about. That would be a big flip  
11 for LSC. And the way it's interpreted here, I think  
12 the OIG agrees with because it's rational and it is  
13 based on the history of all these statutes, which kind  
14 of ended here in this appropriation.

15 But they were talking about federalizing LSC  
16 to the point of making the fraud statutes, the criminal  
17 statutes apply. And then it's not really use of  
18 federal funds we're talking about, it's actions of  
19 grantees, I mean.

20 And I came in in the middle and I'm not sure  
21 what the essence of the confusion is. This reg, this  
22 statute, doesn't have any bearing on the grantee's use

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1 of other federal funds. The grantees have always been  
2 subject to these criminal statutes based on those other  
3 funds.

4 I even suggested a line in the commentary that  
5 management didn't want to put in there that said this  
6 is no different than the fact that the grantees are  
7 already subject to these federal laws, given their  
8 interactions with other federal agencies they accept  
9 funding with.

10 These laws don't really apply to the use of  
11 the funds, they apply more to the interaction of the  
12 agency so that these are laws that get you if you are  
13 lying to your funder and that get you if you are  
14 embezzling, if you are stealing from your funder. But  
15 they don't really apply to your use of the funds at  
16 all.

17 MR. BROOKS: As a practical matter, what  
18 you're saying, I think, is that funds received from  
19 other federal agencies, Title III, or whatever it is,  
20 are already subject to these laws.

21 MR. HOUSEMAN: Yes, that's correct.

22 MR. BROOKS: So as a practical matter --

1 MS. SZYBALA: Yes. And I have to say  
2 something -- yes.

3 MR. BROOKS: -- the only effect of this new  
4 statute is to apply them to LSC funds.

5 MR. McCALPIN: But the real question, it  
6 seems to me is going to be is if there is a misuse of  
7 other federal funds, does the provision about render  
8 any grant or contractual agreement to provide funding  
9 null and void apply?

10 MS. GLASOW: We cannot void a grant between  
11 the recipient and HUD. HUD has to do that. It's their  
12 funds.

13 MS. SZYBALA: The contractual provision --

14 MS. GLASOW: We can only void our agreement.

15 MS. SZYBALA: Right. The contractual  
16 agreement should make it specific to LSC funds. I  
17 mean, what they're agreeing to is for the purpose of  
18 these laws applying in this context. LSC is federal  
19 and its funds are federal. That only applies to LSC  
20 funds. I mean, it has no effect on other funding.

21 I was going to say something about  
22 investigation in other statutes, other funders that are

1 -- other federal grant monies. If other federal grant  
2 monies are involved, it really would depend on the  
3 circumstances. The OIG, this OIG, is considered in the  
4 federal community the cognizance agency.

5           Whether we are or not, that's the way we are  
6 perceived, and it's only because we are the major  
7 funder of most of our funding sources. And OMB  
8 correlates the funding source that provides the most  
9 money is the funding source in charge of all kinds of  
10 things, including the audits and the investigation of  
11 money rip-offs.

12           So that, when there is a theft at our  
13 grantees, we don't go asking is this a theft out of LSC  
14 account? We investigate all thefts. And other funding  
15 sources expect us to.

16           Now, if somebody wanted to prosecute somebody  
17 for giving HHS false information, that would be HHS's  
18 problem. That would not be something that is of any  
19 interest to us in terms of investigating. But for  
20 thefts, we are the agency primarily responsible to  
21 investigate.                   And I just heard something  
22 come up that --

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1 MS. BATTLE: Well, I think I raised the point  
2 in part by saying if in fact this had some application  
3 to other federal funds, then do we have the enforcement  
4 responsibility as well? So I think that your statement  
5 really responds to that, in part.

6 But there are two problems here. One is, what  
7 I'm getting from two of my members is that a plain  
8 reading of the provision of 504(a)(19) leads them to  
9 believe that there is a broader interpretation than the  
10 legislative history would lead one to believe.

11 And so, I think that John's statement is  
12 accurate. We probably do need to address this in our  
13 commentary so that it is clear how we arrive at the  
14 interpretation that we give to the statute. Because  
15 the plain meaning of it, if you read it --

16 MS. GLASOW: We can do that.

17 MS. BATTLE: -- is not clear. Okay, John.

18 MR. BROOKS: I think in 1640.3, defining the  
19 contractual agreement, we should say with respect to  
20 funds received from LSC. That would narrow it.

21 MS. BATTLE: Okay. I have one just -- and  
22 it's an editing change on page -- the top of page 3.

1 MR. BROOKS: Well, I've got another one on  
2 page 2.

3 MS. BATTLE: Okay, let's go back to 2.

4 MR. BROOKS: The second full paragraph, I  
5 think the second sentence should be eliminated, in the  
6 first place. I don't think we should say in the  
7 commentary that it will provide an invaluable tool and  
8 I think it speaks for itself as to accountability. I'd  
9 just drop that sentence.

10 MS. BATTLE: Tell me -- read the sentence you  
11 want dropped.

12 MR. HOUSEMAN: Where are you?

13 MR. BROOKS: Second sentence of the second  
14 full paragraph.

15 MS. GLASOW: So you just want it to say to  
16 ensure program accountability?

17 MR. BROOKS: The requirements of this rule are  
18 intended to provide an invaluable tool.

19 MR. HOUSEMAN: Yeah.

20 MS. BATTLE: All right. Can we move on to  
21 page 3? At the top of 3, the purpose of this rule is  
22 to ensure that recipients' LSC funds are considered

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1 federal funds instead of saying for the purposes of  
2 applicable federal law relating to the proper use of  
3 federal funds, really.

4 MR. McCALPIN: Where are you?

5 MS. GLASOW: Expand upon it?

6 MS. BATTLE: Yeah, at the top of page 3. For  
7 the purposes of applicable federal law really doesn't  
8 communicate anything, I don't think.

9 MR. HOUSEMAN: Explaining the proper use of  
10 federal funds, right?

11 MS. BATTLE: Uh-huh.

12 MS. GLASOW: In the middle of page 3 there is  
13 an errant word. It's Stop.

14 MS. BATTLE: Stop. I have that circled. It  
15 just sounds like somebody dictating, and then stop.

16 MS. GLASOW: That was a message to myself that  
17 that's where I stopped editing and I forgot when I came  
18 back to it.

19 MR. TULL: This is really a telegraph. This  
20 is a telegraph.

21 (Hubbub)

22 MS. BATTLE: Well, the other thing I was going

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1 to ask, since we're going page by page, do we list all  
2 of the laws that come under the proper use of federal  
3 funds there?

4 MS. GLASOW: Yes. That is in the definition  
5 section.

6 MR. BROOKS: But don't do it twice. I say  
7 leave it to the definition in the regulation. I don't  
8 think there is any need of saying the same thing in the  
9 commentary.

10 MS. GLASOW: Take out commentary.

11 MR. BROOKS: Now, back up to line 2, since  
12 we're in editing changes of 40.2, use of federal funds,  
13 in regards, I would take the S off. And to their use  
14 of their LSC funds, strike the word "their."

15 And in the following sentence I question  
16 whether we want to say, "The corporation interprets."  
17 I would say, "The regulation interprets this."

18 MS. BATTLE: Anything else on page 3?

19 MR. McCALPIN: Again, John, that states  
20 basically the position you and I had with respect to  
21 federal funds, because should the subject of federal  
22 laws which deal generally with fraud and abuse relating

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1 to federal funds with respect to the funds from LSC.  
2 Otherwise, you could read this as being broad.

3 MS. BATTLE: Right.

4 MR. BROOKS: Well, I would say it shows with  
5 respect to such funds, the end of the third line.

6 MS. BATTLE: We've been saving our "suches,"  
7 but we can use them up now.

8 MR. BROOKS: What?

9 MS. BATTLE: The use of such. We've been  
10 saving that for later because we have used the word  
11 such over and over again.

12 MR. HOUSEMAN: We have grammatical rules we  
13 have to follow now?

14 MS. BATTLE: Yes.

15 MS. PERLE: Such funds could be federal funds,  
16 maybe? Page 2?

17 MR. BROOKS: All right. Looks good to me.

18 MS. BATTLE: Okay, anything else on page 3?  
19 Page 4? Page 5?

20 MR. McCALPIN: I have difficulty doing it this  
21 way because the text refers to the commentary and I  
22 don't see -- we've been dealing first with commentary

1 and then with text. But if you'll look at (b)(2) on  
2 page 9, that's referred to, I think, in the first full  
3 paragraph on page 4.

4 It seems to me that the employee or board  
5 member has been convicted of or judgment for violation  
6 of any of the laws by a federal court, it seems to me  
7 that only if there has been such a conviction or  
8 judgment with respect to LSC funds. A board member  
9 could have been convicted independently of misuse of  
10 LSC funds.

11 MR. HOUSEMAN: Or other funds.

12 MS. GLASOW: Right.

13 MR. McCALPIN: What?

14 MR. HOUSEMAN: Yeah.

15 MS. SZYBALA: And we were going to suggest  
16 adding that language with LSC funds.

17 MR. McCALPIN: Yeah.

18 MS. SZYBALA: But LSC funds doesn't -- these  
19 laws don't speak to the use of funds.

20 MR. McCALPIN: Beg pardon?

21 MS. SZYBALA: Putting the use of LSC funds  
22 doesn't work here because the laws do not speak to the

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1 use you make of LSC funds. Not one of these laws  
2 speaks to your use of LSC funds. These laws speak to  
3 stealing the funds of the agency and these laws speak  
4 to your getting more or less your grant money under  
5 false pretenses.

6 But not -- they speak about you doing criminal  
7 action. They don't speak about using funds in any  
8 particular way.

9 MR. McCALPIN: My point is that if a board  
10 member is a businessman, who in connection with his  
11 outside  
12 business --

13 MS. SZYBALA: Right. I understand your point.

14 MR. McCALPIN: -- has been the subject of a  
15 conviction or a judgment, then that shouldn't  
16 necessarily make this applicable.

17 MS. GLASOW: What if we change it to with  
18 respect to its LSC funds or its LSC grant?

19 MR. TULL: Its LSC grant. Isn't that the  
20 issue, is getting LSC grant?

21 MS. SZYBALA: No, it's interactions with LSC.  
22 I mean that more or less most of these statutes, the

1 theft ones relate to LSC funds. But there I would have  
2 to disagree with you because the funds are not  
3 sufficiently -- I don't mean to debate all day whether  
4 they are supposed to be sufficiently distinct in terms  
5 of keeping funds so that you could tell which ones were  
6 stolen. And really, basically you can't.

7 MS. BATTLE: Can we fix that in the definition  
8 though, is what I'm wondering? Can we define --

9 MR. McCALPIN: Well, that's where we are.  
10 That's where we are.

11 MS. BATTLE: I thought you were --

12 MR. McCALPIN: We're in a violation of the  
13 agreement means (2).

14 MR. BROOKS: Page 9.

15 MR. McCALPIN: Page 9.

16 MS. BATTLE: Okay.

17 MR. McCALPIN: An employee or a board member  
18 has been convicted of any of the laws. Now, he may be  
19 a board member particularly, could be convicted of a  
20 violation of one of those laws totally irrespective of  
21 the program.

22 MR. HOUSEMAN: Right.

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1 MR. McCALPIN: Then his own business, private  
2 life, and whatever.

3 MS. BATTLE: Well, you say earlier for the  
4 purposes of the laws listed, LSC shall be considered a  
5 federal agency and the recipient's fund shall be  
6 considered federal funds. So that's a predicate to  
7 what you're about to say here.

8 And it seems to me if you use LSC funds in  
9 this context, you've already laid the predicate that  
10 you're talking about LSC funds in the context of them  
11 being considered to be federal funds and also in the  
12 context of LSC being considered to be a federal agency.

13 MR. McCALPIN: But that's not the way that  
14 paragraph reads.

15 MR. TULL: That sounds like a different issue.  
16 You're talking about if somebody is convicted for  
17 violating one of these statutes, but regarding your  
18 transaction work totally unrelated to this --

19 MS. SZYBALA: But that's not a violation of  
20 the agreement.

21 MR. TULL: No, but that's not what this says.  
22 What this says is --

1 MR. McCALPIN: But that's the way this  
2 paragraph reads.

3 MR. TULL: -- you have been convicted of a  
4 judgment, then the following things will apply. So  
5 Bill is just saying we should make certain that this is  
6 written in a way which clarifies --

7 MS. BATTLE: With respect to its use of LSC  
8 funds.

9 MS. SZYBALA: Not use.

10 MR. TULL: The problem that Renee is raising  
11 is that --

12 MR. HOUSEMAN: It isn't just the use.

13 MR. TULL: It isn't the use of funds because  
14 the crime may not involve the use of funds, the crime  
15 involves an action which can be -- is in relation to  
16 the grant, is it not?

17 MR. HOUSEMAN: That's what I was trying to  
18 say.

19 MS. GLASOW: We're searching for a language.  
20 I think we know what we want to say.

21 MS. SZYBALA: Right. I don't think we  
22 disagree.

1 MS. GLASOW: Maybe we can agree in principle  
2 and we can come back to you with some language. Maybe  
3 we were saying it's a violation of the agreement under  
4 its LSC grant.

5 MR. HOUSEMAN: Right. That's what we're  
6 trying to get at.

7 MS. BATTLE: Violation of its agreement under  
8 the LSC Act -- grant.

9 MS. GLASOW: Something like that. We will  
10 need to sort of work with the OIG on this.

11 MS. BATTLE: Okay.

12 MR. BROOKS: Well, shouldn't that apply both  
13 to 1 and 2?

14 MR. HOUSEMAN: Yeah, it should.

15 MR. McCALPIN: Well, that's the recipient  
16 though, the recipient that makes it much easier, it  
17 seems to me. But when you get to an employee or a  
18 board member, then you have the potential for outside -  
19 -

20 MS. BATTLE: Well, John is -- John is raising  
21 a point. The recipient could be convicted of something  
22 relating to its funds that it receives from Title III.

1 And does that violate our agreement? -- becomes the  
2 question.

3 MS. SZYBALA: The agreement should say in  
4 relationship to its use of, or it may have to have lots  
5 of little things in it in common, the use of LSC funds  
6 or its interaction --

7 MS. GLASOW: LSC funding activity? Something  
8 under the LSC --

9 MS. SZYBALA: We will have to pin it to LSC  
10 funds.

11 MR. HOUSEMAN: What I think we're saying is,  
12 (1) and (2) under (b) there has to be a qualifier and -  
13 -

14 MS. BATTLE: To make sure that we're relating  
15 to LSC --

16 MR. HOUSEMAN: -- that does -- I mean, Renee  
17 has pointed out this problem and we've pointed out this  
18 problem. So --

19 MS. BATTLE: So let's find it.

20 MR. HOUSEMAN: -- if we do a draft here --

21 MS. BATTLE: Yeah.

22 MR. HOUSEMAN: I think we can work out a

1       qualifier for both of those that addresses this point.

2               MS. BATTLE:   Okay, that's good.

3               MR. HOUSEMAN:   Maybe I'm wrong.

4               MS. BATTLE:   Okay.   I had called for any  
5 editing changes.   Do we have any others to the  
6 comments?   If not, we've gone through some portion of  
7 this.   Let's look at the rule.

8               MR. BROOKS:   I've got some comments on the  
9 rule itself.

10              MR. McCALPIN:   Well, I've got some comments on  
11  
12 page 4 of the comments.

13              MS. BATTLE:   Okay.

14              MR. McCALPIN:   I think it's sort of inelegant  
15 to talk about getting a grant.   Why don't we talk about  
16 as a condition of receiving?

17              MR. HOUSEMAN:   Get?   Oh, I see, page 4,  
18 getting a grant, receiving.

19              MS. BATTLE:   Okay.

20              MR. BROOKS:   IN regards again.

21              MS. BATTLE:   Take that in regards out.

22              MR. BROOKS:   Well, just the "s" on regards.

1 MS. GLASOW: I'll do a word search for that.

2 MR. McCALPIN: I thought that somewhere along  
3 the line yesterday their suggestion was that wherever  
4 we referred to the 1996 appropriation act, three lines  
5 from the bottom is 504(19)(a) without a reference to  
6 where that comes from.

7 MS. BATTLE: Of the 1996.

8 MR. McCALPIN: Well, whatever we're doing.

9 MS. BATTLE: Right. Because in time, people  
10 are going to forget what that relates to. I mean, this  
11 may be here for the next 20 years and we may have 20  
12 other appropriations that happen after that. Okay,  
13 well taken. Anything else on that page 4?

14 MR. McCALPIN: Yeah, the quote at the bottom  
15 of the page leaves out the phrase "considered to be."  
16 The statute says in all funds --

17 MR. BROOKS: It has considered to be in it.

18 MR. McCALPIN: -- shall be considered to be  
19 federal funds provided by grant or contract is the way  
20 the statute reads.

21 MR. BROOKS: Well, considered to be is in  
22 there twice.

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1 MR. McCALPIN: Yeah.

2 MS. BATTLE: Oh, okay.

3 MR. McCALPIN: Oh, no, I'm sorry. But this is  
4 presumably a quote from the statute.

5 MS. GLASOW: Yes. I'll fix that.

6 MR. HOUSEMAN: Yes, you're right. Bill's  
7 right.

8 MS. BATTLE: Quote to be corrected. All  
9 right, anything else?

10 MR. SMEGAL: How far are you on page 8?

11 MS. BATTLE: WE're on page 5 still, page 5, if  
12 there's anything.

13 MR. BROOKS: Well, the third line of 1640.4,  
14 section 504(a)(19) clearly evidences Congressional  
15 intent that a recipient's funding be terminated if  
16 there is a violation of the applicable federal law.

17 Should we add that point also related to LSC  
18 funds?

19 MS. GLASOW: Take out applicable and be more  
20 specific.

21 MS. BATTLE: And we'll add after the 504(a)(6)  
22 of the 1996 appropriation.

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1 MR. BROOKS: The question which I raised --  
2 will raise -- relates to the language of the regulation  
3 itself about the tendency of an appeal. It bothers me  
4 to have this automatic with a judgment or conviction if  
5 there is a legitimate appeal. And the sanction really  
6 here is -- it's automatic without a hearing, just by an  
7 appeal. I think if there is an appeal, at least there  
8 ought to be a hearing.

9 MS. GLASOW: That I think would be a policy  
10 call by the board when we get to the actual text. We  
11 were trying to draw the line at some point because  
12 Congress expects us to terminate a grant if there has  
13 been a violation of that law.

14 And, you know, we thought, well, gee, do we  
15 want to wait for an appeal to finish? It could take  
16 years. How long do we want to wait? But, I mean, it  
17 does raise the issue of what is --

18 MS. BATTLE: Once it's final -- my thoughts  
19 are this. If there is a judgment or a conviction, it's  
20 final, it's not appealed, then you don't need a  
21 hearing. If there is an appeal, then I think there is  
22 the prospect of the need for a hearing because of the

1 point that John raised.

2 It may be meritorious. There may be a major  
3 error. And at least a hearing before a final decision  
4 is made about the violation of the agreement aspect of  
5 it may make sense.

6 MS. GLASOW: You mean a hearing by the  
7 corporation?

MS. BATTLE: Yes.

8 MS. GLASOW: That -- the reason that's a  
9 problem, and I was going to get into that when we got  
10 into the text, the corporation -- I mean, there are  
11 proper authorities to decide whether someone has  
12 violated this federal law. And we got involved in a  
13 case in California where we were trying to say that one  
14 of our grantees was not using its funds in accordance  
15 with the IOLTA regulations in the state.

16 And we interpreted that law one way and we  
17 wanted to sanction the grantee. And in federal court  
18 we lost because we were not the appropriate  
19 jurisdiction to be deciding that issue. And so we  
20 looked at this law and looked at the causes of action  
21 and the authorities that bring action against the  
22 recipients or employees of the recipients. And we

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1 decided that we are really not the appropriate  
2 jurisdiction to decide if they violated that law. And  
3 it just became a very difficult situation. But if we  
4 had a hearing and said, yes you violated this law and  
5 then the court found that they hadn't violated --

6 MS. BATTLE: Well, our hearing is on the  
7 violation of the agreement.

8 MS. GLASOW: -- it, then they could sue us.

9 MS. BATTLE: More so than the direct violation  
10 of the law.

11 MS. GLASOW: But the agreement is that they  
12 won't violate that law, that they'll use their funds  
13 appropriately to that law.

14 MS. SZYBALA: Generally, it's not a good idea  
15 to have administrative proceedings before criminal  
16 proceedings that are dispositive of the issue are  
17 completed and even in federal debarment actions await  
18 the bottom line on the federal procurement form case.  
19 I mean, if you're going to get a conviction, you debar  
20 me and if you don't, you have to hold hearings to see  
21 if you have other --

22 MS. BATTLE: Well, what do you do if -- you

1 know, I just think that there is irreparable harm if  
2 there is an appeal.

3 MS. SZYBALA: I agree with you, though.

4 MS. BATTLE: You know, and you make a decision  
5 because there is an initial decision by the court  
6 saying that there is a violation of this, and therefore  
7 this person should be convicted of this.

8 MS. GLASOW: You suspend during an appeal and  
9 await the judgment of the court.

10 MS. BATTLE: How do you suspend a recipient?

11 MR. TULL: Then we would have a problem. And  
12 then again, we'd have no grantee.

13 MS. GLASOW: By law we can only suspend for 30  
14 days without going into a termination.

15 MR. TULL: The we would have the problem of a  
16 frivolous appeal, obviously no better, just stringing  
17 it out.

18 MS. BATTLE: Yeah.

19 MR. TULL: So I would think if you can work it  
20 out, ought to be some discretion during the appeal  
21 period.

22 MS. BATTLE: There ought to be discretion to

1 grant an appeal. I mean, in other words to grant a  
2 hearing under certain circumstances and to make some  
3 sort of determination as to whether the appeal is  
4 frivolous or not and to --

5 MS. GLASOW: I don't know how we can make that  
6 decision when a court has jurisdiction over that very  
7 issue. We could be deciding and our decision  
8 completely inconsistent with the court, and then we  
9 could have the grantee bringing suit against us for  
10 lack of jurisdiction to make that decision. This was a  
11 very difficult issue for us to deal with. I mean, we  
12 had to talk to the OIG --

13 MS. BATTLE: Much like drug convictions.

14 MS. GLASOW: -- and say, "How do we handle  
15 this?"

16 MS. BATTLE: You know, it's one that we're  
17 going to have to --

18 MS. GLASOW: Because we're talking about  
19 federal criminal law?" Right.

20 MS. BATTLE: We're going to ultimately just  
21 have to make a cut somewhere.

22 MS. GLASOW: Yeah.

1 MS. BATTLE: But my concern is, I don't want  
2 us to make a cut in a way that irreparably harms  
3 someone who ultimately is found not to have violated  
4 federal law.

5 MS. SZYBALA: Is it enough for the  
6 corporation's reg to say it has to be a final judgment  
7 for this, whatever the result is to happen, but maybe  
8 have a line in the commentary that, pending any appeal  
9 for a judgment is final, the corporation will take  
10 whatever action he thinks he needs to to protect --

11 MR. McCALPIN: You can only appeal from a  
12 final judgment.

13 MS. SZYBALA: Right, okay. And whatever the  
14 right word is, I mean. I just -- I wasn't --

15 MS. BATTLE: Well, I just wonder, is it a  
16 violation of --

17 MR. FORGER: Unless you get an interlocutory -  
18 -

19 MR. McCALPIN: Well, there are some  
20 interlocutory. We're talking basically.

21 MR. HOUSEMAN: We're talking here primarily  
22 about criminal provisions and false claims provisions.

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1 And we're talking here about a recipient is itself  
2 directly found in violation. So -- and I'm not arguing  
3 with you. I actually like the notion. If a recipient  
4 is found in violation, that's the one we're talking  
5 about, I think, in this provision.

6 MS. BATTLE: Yeah.

7 MR. HOUSEMAN: But it thinks that was  
8 incorrect, that's always been my concern about this.  
9 And so what -- what right -- you know, what if it  
10 appeals and you win, the recipient wins, and they've  
11 been cut off already?

12 MS. BATTLE: Yeah.

13 MR. HOUSEMAN: So, I mean, that's the policy  
14 problem we're struggling with.

15 MS. BATTLE: Right. That's exactly it.

16 MR. HOUSEMAN: But remember here, we're only  
17 talking here is about a recipient, not necessarily --  
18 not the employee, but the recipient itself is found in  
19 violation.

20 MR. TULL: Isn't there -- it strikes me we  
21 have --

22 MR. HOUSEMAN: It's rare. It's never going to

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1 happen.

2 MR. TULL: -- two things we're trying to deal  
3 with here. One is, Congress --

4 (The meeting was interrupted by a fire alarm.)

5 MS. BATTLE: Is it 2 o'clock? Is that a test?  
6 Is that real?

7 (Hubbub)

8 (A brief recess was taken.)

9 MS. BATTLE: We'll just disregard the noise  
10 and we can keep going.

11 MR. TULL: I think it's off now.

12 MS. BATTLE: Okay. Right before we went off  
13 of the record, I think that Alan had raised the  
14 critical piece of the issue and John was commenting on  
15 it.

16 MR. TULL: I was going to say that I think we  
17 have a clear indication of intent from Congress that we  
18 not -- that we act as quickly as possible when there  
19 has been a violation of federal -- these federal laws  
20 to terminate a grant.

21 They use language which is a contractually  
22 null and void, which certainly the legal implications

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1 of that is problematic. But the intent that lies  
2 behind that would clearly seem to be that they do not  
3 contemplate us going through a lot of procedures before  
4 we determine if someone where they have in fact  
5 violated the law is terminated.

6 Where, if we allow a termination without a  
7 hearing only in the event that there is a final  
8 judgment or a conviction and it's been appealed, I  
9 don't think that proscribes the corporation from taking  
10 action that we need to take to protect our grant if we  
11 look at that situation and feel that this is a sign of  
12 management which puts federal funds at risk, in which  
13 case we could proceed to a suspension or to a  
14 termination which would involve a hearing. But that  
15 would be pending a final determination if that's what -  
16 -

17 MS. BATTLE: Yes. And I was going to say that  
18 I would think that there ought to be guidance on this  
19 issue from other federal agencies who have the exact  
20 same responsibility to look at all this --

21 MR. TULL: They probably don't have the null  
22 and void language.

1 MS. SZYBALA: They don't have the null and  
2 void language.

3 MS. GLASOW: The sanctions. Yeah, the  
4 sanction's different.

5 MR. McCALPIN: That's the point I want to  
6 raise. You've raised it now. I was waiting for it.  
7 We use the word voidable in 4(a) and the statute says  
8 null and void. And there is a distinct difference  
9 between void and voidable.

10 MS. GLASOW: Yes. I did some research on that  
11 and null and void usually refers to the fact that the  
12 agreement was void ab initio. That means at the time  
13 the agreement made, it was already broken, that there  
14 was no meeting of the minds, therefore, no agreement.

15 And when there is a violation of the agreement  
16 after the agreement is made, then it becomes voidable.  
17 So it's really just a matter of using the correct legal  
18 language. I don't believe that a grantee isn't even  
19 subject to this law under our grant until they get the  
20 grant.

21 So they can't break it until after they get  
22 it. So it almost -- it's hard to think of a

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1 circumstance where it would be void ab initio, at very  
2 beginning. So we use the term voidable, which means if  
3 we find they broke the agreement afterwards, then we  
4 can void the grant.

5 I mean, it doesn't take away any discretion  
6 from us to terminate that grant at the time that we  
7 find there's a violation and we're able to take that  
8 action. I think Congress very clearly said, if this  
9 person has -- if this recipient has violated that  
10 agreement, we expect you to terminate that grant. So  
11 that's the reason we're using that language and I've  
12 done a language opinion on that that I can provide you.

13 MR. TULL: I think this is akin to the problem  
14 in the regulation you talked about yesterday where it  
15 calls for a program seeking an injunction against  
16 itself that the language in the statute uses a legal  
17 term which is, I think, designed -- which arises out of  
18 Congress' intent to make a clear statement.

19 But they are both terms of art which have  
20 significance legally within both state and federal  
21 jurisdictions. And the problem we have encountered  
22 particularly in this area because it does call for

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1 specific action for us is that to treat the use of term  
2 null and void as if it was intended to use that as a  
3 term of art would -- creates a legal conundrum we can't  
4 get out of. It doesn't apply, because it's not --

5 MR. McCALPIN: I don't think 19 calls for  
6 action by the corporation. It says which shall render  
7 any grant or contractual agreement to provide funding  
8 null and void. I don't think that calls for action by  
9 the corporation.

10 MR. TULL: Well, it would cause us to stop  
11 sending a check.

12 MR. McCALPIN: What?

13 MR. TULL: It would cause us to stop sending a  
14 check. If the contract is null and void, meaning that  
15 there is no contract, then our sending a check to the  
16 program would be without any basis in having reached an  
17 agreement or having any underlying contractual  
18 agreement.

19 MR. McCALPIN: Just don't send any more checks  
20 to the program.

21 MR. TULL: well, that's an action on our part.

22 MS. GLASOW: The legislative history uses the

1 word termination, making it clear they expect us to  
2 terminate that grant. And the cases that I looked up  
3 under federal grant law that dealt with voiding of  
4 grants and finding them null and void ab initio, I  
5 mean, there were cases where there literally were  
6 agreements that were void ab initio.

7           There were others where the violation came  
8 later. All dealt with termination rights, et cetera,  
9 because most federal agencies do have the same types of  
10 hearing situations that we do, so --

11           MS. BATTLE: There are to me far-reaching  
12 implications when you say void ab initio. That means  
13 somebody's got to pay the money back. You're saying  
14 none of the dollars you have received should you have  
15 received and somebody has got to pay them back, as  
16 opposed to saying voidable.

17           Now that we discovered and we had determined  
18 that this act violates this law and Section 19, then  
19 you don't get any more money prospectively. And it  
20 seems to me that the intent here is to have the  
21 agreement bind people to not commit fraud, but when  
22 they do commit fraud, part of what happens is not only

1 are you convicted, but you give up the right to get any  
2 more money.

3 I don't think that it means go back and say ab  
4 initio, from the onset that you did not have any  
5 entitlement to the funds from the onset.

6 MS. GLASOW: Right.

7 MS. BATTLE: This could happen in the very  
8 last month of a grant, and I just don't think that  
9 that's practical.

10 MS. GLASOW: That's right.

11 MS. BATTLE: I don't think that's what  
12 Congress intended.

13 MS. SZYBALA: Exactly. This is like the  
14 language on federal laws relating to federal funds.  
15 This particular section seems to be very inartfully  
16 drafted and its intent is very hard to discern, if you  
17 take it just literally; and you can't. And this, I  
18 mean, the OIG agreed completely with Suzanne's memo  
19 because it's the only practical way to interpret this.

20 MS. BATTLE: Yeah.

21 MS. SZYBALA: I mean, you have to live in the  
22 real world.

1 MS. BATTLE: And it is prospective.

2 MS. SZYBALA: Right.

3 MS. BATTLE: It's saying, you go to prison and  
4 you give up the right to any more money, but not that  
5 you somehow have to -- the recipient has to pay all the  
6 money back.

7 John?

8 MR. BROOKS: I think the question is, is it  
9 automatic or is it discretionary? And void means  
10 automatically it's kaput. Void, it will require some  
11 action on the part of the corporation to declare it  
12 void. Forget about the dollar.

13 MS. GLASOW: That's right.

14 MR. BROOKS: And I think voidable, there's a  
15 distinct departure from the words of the statute. And  
16 it seems to me, the escape valve for us here would be  
17 to say that it would be void after the final judgment  
18 is made, although the contract, technically  
19 notwithstanding is -- final judgment after an appeal.

20 And where discretion, it seems to me, ought to  
21 lie, is in the -- during the pendency of an appeal.  
22 And somehow, if we could work that in, that concept, it

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1 would be during that period that the contract would be  
2 voidable after a final judgment of -- after an appeal,  
3 it would be void.

4 MS. SZYBALA: The OIG's comments agreed with  
5 what you just said. That is, for the -- there are two  
6 things set up here as the violation. There's a one and  
7 a two or an (a) and a (b) item.

8 And the one is the recipient itself is  
9 convicted and the two is an employee of the recipient  
10 is convicted. And on that one there's -- you have to  
11 look into it to see if the recipient was at fault at  
12 all or was the victim of this committee.

13 But for the one, if the recipient itself is  
14 convicted of false claims to the government, then that  
15 victim -- that recipient shouldn't be getting  
16 government funds.

17 MR. McCALPIN: Regardless of an appeal.

18 MS. SZYBALA: Regardless. And that should be  
19 void. I mean, given the definitions here of what a  
20 violation of the agreement is, one and two, the OIG's  
21 comment was that one should be void and two should be  
22 voidable, two being if it's an employee.

1 MR. TULL: Maybe the answer --

2 MS. BATTLE: Can we hear from Tom? Just a  
3 minute. Tom, did you have your hand up?

4 MR. SMEGAL: No.

5 MS. BATTLE: Oh, okay, I'm sorry.

6 Go ahead, John.

7 MR. TULL: I was going to suggest that maybe  
8 the problem is, we're using -- we substituted void and  
9 voidable for null and void and it implies that we're  
10 trying to apply a legal standard by saying that.

11 The actual of import of what we're seeking to  
12 do here is that the grant, in the event that there's a  
13 violation agreement, that it's terminated. So perhaps  
14 what we should just say is, in 1640.4(a), instead of  
15 saying voidable just say --

16 MR. HOUSEMAN: Terminated.

17 MS. SZYBALA: Terminated.

18 MR. TULL: -- shall be terminated without a  
19 hearing. And then we just say what the result is,  
20 without trying to apply some legal technical -- some  
21 legal term as to what we're in effect doing.

22 MR. HOUSEMAN: Yeah, that's -- but we have

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1 some other suggestions on this topic we're all working  
2 here together.

3 MS. PERLE: I don't know if this is going to  
4 work or not, but my suggestion is in definition of  
5 violation of the agreement, instead of saying at the  
6 end, regardless of whether there is an appeal, I would  
7 say after any appeal, or whatever the appropriate words  
8 to make it final.

9 And then -- right -- or whatever. And then  
10 underneath, in 1644.4(a), change voidable to --

11 MR. HOUSEMAN: Terminated.

12 MS. PERLE: -- terminated or whatever. And  
13 then put a new sentence, which says during the pendency  
14 of any appeal, LSC shall take whatever actions  
15 necessary to safeguard the funds or whatever --  
16 something similar to what Renee suggested before.

17 I think that does it. In other words, if you  
18 finally -- if there's been a violation meaning there's  
19 a final, so that this has finally been decided that the  
20 recipient has violated something, then they're out.

21 MR. HOUSEMAN: Then they are terminated. I  
22 don't have any problems.

1 MS. PERLE: But if, you know, they've done  
2 whatever -- they've been convicted or there is a  
3 judgment against them and the corporation thinks -- and  
4 they've appealed, but the corporation really thinks it  
5 is not a meritorious appeal and they both win, then the  
6 corporation can take appropriate action to safeguard  
7 the funds.

8 MS. BATTLE: Yeah.

9 MR. McCALPIN: I would move that.

10 MS. BATTLE: Okay.

11 MS. PERLE: Okay.

12 MS. BATTLE: I think that resolves several  
13 issues that we've discussed, that if we can get the  
14 language together on that I think we can --

15 MS. PERLE: Okay, I think we can get the  
16 language.

17 MS. BATTLE: Everybody agrees with that.

18 MS. GLASOW: It's basically what Renee said at  
19 the outside, I think.

20 MS. BATTLE: And I think John, too.

21 MS. GLASOW: I think we agree in principle.  
22 We'll get the language --

1 MS. BATTLE: And we'll take the void and  
2 voidables and null and voids out, and use the term  
3 termination where appropriate.

4 MR. HOUSEMAN: Termination. I think that's a  
5 much easier -- yeah.

6 MR. McCALPIN: Look at the third last line on  
7 page five. I think that should be 2(a)(1) and not  
8 (b)(1).

9 MS. GLASOW: Thank you.

10 MS. BATTLE: (a)(1)?

11 MS. GLASOW: Okay.

12 MS. BATTLE: Because you are talking about the  
13 recipient and not the employee. Okay, that's right.  
14 All right.

15 MR. McCALPIN: Well, now wait a minute.

16 MR. HOUSEMAN: This is hard. We've got a  
17 couple of others coming after this.

18 MR. McCALPIN: Yeah, but this would not be  
19 found against the recipient unless the recipient had  
20 been found to have violated, and that's what (a) is.

21 MS. BATTLE: (a) is, yeah.

22 MR. McCALPIN: (b) is the employee or board

1 member.

2 MS. BATTLE: Employee. That's right.

3 MR. TULL: (b) (1) is the recipient and (b) (2)  
4 is the employee.

5 (Hubbub)

6 MR. McCALPIN: You're right.

7 MS. BATTLE: 2(b) (1). So you're down to 4(a).  
8 Anything else on -- we're really down to  
9 1640.5, Reporting requirements.

10 MS. GLASOW: We did want to change the  
11 standard. At least, we want to talk about changing the  
12 standard in (b) (2).

13 MS. BATTLE: Okay.

14 MS. GLASOW: We had several comments that said  
15 and the corporation finds that the recipient has  
16 explicitly or implicitly allowed the employee or board  
17 member to engage. None of us seem to really know what  
18 that means, so we thought of changing the standard to  
19 knowingly or through gross negligence. Is that right?

20 MR. BROOKS: Are you in the comment area?

21 MR. HOUSEMAN: No, we're both in the --

22 MS. GLASOW: In the text of (b) (2).

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1 MR. HOUSEMAN: It's in the text and the  
2 comment.

3 MS. GLASOW: Yeah.

4 MR. TULL: So 1640.4(b), and --

5 MR. BROOKS: (b)(2)?

6 MR. TULL: No, it's got to be up in  
7 1640.2(b)(2).

8 MS. BATTLE: Yeah. That may give more of a  
9 legal standard that you could use to evaluate the --  
10 yeah.

11 MR. HOUSEMAN: Right. We've been struggling  
12 with this language all along.

13 MS. BATTLE: Yeah. I think that probably is  
14 better than implicit and explicit, especially the  
15 implicit.

16 MR. HOUSEMAN: I suppose they should have, my  
17 concern.

18 MS. BATTLE: Okay. Now, are we at 1640.5, the  
19 Reporting requirement? Are we going to collapse this  
20 reporting requirement?

21 MR. HOUSEMAN: Do we want to do that?

22 MS. GLASOW: Probably not on this one because

1 this is basically requiring the recipient to take  
2 immediate action, notify the corporation when they have  
3 discovered there is a violation.

4 I mean, this is specific to something that is  
5 very serious, has very serious consequences, so it's  
6 not a normal reporting requirement. Matter of fact, I  
7 think one of the grant assurances already requires --

8 MS. BATTLE: This notice?

9 MS. GLASOW: -- this anyway, but we want to  
10 put it also in this ruling.

11 MS. BATTLE: All right.

12 MS. GLASOW: It also, with the recipient  
13 reporting quickly to the corporation, it helps them  
14 show that they didn't intentionally or through gross  
15 negligence allow the use of the funds to be wrongly  
16 used.

17 MS. BATTLE: Okay. And is 1640.6 to remain,  
18 the written policies?

19 MR. BROOKS: I'm sorry, back up. You say  
20 knowingly or with gross negligence? Do we want gross  
21 negligence in there? Knowingly or negligently?

22 MS. BATTLE: I think gross negligently.

1 MR. TULL: Well, the negligently --

2 MS. BATTLE: It's going to be negligent if you  
3 don't know, period.

4 MR. TULL: -- would be at any time like an  
5 intake worker has been doing -- has been embezzling  
6 client trust funds when they come in. That's going to  
7 be because of some amount of negligence and that would  
8 be too low a standard to say just based on that that we  
9 were going to cease to fund the program. That would be  
10 whether it was something that was a higher degree of  
11 wrongdoing on the part of the program and allowing it  
12 to happen and not taking appropriate steps.

13 MS. SZYBALA: I agree. Gross negligence would  
14 kind of require the program had notice of the problem  
15 in advance and did nothing, as opposed to they just got  
16 blindsided --

17 MR. HOUSEMAN: Right. They just weren't  
18 paying attention.

19 MS. SZYBALA: -- that there was this problem  
20 here. I mean, they just didn't know. Then they're  
21 victims. But  
22 if --

1 MS. BATTLE: Because you can raise a internal  
2 controls question --

3 MS. SZYBALA: Right.

4 MS. BATTLE: -- about somebody getting  
5 blindsided. But to me, what you're really --

6 MS. SZYBALA: But it's after you tell them  
7 that.

8 MS. BATTLE: Yeah.

9 MS. SZYBALA: And they didn't fix it and then  
10 that happens, then they were kind of grossly negligent.

11 MR. TULL: Right.

12 MS. SZYBALA: But they need that notice --

13 MS. BATTLE: Yeah.

14 MS. SZYBALA: -- before you can call it gross.

15 MS. BATTLE: Because you've got a high  
16 standard for the actual perpetrator, which is a  
17 criminal conviction. And it seems to me, for the  
18 recipient to have the same level of culpability you  
19 need to have a high standard as well.

20 MR. BROOKS: Because the sanction is pretty  
21 serious.

22 MS. BATTLE: Yeah, because of the sanction

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1 being as serious as it is.

2 MR. BROOKS: Here we're talking about an  
3 employee, so --

4 MS. BATTLE: Okay. Anything else on 1640.5,  
5 the reporting requirement? Call for that two or three  
6 times. 1640.6, the policies and procedures?

7 MS. GLASOW: We will bring our recommendation  
8 about that to you tomorrow, along with --

9 MS. BATTLE: On all of the others.

10 MS. GLASOW: -- all our other recommendations  
11 on that issue.

12 MR. BROOKS: This may certainly be one that  
13 will -- where it's unnecessary.

14 MS. BATTLE: Okay, anything else? I'm sorry,  
15 Tom?

16 MR. SMEGAL: Maybe you've already corrected  
17 this, but on page 8, 1640.6 should be added into the  
18 sections at the top.

19 MS. GLASOW: Thank you.

20 MR. BROOKS: Well, we didn't go on page 8.

21 MR. HOUSEMAN: Are we starting on the text,  
22 because there are some other changes?

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1 MR. ASKEW: We're through with the text.

2 MS. BATTLE: Let's go back through the Purpose  
3 and definition. I think we really covered pages 9 and  
4 10. But let's go back to 8 and see if there are any  
5 others.

6 MR. ASKEW: Well, we've got this part.

7 MS. GLASOW: Oh, yes, yes. We need to look at  
8 the definitions, too.

9 MS. BATTLE: Okay, is that just qui tam  
10 action? Let me pass this out to the board. We've got  
11 some changes that the staff has proposed to the  
12 language that we've got in the -- yeah, that's  
13 everybody.

14 MR. BROOKS: Before we got --

15 MS. BATTLE: In (a) under the definitions, do  
16 you have something on the purpose?

17 MR. BROOKS: Point one?

18 MS. BATTLE: Yeah, point one?

19 MR. BROOKS: Is it the general purpose or just  
20 the purpose?

21 MR. HOUSEMAN: Purpose.

22 MS. GLASOW: Purpose.

1 MR. BROOKS: Where you say the recipients use  
2 their LSC funds, is that a way we do it in the  
3 regulations, or do we say corporation's funds?

4 MS. BATTLE: We have used LSC funds.

5 MS. GLASOW: We probably have used both.

6 MR. HOUSEMAN: It's interchangeable.

7 MS. GLASOW: I think it's interchangeable.

8 Did you have a preference?

9 MR. BROOKS: I suggest conformance would be  
10 desirable if we could figure out what we generally use.

11 MS. GLASOW: I think we used LSC funds a lot.  
12 I just am not sure that we never said corporation.

13 MS. BATTLE: In this particular reg, we have  
14 used LSC funds, I think throughout.

15 MR. HOUSEMAN: Oh, that's right, LSC, non-LSC  
16 funds.

17 MS. BATTLE: We have used LSC funds --

18 MS. GLASOW: And non-LSC funds in Section  
19 1610.

20 MR. BROOKS: All right. Then I think the  
21 second sentence is really redundant. It doesn't tell  
22 us anything beyond what is obvious from the

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1 definitions.

2 MS. GLASOW: In the purpose?

3 MR. BROOKS: This rule also functions to  
4 identify, et cetera. It's pretty obvious that that's  
5 what it does if you read on one more section.

6 MS. GLASOW: I was just trying to be wordy.

7 MS. BATTLE: Do you want to strike that second  
8 sentence?

9 MS. GLASOW: Do you want to strike it? It's  
10 not necessary.

11 MS. BATTLE: Okay.

12 MR. TULL: She likes it, right?

13 MS. SZYBALA: I like it.

14 MS. GLASOW: Renee likes it.

15 MS. SZYBALA: I just think it's clear.

16 MR. McCALPIN: What?

17 MS. SZYBALA: I like the sentence because the  
18 law itself is so difficult to understand on its face.  
19 If you're a recipient, you read this law that says now  
20 you're subject to laws applicable to the use of federal  
21 funds.

22 It's very scary. And this is the place where

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1 you go to find out what that means, what other laws  
2 that are applicable to the use of federal funds. Well,  
3 they're listed here. I like that sentence. I mean,  
4 it's not necessary. I'm not lobbying hard for it. But  
5 it provides clarity. I think it's useful.

6 MS. BATTLE: Well, it is in part, but let me  
7 say this. It actually says that it provides notice of  
8 the consequences of the violation of such federal law.  
9 We really don't provide the consequences of each of  
10 these federal laws, we provide the consequence of your  
11 violating the agreement that we have.

12 MS. SZYBALA: Right.

13 MS. BATTLE: So that's a little bit different.

14

15 MS. SZYBALA: That's true.

16 MR. McCALPIN: Except if you violate the  
17 federal law you violate the agreement.

18 MS. BATTLE: That's true, but we aren't  
19 providing the notice of the consequences of the  
20 violation of the federal law.

21 MR. TULL: We don't say you might go to jail.

22 MS. BATTLE: Yeah.

1 MR. TULL: You might, correct?

2 MS. BATTLE: Yeah. What we say is, if you  
3 violate this agreement that we have with you, that you  
4 will follow this law, you will lose your funds.

5 MR. TULL: Can we prognose the consequences to  
6 the grant?

7 MS. BATTLE: Yes.

8 MR. HOUSEMAN: For violations of the  
9 agreement.

10 MR. TULL: I think -- John, I think now we're  
11 saying the fact that it is obvious that the purpose  
12 section always is an obvious statement of what follows  
13 and that --

14 MR. BROOKS: Well, no, I'm saying that the  
15 first sentence is -- tells her what it's all about.  
16 That's of course --

17 MR. TULL: But I think what the reg does do,  
18 though, which is --

19 MR. BROOKS: -- the second sentence doesn't  
20 really add anything to her, just a plain reading of the  
21 --

22 MS. SZYBALA: Right. I think the first

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1 sentence is really wrong. I mean, I think that's what  
2 the first sentence has to say. But this reg does not  
3 talk about recipients using their funds in accordance  
4 with federal law related to the proper use of federal  
5 funds, it just doesn't. Because Congress used the  
6 wrong words in the statute.

7 I think the first sentence has to say what it  
8 says because that's the statutory language and we have  
9 to hark back to that. But that was a really improper  
10 way for Congress to describe these laws if they were  
11 talking about the laws we're talking about here.

12 And we're talking about that recipients don't  
13 violate laws relating to fraud and abuse.

14 MS. GLASOW: It's misuse. It's misuse.

15 MS. SZYBALA: Right, not -- misuse, exactly.

16 So I think this second sentence clarifies what the  
17 first sentence is unclear on because the law is so  
18 unclear.

19 MS. BATTLE: This rule also functions to  
20 identify applicable federal law and to provide notice  
21 of the consequences to a recipient, their employees and  
22 board members, of a violation of --

1 MR. TULL: Isn't the problem though is with --

2 MS. BATTLE: An agreement to abide by such  
3 federal law.

4 MR. TULL: What it does is, it identifies the  
5 federal laws which are applied. I think the problem, I  
6 think I understand now John's problem, that it says to  
7 identify applicable federal law. That's just a generic  
8 statement. And that's the real meat of it because the  
9 purpose of the regulation is to say these are the laws  
10 that are applied to your funds by virtue of Section 509  
11 -- 504(a)(19).

12 And it's a list that is smaller. I think  
13 Renee's point is, it's just correct -- is that it's a  
14 smaller list than all federal laws that apply to use of  
15 federal funds. These don't involve, you know,  
16 environmental protection act laws and all kinds of  
17 other laws. This is a very specific, narrow list of  
18 federal laws applying because that's what Congress  
19 intended.

20 MR. ASKEW: Z-z-z.

21 MS. BATTLE: The purpose of this rule is to  
22 give notice to the recipients --

1 MR. TULL: As we get tireder, we get more  
2 focused on the meaning of each specific word or its  
3 lack of --

4 MS. BATTLE: Well, you know, each time we go  
5 through this and we get our collective thought  
6 together, we clarify it and we make it simpler and we  
7 make it work. So that's the purpose of this  
8 discussion. Go ahead.

9 MS. GLASOW: Yeah, we want it to be general  
10 enough because it's just a general statement of what  
11 the rule is about. We don't want to get too specific  
12 or we end up restating the provisions.

13 MS. PERLE: May I try this one?

14 MS. GLASOW: Oh, good. What do you have?

15 MS. PERLE: The rule also functions to  
16 identify the federal laws which apply and to provide  
17 notice of the consequences to the recipient of a  
18 violation of such federal law by recipients or their  
19 employees or board members.

20 MS. BATTLE: That sounds good.

21 MR. TULL: Excellent.

22 MS. BATTLE: Write that down.

1 MS. PERLE: I wrote it. I've got it. Thank  
2 you.

3 MS. BATTLE: Now, what about the first  
4 sentence? Did we ever get that first sentence fixed?

5 MS. PERLE: I think the first sentence is  
6 okay.

7 MS. SZYBALA: It's kind of stuck that way,  
8 because that's what the statute says.

9 MR. MCCALPIN: Took out the word "general."

10 MS. BATTLE: Yeah, took out.

11 MR. TULL: I think we should change it to the  
12 proper misuse of federal funds.

13 (Hubbub)

14 MS. PERLE: Related to the misuse of federal  
15 funds. That's actually what it really would say.

16 MS. BATTLE: All right. Anything else on  
17 purpose, definitions, 1640.2?

18 MS. GLASOW: Okay, definitions.

19 MS. BATTLE: Let's take the information that I  
20 passed out to you.

21 MS. GLASOW: It came to our attention as we  
22 studied this law that Section 3730(b) of Title -- what

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1 is it? -- 31, allows private action or third-party  
2 action which are  
3 called --

4 MS. BATTLE: Qui tam actions.

5 MS. GLASOW: -- qui tam actions.

6 MS. BATTLE: Yes.

7 MS. GLASOW: And that, as we look back at the  
8 legislative history, Congress in proposed legislation  
9 consistently accepted the qui tam actions. And I don't  
10 think that's what Congress is after. They want the  
11 proper authorities to come in and investigate and  
12 prosecute, or whatever, but not to allow third-party  
13 actions.

14 And it would make it even more difficult for  
15 us to try to find out whether it's a violation or not.  
16 So we wanted to add language that came right out of  
17 prior legislation and back in the McCollum-Stenholm  
18 legislation that would accept actions that would be  
19 basically be the qui tam actions.

20 MS. BATTLE: Okay, I think that makes sense.  
21 By accepting qui tam though, that doesn't mean that the  
22 corporation will not determine whether or not its funds

1 are at risk based on whatever it is some third party  
2 has brought, but just simply that this statute in this  
3 provision, this reg, won't be operative.

4 MS. GLASOW: That's correct.

5 MS. BATTLE: All right. Okay, anything else  
6 on 1640.2? We have covered (a) and we have essentially  
7 covered (b) (1) and (2).

8 MS. PERLE: I wasn't clear whether we'd make  
9 any similar change in (b) (2).

10 MR. HOUSEMAN: We're trying to work out  
11 language.

12 MS. PERLE: I just missed that because I was  
13 working on this --

14 MS. BATTLE: Yeah, I think we did. I have a  
15 note that we're going to limit both 1 and 2 to the LSC  
16 funds grant.

17 MS. PERLE: I don't mean that. I'm talking  
18 about the appeal and conviction.

19 MR. HOUSEMAN: The what?

20 MS. GLASOW: What did we decide to do?

21 MR. HOUSEMAN: Oh, I thought you were going to

22 --

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1 MS. PERLE: I was working on 1 and my question  
2 was whether we talked about 2 while I was working on 1.  
3 I was sort of not focused on what you said about 2. In  
4 other words, is the corporation going to wait until  
5 after an appeal?

6 MR. HOUSEMAN: Oh, for 2, we're talking?

7 MS. BATTLE: Well, 2 has more to do with the  
8 issue of knowing and gross negligence.

9 MS. PERLE: Right. But my question is, are  
10 you going to wait until there is a final -- there's a  
11 final -- there's finality on whether there was a  
12 connection or a judgment? I just want to know that.  
13 I'm not agreeing or disagreeing.

14 MS. GLASOW: In other words, if an employee of  
15 a recipient has been found to have violated the law,  
16 then there is a violation. At that point the  
17 corporation would say, did the recipient -- can we  
18 impute that to the recipient?

19 MS. BATTLE: Yeah.

20 MS. GLASOW: And you would give a hearing on  
21 whether they knowingly or used gross negligence.

22 MS. PERLE: Right, before the -- during the

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1 pendency of any appeal. I just want to know. I think  
2 we could go either way, honestly, but --

3 MS. BATTLE: Yeah.

4 MR. BROOKS: I think Linda brought out some  
5 language --

6 MS. GLASOW: For one.

7 MR. BROOKS: -- which applied to (b) (1) and  
8 (2) and (4). And that would entail presumably striking  
9 the language of 1 and 2 regardless of whether there was  
10 an appeal.

11 MS. PERLE: Yes.

12 MS. GLASOW: That's right.

13 MR. BROOKS: Right.

14 MS. BATTLE: Yeah. We'll be consistent.

15 Okay, is there anything in 1640.3, Contractual  
16 agreement? Anything on 1640.4, Violation of agreement?

17 MR. HOUSEMAN: We've already added changes.

18 MS. BATTLE: Yeah, we've made some changes to  
19 4. We've made -- yeah.

20 MR. HOUSEMAN: Made changes to 4, yeah, 4(a).

21 MR. BROOKS: And 4(b) we did not discuss  
22 specifically, but presumably that should be --

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1 MS. BATTLE: The same point, the same voidable  
2 change to void final judgment after appeal.

3 MS. GLASOW: Yes. We're going to fix that.

4 MS. BATTLE: Okay. And we talked about  
5 reporting requirements. It seems to me we've talked  
6 about the rest of this, so if there are no other  
7 observations or comments, let's move on.

8 MR. McCALPIN: I think in 5(a)(1), the first  
9 line, the word "having" should be "has." The  
10 recipient, having been charged.

11 MR. HOUSEMAN: Has, you're right.

12 MS. GLASOW: Yes. Thank you.

13 MS. BATTLE: 5(a)(1).

14 MR. McCALPIN: Right.

15 MS. BATTLE: Has been charged. Okay? Let's  
16 move on. Let's take a deep breath and move on, guys.  
17 1637. Are we ready?

18 MR. TULL: One small change on the referring  
19 requirement. The government entity or plaintiff. The  
20 word plaintiff would only happen in a proceeding that -

21 -

22 MS. PERLE: Where is that?

1 MR. TULL: That's in 1640.5(c), governmental  
2 entity.

3 MR. BROOKS: And what are you doing, John?

4 MS. BATTLE: "Or plaintiff" in (c).

5 MR. SMEGAL: Taking out "or plaintiff?"

6 MS. PERLE: Yes.

7 MR. TULL: Right. Because that would only  
8 arise in qui tam.

9 MR. BROOKS: That's right.

10 MR. TULL: Based on my wide experience with  
11 qui tam proceedings.

12 MR. HOUSEMAN: You didn't even know what the  
13 hell it was a day ago.

14 MR. ASKEW: That's what he said.

15 MS. BATTLE: I've actually -- I've been  
16 involved in one, so I've seen how it works.

17 (Hubbub.)

18 MR. McCALPIN: A general question. John,  
19 where do we pick up the restriction in 506 about non-  
20 response appropriatedness act may be used to file a  
21 suit -- pursue a lawsuit against the corporation?

22 MS. PERLE: I think -- have we done that

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1 already?

2 MS. BATTLE: I knew that.

3 MR. McCALPIN: We keep talking about funds and  
4 when we can use funds involved. And there is this  
5 restriction  
6 in 506.

7 MR. TULL: I think the place that it would  
8 probably naturally arise would be in 1630, which is the  
9 cost standards regulation which we are going to --

10 MR. McCALPIN: Cost?

11 MR. TULL: Is this --

12 MR. HOUSEMAN: Yeah, properties and federal --

13 MR. TULL: -- allowable cost.

14 MR. HOUSEMAN: -- allowable cost.

15 MR. TULL: And it not impliedly within that  
16 because of the -- because 1630 includes OMB circulars.  
17 And I believe OMB circulars, as Alan said yesterday,  
18 state that funds can't be used to sue the source of the  
19 funds that gave them, or federal funds cannot.

20 And that -- that implied the past. But now we  
21 have an explicit -- we have an explicit restriction in  
22 the act which would make that clear. So we could

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1 either state it or -- I guess we could state it  
2 explicitly probably.

3 MR. HOUSEMAN: Well, you could also put it in  
4 grant assurance. This is a simple one, unlike --  
5 doesn't really need any explanation.

6 MS. BATTLE: You just can't use our funds to  
7 file a lawsuit against us.

8 MR. HOUSEMAN: Right. I mean, we could put it  
9 a grant assurance, too, you know.

10 MS. BATTLE: The question I had about this, it  
11 really --

12 MR. McCALPIN: You could put an awful lot of  
13 this in a grant assurance.

14 MS. BATTLE: It really goes further than that.  
15 For example, if some employee of the corporation wanted  
16 to file a lawsuit and wanted to have time to do part of  
17 their investigation on our clock, it seems to me you  
18 can't do that. MR. HOUSEMAN: That's right.

19 MS. BATTLE: Now are we ready to move on?  
20 1637, Representation of prisoners. Do we need a  
21 stretch, or is everybody ready to move on?

22 A PARTICIPANT: Well, we've got to change

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1 chairs.

2 MS. GLASOW: I guess we could use a stretch.  
3 I'm hearing all the stretching noises.

4 MS. BATTLE: Okay, let's --

5 A PARTICIPANT: Could we have a five-minute  
6 stretch?

7 MS. BATTLE: Yeah, let's take a five-minute  
8 stretch. We'll move on to the next reg.

9 (A brief recess was taken.)

10 MS. BATTLE: We are now back on the record and  
11 we have before us 1637, Representation of prisoners.  
12 We have a restriction in our appropriations bill for  
13 1996 which precludes any representation of prisoners,  
14 so we have a regulation which is a -- is this a new one  
15 or a draft?

16 MS. GLASOW: It's a brand new one.

17 MS. BATTLE: It's a brand new regulation,  
18 1637, which sets out how we will implement this new  
19 statutory restriction.

20 John, do you want to give us some background  
21 on how we came to the reg that we've got?

22 MR. TULL: It's a fairly straightforward

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1 regulation, as you will see. The prohibition is  
2 against participation in litigation on behalf of  
3 persons who are incarcerated. The regulation seeks to  
4 define incarcerated and what is a prison. And as we  
5 get to the definitions we'll see what we stated.

6 This is a regulation in which the changed  
7 circumstance issue is particular difficult because a  
8 person can become a prisoner after litigation has begun  
9 and the duration of their imprisonment could be  
10 anywhere from three hours to their life.

11 And so, the issue of what to do when there is  
12 a change of circumstances given the fact that the  
13 duration may vary a great deal is a significant  
14 challenge that this seeks to find a proper balance for.  
15 But that's in 6307.4.

16 MS. BATTLE: I've got a true-story example of  
17 this reg. When I was a lawyer with legal services, I  
18 had a client who came in and I began to work on his  
19 case and then I sent him a follow-up letter to come in  
20 and he didn't respond to it. In a couple months I  
21 didn't hear from him, and then he finally came in and I  
22 asked him, where have you been?

1           And he said, "I've been detained." And he  
2 had. But, you know, the reason I raise that now is  
3 because there are going to be instances in which, you  
4 know, just simply because someone has been detained it  
5 may not come to the attention of a legal services  
6 lawyer initially.

7           And there are going to be circumstances where  
8 it's ever so brief and unless we have something in  
9 place, we'll never know that it even occurred.

10           MR. TULL: Well, we, as we looked at the  
11 language that was used, the judgment that we came to  
12 somewhat reluctantly because of the problem it created  
13 was that the limitation is based on the incarceration,  
14 not on the conviction, so that it would include  
15 pretrial detainees, for instance, as well.

16           So that, the issue of being detained, how long  
17 the detention might take place is particularly  
18 difficult, given what we read to be the intent of the  
19 language.

20           MS. PERLE: John, I think LaVeeda raises an  
21 issue that I don't think has been addressed here about  
22 what if the corporation doesn't know that the person is

1 incarcerated. Is that a violation?

2 MS. GLASOW: No.

3 MS. BATTLE: And that can occur, I mean,  
4 because it can be ever so brief. How do we -- what  
5 kind of internal control do we devise so that at least  
6 there is some level of intent from the recipient's  
7 standpoint of view to ascertain that information but if  
8 they don't, after utilizing that, that we can hold them  
9 harmless for not knowing.

10 MR. McCALPIN: I suppose you can always  
11 require the client to tell you if he gets incarcerated.

12 MR. TULL: To use their one phone call to let  
13 you know that they're -- that's really a dirty trick.

14 MS. BATTLE: We might put an intake form, some  
15 little statement at the bottom, and if you are for any  
16 reason detained, let us know. And if they don't let  
17 you know, you don't know.

18 MS. PERLE: Does that mean they are late for  
19 their appointment?

20 MS. BATTLE: Yeah, they just don't show up for  
21 their appointment. That can happen, I'm telling you.  
22 I've got --

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1 MR. McCALPIN: Detained could be very  
2 expressive.

3 MS. BATTLE: Oh, he meant detained.

4 MR. McCALPIN: Yeah, but see, there are a lot  
5 of ways of being detained that don't involve a jail.

6 MS. BATTLE: That's right.

7 MS. PERLE: I mean, it could be instead of  
8 saying the client becomes incarcerated, it could be if  
9 the recipient becomes aware that the client has become  
10 incarcerated or something like that.

11 MS. BATTLE: I think in the commentary handled  
12 what I raised.

13 MR. TULL: Yeah, because the prohibition is  
14 not on knowing.

15 MS. BATTLE: It's on the incarceration, yeah.

16 MR. TULL: It is on the incarceration of  
17 prisoners, right. And there's practical implications  
18 to this that I think were not considered because there  
19 wasn't a lot of discussion of this in the halls of  
20 Congress as to what sort of nuance do you find --

21 MS. PERLE: Well, that may be something that -  
22 - you could raise that in commentary and ask for

1 suggestions.

2 MS. BATTLE: Yeah.

3 MR. TULL: I think we don't want to -- I mean,  
4 we have a conversation with -- around the issue of  
5 notifying clients that they should inform the program  
6 in the event that they do become detained.

7 In conversations that we had with the American  
8 Bar Association around their ethical opinion, the  
9 strong feeling as we looked at that was that, to say to  
10 a client when they come in, well, if you're put in jail  
11 let us know is such a -- for some people it would be  
12 just an out-and-out insult to start out your  
13 representation of them with some implication you assume  
14 they're going to end up in jail because they are poor  
15 or whatever. So it's a hard problem.

16 MS. BATTLE: It is.

17 MR. BROOKS: There's a little sort of a  
18 impetus for the client not to say they're incarcerated  
19 because they know, if they're smart --

20 MS. BATTLE: They're going to lose their  
21 lawyer.

22 MR. BROOKS: -- they're going to lose their lawyer.

1 MR. ASKEW: We are making no distinction  
2 between a  
3 prison and a jail, are we?

4 MR. TULL: No.

5 MR. ASKEW: I think there is a distinction.  
6 But the reg only speaks to -- but it does say federal,  
7 state, and local prisons.

8 MR. TULL: Because it says local prison, our  
9 read of that was that that includes jail. And there is  
10 case law in which the term prison has been used to  
11 include jails. But it's not a term of art which is  
12 intended to -- sometimes it is used to refer to places  
13 where persons who are convicted of felonies are held.

14 But it is not uniformly used as a term of art  
15 to mean that. It's also used more broadly. And  
16 particular issues speak of a local prison because  
17 jails, local jurisdictions don't --

18 MR. ASKEW: Run prisons.

19 MR. TULL: Don't incarcerate felons. That's  
20 my understanding of that.

21 MR. ASKEW: Right.

22 MR. McCALPIN: Are we just raising issues

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1 willy-nilly here?

2 MS. BATTLE: It sounds that way. Well, we  
3 were getting the background on this particular reg and  
4 just surveying the background based on the history of  
5 it and what the law sets out. What we probably need to  
6 do is to begin with the actual rule and go through it.

7 MR. TULL: So the purpose states what I  
8 stated, which is designed to state what the limitation  
9 is.

10 MS. BATTLE: Okay, definition.

11 MR. McCALPIN: Now we get to it. Let me give  
12 you an example under (b). In Missouri, if you are --  
13 you may be convicted and sent to Fulton, Missouri,  
14 which is a state mental hospital. As I would read the  
15 comment on page 3, involuntary mental commitment, it's  
16 that. And they're there as a result of a conviction,  
17 so --

18 MS. BATTLE: A criminal conviction?

19 MR. McCALPIN: What?

20 MS. BATTLE: Are they there as the result of a  
21 criminal conviction?

22 MR. McCALPIN: Yes. And they are in the state

1 mental hospital.

2 MS. PERLE: We addressed that issue and kind  
3 of kept coming back and forth in terms of how to  
4 finally address it.

5 MR. McCALPIN: But it says it does not include  
6 who are held in a facility that is not a prison, as in  
7 the case of involuntary mental commitment.

8 MS. GLASOW: With that we were trying to reach  
9 somebody who was -- rack up.

10 MR. McCALPIN: Who was there not as a result  
11 of a criminal conviction.

12 MS. GLASOW: Right.

13 MR. McCALPIN: I understand that. But you can  
14 also have people there as a result of a criminal  
15 conviction.

16 MR. TULL: I can't remember why this was taken  
17 out. We had a qualification of that originally, which  
18 was involuntary commitment unless the person is held in  
19 a facility which is under the jurisdiction of the  
20 Department of Corrections. In an effort to get to that  
21 --

22 MR. McCALPIN: Well, it's not done to the

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1 Department of Corrections.

2 MS. BATTLE: Because of their conviction for a  
3 crime is really what we need to say.

4 MR. McCALPIN: That's right.

5 MS. PERLE: What if the person is not guilty  
6 by reason of insanity, but is understood, well, they  
7 can be committed. That's a different situation, too.

8 MR. McCALPIN: That's a different situation.  
9 But they are also committed after having been  
10 convicted.

11 MS. PERLE: But the person who is insane but  
12 not criminally liable is not covered. You wouldn't  
13 suggest it should be covered.

14 MR. McCALPIN: I understand that.

15 MS. PERLE: Okay.

16 MR. TULL: Although an example you gave which  
17 is where the person has been convicted but then sent to  
18 an institution which is not a part of the prison system  
19 and they're just there because they've been found to be  
20 insane and they're held there, the statute doesn't key  
21 the ineligibility for representation off of the fact of  
22 a conviction or not.

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1           It has to do with where you're held. And  
2 that, we consistently sought to apply that principle  
3 which does not necessarily lead to a result which is  
4 logical but is a reflection of what the Congress  
5 appeared to intend.

6           MR. BROOKS: We also have in Massachusetts  
7 commonly a commitment by the judge on arraignment to  
8 the facility at Bridgewater for observation. They're  
9 there for 30 days from the criminal court, pretrial.  
10 Is that incarceration within the meaning of it?

11           MS. BATTLE: It is, because you can be  
12 accused. You don't have to necessarily be convicted  
13 under this definition. If you are detained by an  
14 entity, a governmental authority, because you are  
15 accused of a crime, even if it's during that 30-day  
16 observation, it seems to me this applies.

17           MR. TULL: But the key there though would be -  
18 -

19           MR. BROOKS: You've got the 90-day provision.

20           MR. TULL: The key would be whether or not the  
21 facility to which the judge sends the person is a  
22 prison, which would be a place where a person is

1 detained under the jurisdiction of the Department of  
2 Corrections. And we  
3 could --

4 MR. McCALPIN: But, you know, basically what  
5 this is all about is that they were trying to get the  
6 people who were filing suit about prison conditions,  
7 largely.

8 MS. PERLE: Well, except that there was -- I  
9 think there was some discussion when this first came  
10 out where we said, "Isn't that what you want? Isn't  
11 that what you're concerned about?" And the response  
12 was no, we're concerned about -- yes, we're concerned  
13 about that but we're also concerned about broader  
14 things.

15 I mean, I think there is this notion of the  
16 ability in here that if you are accused or convicted of  
17 a crime, you really don't deserve any state -- any  
18 assistance.

19 MR. TULL: Law libraries, weight-lifting or  
20 legal services?

21 MS. PERLE: Yeah, I don't agree with that. I  
22 think that's -- and I would have certainly been a whole

1 lot happier if they had just said prison conditions.  
2 But they didn't, and I think the issue was raised with  
3 people in Congress and they did not decide --

4 MR. ASKEW: Doesn't this turn on the word  
5 incarcerated? And incarcerated doesn't say anything  
6 about a conviction. It just says involuntary physical  
7 restraint. So it really -- in a federal, state or  
8 local prison. So it really doesn't speak to whether  
9 someone has been convicted or not, it is whether they  
10 are incarcerated.

11 MS. PERLE: That's not really the issue.

12 MR. TULL: The board certainly could make a  
13 judgment that a person who is held in a institution for  
14 treatment of persons who are mentally ill after a  
15 conviction or in relation to being charged with a  
16 crime, the board can decide that that's -- that that  
17 should be deemed to be within the definition of  
18 incarceration.

19 That's not -- I think that would be an  
20 extension beyond messing with the language that  
21 Congress chose or used. But there's not -- I don't  
22 think there's a reason not to do it.

1 MR. McCALPIN: Actually, it would be a  
2 definition of prison, not only incarcerated.

3 MS. BATTLE: You know, Senator Domenici said,  
4 during the Senate debate on this on September 29, 1995,  
5 he really was talking about supporting and he gives a  
6 whole list of things: political activities, abortion  
7 litigation, prisoner litigation is what he says, the  
8 same as the House welfare reform litigation, things  
9 that don't involve -- he's talking about except  
10 representing individuals on particular matters that do  
11 not involve changing an existing law.

12 It seems to me this gets back to legislative  
13 intent, that the drafting here seems to key in on where  
14 it is that you're held. But the intent was to get at  
15 administrative appeals filed by prisoners being not a  
16 proper use of federal funds when you have scarce  
17 resources for the poor.

18 And what we've really done based on the way  
19 that the language in the 504 section is drafted is to  
20 key in on exactly what it says by focusing in on this  
21 where you're held business, as opposed to  
22 administrative actions for prisoners, you know.

1 I'm not certain that, for example, if you've  
2 got someone who is going through a divorce that what  
3 we're saying here is, and for some reason there is some  
4 -- you know, this person is filing for this person to  
5 get arrested for this, you know. This is what goes on  
6 sometimes.

7 You've got both parties alleging that there's  
8 abuse, and so one will just go out and swear out a  
9 warrant for this one to get arrested and the other one  
10 will go out and swear out a warrant for the other one  
11 to get arrested because you've got really spousal abuse  
12 going on.

13 Was that Congress' intent that in that  
14 instance that once that woman has somehow been arrested  
15 because the husband has sworn out a warrant for her  
16 arrest that all of a sudden we can't represent her  
17 anymore. Is that the result of what  
18 we've got here?

19 MS. PERLE: I think that that's really taken  
20 care of in change of circumstances. I think that's  
21 addressed in the change of circumstances provision,  
22 that particular situation. I think that what we're

1 really talking about is still the situation where the  
2 person is being held in a facility that is not a jail  
3 but they are somebody who has been either accused of or  
4 convicted of a crime.

5 That's really the issue I think that is being  
6 raised. And I think the board can decide. I think  
7 that's a policy decision the board can make.

8 MR. SMEGAL: If we're looking at the language  
9 on 6 and 7, I have two questions. Why are we using the  
10 word accused in 2(b), rather than arrested for? I  
11 mean, is there a different intention in 2(b)? In 2(b)  
12 it says incarcerated because they have been accused or  
13 convicted of a crime. Why accused? Why not arrested  
14 for?

15 MS. PERLE: Well, they have to be  
16 incarcerated.

17 MR. SMEGAL: No, I'm not looking at that. The  
18 rest of it is there. But why is the word accused?

19 MR. TULL: As opposed to arrested for?

20 MR. SMEGAL: Arrested for, yeah. I mean, can  
21 you be accused of a crime and -- can you be accused and  
22 incarcerated? Don't you have to be arrested?

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1 (Hubbub) .

2 MR. BROOKS: Maybe you never get.

3 MR. McCALPIN: Then you're not incarcerated if  
4 you're out on bail.

5 MR. SMEGAL: You're not incarcerated then.  
6 And also, why are we expanding -- I heard what you just  
7 said, I'm sure, but why are we expanding -- this says  
8 litigation of 504(a)(13) or whatever that says,  
9 litigation. And here I looked at 1637.3. The last 10  
10 words refer to administrative proceedings.

11 MR. McCALPIN: You should have been here  
12 yesterday.

13 MR. SMEGAL: Where did that come from?

14 MR. McCALPIN: You should have been here  
15 yesterday. We went through this.

16 MR. SMEGAL: You did?

17 MR. McCALPIN: In connection with another  
18 regulation.

19 MR. TULL: Do you want to face the definition  
20 thing? And then Tom raises an issue that I was going  
21 to discuss when we got to the prohibition, because it  
22 was a deliberate choice to make that, which I would be

1 happy to explain.

2 MS. BATTLE: Let's just walk through. We're  
3 bouncing, and I'm responsible for some of that  
4 bouncing, too, I know. But let's try to discipline our  
5 discussion to the actual language that we have before  
6 us. Is there anything else in the definition section  
7 that we want to change?

8 MR. McCALPIN: Yeah. I think that we need to  
9 have a better understanding of 2(b). It means any  
10 facility maintained by a governmental authority for the  
11 purpose of housing persons who are incarcerated because  
12 they have been arrested or accused or convicted of a  
13 crime.

14 And then I refer you back over to page 3, the  
15 commentary. And it says the definition does not  
16 include held in a facility that is not a prison, as in  
17 the case of involuntary mental commitment.

18 Juvenile offenders are persons in home  
19 detention and I think the juvenile defenders is another  
20 real problem because I don't know why a juvenile -- the  
21 juvenile court facility in St. Louis doesn't come  
22 within the definition of a prison.

1 MR. TULL: That judgment was based on what  
2 appears to be the law in nearly all states, perhaps  
3 every state where juvenile offenders are treated  
4 differently and they do not consider the facilities the  
5 juveniles are held in to be prisons, as that term is  
6 used as a term of art.

7 That is not to say the board couldn't expand  
8 this to include that, but the judgment we made was  
9 based on a -- with regard to juveniles on the narrow  
10 reading of the meaning of the term "prison."

11 MR. McCALPIN: I think we need to have  
12 discussion and resolution on the involuntary mental  
13 commitment in the hospital as the result of a  
14 conviction or the juvenile defender -- offenders. I  
15 think that there is a strong feeling that we ought not  
16 be involved in representation of juvenile delinquents.

17 MS. BATTLE: Okay.

18 MR. McCALPIN: Which is what's involved here.

19 MR. SMEGAL: Well, let me refresh your memory.  
20 When we used to fund the national support centers,  
21 there was one called the National Center for Youth Law,  
22 which is having its 25th anniversary dinner tonight, by

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1 the way, in San Francisco.

2 But that's all -- that's essentially all they  
3 did. They represented kids in detention facilities.  
4 And unless you have that here, Bill, they couldn't have  
5 done anything they were doing. And I don't think  
6 that's what this law was intended to --

7 MS. PERLE: And originally -- original laws --

8 MS. BATTLE: Michael, why don't you come up to  
9 the table so we can --

10 MR. FERRY: Sure. Well, I just wanted to  
11 raise a flip side to what Mr. McCalpin is talking  
12 about. We have a facility in St. Louis that is called  
13 the State Hospital on Arsenal Street. And the State  
14 Hospital is operated by the Department of Mental  
15 Health, so it is a governmental facility.

16 But it serves dual purposes. It has people  
17 who are there voluntarily who would not be covered by  
18 this because they are not incarcerated under this  
19 definition. But it also has people who are there  
20 involuntarily for civil commitment with no criminal  
21 aspect at all.

22 But they are there involuntarily because they

1 are a danger to themselves or to others in a facility  
2 which I think would be the definition of a prison here  
3 because it is -- one of its purposes is to keep people  
4 who have been accused, because it also has people who  
5 have been found not guilty by reason of insanity or  
6 unfit to stand trial. So I think those people may be -  
7 -

8 MS. BATTLE: But none of those people --

9 MR. FERRY: -- caught here, too. That's not  
10 necessarily --

11 MS. BATTLE: But none of those people that you  
12 described, Michael, as I heard you describe them, have  
13 been convicted of a crime and are incarcerated because  
14 of it or have been a resident.

15 (Hubbub)

16 MR. McCALPIN: -- required by the statute. In  
17 any litigation on behalf of a person incarcerated in a  
18 federal, state, or local prison. And then we define  
19 prison as a facility maintained by a government for  
20 purposes of housing persons who are incarcerated  
21 because they have been arrested, they may have been  
22 arrested or convicted of a crime.

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1 MS. BATTLE: Would those people be considered  
2 prisoners, the people that are in that facility that  
3 you talked about?

4 MR. FERRY: Well, I wouldn't consider them  
5 that, although they can't leave.

6 MS. BATTLE: Yeah.

7 MR. FERRY: But they are not criminals. Your  
8 definition incarcerated just says really someone who is  
9 involuntarily restrained. It makes no reference to the  
10 criminal or civil origin of the reason for that  
11 restraint.

12 Well, if it is a hospital more than a prison, but it  
13 serves the function of a prison, it might -- that's the  
14 only point I wanted to make.

15 MS. BATTLE: And the reason I raised that  
16 issue about prisoner is because, again, the Senate  
17 debate talked about prisoner litigation, so --

18 MR. TULL: A fix for the problem that Mike  
19 just raised, which would be just a civil commitment of  
20 someone in a facility which might also house persons  
21 who have been convicted of a crime but sent to the  
22 facility because they are insane would be to change --

1 would be done in two ways.

2 One would be to collapse (a) and (b) together.  
3 The other would be to move the language regarding  
4 having been arrested for an convicted of a crime to the  
5 definition of incarcerated so that it would read  
6 incarcerated means involuntary physical restraint of a  
7 person who has been accused, arrested for, or convicted  
8 of a crime in a facility dedicated to such restraint.  
9 And then just stop, put a period after incarcerated in  
10 the definition of federal, state, and local prison.

11 MR. SMEGAL: Yeah. I like that.

12 MS. BATTLE: That's a good fix. Put a period  
13 where in (b)?

14 MR. TULL: After incarcerated, so that the  
15 rest of it is moved up.

16 MS. PERLE: Would you read that again, John?

17 MR. TULL: So (a) would read: Incarcerated  
18 means the involuntary physical restraint of a person  
19 who has been arrested for or convicted of a crime in a  
20 facility dedicated to such restraint.

21 And then federal, state, or local prison would  
22 mean any facility maintained -- and I would like to

1 suggest that we change "by" to "under" for a reason  
2 that I'll explain in a minute, maintained under  
3 governmental authority for purposes of housing persons  
4 who are incarcerated.

5 MR. McCALPIN: John, I think your added clause  
6 maybe is better at the end of (a), rather than the  
7 middle. Restraint of a person --

8 MR. SMEGAL: After restraint, comma?

9 MR. McCALPIN: Yeah.

10 MS. BATTLE: Yeah.

11 MR. McCALPIN: Well, I don't know. It  
12 modifies person. You may be right.

13 MS. PERLE: No, I think it modifies person.

14 MR. McCALPIN: No, it modifies person.

15 MR. TULL: The suggested change of under  
16 governmental authority as opposed to by is that, it was  
17 pointed out to us that some states now contract with  
18 private prisons to house people and presumably that  
19 would be under the --

20 MS. BATTLE: Under governmental authority,  
21 okay.

22 MR. TEITELMAN: And I think I would deal with

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1 Mike's case. That's a hospital. What he's talking  
2 about is a hospital to some people in there, it's  
3 dedicated as a hospital, whereas another facility  
4 represented, which is dedicated for not -- it's a  
5 forensic unit of the state prison system, and that's a  
6 different situation entirely. We are not talking to  
7 mass murderers and all that. That is a different  
8 story.

9 MS. BATTLE: Okay. I think that by moving  
10 that language up and then using the word incarcerated,  
11 which will then include the definition that you already  
12 have set out, that that clarifies the problem.

13 MS. PERLE: I just -- one point that I'd like  
14 to make about the juvenile, I think we haven't resolved  
15 the juvenile --

16 MS. BATTLE: No, we haven't.

17 MS. PERLE: -- facility. At one time, the  
18 Legal Services Corporation Act prohibited  
19 representation of juveniles. That was amended in 1977,  
20 and specifically because, as I recall -- I don't have  
21 the legislative history in front of me -- but  
22 specifically because I think in most states juvenile

1 proceedings are basically civil, they are not part of  
2 the criminal system.

3 Now, of course, what's been happening lately  
4 in more recent years is that more and more children are  
5 being tried as adults and are in the criminal system.  
6 We are not suggesting that if a child has been tried or  
7 has been convicted as an adult and is in the criminal  
8 system they shouldn't -- that we should be able to  
9 represent them.

10 We are not suggesting that with this, just  
11 that if they are under the jurisdiction of the juvenile  
12 authority in what is essentially a civil proceeding and  
13 they are being held as a result of that in a detention  
14 facility, that they should not be included in this.

15 MR. McCALPIN: I'm not at all sure that when a  
16 child is certified for trial as an adult he is  
17 necessarily moved out of and/or added into downtown, is  
18 he?

19 MS. PERLE: I think that it may vary from  
20 state to state. I don't know.

21 MR. McCALPIN: I don't know. When a child is  
22 certified for trial as an adult, is it moved out of the

1 juvenile detention facility to the city jail?

2 MR. TEITELBAUM: No, not necessarily. It is  
3 the holding house. They put on there, reformatory or -  
4 - they put in a more highly secure place. But not  
5 necessarily, but if they are certified as an adult,  
6 they get -- you know, for an adult crime they'd be  
7 outside of our appropriate representation.

8 MS. BATTLE: Well, I think by --

9 MR. McCALPIN: They'd be kept in a juvenile  
10 detention facility though?

11 MR. TEITELBAUM: I don't think they're kept in  
12 what -- you referred to Vandever (phonetic). That's  
13 more minimum security. They're moved to someplace else  
14 that's much more maximum security.

15 MS. BATTLE: I think that then with the  
16 changes that we have made to our definition that the  
17 language in -- on page 3 explaining 1637.2 is  
18 consistent with that change. Because what we're really  
19 doing now is clarifying what a prison is and what  
20 incarceration is. And it seems to me that we can leave  
21 this language as is.

22 And in taking up what Linda just suggested,

1 that if a juvenile offender is not in a prison, then  
2 that person is not covered by this, or if a person is  
3 in a place of involuntary mental commitment but they  
4 are not incarcerated because they have not committed a  
5 crime or been arrested for committing a crime, then  
6 they are not covered by this. I think --

7 MR. BROOKS: Excuse me. I wonder if  
8 involuntary commitment shouldn't be modified by other  
9 than as a result of a criminal proceeding.

10 MR. TULL: Yeah. I think it sounds like given  
11 the conversation we need to have a sentence devoted to  
12 the mental commitment distinction because it's --  
13 because there are -- this statement is over-broad.

14 MS. PERLE: In the preamble.

15 MR. TULL: In the preamble.

16 MS. BATTLE: Okay, yeah.

17 MR. McCALPIN: Let me ask you a question.

18 More and more --

19 MS. BATTLE: Are juvenile offenders not --

20 MR. McCALPIN: Oh, I'm sorry.

21 MS. BATTLE: -- in the adult criminals?

22 MR. TULL: Not in the adult. Not charged as

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1 an adult.

2 MS. BATTLE: Not, yeah.

3 MR. BROOKS: Well, the point there is whether  
4 they are in an adult prison. I think if they're in a  
5 juvenile detention center, that's not a prison.

6 MS. BATTLE: In an adult facility.

7 MR. TULL: That's an interesting existential  
8 question whether --

9 MS. BATTLE: Not arrested and tried as an  
10 adult. Not arrested or --

11 MR. TULL: No, John's question was where a  
12 person

13 -- it was what Bill referred to, someone is charged as  
14 an adult, a juvenile, but they are not moved into an  
15 adult facility. They are held -- continue to be held  
16 in a juvenile facility. Does the fact that they are --  
17 I mean, they would fit within the definition of a  
18 person held in a -- let's  
19 see --

20 MS. PERLE: Facility maintained by --

21 MR. TULL: -- facility maintained by the  
22 governmental authority for housing a person who is

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1 incarcerated? It would for that person become a  
2 prison, even though for others who are in the juvenile  
3 system it would not. Which, I think, really makes your  
4 distinction about that a juvenile is not deemed to be  
5 charged with a crime, that it is a proceeding which  
6 is --

7 MS. BATTLE: It's civil.

8 MS. PERLE: Yeah.

9 MR. TULL: It's a closed facility -- if that's  
10 correct.

11 MS. BATTLE: If it's a civil detention as  
12 opposed to a criminal detention. Yeah, so we need to  
13 really kind of spend some time explaining these  
14 distinctions, by taking, by breaking out involuntary  
15 mental commitment and adding what John has suggested,  
16 by breaking out juvenile offender and clarifying the  
17 status of the juvenile as having some bearing on  
18 whether or not it is a criminal detention which would  
19 be covered, as opposed to a civil detention, which  
20 would not.

21 And persons in home detention, if they've been  
22 arrested and because the prison is overcrowded the

1 court just says, "Here's a little thing around your  
2 leg. You stay at home," are they detained? Is the  
3 house at that point serving as a prison?

4 MS. BATTLE: Well, it says not.

5 MR. TULL: No. It says that the judgment here  
6 was not.

7 MR. McCALPIN: But let me ask --

8 MS. BATTLE: All right, Bill.

9 MR. McCALPIN: -- some questions about the  
10 last paragraph on page 3. Do we want to say which the  
11 corporation will resolve on whether a person is  
12 predominantly incarcerated or free? Are we inviting  
13 the programs to send us their questions and we'll  
14 resolve them or are we resolving them in the next  
15 sentence?

16 MS. PERLE: Do you have to ask the corporation  
17 whether you can represent a particular person?

18 MR. McCALPIN: Is that what we intend by the  
19 first sentence?

20 MR. TULL: No.

21 MS. PERLE: No.

22 MR. BROOKS: Can't we say which the regulation

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1 resolves on the basis?

2 MR. McCALPIN: Yeah. Then it's not future,  
3 which the regulation resolves.

4 MR. BROOKS: Yeah, resolves, the best we can  
5 do it at the time, at the moment.

6 MR. McCALPIN: Then my next question is,  
7 recognizing that increasingly there is a practice  
8 toward the end of a service of a sentence of sending  
9 people to a halfway house, what happens about people in  
10 a halfway house? And there are lots of those in the  
11 state, including the recent Attorney General of  
12 Missouri.

13 MR. TULL: Meaning that the person works but  
14 spends -- sleeps there at night?

15 MS. PERLE: No. It's a different facility.

16 MR. McCALPIN: It's -- I think it depends.

17 MS. BATTLE: Like halfway free, halfway  
18 detained.

19 MR. McCALPIN: Sometimes they are free to go  
20 out in certain hours of the day and come back at night.  
21 Sometimes they are permitted to accept employment,  
22 sometimes night. But they currently are expected

1 back -- well, almost always expected back every night  
2 or maybe sometimes they give them  
3 a --

4 MS. PERLE: Weekends.

5 MR. McCALPIN: -- 24- or 48-hour pass. But  
6 it's --the idea is to transition them from a prison or  
7 jail into society.

8 MS. PERLE: I don't think they are in prison.

9 MR. McCALPIN: Huh?

10 MS. PERLE: I mean, they may still be under  
11 the jurisdiction of the prison.

12 MR. SMEGAL: Courts.

13 MS. PERLE: Of the courts. But I don't think  
14 they're in prison. I think if a person is on work-  
15 release from prison and goes out during the day and  
16 works and comes back at night, that they're still a  
17 prisoner.

18 MR. McCALPIN: No, no.

19 MR. SMEGAL: It's kind of a home detention,  
20 isn't it? I'd consider that almost a home --

21 MS. BATTLE: Halfway house is like a home  
22 detention?

1 MR. McCALPIN: No.

2 MR. SMEGAL: It's somebody else's home.

3 MS. WATLINGTON: Is any part of the prison  
4 system directed toward community service?

5 MR. McCALPIN: Yeah.

6 MS. WATLINGTON: They're under the -- still  
7 corrective service.

8 MR. McCALPIN: Sometimes.

9 MS. WATLINGTON: This particular one, I don't  
10 know where it would be.

11 MR. McCALPIN: What do you do? Halfway house,  
12 are they in prison or not?

13 MR. TULL: I would consider them to be but you  
14 would consider them not.

15 MS. PERLE: I would consider them not to be.  
16 I think they are not.

17 MR. TULL: I think under the definition they  
18 are involuntarily physically restrained.

19 MR. McCALPIN: Yes, they are.

20 MR. TULL: As they are in a facility which is  
21 maintained under government authority for the purposes  
22 of housing persons who are incarcerated. I don't --

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1 MS. PERLE: Let me put it this way: I don't  
2 think they should be included.

3 MR. TULL: Well, I don't think they should be,  
4 but I'm not saying --

5 MS. BATTLE: Okay, halfway house included.

6 MS. PERLE: No, but Congress didn't demand  
7 this. Only this definition does it.

8 MS. BATTLE: It says incarcerated.

9 MR. BROOKS: But that is beyond -- they may  
10 have the period of their sentence.

11 MR. McCALPIN: Yes, it is.

12 MR. BROOKS: So in a sense it's --

13 MS. BATTLE: Serving time.

14 MR. BROOKS: -- a projection of a prison which  
15 they have been attending regularly.

16 MR. TULL: Attending?

17 A PARTICIPANT: Like church.

18 MR. McCALPIN: Sometimes it's the last 90  
19 days.

20 MS. BATTLE: Okay. So we resolved that issue.  
21 Do we need to comment on it?

22 MS. PERLE: I think we definitely need to

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1 comment on that because --

2 MS. BATTLE: Let's comment on the halfway  
3 house. Let's give our assessment based on a reading of  
4 the regulation and put it out for comment. I think  
5 that, based on our definition, that I agree with John.  
6 If you apply the standards that we have set out in our  
7 definition, that person is excluded from our  
8 representation.

9 Okay, now we are down to the prohibition,  
10 1637.3.

11 MR. TULL: Tom raised the question regarding  
12 the final clause in this, which is nor may recipients  
13 participate in administrative proceedings on behalf of  
14 such incarcerated persons.

15 The conversation we had yesterday was around  
16 the fact that we consider litigation to mean an action  
17 filed in a court of law. This is an invitation to the  
18 board in this regard to say, and in addition to that we  
19 believe that Congress intended to proscribe  
20 representation in administrative hearings, in  
21 administrative matters.

22 The discussion that we went through internally

1 around this issue was a belief that Congress did intend  
2 to stop persons from being able to participate in  
3 administrative hearings challenging conditions of their  
4 incarceration and that even though they used the term  
5 litigation, that their intent was other than that and  
6 that our recommendation to the board would be to  
7 reflect that because we believe that's what they meant.

8 We considered limiting the representation,  
9 limiting the prohibition just to such administrative  
10 matters, had a discussion internally around the very  
11 limited circumstances in which someone might be  
12 represented in an administrative hearing as a prisoner  
13 that would be other than their conditions of  
14 incarceration, and it would be an extremely rare  
15 circumstance.

16 And the gentle proddings of the Inspector  
17 General in conversations with him agreed that we should  
18 extend this to all administrative proceedings. And  
19 that's what our recommendation --

20 MS. BATTLE: Someone who is an inmate who is  
21 trying to get SSI and they need help.

22 MS. PERLE: Well, this is a real example of --

1 someone called me and said that they had a client who  
2 was mentally disabled, who had been on SSI, and SSI  
3 then charged that there had been an overpayment and was  
4 trying to recover it from this person and his mother.  
5 And I'm not exactly certain how that all works out.

6 This person was then subsequently arrested and  
7 convicted of a crime. So it wasn't an issue about  
8 whether he should be on SSI during his period of  
9 incarceration, it was whether he should be forced to  
10 pay back the benefits that he had gotten prior to the  
11 time that he was incarcerated.

12 This definition would say since he was  
13 incarcerated now you couldn't represent him on that SSI  
14 case.

15 MR. McCALPIN: Wait a minute. But we defined  
16 litigation yesterday not to include an administrative  
17 proceeding.

18 MS. PERLE: I agree with you.

19 MR. McCALPIN: But this --

20 MS. PERLE: This does.

21 MR. McCALPIN: This says participate -- oh, I  
22 see, administrative hearing. I'm under the --

1 MS. BATTLE: And the reason for this --

2 MS. BERGMARK: It doesn't redefine litigation.  
3 It just extends to administrative representation.

4 MS. BATTLE: And the reason for this is that I  
5 think more than the case that Linda just pointed out, I  
6 really believe the administrative proceedings  
7 envisioned by Congress had to do with prisoner appeals  
8 about their conditions.

9 MS. PERLE: I agree with you and I don't think  
10 that we would disagree --

11 MS. BATTLE: You know, I don't think that they  
12 were attending to reach that SSI appeal.

13 MS. PERLE: I think that's right --

14 MS. BATTLE: I think they were intending to  
15 reach how you handle prisoner condition cases.

16 MS. PERLE: And an earlier version of this did  
17 limit the administrative proceedings to prison  
18 conditions, complaints about prison conditions, which I  
19 don't think the language of the legislation includes  
20 but I do think that Congress intended to include.

21 MS. BATTLE: Yeah.

22 MS. PERLE: So I don't think that we would

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1 have a great objection to that. But I think we do have  
2 an objection to a general ban on administrative  
3 proceedings.

4 MS. BATTLE: It's such a small slice though,  
5 Linda. I think it's a significant slice to someone who  
6 is in the position that you just talked about. But if  
7 we are precluded by law from representing anybody who  
8 has been incarcerated --

9 MS. PERLE: Well, we're precluded from  
10 representing them in litigation.

11 MS. BATTLE: In litigation, then I -- are you  
12 saying we could give them referral advice? What is it  
13 that we can do for that person?

14 MS. PERLE: Well, I think that we should be  
15 able to represent them in the SSI situation. That's  
16 your call.

17 MS. BATTLE: Yeah. I -- go ahead, Tom.

18 MR. SMEGAL: Well, I'm not on this committee,  
19 but I'm with Linda on this one. I think we should  
20 either take out the second part, as I suggested  
21 earlier, or limit it to administrative proceedings  
22 regarding prison conditions.

1 MS. PERLE: Or in prison then, or something  
2 like that.

3 MR. SMEGAL: Or whatever magic word you could  
4 use.

5 A PARTICIPANT: What was the word that we --

6 A PARTICIPANT: This isn't right on point, but  
7 what do you do with individual who is in prison or  
8 pertaining to get sued for divorce, I mean, and is  
9 indigent. Can't be represented? Has to go pro se?

10 A PARTICIPANT: What's that?

11 A PARTICIPANT: Civil dissolution?

12 A PARTICIPANT: That's what Congress is upset  
13 about.

14 MS. BATTLE: Well, but the problem is, this  
15 says litigation, so it goes across -- it cuts across  
16 all litigation. It cuts across a divorce. It cuts  
17 across --

18 MR. SMEGAL: Well, I don't think we should go  
19 further than litigation. I don't think administrative  
20 proceedings are there. But I'm not on this committee.

21 MS. BATTLE: Yeah.

22 MR. BROOKS: Congress could easily have said

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1 so if they had wanted to.

2 MS. BATTLE: The problem is, I think that  
3 Congress is in part saying, "We don't want you using  
4 LSC funds, as limited as they are, representing people  
5 that are in prison for any reason." Whether we like  
6 that or not, I just think that that's part of what the  
7 impetus is for these restrictions.

8 MR. SMEGAL: Well, they knew how to say that  
9 though. When they wanted to say you can't represent  
10 somebody, that's what they said. That isn't what they  
11 say here. They say litigation, and the specific word  
12 is --

13 MS. BATTLE: And their word, any litigation,  
14 may mean that their view -- we certainly define  
15 litigation as in court, but their view of litigation is  
16 adversarial proceedings -- could be.

17 MS. PERLE: Well, it could be, but we don't  
18 know.

19 MS. BATTLE: Yeah.

20 MS. PERLE: I mean, they clearly were upset  
21 about the big jail lawsuits.

22 MS. BATTLE: Yeah.

1 MS. PERLE: Especially those that dealt with  
2 conditions of incarceration were prisoners were  
3 demanding in court that they get color TVs and weight  
4 rooms. I mean, we know that they were upset about  
5 that.

6 MS. BATTLE: Ernestine, what are your  
7 thoughts?

8 MS. WATLINGTON: I really think -- I think  
9 that they are thinking, taking litigation and  
10 everything that that amounts to what John says, because  
11 that is their survival, you know, and that usually mean  
12 families. They have such high -- and the other things,  
13 so I really -- but I know the major thing with those --  
14 I guess we had those hearing in Pennsylvania about the  
15 suing, you know, for those conditions and things.

16 MS. BATTLE: John?

17 MR. BROOKS: I think it's a matter of policy,  
18 really. I think as far as the statute is concerned,  
19 litigation to me means litigation in the normal sense  
20 of litigation in court.

21 If we, as a board, choose to extend it to  
22 administrative proceedings, which may well be what

1 Congress had in mind but didn't say, that's a decision  
2 I think we ought to make. Now, we have in general make  
3 a decision that that's not extend these restrictions  
4 and limitations any further than we have to by virtue  
5 of the legislation.

6 This will be contrary to that principle, it  
7 seems to me. And I think I'm inclined to take this  
8 language out of here and limit it to litigation. If  
9 Congress wants to second-guess us on it, so be it. But  
10 I don't think they have precluded our limiting it to  
11 litigation in the usual sense of court cases. So I'd  
12 leave out the administrative proscription.

13 MR. SMEGAL: Excuse me, if I may. In 15 they  
14 use the word litigation and in 17 they say a  
15 proceeding. So these people who wrote this knew what -  
16 - used different language to cover different  
17 circumstances.

18 MR. McCALPIN: Look at 8, if it's the one we  
19 dealt with yesterday. There we concluded that  
20 litigation was limited to civil actions in court and  
21 did not include representing a --

22 MR. SMEGAL: Well, that's another example that

1 would support my position because they go on to say  
2 it's either litigation or a pre-complaint settlement  
3 negotiation. MR. McCALPIN: That's right.

4 MR. SMEGAL: I mean, if you want to construe  
5 litigation broadly as you would have us here in 17 or  
6 15, or wherever we are, you would need that other  
7 language, pre-complaint settlement negotiation. That's  
8 part of litigation. MS. BATTLE: Let me just take  
9 some of the language from the December conference  
10 report from the House report language and from the  
11 Senate debate on this particular issue to see if that  
12 helps to enlighten us as to what Congressional intent  
13 was.

14 First of all, the text was, as I think Tom  
15 just mentioned, any litigation on behalf of a person  
16 incarcerated in a federal, state or local prison. Then  
17 in the December conference report the language was  
18 representation of federal and state prisoners and civil  
19 actions.

20 Then in the House report language in  
21 subsection 8 of 504.16, it read, representation of  
22 federal, state or local prisoners in civil litigation.

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1 And then ultimately what Senator Domenici talked about  
2 was prison litigation. So in all of those instances it  
3 seems clear civil actions, litigation that they're  
4 talking about, prisoner litigation, I think that when  
5 they say prisoner litigation, quite frankly that  
6 Senator Domenici was talking about as it relates to  
7 terms and conditions of their incarceration. So --

8 MR. SMEGAL: Yeah, those terms are all  
9 consistent. You can't get a civil action number unless  
10 you've got litigation.

11 MS. BATTLE: Yeah.

12 MR. SMEGAL: So --

13 MS. BATTLE: I'm just giving everybody the  
14 benefit of at least that background for what it's  
15 worth. We need to take a look at that.

16 Suzanne, what's your thought?

17 MS. GLASOW: Well, I was just looking at the  
18 legislative history. I mean, they do use the word  
19 litigation, and I agree with Mr. Smegal that throughout  
20 they seem to know what they're talking about because  
21 they do use litigation some places, proceedings other,  
22 and more definitely language other places.

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1           It really is reliance on the legislative  
2 history that lets us know that they are concerned about  
3 actions regarding prison --

4           MS. BATTLE: Conditions.

5           MS. GLASOW: -- facilities and conditions. It  
6 really would be a policy decision by this committee.  
7 You're not redefining litigation but you are extending  
8 the prohibition to administrative proceedings, either  
9 to just prison condition actions or beyond. That would  
10 be a policy decision by this committee. It is not  
11 required by this legislation.

12          MS. BATTLE: I say we put it out for comment  
13 with prison conditions in it. What's your thought?

14          MR. McCALPIN: I would extend the prohibition  
15 to administrative proceedings involving prison  
16 conditions.

17          MS. BATTLE: Yeah. I think that's because  
18 what we're trying to do is to embrace as much as we can  
19 Congressional intent and the intent from every -- from  
20 the text, from the conference report, from the House  
21 report and the Senate debate has to do with civil  
22 actions, litigation, and prison litigation.

1           So to extend it to administrative proceedings  
2 involving prison conditions includes their intent, the  
3 full intent of Congress, it seems to me. We'll put it  
4 out for comment, and if somehow we hear that we aren't  
5 being expansive --

6           MR. McCALPIN: Well, it's more than comment.  
7 It's going to be in --

8           MS. BATTLE: It's an interim rule at this  
9 point. But if we hear back that we aren't being  
10 expansive enough, then we can be.

11          MS. GLASOW: Right.

12          MS. BATTLE: But I think what we're attempting  
13 to do really here is to be as expansive as necessary to  
14 cover all of what Congress intended.

15          Do we have any thoughts from the Inspector  
16 General on this?

17          MS. TARANTOWICZ: It's obviously a policy  
18 decision. We I believe in our comments to management  
19 had recommended including administrative proceedings  
20 based on that -- in part on that December conference  
21 report language that you've read which before listing,  
22 among which is prisoner litigation, it had the phrase

1 "litigation and related activities."

2 And it goes on to list about seven different  
3 types of prohibited, quote, litigation. In that list  
4 is also includes things that -- like evictions, which  
5 also include -- which the prohibition also includes, I  
6 think, administrative. So I don't think they were very  
7 precise in the language.

8 So again, it is a policy decision based on the  
9 original intent in this regard. That was our only  
10 thought on that issue.

11 MS. BATTLE: Okay?

12 MR. MEYER: I have one other thing to add,  
13 other than that, which is that they did use the word  
14 litigation in another context where I think they  
15 probably meant it broadly because their abortion  
16 prohibition uses the word litigation. But I looked and  
17 I found three where they used litigation.  
18 We've discussed the other two. We didn't discuss  
19 abortion, where I know they mean it broadly.

20 MS. BATTLE: Yes.

21 MS. PERLE: Actually, I disagree with that.

22 MS. GLASOW: I disagree with that. They've

1 always used that term.

2 MS. PERLE: Right. There's a provision in the  
3 LSC Act which talks about representation in abortion  
4 which is non-therapeutic abortion.

5 MS. GLASOW: And that's proceedings.

6 MS. PERLE: And that's proceedings. And the  
7 corporation has always taken the position that that's a  
8 broader restriction in terms of the type of assistance  
9 than the litigation in abortion litigation, which has  
10 been in the act for a long time. So I don't agree with  
11 you. I mean, I think there is a difference between  
12 those two.

13 MS. GLASOW: Without more, we need to read the  
14 legislative language to mean what it means in the terms  
15 that they use. So you almost need more to go beyond  
16 that. And they've had the Abortion Restriction  
17 Appropriations Act since 1983 and they have never  
18 changed that term.

19 So I think that we have to believe that they  
20 mean litigation when they say litigation, proceedings  
21 when they say proceedings --

22 MS. PERLE: Representation when they say

1 representation.

2 MS. GLASOW: Representation when they mean  
3 representation.

4 MR. TULL: And I think what we would reflect  
5 in the commentary would be that this -- that the  
6 extension of the restrictions to administrative  
7 proceedings challenging the conditions of incarceration  
8 is a policy judgment on behalf of -- on the part of the  
9 board, that that was intended by Congress.

10 MS. BATTLE: Right, yeah.

11 MR. TULL: And that it is not a change in the  
12 definition of litigation.

13 MS. BATTLE: Okay. I think that's fair.

14 MR. TULL: Because that does have implications  
15 elsewhere would could become very problematic if --

16 MS. BATTLE: Okay. Let's make sure that we do  
17 include that in the commentary.

18 1637.4, Change in circumstances. Are there  
19 any comments on this section? Bill?

20 MR. McCALPIN: I think there are two. The 90-  
21 day one troubles me some. I don't know how you apply  
22 it. Suppose you are representing a client who is

1 picked upon a felony charge, pending, or misdemeanor  
2 even, pending trial. How do you know whether that  
3 trial is going to happen in 90 days or not?

4 And even if it's scheduled in 90 days, it may  
5 well not be tried in 90 days. I don't know how you  
6 apply the brief --

7 MS. BATTLE: Where is 90 days?

8 MR. TULL: In the commentary.

9 MR. McCALPIN: Bottom of page 4.

10 MS. BATTLE: Okay.

11 MR. McCALPIN: It seems to me it's a very  
12 difficult -- it's paragraph 1, the period of  
13 incarceration is likely to be brief and the case is  
14 scheduled to come to trial after the client is  
15 released. But my experience with trial dates is that  
16 there ain't nothing certain about them.

17 MR. TULL: We had one just -- all right, to  
18 respond to -- specifically to Bill's comment, but we  
19 had suggested change in the language to this section  
20 where it says the case is scheduled to come to trial  
21 after the client is released. We would recommend that  
22 be changed to litigation is likely to continue beyond

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1 the period of incarceration, since there's a number of  
2 activities beyond going to trial which matter, and  
3 that's much too narrow a definition of the activity  
4 which would need to be addressed.

5 MS. PERLE: Also, the person could have been  
6 arrested in the middle of a trial.

7 MR. TULL: Right. Your comment, Bill, we  
8 wrestled mightily with this issue.

9 MR. McCALPIN: I'm sure.

10 MR. TULL: Because it's so difficult to -- I  
11 mean, it is an area where programs are going to need  
12 significant amount of guidance because it is -- quite  
13 possibly will involve many, many cases.

14 A program that's got 5,000 or 10,000 cases as  
15 some programs do is likely to have hundreds of cases  
16 over the course of a year where someone is detained for  
17 a brief period of time. And they continue to represent  
18 the person at jeopardy to their funding, given the  
19 nature of the restrictions.

20 So our concern was, on the one hand we need to  
21 give people as clear a guidance as possible so that  
22 they can make proper judgments. On the other hand,

1 what you say is absolutely right, we are providing  
2 guidance in an area where it is a completely uncertain  
3 area because you don't -- you do have no way of knowing  
4 whether a person is going to be incarcerated for two  
5 days or their life literally in one action.

6 They might be arrested and let go because they  
7 determine the person wasn't the person that committed  
8 the murder. If it's a murder charge, they might be in  
9 jail literally for the rest of their life and you have  
10 no -- you do have no way of knowing that.

11 But I -- but we could not -- we couldn't think  
12 of a way beyond providing some fairly gross benchmarks  
13 to provide the guidance that programs would need and  
14 did shy away from not addressing the issue because we -  
15 - because programs, we have to make choices about.  
16 So --

17 MR. McCALPIN: Let me ask you, you undertake  
18 the representation, you expect it to be brief. On the  
19 91st day do you withdraw?

20 MR. TULL: Well, I think we did just --

21 MR. SMEGAL: It's just a guideline.

22 MR. TULL: It's just a guideline. We

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1 certainly don't view the 90 days as being a bright line  
2 in the sand, if it's 89 you're in, if it's 91 you're  
3 out. It really is more an effort to say that this is  
4 the range of time that we  
5 would --

6 MS. BATTLE: If it goes on more than two or  
7 three months, then --

8 MR. TULL: But it's always going to be a  
9 judgment call as to --

10 MS. BATTLE: -- then there's a problem.

11 MR. TULL: -- whether it will be brief and it  
12 will -- and it necessarily involves a judgment about  
13 the likely duration of the litigation, which is  
14 uncertain, and the likely duration of the  
15 incarceration, which is uncertain. And we want to  
16 provide some guideline as to what we will look to.

17 But you, the director of this program, have  
18 got to make the call on it. And if you're within a  
19 reasonable range of time, then presumably there will  
20 not -- we will not find that there's a violation. But  
21 we can't -- we couldn't find  
22 -- we couldn't, in spite of much effort to try to

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1 figure out a way to do it, frame a way to provide more  
2 precise guidance than just say 90 days as a guideline  
3 to provide a range.

4 MR. McCALPIN: One of the things you could say  
5 is if the incarceration lasts more than X days you must  
6 discontinue.

7 MS. BATTLE: But the problem --

8 MR. SMEGAL: Well, but are you looking down  
9 the road or are you looking back?

10 MR. McCALPIN: Back.

11 MR. SMEGAL: So you get out 120 days. You say  
12 okay, incarceration has now gone 120 days, now you got  
13 to get out.

14 MR. McCALPIN: No. What I'm saying is, if you  
15 just say -- the period of incorporation (sic) is likely  
16 to be brief. In any event, if the incorporation lasts  
17 more than however many days you pick, representation  
18 has to be discontinued.

19 MS. BATTLE: I almost think case by case, 91  
20 days to me, depending on where you are in the case and  
21 what it is that you're doing shouldn't be such a bright  
22 line that you're automatically under our regulations.

1           Now, the commentary just gives guidance and  
2 says if it's over 90 days, so that you have some idea  
3 when a person is incarcerated, but it looks like it's  
4 going to be a long time, start now and get out. But if  
5 it runs 90, 91, 92 days, by the time you've gotten out  
6 of the case, it could have been disposed of.

7           So it's a judgment call. The first paragraph  
8 really says a program as a general rule must take steps  
9 to discontinue representation. It's only when a  
10 program believes that it's going to be brief from the  
11 onset of their knowledge about the incarceration that  
12 they get into this situation of trying to determine  
13 whether they should get out or whether they have an  
14 ethical duty to bring the litigation to a close.

15           MS. PERLE: I think I would feel more  
16 comfortable instead of saying as a guideline LSC will  
17 consider incarceration 90 days, I would say -- I would  
18 suggest that you say as a guideline recipients should  
19 consider incarceration of more than two or three --  
20 less than two or three months to be free.

21           In other words, to make it clear that the  
22 recipient is the one that has to make the judgment

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1 because they're there.

2 MS. BATTLE: Yeah, and put the burden on them  
3 and not on us for making those kind of judgments. I  
4 agree with you on that, Linda.

5 Bucky?

6 MR. ASKEW: 1637.4 says if a client becomes  
7 incarcerated after litigation has commenced. Was that  
8 purposeful, rather than saying representation after  
9 representation? It has to be litigation?

10 MR. TULL: Well, the restriction is on  
11 litigation. So that, if you're just providing advice  
12 to someone or negotiating --

13 MR. ASKEW: So if you're in a case that is not  
14 going to involve litigation, then this doesn't apply to  
15 you?

16 MR. TULL: That's correct.

17 MR. ASKEW: That's 90 percent of the cases  
18 that Legal Services programs do.

19 MR. TULL: And as a practical matter, that's  
20 not likely to be a serious problem simply because if it  
21 is most advice through service and that kind of  
22 activity is of relatively short duration, the cases

1 which last a long time or eventually become a problem  
2 are ones where there is litigation or administrative  
3 representation.

4 MS. BATTLE: Yeah, okay.

5 MR. TULL: We have eliminated the problem with  
6 regard to initiating representation because presumably  
7 if you are involved with an administrative matter  
8 before some is arrested, it wouldn't involve the  
9 conditions of incarceration. So that wouldn't be able  
10 to continue.

11 MS. BATTLE: What about into this refusal to  
12 permit a recipient to discontinue representation? We  
13 struggled with this same issue earlier and we came to  
14 some --

15 MR. McCALPIN: And if you look at the  
16 paragraph on page 5, it's a rather different treatment  
17 than we were talking about this morning.

18 MS. BATTLE: Yeah. I think that this kind of  
19 gets at the documentation that I mentioned when we  
20 discussed this before. That is, filing motions and  
21 making it clear to the court, possibly getting in  
22 contact with LSC so that we can inform the court

1 directly of the implications of continued  
2 representation.

3 Part of what you do have here though is the  
4 same, that this lawyer may not file anything related to  
5 the claims on behalf of that client on a prospective  
6 basis. And I'm wondering, does that in any way  
7 conflict with that lawyer's professional responsibility  
8 if the judge refuses to let them out of the case, the  
9 case is set for trial, they filed all their motions,  
10 the case is supposed to go to trial on a certain date  
11 if they don't file their pre-trial documents, whatever  
12 they are.

13 MR. TULL: I was going to recommend in our  
14 redrafting of the commentary that we add a clause after  
15 that to address the problem you raised, which would --  
16 the very last sentence of the commentary to add, unless  
17 failure to do so would jeopardize the right of the  
18 client.

19 Because there may be times when, if a claim is  
20 not filed, then the person would lose the right to make  
21 the claim and the lawyer is still responsible for that  
22 person's legal problem, has an ethical duty to pursue

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1 that.

2 And this is really designed just to make  
3 certain that during the time the person is incarcerated  
4 that you don't expand the litigation in a way which is  
5 an elective procedure, if you want to put it that way.

6 MS. BATTLE: Okay.

7 MR. BROOKS: I think it relates to the two  
8 there, the refusal of the court to permit the recipient  
9 to discontinue. It seems to me it would be more  
10 helpful to start off, if the client becomes  
11 incarcerated, the recipient must use its best efforts  
12 to withdraw promptly.

13 MS. BATTLE: Yes.

14 MR. BROOKS: And that was maybe with a little  
15 clause in the commentary. We could suggest that if the  
16 court is reluctant to permit withdrawal, then the  
17 recipient should explore alternate procedures for  
18 getting substitute counsel or whatever.

19 MR. TULL: Was that the last paragraph, John?

20 MS. BATTLE: Yeah, he is speaking of 1637.4,  
21 Change in circumstances, putting in a clause about  
22 recipient must use his best efforts to withdraw.

1 MR. TULL: Promptly.

2 MS. BATTLE: Promptly.

3 MS. PERLE: Where? I'm sorry?

4 MS. BATTLE: From the case.

5 MR. SMEGAL: The last sentence. It goes on  
6 for four lines.

7 MS. BATTLE: Unless the period of  
8 incarceration is likely to be brief and the case is  
9 scheduled to come to trial after the client is  
10 released. And then you would say period, and then add  
11 this second part about the court refusing to permit  
12 discontinuation in the commentary?

13 MR. BROOKS: Yes. Strike out the little one  
14 in the second line.

15 MS. BATTLE: Yeah, take out the one.

16 MR. TULL: I had suggested a different clause  
17 to follow after, and it is likely to be brief to say  
18 instead of -- and the case is scheduled to come to  
19 trial, to change that to, "and the litigation is likely  
20 to continue beyond the period of incarceration." Is  
21 that --

22 MS. BATTLE: The litigation is likely.

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1 MR. TULL: The litigation is likely to  
2 continue beyond the period of incarceration.

3 MR. SMEGAL: I suppose beyond the  
4 incarceration.

5 MS. BATTLE: Beyond the incarceration? Okay.  
6 Okay, period at the end of that, okay?

7 Mike, do I see your hand?

8 MR. FERRY: Yes. I would like to raise a  
9 related issue because the discussion is entirely  
10 relevant to it, although it doesn't involve a change of  
11 circumstances. I have two cases right now which are  
12 prison cases, one, again in 1981, the other in 1989.  
13 They are long-term cases.

14 I have -- actually, months before this law was  
15 passed, I warned the judge that this might be coming.  
16 The judge said, "Well, we'll worry about that when the  
17 law is passed."

18 When the law was passed, I filed a motion to  
19 withdraw with the judge and I explained it to him and I  
20 spoke to him, and I'm relying on him to let me out and  
21 appoint substitute counsel by the end of July. And I  
22 feel fairly comfortable that he will.

1           But I think that's -- it's not just my  
2 problem. I think there are going to be other people in  
3 the ongoing cases where this is not a change of  
4 circumstances, it's simply a change in the law that has  
5 put people in exactly the same situation. And I would  
6 like to ask that you consider providing the same kind  
7 of protection in a case where the court will not allow  
8 withdrawal, assuming that efforts have been made to  
9 obtain that withdrawal, the people in my situation.

10           MS. BATTLE: I think your point is well taken,  
11 that certainly we can implement here in our regulations  
12 what our view of Congressional intent is, but that both  
13 state and federal sitting judges make their own rulings  
14 with regard to these motions.

15           MR. FERRY: Right. And I don't have any  
16 control over that.

17           MS. BATTLE: And none of us have control over  
18 that. And what I'm hoping that we can do is to  
19 document though our effort, all of our efforts to meet  
20 all of the requirements that are set out in these  
21 provisions.

22           MR. BROOKS: We were talking some time ago

1 about a recipient knowing of the incarceration. It  
2 seems to me we ought to have had language on the last  
3 line of page 6, recipients may not participate in civil  
4 litigation on behalf of a person who, to the knowledge  
5 of the recipient, is incarcerated. And the same  
6 language, when you're ready, on the first line of point  
7 four, if to the knowledge of a recipient the client  
8 becomes incarcerated.

9 MR. TULL: Can we say, who is known to be  
10 incarcerated, known by the recipient to be?

11 MR. BROOKS: All right.

12 MS. PERLE: In the first one or the second  
13 one?

14 MR. BROOKS: Known by the recipient?

15 MS. BATTLE: If a client is known by the  
16 recipient to be incarcerated after litigation has  
17 commenced, the recipient must use his best efforts to  
18 withdraw promptly unless the period of incarceration is  
19 likely to be brief and the litigation is likely to  
20 continue beyond the incarceration.

21 MR. TULL: John, did you suggest that change  
22 in both?

1 MS. BATTLE: Yeah.

2 MR. TULL: Prohibition and the change in  
3 circumstances?

4 MR. BROOKS: Yes.

5 MS. BATTLE: Yeah, he did. He's saying  
6 knowledge.

7 MR. TULL: Because I'm trying to think of a  
8 circumstance in which, if a person is already  
9 incarcerated a program would not know that a person is  
10 incarcerated.

11 MS. BATTLE: If they're on some sort of  
12 release --

13 MR. TULL: The knowledge really becomes a  
14 problem only in change of circumstance where you just  
15 don't hear from them and you may not even hear from  
16 them because they're incarcerated. But a person, a  
17 program --

18 MS. BATTLE: Somebody serving out a weekend  
19 sentence on weekends, unless you've got in your intake  
20 procedure something to catch that, you may not know  
21 that that person from the onset is incarcerated.

22 MS. PERLE: This suggests, I think, that the

1 person is non-inclusive. It suggests --

2 MS. BATTLE: Not all people that are --

3 MS. PERLE: Under imprisonment there's -- on  
4 page 3 at the bottom?

5 MS. BATTLE: Yeah. You have people who are  
6 incarcerated, but on an intermittent basis.

7 MS. PERLE: Right. But what this says in the  
8 preamble is, however, a person serving a term of  
9 successive weekends in prison would be considered not  
10 to be incarcerated.

11 MS. BATTLE: Oh, they're not?

12 MS. PERLE: That's what this says.

13 MR. TULL: That's what they say.

14 MS. BATTLE: Okay.

15 MR. TULL: I think the concern with putting it  
16 in the regulations, we don't want -- I think the degree  
17 to which how we frame these is an indication of the  
18 rigor with which we expect programs to operate to  
19 implement them. And I think a -- where a person is  
20 applying for a benefit, applying for representation --

21 MS. BATTLE: We're going to presume that, I  
22 think, that the program--

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1 MR. TULL: I think that the program has more  
2 of an obligation at that point to determine --

3 MS. BATTLE: Find out, yes.

4 MR. TULL: -- if in fact they are -- assuming  
5 that person puts them out, come into the office and  
6 still be incarcerated, which may not be physically  
7 possible. And if that is in our definition, if there  
8 is more a legitimate obligation on the part of the  
9 program to ask the kinds of questions which we would  
10 answer, which is different from saying you have to  
11 create an obligation for people to report to the  
12 program, which I think does have a significantly  
13 detrimental impact on the attorney-client relationship.

14 MS. BATTLE: So you are saying take it out of  
15 three but leave it in four?

16 MR. TULL: Yes, that's what I would recommend.

17

18 MS. BATTLE: All right, John, what's your  
19 thought? Is that okay?

20 MR. BROOKS: I think that makes sense.

21 MS. BATTLE: Okay. We'll take it out of  
22 three, we'll leave it in four.

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1 MS. PERLE: Could you just go over how you  
2 want it read and how you want three and four again?

3 MS. BATTLE: Yeah, I can. In four it would  
4 read: If a client is known by the recipient to be  
5 incarcerated after litigation has commenced, the  
6 recipient must use its best efforts to withdraw  
7 promptly from the case unless the period of  
8 incarceration is likely to be brief and the litigation  
9 is likely to continue beyond the incarceration.

10 MS. PERLE: The first part, I was bothered by  
11 the way they -- if they are known to be incarcerated.  
12 I think you want to really say -- make it clear that  
13 they become incarcerated after you've started. I think  
14 maybe you want to say if, to the recipient's  
15 knowledge --

16 MR. TULL: I think John's --

17 MS. PERLE: -- a client becomes incarcerated  
18 after litigation has commenced.

19 MR. TULL: Your language is better.

20 MS. PERLE: I mean, do you think that is  
21 closer to what John suggested?

22 MR. TULL: That was down the road. I --

1 MS. BATTLE: John, what did you say? I  
2 thought I wrote down what you said.

3 MR. BROOKS: Well, I say if to the knowledge  
4 of the recipient a client becomes incarcerated.

5 MS. BATTLE: To the knowledge of the  
6 recipient.

7 MR. BROOKS: Maybe when would be a better. I  
8 guess if is better.

9 MS. BATTLE: A client becomes incarcerated,  
10 okay. All right, Bill?

11 MR. McCALPIN: Do I understand there is going  
12 to be some change in the paragraph on page 5 to  
13 accommodate the situation of Mike Ferry disclosed?  
14 Because that only -- after of an initially eligible  
15 client there was that, but it says discontinue -- it is  
16 not likely, but during a period --  
17 while seeking alternate counsel, when involvement in  
18 successful litigation.

19 It's not has become incarcerated, it's where  
20 the program has been discontinued representation, or  
21 who has become incarcerated. It's that. He was  
22 incarcerated at the time the representation started.

1 MR. TULL: I think the conversation we had  
2 this morning about the transition issues with regard to  
3 prisoners, class actions, and aliens was that not to  
4 treat those in the regs but to address those as a  
5 general problem. It's a matter of our relations with  
6 Congress as to what they will expect of us.

7 And I think it would -- this is deliberately  
8 designed to address the circumstance where a person  
9 does become incarcerated afterwards, doesn't address  
10 the issue that Mike raised. It's one we're going to  
11 have to face.

12 But I think the discussion this morning was  
13 around the assumption that that is best addressed as a  
14 cluster of issues that will involve conversations with  
15 the House committee and the Senate committee about what  
16 we do about it, and making a presentation to them  
17 regarding the problem, which is really not -- not well  
18 addressed.

19 MR. McCALPIN: But can we say anything about  
20 what the attorney may do while trying to withdraw,  
21 which is what we do here?

22 MR. TULL: With regard to -- ?

1 MR. McCALPIN: The attorney who is attempting  
2 to withdraw, who is finding it difficult to withdraw  
3 not because the client has become ineligible -- not  
4 because the client was initially not incarcerated but  
5 becomes incarcerated. He's already been incarcerated.  
6 Now he's trying to withdraw.  
7 What may the attorney do while the withdrawal is being  
8 affected?

9 MR. TULL: We in the program letter that we  
10 sent to programs last fall recommended that they not  
11 institute new -- not expand the litigation that they  
12 were seeking to withdraw. That is not a requirement,  
13 it's a recommendation. But this regulation will not  
14 become --

15 MR. McCALPIN: They may file such motions as  
16 are necessary?

17 MR. TULL: Well, this regulation will not be -  
18 -

19 MR. McCALPIN: I understand that.

20 MR. TULL: -- printed until after the period  
21 of transition is over. So the issue of what a program  
22 should do during the period of transition is one which

1 will no longer be timely when this is published. So I  
2 think our advice not to address the transition issue in  
3 the regulations because it's a Congressional relations  
4 issue would hold us regarding that as well.

5 MR. McCALPIN: But I'm asking when you talk to  
6 the Congress or send out another program letter or do  
7 whatever you're going to do, what are you going to say  
8 about what an attorney who is trying to -- who started  
9 out representing an incarcerated prisoner is trying to  
10 extricate himself can do while the process goes on.

11 You have said here what the attorney may do.  
12 How are you going to protect the attorney doing that in  
13 Ferry's situation?

14 MR. TULL: What we recommended, which is not a  
15 requirement, what we recommended in the program letter  
16 we sent out was quite similar to this.

17 MR. McCALPIN: But you said not file  
18 additional claims. What about motions to protective  
19 rights?

20 MR. TULL: We -- I can't remember the precise  
21 language we used, but the concept in the letter was the  
22 same, which is, you should continue to do what's

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1 necessary to protect your client's rights, but we  
2 recommend that you not file additional claims or seek  
3 to expand the claims that you have.

4 MR. McCALPIN: New defenses?

5 MS. BATTLE: You know, you get into really  
6 things that I think are governed by your ethical  
7 responsibility. If you've got a pending pre-trial  
8 order that says -- or a scheduling order that says  
9 you've got to file all of your defenses by X date, and  
10 that date is to come to court and you haven't gotten  
11 any continuance on that, I think you've got an  
12 obligation to file whatever you are supposed to file in  
13 accordance with that scheduling order.

14 I don't think that until the court has granted  
15 your withdrawal you are in a situation where you have  
16 got to represent that client until you're out of that  
17 case.

18 MR. TULL: We certainly said nothing in a  
19 program letter which was inconsistent with the view  
20 that you just stated because that's certainly my view  
21 and I signed the letter. So I'm certain that we did  
22 not say -- we did not recommend or in any way require

1 action which would --

2 MS. BATTLE: If you've got an order that says  
3 you've got to join all of your parties, you've got to  
4 join additional defendants by X date --

5 MR. McCALPIN: Name your witnesses.

6 MS. BATTLE: Yeah, or name your witnesses.

7 That --

8 MR. McCALPIN: Identify your documents.

9 MS. BATTLE: You know, or but joining other  
10 parties may be expanding the lawsuit in a sense because  
11 you are bringing in more defendants that you originally  
12 have. But if you've got a time frame and a deadline on  
13 that, I think you have to do it.

14 MR. TULL: As I'm speaking, I'm remembering  
15 that as we're talking about this, that the act itself  
16 has language about not filing additional claims during  
17 the transition period.

18 MR. McCALPIN: Is there any thought that  
19 programs, particularly program attorneys ought to be --  
20 ought to require to do this, other than as an employee  
21 of the program, basically pro bono?

22 MS. BATTLE: Well, I don't know that we can

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1 require attorneys to do pro bono work on cases that are  
2 restricted under our provisions. I think that that may  
3 in some instances end up being the only option in order  
4 for a lawyer not to be in violation of their own  
5 ethical requirements, but I don't think that the  
6 programs can actually require and say, "This is a case.  
7 You're in it. You must take it pro bono and finish  
8 it."

9 MS. PERLE: It may be not so practice program  
10 problem if the people are full-time attorneys.

11 MS. BATTLE: Yeah, and that's the other  
12 problem.

13 MS. PERLE: It's just a big case which is  
14 going to interfere with their ability to --

15 MS. BATTLE: Do their work. And we're keeping  
16 their time, so it's -- you know, I would venture to say  
17 that these are, you know, these are really very knotty,  
18 difficult issues that will have to in the transition,  
19 as John has pointed out, be determined based on  
20 judgments that will be made by recipients, given their  
21 specific view of what's going on, their knowledge of  
22 the case, their knowledge of the prospect of being able

1 to find other counsel to take the case, their knowledge  
2 of the judge, his willingness to let them out, how  
3 promptly that may happen, how slowly that may happen.

4 And I think any challenges that may come from  
5 there that we're in the best position if there is  
6 strong documentation of efforts, given John's language,  
7 to withdraw. If you not only have a notice of intent  
8 to withdraw but documentation about the change in the  
9 law and the reasons for it and an affidavit, and all of  
10 that is somehow denied and you file a request for  
11 reconsideration in that denial.

12 And you go through all that you can and you  
13 have documentation to your client about your obligation  
14 to withdraw, and there's some documentation of efforts  
15 to retain or to find other counsel, or to refer the  
16 case to other places, and in all of those instances you  
17 hit dead ends, I think you're stuck and you've got an  
18 ethical obligation as long as you are the attorney of  
19 record to do the work on that case.

20 But all those things I think are things that  
21 we'll have to, in our discussions with the recipients  
22 and with Congress, make them aware of how far along we

1 are in that process and how we've worked it out, it  
2 seems to me.

3 MR. TULL: And the other half of that, which  
4 does create the problem we're in is what Martha said  
5 this morning, which is, none of us should presume that  
6 making that record is going to satisfy Congress' belief  
7 that we should not fund programs that do this, that  
8 they believe that the 90-day transition period that  
9 they gave is --

10 MS. BATTLE: Sufficient.

11 MR. TULL: Is sufficient to address that  
12 problem and that we may well hear back from them what  
13 Alex said, which is they may have an ethical obligation  
14 to stay in the case but we don't have a obligation to  
15 continue to pay money for that. So someone's got a  
16 choice to make here.

17 MS. BATTLE: Yes. And that's the bottom line.  
18 And I think that what we're going to have to do is to  
19 err on the side of strong regulations that communicate  
20 that Congressional intent and how we construct them and  
21 how we set out our language.

22 Because as people have to make these

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1 judgments, they need to know what's at risk. And it's  
2 a major risk. It's a major risk, from our standpoint  
3 of view. So I'm hoping that our commentary will be  
4 reflective of the discussion that we've had on this  
5 point so that as these knotty issues -- I have judges.

6 I can remember a case that I just argued  
7 before the 11th Circuit last week that I should have  
8 been let out very early on in the case. The judge  
9 refused, the District judge refused to let me out, and  
10 I had to take the case and represent a defendant  
11 against my will, through the trial, through everything.  
12 So, that happens. I'm a witness.

13 Okay. Now, let me give you -- John?

14 MR. BROOKS: One other -- on page 2, the first  
15 line. I wasn't here so I'm not sure, but I believe  
16 that should be the committee determines, rather than  
17 the board.

18 MS. BATTLE: Okay, the committee.

19 MS. PERLE: I don't think anybody here heard  
20 what John said.

21 MS. BATTLE: John said on page 2, the first  
22 line, the second -- third word -- actually, the second

1 word in the first actual sentence, should be the  
2 committee determined, rather than the board determined.

3 MS. PERLE: It's because it's an interim rule.

4 MS. BATTLE: It goes before the board.

5 MS. PERLE: It needs to be a board  
6 determination.

7 MS. BATTLE: Okay.

8 MS. PERLE: This is written as if it will be  
9 an interim rule. Normally, when we send out a proposed  
10 rule we say the committee determined. But because it's  
11 an interim rule the board has to take it. And that's  
12 why --

13 MR. BROOKS: Now, this --

14 MS. PERLE: I have nothing inconsistent  
15 throughout these rules, and I have to fix that.

16 MS. BATTLE: We need to fix that throughout.  
17 Let's just make sure we got back through, since these  
18 are interim rules, and that we're consistent throughout  
19 to say because all of these rules, unlike the way we  
20 normally do proposed rules when the committee sends  
21 them out for comment, they come back and then we get it  
22 to the board when it becomes a final rule.

1           For an interim rule we'll present it to the  
2 board directly before it goes out and then we will take  
3 comments in and then come back to the board again for  
4 the final rule. But we need to throughout make sure  
5 that we use the language that's consistent with the  
6 interim rule procedure.

7           MR. BROOKS: Well, I may have confused this  
8 with the statement in some of the other ones that on  
9 May 19th the committee requested.

10          MS. GLASOW: Uh-huh. And that created --

11          MS. BATTLE: But is it the committee  
12 soliciting public comment?

13          MS. GLASOW: Yes, it's the committee that's  
14 soliciting public comment because --

15          MS. BATTLE: But it is the board making  
16 determinations --

17          MS. GLASOW: Yes.

18          MS. BATTLE: -- on the interim rule.

19          MS. GLASOW: Because it also functions as a  
20 proposed rule seeking public comment.

21          MS. BATTLE: Okay.

22          MS. GLASOW: But the board makes the

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1 determination on the interim rule.

2 MS. BATTLE: Okay. I'm going to make a  
3 judgment. That's what we're here all about, that we  
4 are not -- we are too weary at this point to take up  
5 welfare reform. I think that's a lengthy reg. We've  
6 got 12 pages, significant commentary. It's a new one.  
7 And I just think we'll be fresh in the morning.

8 We have at this point one, two, three, four --  
9 four regs to cover tomorrow. And I think we should be  
10 able to get that done -- hopefully -- with a morning  
11 maybe plus session, morning 12 to 1 o'clock hopefully  
12 session.

13 I'm really proud of what this committee has  
14 done in getting through 11 regs in two days. I mean,  
15 this is -- we should write the Guinness Book of World  
16 Records about what we have done and the yeoman task  
17 that our staff and the Inspector General has undertaken  
18 to get us to this point as well.

19 But I just don't want to be a difficult  
20 taskmaster. It's after 4 o'clock. I think we should  
21 take a break and recess for today and resume tomorrow  
22 morning at 9 o'clock to take up the four regs that we

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