

ORIGINAL

RETURN TO CORPORATION
SECRETARY ARCHIVES FILE

TRANSCRIPT OF PROCEEDINGS

LEGAL SERVICES CORPORATION

OPERATIONS AND REGULATIONS COMMITTEE MEETING

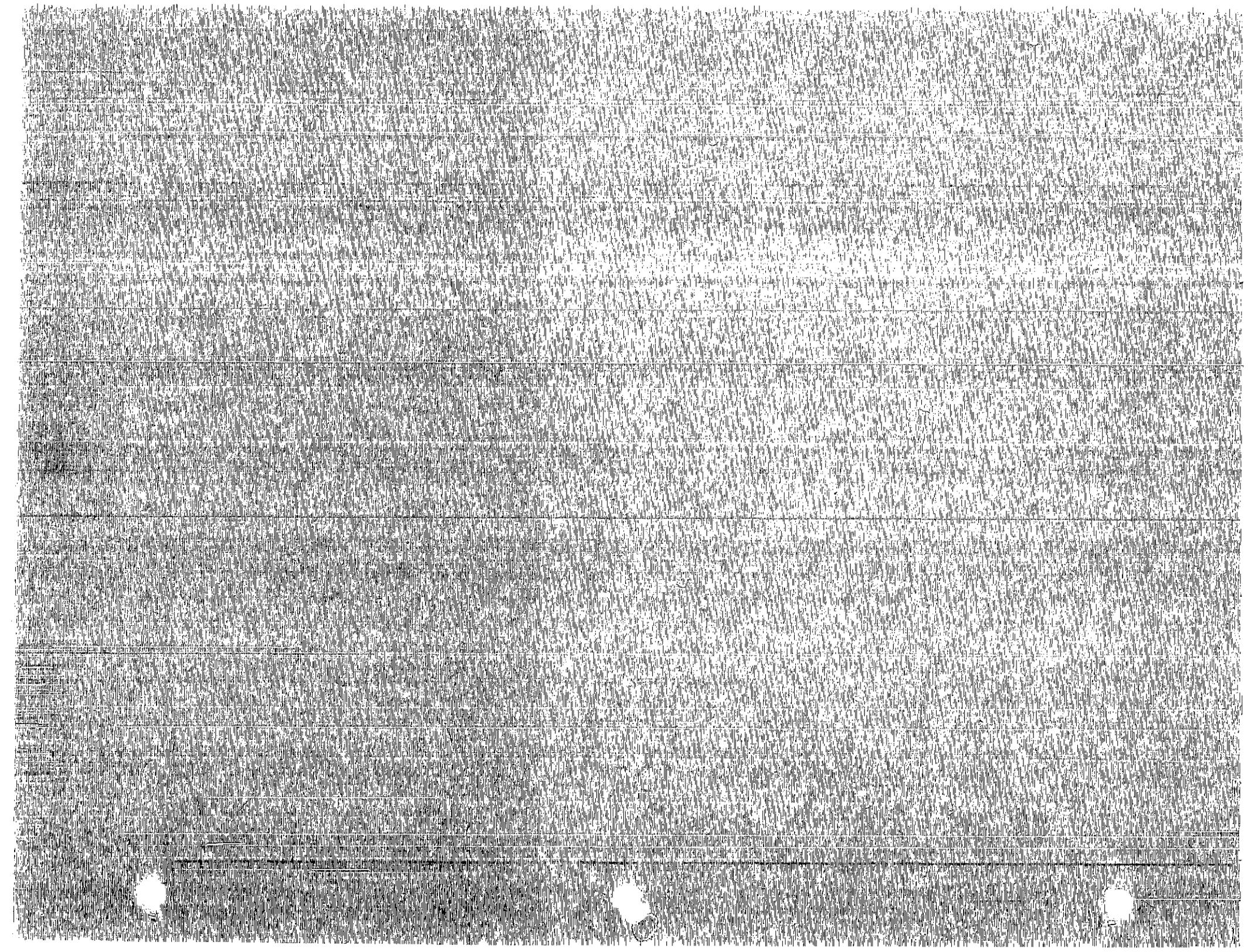
Pages: 1 through 121

Place: Washington, D.C.

Date: October 25, 1985

Acme Reporting Company

Official Reporters
1220 L Street, N.W.
Washington, D. C. 20005
(202) 628-4888



1 LEGAL SERVICES CORPORATION

2

3 OPERATIONS AND REGULATIONS COMMITTEE MEETING

4

5

Friday,
October 25, 1985

6

Lewis Room
Capitol Holiday Inn
550 C Street, SW
Washington, D.C.

7

8

9

The committee met, pursuant to notice, at

10 10:07 a.m.

11

PRESENT:

12

MICHAEL B. WALLACE, ESQ., CHAIRMAN

13

W. CLARK DURANT III, ESQ.

14

LEA ANNE BERNSTEIN, ESQ.

15

PEPE MENDEZ, ESQ.

16

LORAIN MILLER

17

HORTENCIA BENAVIDEZ

18

19

20

21

22

23

24

25

P R O C E E D I N G S1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHAIRMAN WALLACE: I think we have all of the members of the committee present. We're a little bit late, but nonetheless, we are here.

At this point, let me call the committee meeting to order. This is the meeting of the Operations and Regulations Committee of the board of directors of the Legal Services Corporation, pursuant to notice duly given in the Federal Register, running about 37 minutes late at this point.

Members of the committee present are the Chairman, Mr. Wallace; the two members, Mrs. Bernstein, Mrs. Miller; the ex-officio member of this committee, board chairman Mr. Durant; and a board member, not a member of this committee, with us, Ms. Benavidez. We're happy to have you with us this morning. I know Pepe Mendez is floating around someplace, but I don't see him at the moment.

The first item on the agenda is the approval of the agenda. I think all members, all members of the committee have the tentative agenda before them. If you've had a chance to review it, is there a motion to adopt the agenda?

MR. DURANT: I so move.

CHAIRMAN WALLACE: Is there a second?

MS. MILLER: I second.

CHAIRMAN WALLACE: Any discussion of the agenda?

(No response) All in favor, say aye.

1 (Chorus of Ayes)

2 CHAIRMAN WALLACE: Opposed?

3 MS. BERNSTEIN: No.

4 CHAIRMAN WALLACE: All right. I heard two ayes
5 and one no, and the Chair votes aye. The agenda is carried.

6 We do not have minutes of the previous meeting
7 which was just two weeks ago. Those have not yet been
8 prepared, so I suppose when we get to Santa Anna in two weeks,
9 we will try to deal with two sets of minutes at once.

10 The first and basically the only item on the agenda
11 today is the proposed Part 1630 of our regulations on question
12 costs. We postponed dealing with this in New Hampshire.
13 We called this meeting to try to deal with it today.

14 Is there a report from the Office of Monitoring
15 Audit and Compliance, as listed in the agenda? Mr. Bovard,
16 is there anybody here from the Monitoring, Audit and Compliance
17 office?

18 MR. BOVARD: I'm sorry. Fred Williams said that
19 he wanted an opportunity to speak.

20 CHAIRMAN WALLACE: Do you know if he wants to address
21 the committee on the subject?

22 MR. BOVARD: I'm not sure.

23 CHAIRMAN WALLACE: Better go check with him.

24 (Pause)

25 CHAIRMAN WALLACE: Mr. Williams, one of the items

1 on the agenda, we are ready for a report from your office
2 on this regulation. If your office has anything it wants
3 to report at this time.

4 MR. WILLIAMS: Okay. I would simply stand with
5 the recommendation I made in New Hampshire, that these matters
6 be dealt with in the audit guide.

7 CHAIRMAN WALLACE: Okay. Go ahead, Ms. Bernstein.

8 MS. BERNSTEIN: I've got some questions because
9 I've got a real concern that we're -- that this board, that
10 has tried very hard to be deliberative, is being precipitous
11 in this instance, and as we are rushing headlong into
12 regulations that, as far as I've been able to tell, have
13 not been adequately explored in terms of either our own sense
14 of knowledge about what the effect of the regulations are,
15 or how they fit in with the total audit and accounting
16 procedures.

17 I received a book this morning from Tom Bovard,
18 of something that I asked for a long time ago, which was,
19 and I'm not blaming Tom and I certainly don't mean to indicate
20 that there is any sort of criticism of the staff on this;
21 I recognize how short-staffed we are and how many directions
22 the board has been going.

23 I am concerned, though, that I get a book this
24 morning that shows all the different ways the question costs
25 are dealt with in different other federal money funding entities.

1 And, this, as far as Tom has been able to tell me, has not
2 been analyzed by the corporation in order to give us any
3 sort of recommendation one way or another as to whether or
4 not these other ways of doing it are better, worse, have
5 flaws, have advantages over what we are proposing to do,
6 and I question -- I ask you, have you had a chance to look
7 at this material?

8 MR. WILLIAMS: No, I haven't.

9 MS. BERNSTEIN: And, yet, you're going to be charged
10 with enforcing this, you're going to be charged with dealing
11 with this, and it seems to me that we, as a committee, are
12 being -- we're doing less in terms of trying to find out
13 the entire story on this regulation than on any other regulation
14 I can see that we have dealt with in the last year.

15 MR. WILLIAMS: I can't -- I can't comment on that.

16 MS. BERNSTEIN: But, it -- I am concerned about
17 that, and the other thing that I'm concerned about is Alan
18 Houseman gave us in New Hampshire, a memorandum on question
19 costs and private funds, which, to my knowledge, we've not
20 had an analysis of in terms of our corporation staff.

21 I think it's a crucial issue. I think it would
22 be -- I think, frankly, it would be lacking in proper
23 deliberative mode for this committee to recommend one way
24 or the other, the passage of a regulation, without having
25 dealt with these two very serious information areas.

1 That, in addition to the fact that we've had a
2 corporation staff recommend to us that we deal with it all
3 in the audit and accounting guide. Now, is there -- as I
4 understand it before, the whole question of question costs
5 was dealt with, was encompassed in the audit and accounting
6 guide before.

7 MR. WILLIAMS: That's where the corporation has
8 traditionally dealt with this question.

9 MS. BERNSTEIN: Okay. Would you -- could you give
10 us, you know, from your perspective, some of the reasons
11 why it's important to continue to do that?

12 MR. WILLIAMS: I find that a simpler and cleaner
13 place to deal with these questions. I don't think one should
14 -- as a general policy, I suppose the president's earlier
15 circular to its -- the president's agencies, we are not,
16 but I think it's relevant for the committee to -- the
17 corporation to take this sort of pronouncement as not binding,
18 but as something that should be taken into consideration,
19 that regulations should be minimized, that things that can
20 be dealt with through internal policies rather than publica-
21 tions and the Federal Register and through federal regulations,
22 etc., should be dealt with elsewhere.

23 Federal Register is too many pages in it every
24 year. That sort of thing. That's beyond what was in the
25 president's directive, but that was the general sense, as

1 And, my sentiment is that in exercising the power
2 delegated to us, deal with the general citizenry, we ought
3 to tell people what the rules are we're going to play by,
4 and what we expect of them; as to how they deal with each
5 other, I couldn't agree with the president more, that there
6 ought to be fewer regulations.

7 But, as to how the Government deals with its
8 citizens, I think the Government has an overwhelming obliga-
9 tion to tell people what the rules are, and I am prepared
10 to be convinced to the contrary that we don't need to spell
11 these out or if we do need to spell them out, we need to
12 spell them out some place other than in the Code of Federal
13 Regulations.

14 But, it seems to me that we're planning to spell
15 them out some where, that they are either going to be in
16 the audit guide or they're going to be here, and that the
17 best way to spell them out is to spell them out here, where
18 anybody with access to a library can find out what they are.

19 That's-- that is my general position. I stated
20 my general position in New Hampshire, haven't seen anything
21 yet to dissuade me from that, but between now and the time
22 the board deals with this, if the board ever does deal with
23 it, I'm prepared to be convinced to the contrary.

24 MS. BERNSTEIN: But, --

25 MR. WILLIAMS: May I make one suggestion? I agree

1 the Legal Services Corporation, there would be no problem
2 at all on not putting in the CFRs. It's just in our own
3 house, in our own building.

4 If we want to audit our grantees, none of whom
5 are federal agencies, almost all of whom are non-profit
6 corporations, some place else, then, we are dealing with
7 non-governmental individuals. It's no longer internal.
8 We are putting restrictions on how they do their business.

9 Now, we may not need a regulation to do that. We
10 may be able to do it entirely by contract, and we have grant
11 conditions in our contract that say you shall comply with
12 the audit guide. That may be enough, but it may also be
13 that some court is going to take the position that this ought
14 to be a regulation, that it should have been put forward
15 in strict conformity with the administrative procedure act,
16 full notice to everybody, plenty of hearings, lots of
17 consideration, and print it in the CFRs.

18 And, if there's any doubt on the subject, it seems
19 to me that the most sensible and most cautious way to proceed
20 is to give the maximum amount of notice, the maximum amount
21 of technical compliance with the law, and to put it forward
22 that way.

23 I don't see what you lose by that, and I do see
24 that there is a risk that if you do not follow those procedures,
25 some judge some where is going to say that you should have,

1 and we will not be able to do what we hope to do by this
2 provision.

3 Ms. Bernstein?

4 MS. BERNSTEIN: Mike, with your -- with that
5 reasoning, my concern is really in terms of our own kind
6 of policy structure, a committee, you know, is given the
7 responsibility and Clark, when he, you know, created the
8 chairman for the committee and assigned the membership to
9 the committee. My thought was that the committees were going
10 to look at all of the options and make a recommendation to
11 the board.

12 What I'm hearing from you is come, you know, come
13 the end of this meeting, you might have something to recommend
14 to the board with the obvious --

15 CHAIRMAN WALLACE: Sure.

16 MS. BERNSTEIN: -- exclusion of lots of information.

17 CHAIRMAN WALLACE: And, I'll tell you why I want
18 to do that. Why I want to do that is that at several points
19 in our regulations, it makes a difference whether or not
20 certain restrictions are in place by the beginning of the
21 grant year.

22 The only way that this regulation can be in place
23 by the beginning of the grant year is if it's adopted in
24 Santa Anna.

25 Now, we were scheduled to meet on this in New

1 Hampshire. The staff work had not been fully completed.
2 We called this special meeting to give the opportunity for
3 that to be done.

4 The staff believes that the audit guide is more
5 important, and that's where the resources have been devoted.
6 That's fine. We'll talk about the audit guide soon as this
7 meeting is over. But, we don't have any more time between
8 now and Santa Anna for our committee meeting --

9 MS. BERNSTEIN: Can I --

10 CHAIRMAN WALLACE: -- and we've got to move if
11 the board is going to act, and if the staff, between now
12 and Santa Anna, thinks it's got the time to --

13 MS. BERNSTEIN: Your presumption --

14 MR. DURANT: Are you doing that Sunday?

15 MS. BERNSTEIN: Your presumption, though, Mike,
16 is that --

17 CHAIRMAN WALLACE: Writing a jurisdictional statement.

18 MS. BERNSTEIN: Your presumption is that unless
19 this regulation is in place by the beginning of the year,
20 that it will have no effect for any grantees during the next
21 calendar year.

22 CHAIRMAN WALLACE: That's not -- okay. Go ahead.

23 MS. BERNSTEIN: You know, what I'm saying is that,
24 number one, Santa Anna is not our last meeting, you know,
25 the last meeting of the board, and if it's important enough

1 then the board is simply going to have to make time to make
2 sure that it gets done.

3 What I think is that the improper approach is knowing
4 that we don't have enough information at the committee, making
5 a faulty or a not necessarily a wrong recommendation to the
6 board, but a recommendation that has no, you know, has not
7 excluded the possibility of error.

8 And, we are -- at least from our standpoint, we
9 are knowingly making an uninformed decision, and I think
10 that's bad policy, and I think that we -- if it's a situation
11 where we have looked at all these things and we disagree
12 with them, I don't have any problems at all.

13 CHAIRMAN WALLACE: We are knowingly making an
14 uninformed recommendation or a less than perfectly formed
15 recommendation. We are not making a decision. The decision
16 will be made in Santa Anna.

17 MS. BERNSTEIN: Then, why have a committee
18 recommendation at all, is my point? Why not --

19 CHAIRMAN WALLACE: Because it is not completely
20 uninformed. There has been a little work that has gone into
21 this. There has been progress that has been made on this
22 regulation. I have some things, some substantive things
23 that I'm reasonably satisfied with, that I want to propose
24 to this committee today.

25 But, it seems to me that the chief question before

1 us is what is the best way to proceed, whether the best way
2 is to proceed by regulation or through the audit guide. I'm
3 not sure that -- maybe there is a tremendous dispute about
4 the substance of what it is we want to do, but the method
5 of how we proceed, it seems to me, is largely a legal question
6 that our legal staff has not been able to focus on because
7 of staff problems.

8 Now, they're going to have two weeks to do it.
9 We'll get a recommendation and we'll abide by whatever you
10 tell us, but if there's nothing on the table in Santa Anna,
11 we do not have the option to have a regulation by the end
12 of the year.

13 MS. BERNSTEIN: Mike, how many members do you need
14 for a quorum in this committee?

15 CHAIRMAN WALLACE: We need three members in this
16 committee for a quorum.

17 Any further questions, Mr. Williams?

18 MS. BERNSTEIN: I just wonder what -- if we could
19 ask -- I know that Fred is not in the general counsel's office,
20 but do you agree with Mr. Wallace that if it's not in place
21 before the beginning of the year, that we would lose calendar
22 '86 in terms of having an enforceable regulation?

23 MR. WILLIAMS: I believe the statute is clear that
24 regulations are effective thirty days after publication.

25 CHAIRMAN WALLACE: Regulations are effective thirty

1 other public funds, shall be accounted for and reported as
2 receipts and disbursements separate and distinct from federal
3 funds.

4 As a result, the Act itself gives the corporation
5 the basis at the bare minimum for requiring recipients to
6 account to the corporation for the use of these funds.
7 The Act also gives the corporation -- that also provides
8 that these funds are not to be spent for prohibited purposes.
9 Purposes prohibited by the whole title.

10 The -- as a result, the corporation, I would argue,
11 has the duty to enforce that as well, and it has asserted
12 that duty in Section -- in Part 1610 of its regulations.
13 Section 5 of Part 1610 provides that funds received from
14 another source for the provision of legal assistance shall
15 not be used by a recipient for purposes prohibited by the
16 Act or corporation regulations, unless such use is authorized
17 by Section 1610.3.

18 Section 4 of Part 1610 then directs recipients
19 in the way to account for the use of these funds, funds received
20 by recipients from a source other than the corporation shall
21 be accounted for as separate and distinct receipts and
22 disbursements in the manner directed by the corporation.

23 I would also like to point out that the corporation
24 has not hesitated to asserted its authority to regulate the
25 use of non-LSC funds received by recipients in other ways.

1 In Section 1609.5 of the regulations, it restricts
2 the use of fees awarded to recipients by certain third parties,
3 attorneys fees. It provides a recipient may seek and accept
4 a fee awarded or approved by a court or an administrative
5 body or included in the settlement, and then skipping down
6 to subsection (b), "Funds received are not to be used for
7 purposes prohibited by the Act.

8 These regulations or other law applicable to the
9 expenditure of funds appropriated in the year the fees are
10 received." And, then provides that they must be accounted
11 for in the manner directed by the corporation.

12 1609.6 then goes on to direct the proper way in
13 which to account for these fees. Fees awarded to a recipient
14 represent compensation to the recipient for resources expended
15 in litigating a particular matter. The revenue from such
16 fees shall be recorded in the same fund in which related
17 expenses have been charged. The revenues shall be reported
18 during the accounting period in which the monies from the
19 fee awarded were received by the recipient.

20 So, I think that illustrates the ways in which
21 the corporation has asserted its authority in the past. The
22 present proposed audit guide deals with the use of these
23 funds. Page 9, people have their draft section, 2-1.1,
24 organizationwide, financial statements and audits provides
25 that in order to implement the requirements of Section 1010(c)

1 of the Act, LSC requires that the recipients' financial statements
2 be prepared in accordance with this guide, and includes the
3 entire financial resources of the program, including all
4 non-LSC funds.

5 That is perfectly in accordance with the Act and
6 what has been done in the past.

7 CHAIRMAN WALLACE: Yes. I'm reasonably satisfied.
8 I'm looking at 1610.2, which deals with these funds, and
9 it says "shall not be used by a recipient for purposes
10 prohibited by the Act or corporation regulation", and it
11 seems to me that is a reasonable exercise of our authority
12 under 1010(c), that we may -- that anything that we have
13 the authority to restrict with regard to funds provided by
14 Congress should also be restricted to the same extent by
15 funds provided from non-public sources.

16 The next question is how we enforce that, and whether
17 recovery of those non-LSC funds through question costs is
18 appropriate since they weren't our funds to start with. I
19 mean, that may get into book juggling and audit problems
20 that I don't understand since funds are fungible.

21 But, it does seem to me that that is at least a
22 potential problem with trying to recover, even though we
23 could punish somebody for misuse of those funds, trying to
24 recover funds that weren't ours to start with is a little
25 more questionable.

1 MR. BOVARD: The Act asserts that recipients are
2 not to use those non-public funds for purposes that are
3 prohibited by that title. I would suggest that if we're not
4 in a position to enforce it, there is no one else.

5 CHAIRMAN WALLACE: Well, there are other ways to
6 enforce it other than getting the money back and one would
7 be termination, one would be suspension -- I mean, those
8 are sort of capital punishment ways to enforce it.

9 I think those would be clearly justified, whether
10 a less drastic method of recovering money that wasn't ours
11 to begin with would be justified is something I don't know.
12 That's a tougher problem.

13 I know, I'm going to let you talk on it in a minute,
14 Mr. Houseman. I want to finish with Mr. Bovard first.

15 MR. BOVARD: I make the point that with respect
16 to accounting, if a recipient used other funds, non-public
17 funds, for lobbying, for instance, there would be an important
18 issue, not only with respect to the illegality of that
19 particular use of the funds, but with respect to whether
20 our funds have been unfairly used to pay for overhead and
21 other expenses.

22 So, the accounting would take care of a number
23 of issues.

24 CHAIRMAN WALLACE: My chief concern is that we
25 know where all the money is coming from and where all the

1 money is going, and the audit guide does provide for full
2 reporting.

3 MR. BOVARD: And, we clearly have the authority
4 to gather that information.

5 CHAIRMAN WALLACE: Okay. Now, Mr. Bovard, that
6 was the main legal question that I left in your hands, when
7 we met in New Hampshire.

8 At that meeting, I reviewed what I thought were
9 the main issues, and I don't want to go through that for
10 everybody again this morning.

11 Have you got anything else that you think you need
12 to call to the committee's attention at this point, before
13 we open it up to public comment?

14 MR. BOVARD: Several things.

15 One, I just want to summarize very quickly the
16 contents of this notebook that I distributed to people.
17 The -- although the United States has given grants to various
18 parties throughout its history, the widespread use of the
19 grant mechanism dates only to the Johnson Administration.

20 The law in the area is very -- it's in a state
21 of infancy basically. You see in this notebook, basically,
22 one, two, three, four, five, six regulations dealing with
23 the issue of question costs in some respect.

24 That is out of some forty federal agencies that
25 were summarized into one volume that deals with this issue.

1 this regulation would not provide for such a formal hearing
2 on the record.

3 The other standard is basically a de novo standard
4 of review; that standard is only applied in cases where Congress
5 has specifically granted -- given the courts the authority
6 to engage in such a review.

7 CHAIRMAN WALLACE: So, it is your judgment, based
8 on what you've been able to find out in the new area of the
9 law, that whether we have a regulation or whether we do it
10 through an audit guide, the court is likely to review any
11 factual determinations we make, and they're likely to do
12 it on an arbitrary and capricious standard fact-finding review?

13 MR. BOVARD: Slash clear error of judgment.

14 CHAIRMAN WALLACE: Or clear error of judgment standards.

15 Ms. Bernstein?

16 MS. BERNSTEIN: May I just ask a question? I usually,
17 you know -- I see that you've got a memo on this from Tom.

18 CHAIRMAN WALLACE: Got it this morning. I haven't
19 read it yet.

20 MS. BERNSTEIN: Well, none of the other committee
21 members have the memo, and, once again, you know, this is
22 a situation in which things that, you know -- it's fairly
23 unreasonable for us to be moving forward without having,
24 you know, at least discussed this, you know, a little bit
25 in advance, because Tom, I know, has been very busy, but

1 it seems to me that we've got a problem here when we're dealing
2 with something like the audit and accounting guide, which
3 is a kind of whole animal, with, you know, -- that we're
4 dealing with in terms of the corporation's relationships
5 to the programs as it relates to financing and accounting.

6 And, it may be that this is the approach we're
7 taking is a good approach, but I think that all we're --
8 you know, you took my book away from me, and I said, you
9 know, didn't you get a copy of it.

10 CHAIRMAN WALLACE: I thought that was my copy.

11 MS. BERNSTEIN: Yeah. You, as the chairman, have
12 not even looked at any of this stuff. I admit it. I haven't.
13 It's not because I wasn't interested in it. I just haven't
14 had it to look at it, and, you know, I really, you know, --
15 if you're intending to plug forward here, without the
16 information, you know, I can't stop you, but I don't think
17 that it's the proper procedure. I mean, just from the stand-
18 point of the validity of our decision-making process.

19 CHAIRMAN WALLACE: Mr. Bovard, are there any other
20 points that you feel you need to get into at this time?

21 MS. BERNSTEIN: Can I --

22 CHAIRMAN WALLACE: Yes, ma'am?

23 MS. BERNSTEIN: I just want to get this on the
24 record. Have you -- has our general counsel been consulted
25 regarding whether or not this would be his advice to us.

Acme Reporting Company

(202) 628-4888

Acme Reporting Company

1 MR. BAYLY: That's the Supreme Court decision that
2 had to do with lethal injections, you might recall, and
3 the Supreme Court ruled that the Food and Drug Administration
4 did not have to review the kind of poison used.

5 I think it stands for the proposition that in many
6 instances, when action is withheld, when you withhold action,
7 indeed, agency decisions are unreviewable. Well, as you
8 can see, it's only by analogy that it's applied here, but
9 it's the kind of thing that still has a certain amount of
10 concern for me because I haven't research the point.

11 CHAIRMAN WALLACE: Here, and I understand, you
12 know -- I'm more of a stickler on jurisdiction than a lot
13 of people. We're not a federal agency, and I'm not sure
14 how some federal courts would get jurisdiction to review
15 us at all, except I know they're going to do it. They're
16 going to find some way to do it because they always do.

17 But, we are not being inactive by calling back
18 money that we think had been improperly spent. If we start
19 cutting back on peoples' credit checks, that's not inaction,
20 that's action.

21 I just think it's a lead pipe cinch that somebody
22 is going to review us and the standard they're going to apply
23 is arbitrary and capricious, a clear error of judgment.
24 I mean, I don't know what kind of verbal formulation the
25 courts of appeal are playing with these days, but --

1 MR. BAYLY: There is a recent decision in this
2 circuit, caption, I believe, Association of Data Processing
3 Association versus, the appellee's name escapes me, in which
4 there is some dictive by Judge Diborka Stellia that writes
5 a whole new gloss on the distinction between rules and
6 regulations on the one hand, the guidelines on the other,
7 and what happens to a grant -- to contracts in respect to
8 grant money.

9 That, too, needs careful attention, it seems to
10 me, because it indicates that at least some of the circuits
11 may be moving in a different direction with what consequences
12 to our work is just unknown without further research.

13 CHAIRMAN WALLACE: Mr. Bovard?

14 MR. BOVARD: I'd just like to add one point to
15 that. There is an interesting case, Southern Railway Company
16 versus Seaboard Allied Milling Corporation, dealing with
17 the reviewability of an action by the Interstate Commerce
18 Commission in deciding not to investigate a seasonal rate
19 increase.

20 There were two basic issues that led the court
21 to say the decision of the ICC was unreviewable. The first
22 element was that Congress used the word "may" when referring
23 to their investigation, said that they might investigate
24 that rate increase.

25 The second was the standard that Mr. Bayly has

1 referred to, that there was no law to apply. I think to
2 look at our question cost regulation, we have to go through
3 particular issues. If we were dealing with expenses for
4 illegal lobbying, we have standards in the act. There is
5 law to apply, and a court could easily, on that no law applied
6 issue, could look and say well, this was a clear error in
7 judgment to say that these expenses were questionable.

8 CHAIRMAN WALLACE: Well, I think both of you, and
9 I don't mean to put either one of you on the spot, this committee
10 may not decide to take action today. It is my judgment as
11 a lawyer, who's had about a year or two experience with this
12 corporation now, that it is important to get something before
13 the board so that the board may have the option of taking
14 action before the year-end.

15 MS. BERNSTEIN: Can I --

16 CHAIRMAN WALLACE: And, I implore both of you and
17 I've discussed this with the president, that the work that
18 has not been done needs to be finished.

19 Mr. Bovard, I think working under difficult
20 circumstances, you've done a good job of making a first crack
21 at the issues the board is going to have to resolve, but
22 I wouldn't say, for an instant, that this is a final answer
23 to the question. I think we need a final answer by the time
24 we get to Santa Anna.

25 But, most of what I have seen has suggested to

1 me that it is -- that we don't lose anything by proceeding
2 by regulation and that we may remove at least one possible
3 legal problem from our path, and I'd want to proceed that
4 way, if the committee gets to vote on it.

5 Mrs. Bernstein?

6 MS. BERNSTEIN: Yeah. Mike, I didn't mean to interrupt
7 you. I guess the thing it is is that it seems to me that
8 we have some other options, so even if every one were in
9 agreement that we have to have the regulation in place before
10 the beginning of the year, the other options are that the
11 committee and the board can do anything without a meeting
12 that they could do at the meeting as long as it's ratified
13 by the board later. That's under our by-laws.

14 And, therefore, if we can get an analysis of what
15 this is and can be sent to us, we could vote by mail and
16 if the committee could make the recommendation to the board
17 at Santa Anna, even get a board action at that time, in other
18 words, we've got two more weeks, I -- see, what I'm real
19 uncomfortable with, Mike, is the whole process of not having
20 looked at how everybody else is doing this, not having a
21 firm feeling that we are considering all of the possible
22 ramifications in terms of the audit guide and so forth, and
23 it seems to me that we've got other options.

24 If it's that important, then we also have the option
25 of having another meeting. I know that you are concerned

1 Section 1008(e) of the Legal Services Corporation
2 Act says, "The corporation shall afford notice and reasonable
3 opportunity for comment prior to issuing rules, regulations,
4 and guidelines." It does not distinguish in its process
5 between rules, regulations and guidelines on the one hand,
6 -- between them. It does not draw a distinction between
7 rules, regulations and guidelines.

8 It does draw a distinction between rules, regulations,
9 guidelines on the one hand, and instructions on the other
10 hand, and it says it shall publish in the Federal Register
11 at least thirty days prior to their effective date all, not
12 a few, not some, all, shall publish all its rules, regulations,
13 guidelines and instructions.

14 I think you've got to start with the Act. It is
15 different from the APA. It poses a far more stringent
16 standard, both in terms of the regulatory process and in
17 terms of the publication process. That's first.

18 Secondly, it seems to me quite obvious that regard-
19 less of what other federal agencies do, the definition of
20 rules and regulations is met by the question of cost procedure.
21 Rules is defined in a number of ways. We talked about this
22 before, but there's no doubt that a rule is a statement of
23 general or particular applicability, that sets forth
24 restrictions and requirements for all Legal Services recipients.
25 That's what this is. It has future effect --

1 CHAIRMAN WALLACE: Where are you reading from?

2 MR. HOUSEMAN: I'm not -- I'm reading from -- I
3 can get into this by -- I'm not reading -- I'm reading from
4 a memo.

5 CHAIRMAN WALLACE: Okay.

6 MR. HOUSEMAN: A memo that was --

7 CHAIRMAN WALLACE: Have we got this defined in
8 our regulations some place?

9 MR. HOUSEMAN: No, no, no.

10 CHAIRMAN WALLACE: Okay.

11 MR. HOUSEMAN: No, we do not have the rule defined in
12 our regulations.

13 The definition that I'm using comes from the general
14 definition of rule, which is used in the Administrative
15 Procedure Act, and that defines rule in certain ways, and
16 I'm just picking parts of that definition. I could read
17 it to you. I have the memorandum. I could hand it to you.
18 It wasn't prepared with this issue in mind, but a statement
19 of general with particular applicability, sets forth
20 restrictions and requirements is a rule. A rule is something
21 that also has future effect, is designed or intended to implement
22 or prescribe law or policy, and it announces important new
23 policies which differ from existing corporation policies.

24 That's what all of this does. It seems to me that
25 this is a clearly a rule, and I think the appropriate way

1 to proceed is by rule, regulation or guideline processes.
2 I don't care what you call it, but, to me, this is a rule.
3 Clearly, a rule, and some of the decisions that have dealt
4 with similar issues, such as the National Senior Citizens
5 Decision, which dealt with construction 83-9, held that that
6 construction was a rule and had to go through the publication
7 process in the Federal Register.

8 Now, turning aside from that issue, let me address
9 what I think is the more important issue, and see if I can
10 clear up what I think are some misunderstandings about what
11 we are saying and what Tom is saying around private funds.

12 In general, I agree with the analysis that Tom
13 has made, except that I don't think it goes to the issue
14 we're discussing. Under 1010(c), the Legal Services Act,
15 it says that non-federal funds shall be accounted for and
16 reported as receipts and disbursements separate and distinct
17 from federal funds.

18 We have a requirement in our audit guide now. We
19 have a requirement in the proposed audit guide, that such
20 non-federal funds be accounted for and reported separately
21 as receipts and disbursements. I agree. The corporation
22 has to do it, mandated by Congress to do it. It has done
23 it in the past, it should continue to do it.

24 There's no issue there. Secondly, 1010(c) says
25 any funds, that is, non-federal funds, so received for the

1 provision of legal assistance, shall not be expended by
2 recipients for any purpose prohibited by this title, and
3 then there's the public fund exception.

4 What that says to me, simply, is that LSC must
5 review any funds, private funds, provided to the provision
6 of legal assistance, to determine if they were spent for
7 a purpose prohibited by the title. So, there's two deter-
8 minations which LSC must make.

9 First, whether the funds were received for the
10 provision of legal assistance. If a recipient got private
11 funds, not for the provision of legal assistance, which some
12 may get, they may -- those aren't covered.

13 Secondly, if they are provided to the provision
14 of legal assistance, whether they were expended for the purpose
15 prohibited by this Act. That is defined, that is, the purposes
16 prohibited by this Act, are defined in your regulation 1610.
17 Please note that the purposes prohibited by this Act in 1610
18 have to do with the substantive restrictions in the Act or
19 regulation on certain, not all, on certain activities of
20 recipients.

21 To take the obvious point and to be clear about
22 it, can't 1610, for example, which does not prohibit private
23 funds being used for the representation of ineligible clients?
24 Maybe it should, but it doesn't. That is not perceived in
25 this regulation as a prohibited purpose.

1 The parts of the regulation which are defined as
2 prohibited purposes are set out quite explicitly in the
3 regulation 1610. I agree completely that you have the
4 responsibility in reviewing funds of a recipient to determine
5 whether those private funds were used in contravention of
6 these restrictions of the LSC Act. There's no argument about
7 that.

8 My argument is a different one entirely. My argument
9 is that there's no authority in the LSC Act for you to impose
10 the substantive accounting requirement on recipients with
11 their private funds, that you can't obviously impose on LSC
12 funds, and by the substantive accounting requirements, I'm
13 calling -- talking about the requirements of prior approval,
14 review for reasonableness and necessity, and review for whether
15 there was a proper receipt, etc.

16 That's what my argument is. My argument is not
17 that you shouldn't regulate private funds. I thought this
18 was crystal clear from the memo, but I'm trying to make it
19 crystal clear. You can regulate private funds. You obviously
20 should look at what a recipient is doing. You have a respon-
21 sibility under 1010(c) to do that, but you do not have the
22 responsibility and I suggest neither do you have the authority
23 to say that private funds of a recipient are going to be
24 subject to all of the same audit requirements that the LSC
25 funds are going to be subject to.

1 First of all, I don't think you may have the
2 constitutional authority to do that. Second of all, more
3 importantly, you have donors of private funds that imposed
4 all kinds of different accounting requirements on those private
5 funds, and I don't think you're suggesting that you're going
6 to make all donors conform to your criteria, which may be
7 different for different donors.

8 So, you know, that is, I think, the first issue
9 of disagreement between the proposed staff draft and maybe
10 what Tom said. I'm not sure Tom really --

11 CHAIRMAN WALLACE: Let's understand what you mean
12 by substantive accounting requirements because I think
13 substantive is a word that is subject to quite a few
14 different interpretations.

15 MR. HOUSEMAN: Right.

16 CHAIRMAN WALLACE: I think I understand what you
17 mean, but I'd like you to specify as best you can, because,
18 obviously, we've got to have these funds accounted for, and
19 I think we've got to have the authority to require them to
20 set it forth in the form that we can understand it.

21 MR. HOUSEMAN: Absolutely.

22 CHAIRMAN WALLACE: So, what do you consider to
23 be a substantive accounting requirement that we can't impose
24 upon non-LSC funds?

25 MR. HOUSEMAN: I would start with virtually every

1 thing you have in B. Let's start with B-2. Whether the
2 cost for the private funds now are adequately supported by
3 vendor's invoices. That, to me, is a substantive requirement.

4 Three, whether private funds are unnecessary or
5 unreasonable. That, to me, is a substantive requirement.

6 One, look at what one says. Costs specifically
7 prohibited by the Act. I agree that you can look at private
8 funds to determine whether they comply with 1610, but you
9 can't look at private funds to decide whether they comply
10 with all the other rules and regulations which, under 1610,
11 don't apply to private funds.

12 So that as written, what you're saying here is
13 that if the recipient's private funds are not adequately
14 supported by or if the recipient's private funds are used,
15 for example, to represent a client ineligible under the LSC
16 Act, then that could be a question cost. That's the way
17 this regulation reads.

18 I don't think you mean to do that. I think the
19 most you mean to do is to say that you will look at private
20 funds as a subset of B-1, that is, those provisions of the
21 Act or regulations which explicitly apply to private funds
22 for prohibited purposes provision, and that's all that I'm
23 arguing with you about here, to be quite clear.

24 CHAIRMAN WALLACE: Okay.

25 MR. HOUSEMAN: I hope I'm quite clear.

1 I think, also, what I don't think you have any
2 authority to require prior approval of the expenditure of
3 private funds under all of the prior approval language. I'm
4 not talking about LSC funds, now.

5 So that we don't disagree that you have the authority
6 to regulate private funds, when they are used for prohibited
7 purposes or may be used for prohibited purposes. You
8 certainly have the authority to have an accounting system
9 that reports them and then allows you to determine whether
10 they are used for prohibited purposes.

11 We're not arguing about that. Now, as to whether
12 you can recover private funds, I find it a bit astonishing,
13 maybe I'm just blind, that you would assume that private
14 funds, given by another grantee, could be recovered by the
15 corporation if they were used illegally by that grantee under
16 the LSC Act.

17 I think you could obviously defund them. You could
18 obviously suspend them. You could obviously deny refunding.
19 No question in my mind about that. You could put additional
20 grant conditions on. I think, frankly, I said this before,
21 I'll say it again, I think you could sue in court to force
22 them to use those private funds effectively, but I don't
23 think any where in the LSC Act suggests that you have the
24 authority to recover private funds. Not LSC funds now, private
25 funds, which were used in contravention of these provisions.

1 That's the second basis of disagreement, I might
2 point out, probably shouldn't but I will, so you're clear,
3 you don't claim that authority in any other parts of the
4 regulation. But, of course, we're talkin about it.

5 CHAIRMAN WALLACE: Money is fungible, and as long
6 as we're recovering less than we gave them, maybe our money
7 that we're recovering, I mean, you know, no matter how the
8 books are set up, and I'm not an auditor, but it doesn't
9 seem to me completely absurd that we can recover money so
10 long as we're not recovering more than we gave them.

11 I mean, I understand the point that you're making,
12 and it makes intuitive good sense, but any time I see somebody
13 saying oh, no, that's not your money I'm doing that with,
14 that's somebody else's money, my -- you know, my antennae
15 go up. I'm afraid I may be getting conned.

16 MR. HOUSEMAN: No. I understand, and I think that's
17 a different issue. I think it's a more complex issue than
18 our -- whether you can recover LSC funds when private funds
19 are expended illegally.

20 I think what you will find, although I'm not sure,
21 I'm not sure we even have -- certainly the memos we have
22 so far don't illustrate that there's any particular problem
23 with this, although I don't know -- I don't think it goes
24 quite to that depth, but just from what we have in the record
25 so far, it doesn't appear that there's any problem along

1 the lines that we're arguing here.

2 There may be, but the question cost that was reported
3 by Gail and her memo, I don't think, illustrate that there's
4 a problem here. So, I'm not sure we're legislating against
5 a practical problem, but even if we are, I still think that.

6 Now, so, I hope it's clear what I'm suggesting.
7 I think the best way is for you to pull the private funds
8 out of the whole thing all together, but if you want to leave
9 them in, I think it's a subset of B-1, where the restrictions
10 should be, and it should be clearly delineated what provisions
11 you're relating to.

12 The other two issues, let me just comment very
13 briefly, and then take any questions. Standard of review.
14 There are, of course, a series of decisions made by Federal
15 District Court and Civil Court of Appeals which have applied
16 standards of review to review of LSC actions. There are
17 now three circuits that have applied the standard of review
18 to LSC actions. The only two cases that have discussed it
19 in any depth were the San Juan case and the Spokane case,
20 and talked about an arbitrary and capricious standard of
21 review and San Juan said it doesn't matter because whatever
22 standard of review we use in this case, the corporation met
23 it.

24 Those were, of course, -- Spokane was a merger,
25 it was a denial of refunding to some programs because they

Acme Reporting Company

(202) 628-4888

Acme Reporting Company

1 MR. HOUSEMAN: No. The audit guide makes substantive
2 changes.

3 CHAIRMAN WALLACE: Sure. But, it's status quo
4 in the sense that we're doing it in the audit guide.

5 MS. BERNSTEIN: Yes.

6 MR. HOUSEMAN: Yes, but it's completely separate
7 from the issue of whether you have enough information to
8 act. That's all my point was. If you don't have enough
9 information to act now here, you don't have enough information
10 to act there.

11 CHAIRMAN WALLACE: Any further questions of this
12 witness? What the Chair would like to do at this point,
13 since it's 11:15 and check-out time at noon, I'd like to
14 take about a fifteen minute recess and let people get out
15 of their rooms. We'll get the board chairman back in here,
16 and then, if there's any voting to be done today, we can
17 vote on it, and then get on off to lunch.

18 Is there any dissent from the motion of the fifteen
19 minute recess?

20 MS. BERNSTEIN: Are we going to go through section
21 by section for suggested changes?

22 CHAIRMAN WALLACE: That would be my intention.
23 All right. Hearing no dissent, we'll be back here close
24 to 11:30, if we can all get checked out.

25 (Whereupon, a brief recess was taken.)

End T 2

Beg T 3

1 CHAIRMAN WALLACE: I think the committee has returned,
2 so at this point, the next item on our agenda is the considera-
3 tion of the draft of Part 1630, and it's the same draft that
4 was in our board book in New Hampshire, and it's the same
5 draft that's in the committee books that are over on the
6 table.

7 I would propose to go through this section by section
8 as we have in the past, and then determine whether we might --
9 what we're left with at the end.

10 Does anybody on the committee have any amendments
11 to offer with regard to Section 1630.1 on purpose?
12 Any amendments?

13 MS. BERNSTEIN: I would move to strike "approval
14 of proposed expenditures" and the words that were put in
15 afterwards on the basis that what we're really dealing with
16 is the question cost.

17 CHAIRMAN WALLACE: And, I suppose you'll have a
18 later motion then to strike 1630.4 accordingly?

19 All right. It has been moved to strike "approval
20 of proposed expenditures and the", and those are the under-
21 lined words on lines 2 and 3 of Section 1630.1. Is there
22 a second to that motion?

23 MS. MILLER: I second.

24 CHAIRMAN WALLACE: There is a second. Is there
25 any debate on that from members of the committee?

1 MS. BERNSTEIN: I would just speak to the reason
2 I think this should be done is I think that the other is
3 definitely a management question that should properly stay
4 within the corporation. The question of cost issue is an
5 issue that deals with procedures that would reflect the
6 recovering back of the cost and, therefore, I think it's
7 a different question. I think internal management needs
8 to stay within the corporation.

9 CHAIRMAN WALLACE: I would say -- I apologize.

10 MS. BERNSTEIN: That's okay.

11 CHAIRMAN WALLACE: I would speak against the motion.
12 This has been put in because we have had a lot of comments
13 on this. We have had a lot of complaints that the approval
14 process takes a long time, never happens. There are great
15 difficulties with it.

16 I think it is important to set forth how that's
17 going to be done. I think it's going to help us improve
18 our relations with the programs in the field that we all
19 have definite rules that we're committed to and they're committed
20 to. I think this makes it a better regulation to have that
21 in there.

22 It responds to a lot of comments, and I think it
23 responds appropriately to those comments. Now, when we get
24 to 1630.4, if there are any particular recommendations on
25 how to deal with it better, then, you know, I'd be delighted

1 to consider those and deal with them on their merits. But
2 I think it ought to be dealt with, and I think this language
3 ought to stay in here.

4 Any further debate on that motion? (No response)

5 All right. The motion is to strike the words "approval
6 of proposed expenditures and the", the underlined words on
7 lines 2 and 3 of 1630.1.

8 All in favor of the motion say aye.

9 (Chorus of ayes.)

10 CHAIRMAN WALLACE: All opposed?

11 MR. DURANT: No.

12 CHAIRMAN WALLACE: That's a two to two vote, and
13 the amendment fails.

14 Any further amendments to 1630.1? (No response)

15 Any amendments to --

16 MR. HOUSEMAN: Mike?

17 CHAIRMAN WALLACE: Excuse me?

18 MR. HOUSEMAN: I just -- I know that I think it's
19 quite clear you're not going to adopt what I'm about to say,
20 I think you may have a problem under the East Arkansas Decision
21 with your effort to construe this not a termination or denial
22 of funding, and I know we're going to proceed.

23 So, it's okay. I just think you ought to know
24 that there may be a problem because the East Arkansas Decision
25 broadly defines what it -- not only interprets the Act, but,

1 as you know, it broadly defines the parameters of the Act,
2 and says that any significant reduction must require notice
3 and a hearing under the Act, not under the regs. Although
4 clearly it was only a decision that dealt with regs, the
5 Court of Appeals' decision did deal broadly with construction
6 of the Act.

7 CHAIRMAN WALLACE: I realize that we're going to
8 have a problem with that, and I realize that this language
9 is a little bit more than a wing and a prayer, but it is
10 that. It wouldn't be the first time I disagreed with the
11 federal court, and I am -- my view is we ought to tell them
12 we disagree with them and if they disagree with us, that's
13 fine. They, you know, have got lifetime jobs.

14 Any amendments on 1630.2?

15 MS. BERNSTEIN: I have a wording change on B.

16 CHAIRMAN WALLACE: On B.

17 MS. BERNSTEIN: I think it's ridiculous to say that
18 an ineligible cost is a charge. I don't think that what
19 I'm proposing is a lot different, but I think it makes a
20 lot more sense.

21 An ineligible cost is a cost charged to a recipient's
22 LSC and non-public funds, and may include any of the
23 following or other costs:.

24 CHAIRMAN WALLACE: All right. Now, let me -- would
25 you read that language again and let me write it down?

1 It's better drafting. May include any of the following or
2 other costs is not what I wrote, you know, when I wrote this,
3 intending to say. I intended to define and to delimit.

4 MR. MENDEZ: What about -- what about some language
5 saying shall include the following without limitation?

6 CHAIRMAN WALLACE: That's the same thing, and I
7 don't know -- I mean, if there were other things that ought
8 to be included here, then I'd like to hear what they are.
9 But, I really think that number three -- I mean, number three
10 doesn't put very many limits on what can be charged. Number
11 three says "any cost that is unnecessary for the effective
12 operation or unreasonable, don't reflect the actions of a
13 prudent person", that's pretty broad language, and I'm not
14 sure that we want any language any broader than that.

15 I'll be, you know, I'll be happy to hear from anybody
16 who can think of a problem that we might face that wouldn't
17 be covered by the language we've got here. But, I have a
18 hard time, I have a hard time thinking of such a problem.

19 MS. BERNSTEIN: But, whenever you, whenever you've
20 got a discussion about unnecessary or unreasonable, it goes
21 both ways in terms of the vagueness.

22 CHAIRMAN WALLACE: Oh, sure. I mean, and as we
23 said in the standard of review, some judge may find something
24 that we thought was clearly unnecessary and unreasonable,
25 was perfectly necessary and perfectly reasonable, but I think

1 if we tried to back charge a cost that isn't delineated in
2 this regulation, a judge would knock us down in about thirty
3 seconds.

4 So, if there's a -- if there's something else that
5 ought to be included here, I'd be happy to hear what it is,
6 but I don't think open-ended language in a regulation is
7 going to help us do what we're trying to do.

8 MS. BERNSTEIN: I can't call the question because --

9 CHAIRMAN WALLACE: No. I realize you can't.

10 MR. DURANT: LeeAnne, you don't want it to be limited
11 to one to three or four?

12 CHAIRMAN WALLACE: One, two, three, four, and five.
13 There are five.

14 MS. BERNSTEIN: No, I don't think that we're in
15 a position as someone who's entrusted with funds to --

16 MS. MILLER: Call the question.

17 CHAIRMAN WALLACE: Okay. The question has been
18 called. All in favor of the motion say aye.

19 (Chorus of ayes.)

20 CHAIRMAN WALLACE: Opposed? No? The ayes have
21 it. So, B would read: "an ineligible cost is a cost charged
22 to a recipient's LSC and non-public funds and may include
23 any of the following or other costs: ...". That's the way
24 that's going to read.

25 Are there any other amendments to 1630.2?

1 MS. BERNSTEIN: Yes.

2 CHAIRMAN WALLACE: Mrs. Bernstein?

3 MS. BERNSTEIN: Under what is now 4i, the seventh
4 line down, which it says, it's starting, "in which", strike
5 "each" and substitute "the", in which -- and I'll read you
6 what the language to say and you can figure it out.

7 "In which the components are planned as integral
8 parts of the system." And, then, the rest of that, down
9 to the period, would be struck, because I think that when
10 you're talking about something about an entire system, then
11 you deal with not just what's purchased each year, but what
12 has been planned to be purchased, and you planned -- you
13 know, the approval would cover all of the planned expenditures.

14 CHAIRMAN WALLACE: All right. So, the period would
15 come after system and you would strike "and" all the way
16 down --

17 MS. BERNSTEIN: To process.

18 CHAIRMAN WALLACE: Where is process?

19 MR. MENDEZ: Here.

20 CHAIRMAN WALLACE: Oh, okay. I was looking at
21 the next period. Okay. All right.

22 Now, --

23 MR. MENDEZ: Question, Mike?

24 CHAIRMAN WALLACE: Yes, sir?

25 MR. MENDEZ: You would an "s" to components, "in

1 which the components as integral parts of the system." Every-
2 thing else would be stricken?

3 CHAIRMAN WALLACE: Yeah, in that sentence. All
4 right. On the same basis, I'm going to second that, and,
5 then, I'll ask Ms. Bernstein again to explain what it is
6 she proposes to accomplish by this now.

7 MS. BERNSTEIN: I think the purpose is the same
8 as what we have been doing with the other language, is I'm
9 just saying that the process of planning it may be -- the
10 process that we're dealing with is not just the individual
11 persons.

12 CHAIRMAN WALLACE: So, what you're looking at is
13 when you start building a system, does the plan show that
14 it's going to be more than \$10,000, no matter how many years
15 it takes to carry out? Okay. I think that's --

16 MS. BERNSTEIN: I think that's the -- as I remember
17 the discussions with Tom and the people in this approval
18 process, that was the purpose of this new language, is to
19 build in problems like the computer system, and it seems
20 to me that we're dealing with plans, not individual years
21 of purchases.

22 CHAIRMAN WALLACE: I understand that. Mr. Houseman,
23 and I see Mr. Simpson as well. So, let's let you go first,
24 Mr. Houseman.

25 MR. HOUSEMAN: Well, first, I think, as written,

1 what this would include is the development of a library,
2 and I really don't think you want to do that. I think it
3 would include a number of other kinds of routine purchases
4 that I don't think you want to subject programs to having
5 to obtain prior approval on.

6 The language that's here was designed to be a
7 specific and as clear as possible as to what the components
8 of the combined purchase price would include. The language
9 as proposed would cover a range of issues which I just don't
10 think you want to do.

11 Now, if you're going to purchase or lease a computer
12 system at about the same time, which is -- and it's really
13 a single system you're buying, that's what you -- and the
14 combined purchase price is over the limit, that's what you
15 want prior approval on. But, if what you're saying is every
16 time you buy a book for a library, the total price of which
17 is going to exceed \$10,000, that you have to get prior approval
18 every time you do that.

19 CHAIRMAN WALLACE: But, see, the next sentence
20 takes care of that. The next sentence stays in.

21 MR. BOVARD: We are striking simply --

22 CHAIRMAN WALLACE: That's right. I mean, I think
23 I understand your problem, and I understand Mrs. Bernstein's
24 concern, and I think this language deals with the problem,
25 but if there is a plan to make a big coordinated purchase

1 over a period of years, then there ought to be approved up
2 front, but there's an exception to that, and that is buying
3 books --

4 MR. HOUSEMAN: Okay.

5 CHAIRMAN WALLACE: -- and buying a printer and
6 buying office furniture. I think that's the way it reads
7 and I think it makes sense.

8 MR. HOUSEMAN: Yeah.

9 CHAIRMAN WALLACE: Mr. Singesen, you're nodding
10 your head. You may have some other things to say.

11 MR. SINGSEN: Yeah. First, I agree entirely with
12 the substitute of planned, a plan for the earlier language.
13 I have no problem with that.

14 I think you ought to --

15 MR. DURANT: You mean you agree with an amendment?

16 MR. SINGSEN: Absolutely. I think you want to
17 keep an explicit reference to a lease process as well as
18 to a purchase situation because this is partly a matter of
19 notice. I think the lease situation is sometimes more complex
20 than the purchase situation.

21 So, unless there's something substantive, I just
22 urge you to consider putting the language at the end instead
23 of just the words "system" as part of, I would say, the original
24 language probably works, a single system purchase or lease
25 process. I'm not sure the word "single" is critical. The

1 idea, of course, is that it's all an integrated thing and
2 that integrated may cover that.

3 MR. MENDEZ: What about of the system or at least
4 process?

5 MR. SINGSEN: That -- anything -- I think the concern
6 I have is just that the lease process is explicit.

7 MS. BERNSTEIN: Well, it begins that whole little
8 i section, the cost of the lease or purchase of equipment.

9 MR. SINGSEN: Yeah, I know.

10 MS. BERNSTEIN: Yeah. I mean, I don't --

11 CHAIRMAN WALLACE: I don't think striking the rest
12 of that sentence causes a problem because it is dealt with
13 in the first sentence of this subsection.

14 MS. BERNSTEIN: Right.

15 CHAIRMAN WALLACE: It's all in there.

16 Any other comments from any members of the committee
17 or any public comments on this motion? The motion is in
18 4i, top of page 3, which presently reads, "In which each
19 component is an integral part of the system, and in which
20 all the components are purchased or leased at about the same
21 time as a part of the single system versus the lease process."
22 That language would be changed and it would read, "In which
23 the components are planned as integral parts of the system."

24 That's the motion. It's been moved and seconded.

25 MR. MENDEZ: I'm not part of your committee.

1 I am moving to strike at the top of page 2, the
2 words "and non-public" in Section A and the words "and non-
3 public" as in Section B. Section B has been slightly re-
4 constituted by the previous motion, but the words "and non-
5 public" have been in there in both places.

6 I am moving to strike those. Is there a second
7 to that motion?

8 MR. DURANT: I'll second the motion and allow
9 discussion.

10 CHAIRMAN WALLACE: I don't have much discussion
11 on it. I am satisfied that -- my main concern about "and
12 non-public" funds is to know where they're going, and the
13 audit is going to tell us where those funds are going.

14 I am satisfied that those funds are spent in violation
15 of the Act, we can defund people. That's capital punishment,
16 which you don't like to do it, but it's clearly permissible.

17 Trying to recover funds that weren't ours to begin
18 with, I consider to be slightly problematical for the reasons
19 I was discussing earlier. I don't think it's impossible
20 conceptually. I can see how we could do it, but it does
21 seem to me to be inviting unnecessary problems.

22 We clearly have disciplinary measures at our
23 disposal. We can find where these things are going. On
24 the present state of the record, I would move to strike the
25 reference to non-public funds in our questioned cost regulations.

1 MS. BERNSTEIN: I'm opposed to it because of capital
2 punishment, and we really have no sanction whatsoever for
3 a program that volitionally expends or uses non-public funds,
4 private funds, for purposes that would be restricted under
5 our act. I think we ought to be able to set off from our
6 grant those funds, if the program has done it, without defunding
7 the program and hurting the clients.

8 CHAIRMAN WALLACE: Okay.

9 MS. BERNSTEIN: I mean, I think that that's a sanction
10 that we need, and that's the reason that I would maintain
11 it and expand it.

12 CHAIRMAN WALLACE: The Chair admits it's a close
13 call. Any further debate on it?

14 All in favor -- oops. Excuse me.

15 MR. HOUSEMAN: Mike, I just wanted everybody to
16 understand that by keeping it in in this form, what you're
17 doing is subjecting private funds to the same criteria as
18 LSC funds way beyond the provisions of 1010C. 1010C permits
19 you to look to see what the private funds are used for purposes
20 prohibited by the Act.

21 This, and the reason I'm sort of doing this is
22 because I don't think Clark was up front at least when I
23 gave my earlier talk.

24 MR. DURANT: Up front?

25 MR. HOUSEMAN: Here.

1 CHAIRMAN WALLACE: He sneaks around.

2 MR. HOUSEMAN: I don't meant that. I mean I thought
3 I saw him in the back of the room.

4 And, what I'm saying is that 1010(c) permits you
5 to regulate private funds to the extent that they are given
6 to the provisional legal assistance for purposes prohibited
7 by the Act, and here, we are going far, far beyond that.
8 You are attempting to regulate private funds by saying that
9 you're going to determine whether private funds not only
10 were used for prohibited purposes, but whether they were
11 used for any other provisions of the Act, which is what B-
12 1 says, whether, two, they were adequately supported by invoices,
13 records, etc., which is what B-2 says, three --

14 MR. DURANT: Where is that?

15 MR. HOUSEMAN: B-3, whether they are unnecessary
16 or unreasonable.

17 And, that is, you're going to try to regulate the
18 full scope of accounting of private funds to the same degree
19 that you're going to regulate LSC funds, and I don't think
20 you want to do that.

21 I agree completely that you have the right to look
22 at the prohibited purposes, and I think --

23 MR. DURANT: Alan, what does this language mean?
24 It says that the -- "shall not be expended by recipients
25 for any purpose prohibited by this title", which the title

1 questioned cost regulation is limited to those purposes to
2 which our own regulations say that we can regulate the use
3 of those funds, isn't that permissible?

4 MR. HOUSEMAN: I think that that is as far as I
5 think it can go. I think it's cleaner if you pull it out,
6 just because I don't think you should get the processes mixed
7 up between the two.

8 But, if you're going to regulate it, I think that
9 is the only place you should regulate it.

10 MR. DURANT: What is the process?

11 MR. HOUSEMAN: Well, if you've got two problems.
12 One is that you've got a remedy problem, which Mike alluded
13 to, if you keep it in here.

14 MR. DURANT: The remedy problem being that we can't
15 take back --

16 MR. HOUSEMAN: Yes. The private funds, and I think --

17 MR. DURANT: Can you offset -- isn't that the way
18 that would do it?

19 CHAIRMAN WALLACE: Probably would in practice.

20 MR. HOUSEMAN: Probably would in practice, but
21 the question is what are you doing. You are taking back
22 private funds.

23 Now, if you're saying, which I don't think you
24 have the power to take somebody's private funds back, if
25 they are expended, even if they're expended illegally, I

1 think you have the power to sanction the program.

2 Now, whether you want to also -- whether you want
3 to impose some other sanctions short of that, maybe you do,
4 maybe we can work on some other sanctions. What I'm saying
5 here is what we've got here is a questioned cost regulation
6 that deals with the improper expenditure of LSC funds, which --
7 and, you know, we'll argue about various provisions under
8 it, but that's clearly permissible and that's clearly something
9 you ought to regulate.

10 So, I'm not quite sure why you want to move beyond
11 that the private funds.

12 MR. DURANT: Well, let me --

13 MR. HOUSEMAN: Except to make those determinations
14 and to --

15 MR. DURANT: For the purposes of this meeting,
16 what I'm going to vote against your motion, but Mr. Bovard,
17 I want you to -- I think Mr. Houseman has raised a good point
18 in terms of the limitations and I want -- if this is voted
19 out of committee, I want to, with or without recommendation,
20 I want to see some language that is refocused, taking into
21 account the 1610.1 regulation.

22 CHAIRMAN WALLACE: Okay. I think, I think Mr.
23 Bovard understands that, and I'm sure he'll be working on
24 it.

25 Any further debate on this motion? Mr. Singen?

1 MR. SINGSEN: I want to focus on a much more practical
2 question to make sure that the invocations of this provision
3 are clear.

4 As I understand the current language, if the amendment
5 is not passed, that means that under (b) (4), programs will
6 have to seek approval for any of the listed types of expenditures
7 whether they are using LSC funds or private funds.

8 That means that they will have to seek approval
9 to use private funds to purchase equipment, furniture or
10 books with non-LSC funds, purchase real property with non-
11 LSC funds, or to enter into a consultant contract with non-
12 LSC funds.

13 It strikes me that that's not (a) probably what's
14 in mind in having the language on non-public funds, but (b)
15 also a fairly extraordinary reach for the corporation micro-
16 management role with regard to non-LSC funds.

17 I'd also point out a very significant problem in
18 (b) (4) (3) (a), top of page 4, the provision there now, which
19 perhaps will be discussed shortly, prohibits the use of LSC
20 funds for hiring counsel. But, the language on consultant
21 arrangements is still within the approval section, and if
22 you apply it to non-public funds and leave the language the
23 way it is now, the program that wishes to retain counsel
24 in a matter in which the corporation has an interest, will
25 have to come to you for approval despite the ethical problems

1 that are involved, even though it's using non-public funds.

2 I think that can't be your intent.

3 CHAIRMAN WALLACE: I will have a motion on that
4 later, and the outcome of this motion may decide some of
5 how that goes. But, I think that's an accurate analysis
6 of the language that's before us at the moment.

7 MR. MENDEZ: I am not a part of the committee,
8 but I would like to make one interjection.

9 I am very persuaded by Mr. Singesen's argument and
10 Mike's argument about this. I'm very concerned with what
11 would happen if we attempted to cover the private funds on --
12 for ourselves or offset them. I'm very concerned about that.

13 CHAIRMAN WALLACE: I think I see which way the
14 vote is going to go, and I think Mr. Bovard will be working
15 on language that may satisfy all of us.

16 If there is no other debate at this point, let's
17 go ahead and vote on the motion. The motion is to strike
18 the word "and non-public" as they appear in subpart A and
19 subpart B.

20 All in favor say aye. Aye.

21 Opposed?

22 (Chorus of no's.)

23 CHAIRMAN WALLACE: The motion fails.

24 Mr. Bovard, you've heard your instructions.

25 MR. DURANT: And, that deals not only on

1 the regulation but also this whole problem --

2 CHAIRMAN WALLACE: Yeah. Now, the Chair has another
3 motion to make, with regard to the problem --

4 MR. DURANT: And, I understand that Mr. Housemane
5 will make up the difference anyway.

6 CHAIRMAN WALLACE: With regard to the problem that
7 Mr. Singesen has just addressed, I asked Tom to draft up some
8 language yesterday. I must have called him in a deposition
9 break. My mind is a fog at the moment, but I got this
10 language this morning. I think you've probably got some
11 copies of it.

12 I am going to explain it, and then I'm going to
13 move it.

14 This would be inserted in its entirety as the top
15 of page 4 of the regulation for the previous sub-sub-sub-
16 subsection (a), and its effect would be that you can use
17 up to \$5,000 to hire an attorney to represent you in a matter
18 in which the corporation and posing party have an opposing
19 interest.

20 You can do that just like any other consultant.
21 You can spend that \$5,000 without asking us for permission,
22 without explaining yourself, without anything else. Once
23 you get to the point that you have to go over \$5,000, you
24 can't do it. You cannot ask for our approval to use LSC
25 funds to pay counsel fees because I think there is an ethical

1 funds to pay counsel fees, exceeding the limit. That doesn't
2 say you can't do it.

3 CHAIRMAN WALLACE: Okay. I would be happy to edit
4 that recipient shall not expend LSC funds to pay counsel
5 fees exceeding the limits provided for in sub-sub paragraph
6 3. We really are down to sub-sub-sub paragraphs, aren't
7 we?

8 I think that makes sense, and with the second approval,
9 we'll go ahead and make that change.

10 MR. DURANT: Fine.

11 CHAIRMAN WALLACE: What does this last sentence
12 do with regard to the -- I mean, I haven't looked at it in
13 detail, but with regard to the problem of use of non-public
14 funds for this purpose, without having to get approval. Does
15 this help us any as it is now?

16 MR. BOVARD: No.

17 CHAIRMAN WALLACE: No, it doesn't. Okay. So, if
18 we want to get to the point, and I think we should get to
19 the point, of permitting the recipient to use non-LSC funds
20 without securing our prior approval, we need new language
21 here some place.

22 MS. BERNSTEIN: I think if you're going to do that,
23 then there's no point in making -- in giving the free \$5,000.

24 CHAIRMAN WALLACE: Elaborate, please, ma'am.

25 MS. BERNSTEIN: Well, I think it's a conflict of

1 interest for us to be in a position of granting funds for
2 the delivery of legal services for people, and for us to
3 be authorizing a \$5,000 expenditure with no approval, no
4 oversight, you know, nothing, to sue us instead.

5 We're setting aside \$5,000 to do that, and although,
6 you know, a program can say well, we're doing this on the
7 behalf, that's not what it's granted for.

8 CHAIRMAN WALLACE: Sure. But, you can -- I mean,
9 you can solve that problem just by voting no on the motion
10 and keeping the language we've got. I thought you might.

11 Let me see if --

12 MR. HOUSEMAN: Mike?

13 CHAIRMAN WALLACE: Mr. Houseman, go ahead. You
14 can speak while I try to find something.

15 MR. HOUSEMAN: Well, I -- there are two issues
16 here, and let me deal with the technical issue first, whic
17 his that what you have now, Mike, it isn't \$5,000, it's also
18 \$261 for eight hour day and \$35 per hour.

19 CHAIRMAN WALLACE: Okay.

20 MR. HOUSEMAN: I think as a practical matter, that's
21 a big problem in a lot of programs. You're not going to
22 find attorneys to retain for \$35 an hour in many areas or
23 \$261 per eight hour day.

24 If you wanted to provide the \$5,000 limit, then
25 I think you have to rewrite your motion just to say that.

1 As a cross reference of the -- whatever it is. B-43. So,
2 that's my technical problem, and obviously I would urge you
3 to do that. That at least gives some flexibility, but there's
4 a more basic problem, and I want to address all of you on
5 it.

6 What you're doing here is making a change from
7 past practice that has in the past permitted LSC funds to
8 be used to retain counsel for programs when there is a dispute
9 with the corporation.

10 Now, there are a variety of disputes with the
11 corporation, not just in court, but in a number of other
12 contexts, where corporations -- where programs hire attorneys.

13 MR. MENDEZ: All right. Alan?

14 MR. HOUSEMAN: Yes.

15 MR. MENDEZ: Do you think we ought to allow programs
16 to hire individuals, such as yourself, to come in and advocate?

17 MR. HOUSEMAN: Well, you can't hire me because
18 I work for a public interest law firm.

19 MR. MENDEZ: No.

20 MR. HOUSEMAN: I can't charge fees. So, I'm not
21 sure -- yes. If a program wants to hire an attorney to represent
22 them before this board on a regulatory matter and wants to
23 pay the attorney to do it, because the regulation is going
24 to adversely affect them, I think that they ought to be
25 permitted to do that.

1 Let me address -- let me start by addressing something
2 I think you're under a misassumption under. If you either
3 leave the status quo alone or adopt a proposal that I have
4 suggested, either way, the status quo today is that you can
5 get prior approval to hire a consultant if it's above the
6 limits, and under the limits, there's no prior approval.
7 In either case, you still regulate under 1630.2(b), that
8 is, you still determine whether the costs were ineligible
9 because they violated a provision of the Act or reg, they
10 were not actually supported by invoices, or they were
11 unnecessary or unreasonable to carrying out the purposes
12 of the program.

13 That's still in there. That regulatory basis is
14 still there. It's after the fact, but you still have the
15 power to, and you are still doing this, regulate and control
16 those costs. So that you're not in an either or situation
17 that's being presented either by my proposal, which is in
18 the board material, which would exempt the initial prior
19 approval. That's all it would exempt on any set, or by Mike's
20 proposal, which would exempt it up to whatever the limits
21 are that were \$5,000 or whatever.

22 What you're doing -- so you're not giving up on
23 any regulatory power. I want to be quite clear on that.
24 It's regulatory power that you use in a variety of other
25 situations under B-1, 2 and 3. Many costs are not subject

1 to prior approval. Many costs are looked after afterwards
2 plus all costs have to be submitted to a program's auditor
3 and you have to prove that those costs were consistent with
4 the grants and consistent with the purposes of the program.

5 That's just part of the audit process. So that
6 these costs are not going unregulated, first point. Second
7 point, if you adopt either Mike's proposal, above \$5,000,
8 or the proposal that's currently on the board book, here's
9 what you're doing:

10 First of all, you're prohibiting some programs
11 from being able to retain counsel because some programs do
12 not have any private funds, aside from that issue; they don't
13 have any public funds; they don't have any other funds.

14 MR. MENDEZ: But can't they come in just before
15 us?

16 MR. HOUSEMAN: Yeah, but -- wait a minute. We're
17 talking about a range of issues that we're talking about
18 in court, litigation in court, litigation on defunding, on
19 a termination, on affirmative suits. We're talking about
20 questioned costs. We're talking about retaining counsel
21 to assist in OCR investigations, and in monitoring investi-
22 gations.

23 A range of things, and what you're saying is for
24 some programs, you can't use LSC funds, as you can't hire
25 an attorney to represent you, and in several -- in a number

1 of places, you're going to be telling -- you're going to
2 be essentially precluding the program from retaining counsel.
3 I don't think you want to do that, and that's what the
4 consequence of this is.

5 Plus, you're creating a discrimination. Some programs
6 have private funds, have public funds, that can be used for
7 these purposes, so they're going to be able to retain counsel
8 and the programs that don't have those funds are not going
9 to be able to retain counsel.

10 MR. MENDEZ: I'm sorry. I have got a little problem
11 here.

12 MR. HOUSEMAN: Okay.

13 MR. MENDEZ: If you have a series of arrows and
14 a batch of arrows in your hand, and you can either point
15 them the other way or point them back at yourself, and essentially
16 what you're telling us to do is take these arrows and point
17 them back at ourselves to stab ourselves in the heart with
18 our own money. Isn't that correct?

19 MR. HOUSEMAN: It's no different from the Federal
20 Government gives the program money to sue the Federal Government.

21 MR. MENDEZ: Well, that doesn't make it right.

22 MR. HOUSEMAN: I know, but that's what the Legal
23 Services is all about, in a sense. So, --

24 CHAIRMAN WALLACE: Sueing us?

25 MR. HOUSEMAN: No. What he said is you're slinging

1 arrows. I understand that. The question is --

2 CHAIRMAN WALLACE: Do you really want to say Legal
3 Services is all about suing the Federal Government?

4 MR. HOUSEMAN: No. But, I mean, one of the big
5 differences is whether the Federal Government should pay
6 programs to bring suits against the Government. Clearly,
7 the Act permits that. That is, a lot of litigation by the
8 Legal Services program on behalf of eligible clients is
9 against the Government.

10 MR. MENDEZ: That's fine, but what's the difference
11 between the Federal Government and the corporation itself?
12 There is a difference.

13 MR. HOUSEMAN: Sure. Yes. I'm not arguing the
14 difference.

15 MR. MENDEZ: And, why should we provide legal services
16 -- I mean, grantees, people that we give money to, monies
17 to sue us? I don't understand that.

18 MR. HOUSEMAN: Because you may --

19 MR. MENDEZ: We're committing suicide.

20 MR. HOUSEMAN: No. You may have acted illegally,
21 you may have acted improperly, or your staff may have acted
22 illegally or improperly, and you're telling programs that
23 they can't retain counsel to sue.

24 Now, what you're going to permit them to do is
25 use their own staff to sue. So, either way you do it, you're

1 going to allow them to --

2 MR. MENDEZ: Well, but they are competent attorneys.
3 I agree that a competent staff can do that.

4 MS. BERNSTEIN: How many of the attorneys out in the
5 field are making \$261 a day?

6 MR. HOUSEMAN: Private counsel? Most private counsel --

7 MS. BERNSTEIN: No. I'm talking about our staff
8 attorneys.

9 MR. HOUSEMAN: This has nothing to do with staff
10 attorneys.

11 MS. BERNSTEIN: It sure does. The question is
12 whether we're going to hire consultants to do it or whether
13 the staff that's out there can do it.

14 MR. HOUSEMAN: Okay. Two arguments are going on
15 here. Mr. Mendez suggested that we shouldn't permit programs
16 to sue the corporation. Well, --

17 MR. MENDEZ: We all agree that the programs can
18 sue the Federal Government, and all the other agencies.

19 MR. HOUSEMAN: Yes, but --

20 MR. MENDEZ: They can sue us.

21 MR. HOUSEMAN: They can use LSC funds to sue you.

22 That's --

23 MR. MENDEZ: That's correct. They can --

24 MR. HOUSEMAN: All this prohibits is them from
25 hiring retained counsel. So what you're saying is that

1 -- I mean, what you're doing is saying they can't hire retained
2 counsel but they can do it themselves; secondly, you're saying
3 some programs that have private funds or other public funds
4 that can be used for this can retain counsel, but other programs
5 can't.

6 You're setting up a system of discrimination within
7 programs which, frankly, makes no sense to me, and you're
8 doing it because of a proper concern about the relationship
9 between you and the programs on the one hand, and your proper
10 concern about fiduciary control over the funds.

11 What I'm saying is you still have the power under
12 1630.2(b) to assure your fiduciary control over the funds,
13 that's the main power, the prior approval process doesn't
14 work in most -- I mean, that is not -- that's where the huge
15 problems are, but that's not where most of the costs lie.

16 MR. MENDEZ: All right. Let me --

17 MR. HOUSEMAN: That a program incurs.

18 MR. MENDEZ: Let me just ask you. Let's assume
19 that we go follow you logic.

20 MR. HOUSEMAN: Which is --

21 MR. MENDEZ: And, we have \$10,000 that we would
22 rule as ineligible or is determined to be ineligible after
23 all of the -- how do we go about collecting it back?

24 MR. HOUSEMAN: You can collect it -- from the mis-
25 regulation in the same way you could collect back any other

1 money.

2 MR. MENDEZ: All right. How long would it
3 take us to get it back?

4 MR. HOUSEMAN: No different from any other ineligible
5 costs.

6 MR. MENDEZ: But, it would be about a year-two
7 years later, wouldn't it?

8 MR. HOUSEMAN: Under the regulation, I don't know
9 what it's got the time down to. There obviously could be
10 disputed the end, but under the regulation, whatever it is,
11 six months now or something, it's no different than any
12 ineligible costs.

13 MR. MENDEZ: Okay. But if we didn't allow it at
14 all, we would never have the issue arise.

15 MR. HOUSEMAN: Of course, but if you didn't allow
16 a lot of costs, you wouldn't have the issue arise. The question
17 is in this situation, what you're saying is you're not going
18 to permit programs to hire or retain counsel to represent
19 them in a dispute with the corporation. You will permit
20 programs to use their own staff and use all the money they
21 want to spend. You will permit programs to use private funds
22 and public funds to do it; you just don't want permit them
23 to use LSC funds, and that creates the problems I said.

24 One, for some programs, you are essentially
25 prohibiting them from hiring attorneys and you're creating

1 distinctions between classes of programs, depending on the
2 source of funding.

3 I don't really think you want to do either one
4 of those things.

5 CHAIRMAN WALLACE: If the Chair may interject
6 at this point, let me try to sum up because I've heard these
7 arguments and there's merit in various views. But, it seems
8 to me that Mrs. Bernstein is basically correct that these
9 things need to be checked.

10 There are a lot of lawyers out there who charge
11 too much money, and I don't think programs ought to have
12 a blank check to go out and spend as much money on consultants,
13 on any consultant, without getting checked.

14 Now, this is a special case, and it comes to us
15 because of ethical problems. The extent to which we can
16 review consultants hired in opposition to us to see whether
17 or not you're getting your money's worth.

18 I don't think it removes the ethical problem to
19 do it after the fact. I don't think it makes any difference
20 whether we examine it before the fact to see if it's
21 reasonable or after the fact to see if it's reasonable.

22 I don't think we've got any business examining
23 the thing at all, and I am willing, and you're right, it's
24 not just \$5,000, there are hourly limits on it, and that's
25 the problem. These are limits that I think are reasonable,

1 that we can live with. We've got no business conducting
2 an examination of other arrangements, either before or after
3 the fact.

4 Now, sure, it creates a discrimination. There
5 are all kinds of people who don't get money from us either
6 that can't afford to sue us that would like to. I mean,
7 you know, the money is a great discriminating factor, and
8 people who don't have enough of it are behind the eight ball.
9 That's why we're all here.

10 But, what we're talking about is our money, our
11 obligation to see that it's wisely spent, and the ethical
12 limits on our obligation to check that over, and I'm willing
13 to permit some of our money to be spent on these terms up
14 to the limit and after that, you've got to go out and raise
15 your own funds, and to deal with that, I'm going to propose --
16 I'm going to ask my second to permit me to suggest this language
17 to the amendment that's before us.

18 The period after sub-sub paragraph 3 changed to
19 a semi-colon, and say "non-LSC funds, however, may be used
20 for such purposes without prior approval. Other services."

21 I think that says exactly what I'm trying to say,
22 and the committee may or may not like what I'm trying to
23 say.

24 MR. DURANT: I don't think I have a problem with
25 that.

1 CHAIRMAN WALLACE: It's -- Tom, at the end of that
2 line, where you have the first period in the sentence, turn
3 it to a semi-colon, --

4 MR. BOVARD: Right.

5 CHAIRMAN WALLACE: "Non-LSC funds, however, may
6 be used for such purposes without prior approval." Unless
7 you go out and raise your own money, if you can to sue us
8 on any terms you like. Some people won't be able to do that,
9 and I'm sorry, but I don't think, in good conscience, I can
10 let them use our money for that purpose without some means
11 to review it, and I haven't got any ethical means to review
12 it.

13 Is there a second?

14 MR. DURANT: I don't have any objection.

15 CHAIRMAN WALLACE: All right. All right. So,
16 that's before us, and any debate on the motion?

17 MR. HOUSEMAN: One thing.

18 CHAIRMAN WALLACE: Let Ms. Bernstein go ahead and
19 then I'll recognize you for final comment.

20 MS. BERNSTEIN: I would suggest -- I think it's
21 bad policy for the board to be implying that the programs
22 we are funding 4500 attorneys -- those attorneys are not
23 making -- did not answer my question because the answer
24 to the question is they're not making \$261 a day. They're
25 not making \$35 an hour.

1 They are making a great deal less than that, and,
2 yet, they are very competent attorneys. I think that it
3 is wrong to be freeing up money to spend on high-priced lawyers
4 in comparison to be suing the corporation, whereas the attorneys
5 that are handling the cases for clients and the money that
6 is being appropriated by Congress for serving clients, that
7 is the attorneys that are doing that. I see no reason why
8 they cannot, you know, take care of all of the problems,
9 whether they think that their problem in serving the client
10 is suing us or, you know, suing somebody else.

11 That they handle those problems, and the consultants'
12 situation, I mean, they are obviously going to be in a much
13 more expertise situation also relating to the corporation
14 than any outside attorney would be.

15 The other thing is that, technically, I think,
16 your amendment doesn't belong there; it belongs in sub-A
17 because we don't want to -- you're not wanting to free up
18 non-LSC funds for any consultant situation, are you? It's
19 only we want to be able to make approvals for other consultants'
20 situations that don't deal with suing the corporation.

21 CHAIRMAN WALLACE: No, no.

22 MS. BERNSTEIN: And, you're really wanting it in
23 here.

24 CHAIRMAN WALLACE: I am putting it in here, and
25 I think --

1 MS. BERNSTEIN: I thought you made this a semi-
2 colon in here.

3 CHAIRMAN WALLACE: No, no. It -- this is the semi-
4 colon here on the draft before us.

5 MS. BERNSTEIN: Oh, okay. I thought you were saying
6 sub-paragraph 3 semi-colon.

7 CHAIRMAN WALLACE: No. I'm sorry. I apologize.
8 I was reading sub-paragraph 3 as appears in the amendment,
9 and --

10 MR. BOVARD: Fifthline.

11 CHAIRMAN WALLACE: Fifth line of what's printed
12 before us.

13 MS. BERNSTEIN: Oh.

14 CHAIRMAN WALLACE: At least technically -- I mean,
15 I think this language says what I want it to say, but I may
16 not enjoy the support of the committee on this subject.

17 Mr. Singsen, I don't think you've spoken. I'll
18 let you comment, and then I think we probably ought to --

19 MR. SINGSEN: I -- I'm -- I -- as you might expect
20 I'm more the numbers person than Alan. I'd like to respond
21 to Mrs. Bernstein's question. I didn't have an opportunity
22 before. I desired to respond when she asked the question.

23 If the cost of an attorney, that is, the full cost
24 of an attorney in the Legal Services program, is \$60,000,
25 including all the overhead and support, which, as you may

1 remember, would come to only \$12 per four person for two
2 attorneys and congressional figures considerably higher,
3 and that attorney works 2000 billable hours in a year, then
4 the attorney would bill \$30 an hour.

5 If the attorney only works 1500 billabe hours,
6 the attorney would bill more, and, in fact, in attorneys
7 fee cases, the cost only submissions are made to fees, programs
8 are billing \$35 or \$40 an hour, it is very close to the figures
9 that you have here.

10 Now, the attorneys aren't paid the salary at that
11 full rate, but, of course, an attorney who bills \$35 an hour,
12 in his firm, doesn't keep all the money either. A lot of
13 it goes to the same overhead.

14 MR. HOUSEMAN: A final comment was if the concern
15 is the hourly rate, which is one of the things you said,
16 then let's set an hourly rate cap. That's easy to determine.
17 One way or the other.

18 CHAIRMAN WALLACE: But, it's not just an hourly
19 rate because you can spend too many hours just like you
20 can spend too high a rate. I mean, that happens, and I don't
21 see any way to avoid it.

22 Mr. Bovard, do you --

23 MR. BOVARD: I would like to read this into the
24 record.

25 CHAIRMAN WALLACE: Please read it into the record

1 the way it has been amended.

2 MR. BOVARD: "Where a recipient retains counsel
3 to represent it in a matter in which the corporation is an
4 opposing party or has an opposing interest, the recipient
5 shall not expend LSC funds to pay counsel fees exceeding
6 the limits provided for in sub-sub paragraph iii; non-LSC
7 funds, however, may be used for such purposes without prior
8 approval." Other services secured by a recipient on its own
9 behalf, such as representation of the recipient in other
10 lawsuits or labor disputes to which it is a party, shall
11 be considered consultant services and shall require approval
12 if the fees exceed the limit established in sub-sub paragraph
13 iii;"

14 CHAIRMAN WALLACE: Okay. The motion is before
15 us. It has been moved, seconded, and debated. Is there
16 any further comment from the committee? (No response)

17 If not, we're ready to vote. All in favor say
18 aye.

19 (Chorus of ayes.)

20 CHAIRMAN WALLACE: Opposed?

21 (Chorus of no's.)

22 CHAIRMAN WALLACE: I heard two ayes and two no's,
23 and the vote fails on a tie vote.

24 Are there any further motions with regard to Section
25 1630.2?

1 MR. SINGSEN: Yes, Mr. Chairman.

2 MS. BENAVIDEZ: Mr. Singsen, do you have any further
3 suggestions to make for the committee?

4 MR. SINGSEN: I have two. One is whether in the
5 language you now have in A, the provision not to amend it
6 just then, you would like to include at least the second
7 amendment that you proposed as to the use of non-LSC for
8 counseling.

9 CHAIRMAN WALLACE: I would -- I think the Chair's
10 sentiments on that is established, but if any other member
11 of this committee would like to make that motion, I'll let
12 them do it.

13 MR. SINGSEN: Okay. I continue to think there's
14 a problem about prohibiting non-LSC funds to be used to hire
15 counsel.

16 CHAIRMAN WALLACE: Yeah. I haven't heard --

17 MR. SINGSEN: Or requiring approval.

18 CHAIRMAN WALLACE: I haven't heard such a motion,
19 but before I recognize you, I will ask unanimous consent
20 that 6 be changed to sub-5 on page 4. I think we -- that's
21 a casualty of prior editing, but sub-6 ought to be sub-5.
22 So ordered by unanimous consent.

23 Your other point, Mr. Singsen?

24 MR. SINGSEN: The other is slightly more
25 complicated. It arises in the audit guide context, paragraph

1 2-1.92 of the audit guide. As I mentioned two weeks ago,
2 introduces a new approval process and creates a new class
3 of questioned costs, which is not covered currently in the
4 list of items that require approval or give rise to questioned
5 costs.

6 The specific issue is a very narrow one. There
7 are relatively few cost reimbursable contracts left to the
8 recipient at this point, and most of them probably don't
9 produce cost overruns. Occasionally, however, there will
10 be such a situation.

11 What the audit guide proposes is that before any
12 LSC funds in the basic field grant can be used on this issue,
13 there must be an approval of same during the process of which
14 the corporation determines if using basic field funds to
15 supplement the LSC funds reimbursable contract will have
16 an adverse impact on the program.

17 What I would suggest is, first, as I do there,
18 in the audit guide material, that there is already full control
19 for any cost overrun if it's unnecessary, unreasonable,
20 ineligible or in any other way inappropriate.

21 So that I would urge the provision in the audit
22 guide not go forward --

23 CHAIRMAN WALLACE: Sure.

24 MR. SINGSEN: If you intend to go forward on that
25 provision in the audit guide, however, I think you ought

1 to introduce it as another part of sub-4 here, an issue upon
2 which prior approval is required.

3 CHAIRMAN WALLACE: What I will ask on that, unless
4 I hear a motion to the contrary from anybody on the
5 committee, Mr. Bovard, let's hang around for the audit meeting
6 and if, after the audit meeting, Mr. Mendez still has this
7 in, I'd like you to work on potential language to present
8 to the board in Santa Anna to coordinate those two sections.
9 Mr. Mendez and his committee may want to take this out,
10 so I think it's premature for us to try to deal with it here,
11 but if the audit committee keeps it in, I'd like you to work
12 some language on that.

13 MR. HOUSEMAN: One more thing?

14 CHAIRMAN WALLACE: Mr. Houseman?

15 MR. HOUSEMAN: Sorry. The current audit guide
16 and one of the earlier drafts had a proposal with regard
17 to prior written approval was not required for consultant
18 services secured for eligible clients, except when the contract
19 was part of the sub-grant per 1627.

20 I would urge someone to put that in here. I don't
21 think you want to require prior written approval for
22 consultant services secured for eligible clients because
23 I think that puts you in the position of determining what
24 a program can use expert witnesses and other things on, and
25 I don't think you want to do it, and it's not -- we're not

1 talking about suing the corporation; we're talking about
2 the normal representation of eligible clients, and you have
3 all your after the fact checks that have to be reasonable
4 and necessary. They have to be reported. They can't, of
5 course, be in violation of the Act and the regulations.

6 CHAIRMAN WALLACE: I've considered it, and for
7 all the reasons Mr. Mendez so aptly stated a minute ago,
8 I'd rather check it before the facts than after the facts,
9 but if somebody on the committee has a motion to make in
10 that regard. Hearing none --

11 MS. BERNSTEIN: That's not what I heard. Is that
12 what you said?

13 MR. HOUSEMAN: Yeah. That is, I don't think you
14 should require prior written approval for when a program
15 wants to hire an expert witness in a case, when it's
16 representing an eligible client. Let's be clear what I'm
17 saying.

18 CHAIRMAN WALLACE: Yeah. I understand what you're
19 saying.

20 MR. HOUSEMAN: Yeah. I want to make sure everybody
21 understands, and what this now does is says that you have
22 to do it.

23 First of all, it may come up in the context where
24 you have to act immediately. You may be in the middle of
25 a trial, an issue comes up, you've got to go hire an expert

1 witness, the expert witness you want is going to take you
2 over the amount, and you've got to make a decision right
3 there, and under this, you have to go get prior approval
4 or the questioned costs.

5 CHAIRMAN WALLACE: Yeah, you do, and I recognize
6 that that's a problem, but I think it's a problem, but I
7 don't think is a soluble problem.

8 I think that there --

9 MR. DURANT: We have an expedited procedure.

10 CHAIRMAN WALLACE: We do have an expedited procedure,
11 at least we do at the moment, when we get to 1630.4, we may
12 not have any procedure anymore, but we do have an expedited
13 procedure, which gives you twenty day turnaround time.
14 I know in some lawsuits, that may not be fast enough, but
15 I don't think the answer is to -- I don't know what the answer
16 is, but I don't like having a blank check just because a
17 client's involved, and that's why I haven't got any language
18 proposed to solve the problem.

19 MR. DURANT: But, maybe -- well, Mr. Bovard, I
20 would like you to look at that because, I mean, I can think
21 of examples where it's the lawyer who has to make the judgment
22 and has to make it very quickly.

23 And, if you could come up with a sentence or two
24 to perhaps add to .4, not necessarily now, but when it comes
25 before the full board, so that, you know, by phone call,

1 something like that could be taken care because I can imagine
2 circumstances where -- because I've been in them, where a --
3 you have to make quick judgment about involving resources
4 and people in a trial, and you have to make it in fairly
5 short order.

6 MR. BOVARD: You want a specific expedited procedure
7 for consultants hired to represent eligible clients?

8 MS. BERNSTEIN: Would the cost, though, exceed --
9 if you're just having an expert come to trial and you make
10 a flat contract with that expert to testify at trial and
11 rather than set it up on a fee basis of \$261 a day, you say
12 you will testify, you will provide expert witnesses, is that
13 going to exceed \$5,000 in most instances?

14 MR. DURANT: Yeah, but I don't want us, frankly, --
15 I mean, if --

16 MS. BERNSTEIN: Well, if it's not -- what I'm saying
17 is if it's for a client or a service and you make a flat --

18 MR. DURANT: It may, it may exceed \$5,000.

19 MS. BERNSTEIN: If it looks like it is, then you
20 start the approval process.

21 MR. DURANT: But if you're in the middle of a trial,
22 you don't have that choice.

23 MS. MILLER: I move to table this.

24 CHAIRMAN WALLACE: Yeah. Okay. I think -- there's
25 nothing on the table, but there's no motion --

1 MR. MENDEZ: We're debating this issue --

2 MS. MILLER: Broken --

3 CHAIRMAN WALLACE: All right. I -- understanding
4 the spirit of the motion, we have moved to table this
5 discussion. All in favor say aye.

6 (Chorus of ayes.)

7 CHAIRMAN WALLACE: Opposed? (No response)

8 Okay. We will discuss it no further, but I think
9 Mr. Bovard gets the drift.

10 MR. DURANT: And, I'd like to see some language.

11 CHAIRMAN WALLACE: Okay. Anything further on 1630.2?

12 (No response)

13 How about 1630.3? (No response) How about 1630.4?
14 Any motions with regard to 1630.4?

15 MS. BERNSTEIN: Well, I move to strike for the
16 same reasons we talked about earlier.

17 CHAIRMAN WALLACE: All right. I'll second it for
18 the purposes of getting the vote on that.

19 MS. BERNSTEIN: I'm not going to belabor this with
20 more discussion. There's no point. I just believe that is
21 the management's prerogative.

22 CHAIRMAN WALLACE: Okay. This is the second half
23 of the motion we had a while ago, and this would strike the
24 entirety of 1630.4 and I oppose it for the same reasons I
25 said awhile ago.

1 MS. BERNSTEIN: If this motion fails, I have one
2 word change I'd like to make.

3 CHAIRMAN WALLACE: Okay.

4 MS. MILLER: I'll second it.

5 CHAIRMAN WALLACE: All right. It's been seconded.
6 All in favor say aye.

7 (Chorus of ayes.)

8 CHAIRMAN WALLACE: Opposed?

9 (Chorus of no's.)

10 CHAIRMAN WALLACE: Okay. Fails on a two to two
11 vote.

12 Mrs. Bernstein, do you have further amendments
13 with regard to this section?

14 MS. BERNSTEIN: The last word in that -- not the
15 last one -- the second to last word, "a", says, "should the
16 corporation fail to respond within the applicable period,
17 sixty or twenty days, the prior approval request shall be
18 deemed granted." I would like to request the word
19 "unnecessary" because I think that it puts us in a less than
20 estoppel mode in terms of whether -- granted implies that
21 the legality is looked at or that we have -- that we are
22 presuming legality by the fact that we didn't act.

23 I think that is unreasonable for us, the fiduciary
24 for the corporation, and an unnecessary simply talks about
25 the procedural process being unnecessary in this instance,

1 but that we still can come back and say the cost was illegal,
2 un -- you know.

3 MR. HOUSEMAN: I think you can do it any way.

4 MS. BERNSTEIN: But, the problem that I'm trying
5 to deal with it, I don't want any estoppel set up in terms
6 of the corporation is presumed to have granted it.

7 CHAIRMAN WALLACE: Okay. I understand that, and
8 if I may suggest a technical way to do the same thing. I
9 think what we ought to say, not that it's unnecessary, prior
10 approval requirements shall be deemed be waived.

11 In other words, that we cannot jump on them for
12 not having gotten prior approval. We can still go back and
13 do it if it's unreasonable and unnecessary, inadequately
14 supported and all the things.

15 MR. DURANT: What are you doing? You're changing
16 granted to waived?

17 CHAIRMAN WALLACE: Yes. Prior approval requirement
18 request.

19 MS. BERNSTEIN: No. Requirement -- you want us
20 to change that word, too, and I think that's necessary if
21 we're going to go your route, and I -- because I was
22 dealing with the request, you know -- I don't have --

23 CHAIRMAN WALLACE: Okay.

24 MS. BERNSTEIN: That meets the procedural versus
25 substantive question that I am dealing with.

1 MR. HOUSEMAN: No, no. I'm either saying go this
2 version that you published in the Federal Register, which
3 is a different version, substantiavely was the same, just --
4 when we bring it back before the board, use the Federal Register
5 version. That's what I'm saying, and then you don't have
6 any other problems.

7 CHAIRMAN WALLACE: I think my lack of sleep is
8 getting to me. I haven't got the foggiest idea what you're
9 talking about.

10 MS. BERNSTEIN: Purely technical. That's what
11 it looked like before.

12 CHAIRMAN WALLACE: Oh.

13 MS. BERNSTEIN: He's saying present it the way
14 it looked, and then we changed it --

15 CHAIRMAN WALLACE: Okay. Tom and Pepe understand
16 it, and so does everybody else. So, take care of it.

17 All right. 1630.6, any amendments to be proposed
18 there? (No response)

19 How about 1630.7.

20 MR. HOUSEMAN: Can I just ask?

21 CHAIRMAN WALLACE: Yeah.

22 MR. HOUSEMAN: Under this current form, you do
23 not have the criteria under the decision process. You have
24 it after the decision process.

25 CHAIRMAN WALLACE: That's right.

1 MR. HOUSEMAN: And, I believe we talked briefly
2 about this. I think it would be better to have it both under
3 the decision process and after the decision process because
4 the decision process not only should be determining whether
5 there was, in fact, an unreasonable or unnecessary, etc.,
6 questioned cost, and these factors go to, it seems to me,
7 some of them, not all of them, but most of them go to whether
8 there was a questioned cost in the first place as well as
9 to the question of what the corporation is going to do with
10 it.

11 CHAIRMAN WALLACE: All right. I understand your
12 views on it. My consideration of it was that the factors
13 belong more appropriately under remedy. I mean, it seems
14 to me that if it's ineligible, it's ineligible, and unnecessary
15 and unreasonable define themselves as best they can.

16 These factors, to me, were not factors being used
17 to define unnecessary and unreasonable because I'm not sure
18 how to define those.

19 I think the auditors are best at that, and if it's
20 decided that something is ineligible, it ought to be
21 ineligible and that's the decision, and I put all the factors
22 under remedy because these, to me, seem to be the equitable
23 or semi-equitable things that you take into account on what
24 to do having found the problem.

25 I mean, I thought about your suggestion and maybe

1 somebody on the committee agrees with it, but this was my
2 judgment as to the way to do it.

3 Do we hear any sentiment on the committee?

4 MS. BERNSTEIN: Well, I don't have any problems
5 with 1630.6 as written, but I have a problem with 1630.7,
6 which is the same subject matter.

7 CHAIRMAN WALLACE: Okay. I'm sorry. I couldn't
8 hear you, Ms. Bernstein.

9 MS. BERNSTEIN: I'm dealing with the same concerns
10 you have. I'm just dealing with it in a different fashion.

11 CHAIRMAN WALLACE: Okay. All right.

12 MR. HOUSEMAN: Can I ask a personal favor? I need
13 to go to the restroom.

14 CHAIRMAN WALLACE: Okay. Point of personal privilege.

15 MR. HOUSEMAN: Thank you.

16 CHAIRMAN WALLACE: We'll take a two minute break
17 because the board chairman is out on the phone anyway.

18 (Whereupon, a brief recess was taken.)

19 CHAIRMAN WALLACE: Let's go on ahead.

20 Now, at this point, we're at 1630.7. I think that
21 Mrs. Bernstein has a motion that she wishes to offer on 1630.7.

22 MS. BERNSTEIN: Okay. I would just say that I
23 would move to strike the -- the change would read the number
24 and everything else. The reason for that is that I think
25 that this is obviously -- the corporation is going to consider

1 a moment -- other considerations. These kinds of things
2 in terms of remedies that I think -- I don't think that we
3 are -- it's an unnecessary burden to list them like this
4 after the findings have already been made that it's eligible
5 or ineligible.

6 That I -- in some of the individual circumstances,
7 I think -- I don't think that they should be items for whether
8 or not a person should not be set off because if it's found
9 to be ineligible, then it should be disallowed without, you
10 know, mercy as we discussed it.

11 It's not a question of whether or not there's a
12 history of doing it or the cost of -- I mean, if the whole
13 point in having the set off rights to the questioned costs,
14 it's for us to keep track of whether the money is being spent
15 accurately, and I don't think most of these should be a part
16 of it. And, I think that if the appeal process, I think,
17 takes care of all of these things, and this is not a delimiting
18 list, and the corporation could consider other things in
19 addition to this, I think it's not useful to have these --
20 this even in there, and I would move that we take this out
21 and return some of the management perogatives in terms of
22 making the decision process.

23 CHAIRMAN WALLACE: As I have done before, I'll
24 second it for purposes of discussion, and I'll speak against
25 it. I think when you tell somebody that they have a right

1 to respond and to give you reasons for actions that you ought
2 to take, it's useful to tell them the sort of things that
3 you wouldn't like to hear, and in setting these considerations,
4 because they are not criteria in a formal sense, they are
5 simply sayings that may be taken into consideration, they
6 are not mandatory, we are telling people who are appealing
7 to us for mercy and I think even in this circumstance, there
8 are times when mercy is called for, that --

9 MS. BERNSTEIN: That doesn't remove that possibility.
10 It's simply that I don't see the point in setting up a list
11 which is not a limit, you know, a limit on the corporation,
12 but might be argued in a specific circumstance that unless
13 the corporation went through and rejected every single one
14 of these things and unless the corporation went through and
15 considered every single one of these things, we are not allowed
16 to set it off, and I'm simply saying that once we make a
17 decision to have disallowed costs and it's been determined
18 to be disallowed, then that should be the presumption because
19 that was proper and that we -- that the appeals process doesn't
20 keep them from, you know, everybody can have this draft and
21 say well, these are some of the things that the corporation
22 has thought about.

23 This doesn't limit us and, so, I don't see the
24 point in pursuing it.

25 CHAIRMAN WALLACE: It is possible that a court

1 I think that summaries it.

2 Any further debate on this one? (No response)

3 All in favor Mrs. Bernstein's motion to strike
4 subsection B say aye.

5 (Chorus of ayes.)

6 CHAIRMAN WALLACE: Opposed? No.

7 The ayes have it, and subsection B is stricken,
8 and subsection C and B and all the rest of them are renumbered
9 appropriately.

10 MR. HOUSEMAN: Mike?

11 CHAIRMAN WALLACE: By the way, on renumbering appropriate
12 ly, I think, on page 8, what is now C is going to become
13 B, and then as I look at page 9, I see we have another C,
14 so I guess we're not going to renumber that one. That now
15 becomes right. Technical change we don't have to make.

16 Mr. Houseman?

17 MR. HOUSEMAN: Well, I hope you realize what you
18 just did. You just took away the criteria by which programs
19 can appeal the process, so nobody is going to know what they
20 are doing.

21 MS. BERNSTEIN: They can do -- that's my point.

22 MR. HOUSEMAN: Right. Great. Now, in A, you have
23 some shalls where I think you should have mays, particularly --

24 MR. DURANT: Mr. Houseman, why won't there be the
25 opportunity to have it under consideration and any kind of

1 appeal process?

2 MR. HOUSEMAN: They will, except you've got to
3 state what the factors are. I mean, this is a reg that tells
4 you the process we're going to use, the criteria we're going
5 to use, and attempts to give somebody who's in this resolution
6 process by which a program writes in after there's an additional
7 cost and says I don't think you should disallow it for these
8 reasons.

9 All this does is state the kinds of factors that
10 a program should use. I don't mean to -- I just want to
11 realize you just that by taking this out, what you're doing
12 is taking away -- you're not telling programs what the factors
13 are.

14 MS. BERNSTEIN: Tom?

15 MR. BOVARD: Just one technical comment on this
16 issue.

17 MR. HOUSEMAN: It's already in the current questioned
18 costs.

19 CHAIRMAN WALLACE: I'm sorry. Go ahead, Mr. Bovard.

20 MR. BOVARD: The discussion which has been stricken
21 doesn't go to disallowance per se. We amended it to go simply
22 to the remedy.

23 CHAIRMAN WALLACE: It goes simply to remedy, and
24 that's what he said. Now, you can ask for remedy on any
25 basis you want, which you could before. We're just not going

1 to tell you which ones are most interesting, and that, you
2 know, -- I have stated my position, and the committee has
3 acted.

4 Now, --

5 MR. DURANT: Mr. Houseman, if you -- I mean, I'm
6 willing to -- I don't want to reconsider anything --

7 CHAIRMAN WALLACE: You can't. You didn't vote.

8 MR. DURANT: I know, but it will eventually come
9 to the full committee.

10 MR. HOUSEMAN: Yeah. I just raised it in the comment.
11 I wanted to be clear.

12 Now, on A, may, third line from the bottom of the
13 page, 1630.7(a), do you really want to say shall? Don't
14 you want -- I assume you want to give some discretion.

15 CHAIRMAN WALLACE: Now, wait a minute, wait a minute,
16 wait a minute. Within thirty days after receipt of notice
17 from the corporation, the recipient may respond --

18 MR. HOUSEMAN: Right, but keep going down.

19 CHAIRMAN WALLACE: -- in writing. Okay. That's
20 not the may you're worried about.

21 MR. HOUSEMAN: No, no, no, no. That's fine.

22 CHAIRMAN WALLACE: Okay. I'm sorry.

23 MR. HOUSEMAN: It's the shall word about in the --
24 three lines from the bottom of A.

25 CHAIRMAN WALLACE: Okay, okay.

1 MR. BOVARD: The corporation shall recover the
2 amount not to exceed --

3 CHAIRMAN WALLACE: Okay. If the recipient fails
4 to respond, the corporation shall recover an amount -- I
5 thought about that, and I wanted to say shall because we --
6 by this point, we have already made a determination that
7 this cost is ineligible and has been disallowed, and the
8 purpose of this section is to permit somebody to show us
9 why we shouldn't do what we would otherwise do.

10 If they don't do it, you know, I don't see any
11 business in monkeying around with it anymore. Let's just
12 do it. That's why I put shall.

13 MR. HOUSEMAN: All right. But what you're doing,
14 as I understand the process, the process -- first, you're
15 deciding whether there was a questioned cost. We have very
16 clear criteria, and we decided it was a questioned cost.

17 What this says is that even if there were extending
18 circumstances which you are aware of, even regardless of
19 what the program says, you can't exercise discretion to take
20 into account those extending circumstances. It seems silly
21 to me.

22 MS. BERNSTEIN: That's not true.

23 MR. HOUSEMAN: Well, it says shall, staff has no
24 option.

25 MS. BERNSTEIN: But, there's an appeals process.

1 CHAIRMAN WALLACE: Well, yeah, but, I mean, I'm --
2 if we're going to permit discretion, you shouldn't have to
3 go all the way to Mr. Winchell to get it. I mean, I understand
4 that.

5 I didn't intend to permit discretion. I mean,
6 it seems to me having made the determination that this is
7 ineligible, the program hadn't come before us to show us
8 that there is some reason we shouldn't do what we would
9 ordinarily do, I don't want -- I don't think there ought
10 to be any burden on anybody at that point to do anything
11 other than get the money back.

12 Now, but I think the difference in what we're doing
13 here is well stated. If there is somebody on the committee
14 that wants to move to change this shall to may to give us
15 discretion not to recover the whole amount, even when the
16 program has not come before us, in other words, act on our
17 own say-so, and not recover the full amount because of items
18 that we may owe -- if you want to make that change, now would
19 be the time to do it.

20 MS. BERNSTEIN: I'd like it the way it is.

21 CHAIRMAN WALLACE: Is there a motion to change
22 shall to may? (No response)

23 Hearing none, we'll have to say that one for the
24 board, Mr. Houseman. Did you have another shall or may in
25 this section?

1 MR. HOUSEMAN: Not on this one. Later -- one other
2 point on this.

3 CHAIRMAN WALLACE: Yeah.

4 MR. HOUSEMAN: You include here derivative income
5 under A. A, I'm not sure why, and, B, I'm not sure you want
6 to.

7 What this says is that if -- that you can not only
8 recover the amount of the disallowed costs, but you can allow
9 to recover the income that was generated by disallowed costs.

10 Now, we may have a disallowed cost because it wasn't
11 prior approval, and otherwise the cost is perfectly fine.
12 And, I don't think -- it seems to me you should not be going
13 after derivative income. You should be going after the amount
14 of the cost and this is going to get into a number, I think,
15 of technical problems for you. Interest income, attorneys
16 fees, proceeds, based on -- for example, what is there was
17 a building purchased without prior approval, but it was a
18 perfectly legitimate building purpose -- building purchase,
19 and the building was later sold and there is some income
20 from it, and the only problem was it wasn't prior approval
21 in the past, you're saying here that you will recover the
22 proceeds from that building sale as opposed to the amount
23 of costs that would have been otherwise -- that would have
24 been expenditures of LSC funds.

25 CHAIRMAN WALLACE: I don't think we've said that

1 because I think we took care of that back at -- back on page
2 4, subsection 2-B when we disallowed only the excessive amounts
3 and maybe I don't understand. I mean, if you pay a \$100,000
4 for a building and you should have paid \$90,000 for it, then
5 you get \$10,000 back, and I'm not sure that -- I'm not sure
6 that the profit on resale really relates to that \$10,000.

7 I mean, I see, I see how it could, but you're not
8 trying to get the whole profit on the whole \$100,000.

9 MR. HOUSEMAN: Let me see if I can come up with
10 some --

11 CHAIRMAN WALLACE: yeah.

12 MR. HOUSEMAN: Trying to address my concerns and
13 get --

14 MS. BERNSTEIN: The situation that he's talking
15 about, I would hope that we are covering because we're not
16 in the business of real estate speculation, and we don't
17 want to be in a position of encouraging this even by, you
18 know, even by flexibility that option and having reread during
19 the last couple of days Gerry's management of scarce resources
20 or how to be a better ad, there was a suggestion in there
21 when you go to buy a building, you should look for a building
22 that has possibilities for income and appreciation and so
23 forth.

24 And, I'm simply saying that to excuse a program
25 for going around the purpose of providing legal services now,

1 not setting things aside for next year, is wrong.

2 CHAIRMAN WALLACE: Well, I think the basic thrust
3 of this section is appropriate. I think the particular problem
4 you raise is probably taken care of over here in 2-B, but --
5 and, as you can see here, with the sentiments on the board
6 about not dealing with it in any way at all, but between
7 now and Santa Anna, I think you're going to need to come
8 up with a specific proposal to do something about it because
9 I think it's a strong sentiment of the committee to go after
10 these funds in a way that won't cause problems but will recover
11 them.

12 MR. SINGSEN: Please, Mr. Chairman, if I may just
13 say one more thing that needs to be looked at?

14 Given the current structure of 2, a program that
15 uses non-LSC funds to purchase a building but doesn't get
16 approval, --

17 CHAIRMAN WALLACE: Right.

18 MR. SINGSEN: -- is going to give rise to the
19 questioned cost for the entire purchase, the entire value
20 of the building would then be subject to recovery under your
21 current reg, and would be requiring somebody to object on
22 the various factors, and you might be dealing with the
23 appreciation on that building five or ten years down the
24 road, where not a dollar of federal funds has been used.

25 It strikes me that the corporation is also not

1 in the business of real estate speculation, but it clearly
2 would be at that point.

3 CHAIRMAN WALLACE: The committee is conscious of
4 the problem with non-LSC funds, and you heard the board
5 chairman asking staff to correct that problem, and I'm sure
6 he paid attention to it as I did. I think that's a reasonable
7 point.

8 Any further points to be raised on 1630.7?

9 MR. HOUSEMAN: Well, you got in C on page 9, I
10 guess it's C still, you got -- there's two problems, it seems
11 to me.

12 The first is you got some shalls here, which may
13 be you want to leave in, but --

14 CHAIRMAN WALLACE: Yeah. I do want to take --
15 leave those in. I think if there are -- if there is a dis-
16 allowed cost, we ought to require that some action be taken.
17 We don't specify the action. We just say things can be done,
18 if necessary, and as far as shall take action to terminate,
19 I think that's qualified by the adjective "serious" and that
20 may be, you know -- that adjective may be open enough to
21 debate that the shall really doesn't mean anything at that
22 point, but if it's something serious, yeah.

23 I think you ought to take action and both of those
24 shalls were on purpose.

25 MR. HOUSEMAN: Right. Now, C, also, as I read

1 this, you could require recipients to implement organizational
2 or personnel changes directly. I would urge that you, instead
3 of doing that, require that you -- that we can change it
4 so that they would implement a plan for organizational and
5 personnel changes. That is, that you wouldn't order them
6 to take a personnel or organizational change but require
7 them to implement a plan which, of course, you would review,
8 to do that.

9 I think this goes to local control of programs
10 and the role that the corporation wants to play in micro-
11 managing programs, and I don't think you want to do what
12 this says here. At least I would hope you wouldn't want
13 to be able to come in and tell a program how to reorganize
14 itself or take personnel changes in particular personnel,
15 but, instead, for the program's board to come up with a plan
16 to address it, which would have to include organizational
17 and personnel changes and you would review that plan.

18 Leaving it in the first instance to the program's
19 board, here's what I think is the appropriate way of proceeding
20 under this -- if there is this kind of a problem.

21 CHAIRMAN WALLACE: I may not know enough about
22 how other agencies do it, but it's my impression during the
23 recurring scandals in the Defense Department that the
24 department has got the authority to debar individuals who
25 are rotten apples from having anything to do with Defense

1 Department programs. I think that's good, and I think it's
2 good for us, like it's good for the Defense Department, and
3 I wouldn't think that this is something we would do very
4 often, but I would think that if there's some of us -- that
5 if there is a recipient out there who has gone through this
6 whole process and has found -- been found to have ineligible
7 costs and there is somebody that we know is responsible for
8 that, I think we ought to have the same authority the Defense
9 Department has, which is to say get rid of that joker.

10 Maybe at some point, you know, maybe we need extra
11 safeguards around that particular action, but I think it's
12 a power that we ought to have, and if you've got some
13 suggestions about controlling the way we exercise that power,
14 this chairman would be happy to entertain them. I think
15 we've got lots and lots of procedural safeguards in here
16 as is.

17 I just think it's a power we ought to have. I
18 don't anticipate that it's a power that we're going to use
19 from time to time, but it ought to be there.

End T 4
Beg T 5
20 Okay. Further thoughts on 1630.7? (No response)
21 Hearing none, we are up to 1630.8. Mrs. Bernstein?

22 MS. BERNSTEIN: I have a proposed -- again, it's
23 a wording change. I just think it makes things a little
24 bit more clear. Under C, the first sentence would read:
25 "The appeal shall be based on a written record submitted,

1 the recipient's notice of appeal, and any response and analysis
2 by corporation staff."

3 In other words, it sets up, you know, you've got
4 three things going for you.

5 CHAIRMAN WALLACE: Would you read that once more,
6 please?

7 MS. BERNSTEIN: "The appeal shall be based on a
8 written record submitted, the recipient's notice of appeal,
9 and any response and analysis by corporation staff." I believe
10 that all those things are necessary to have if the board
11 is going to be making this kind of -- rather than just leaving
12 it because it says the appeal shall be based on a written
13 record --

14 CHAIRMAN WALLACE: I don't have any problem with
15 that amendment except who's going to submit the record? I
16 mean, why are we wanting to strike --

17 MS. BERNSTEIN: I would presume that the record
18 will be all the documentation in the audit department, and,
19 I mean, that's what was -- I would presume would be in what
20 the sentence says now.

21 What I am saying is that the record submitted to
22 whoever is going to decide the appeal, should also include
23 the appeal and an analysis by staff because I think there
24 is necessary for whoever is going to make the decision that
25 there be an analysis of the appeals process.

1 CHAIRMAN WALLACE: Okay. The Chair doesn't have
2 any problem with that. As before, I'll second it, and I'll
3 open any debate on that on the committee.

4 MR. HOUSEMAN: Mike?

5 CHAIRMAN WALLACE: Mr. Houseman, I think you will
6 have a response to that.

7 MR. HOUSEMAN: Well, I don't have a -- I would
8 hope that it would be a written response, and I would hope
9 that the recipients could get a copy of it to be able to
10 comment on it. That would be my only concern about this.

11 CHAIRMAN WALLACE: Well, --

12 MS. BERNSTEIN: It says a written record.

13 MR. HOUSEMAN: No, but the written -- you don't
14 say written before response.

15 CHAIRMAN WALLACE: Okay.

16 MR. DURANT: Can we take care of that with a sentence?

17 MR. HOUSEMAN: Yeah. You can take care of it with
18 a word.

19 CHAIRMAN WALLACE: Yeah. Put written response.
20 Okay. I mean, if the mover and the seconder are happy, we
21 will put written before the word response at this point.

22 Mr. Bovard, would you like to read it?

23 MR. BOVARD: I'd like to read it.

24 "The appeal shall be based on a written record
25 submitted, a recipient's notice of appeal, and any written

1 response and analysis by the corporation staff." Striking
2 the word "but appropriate LSC officials"?

3 CHAIRMAN WALLACE: Yeah. Ms. Bernstein, do we
4 need the word "submitted"? I mean, having stricken by the
5 appropriate official, I think that -- comma, notice of appeal,
6 and any written response. Do we need the word submitted?

7 MS. BERNSTEIN: No, but maybe it would be better
8 to change the "a" to a "b".

9 CHAIRMAN WALLACE: Okay. All right. "The appeal
10 shall be based upon the written record, the notice of appeal,"
11 whatever the written response was you used.

12 MR. BOVARD: You want to delete the word "recipient"?

13 CHAIRMAN WALLACE: The recipients. I'm sorry.
14 No. Go ahead with that.

15 MR. BOVARD: Let me read it.

16 CHAIRMAN WALLACE: Read it again. We've got to
17 change the "a" to "be", we've stricken "submitted". Read
18 what we've got.

19 MR. BOVARD: "The appeal shall be based on the
20 written record, the recipient's notice of appeal, and any
21 written response and analysis by corporation staff." Do
22 you want the word "any" to remain?

23 MS. BERNSTEIN: Yes.

24 MR. BOVARD: Okay.

25 CHAIRMAN WALLACE: All right.

1 MS. BERNSTEIN: If the corporation staff does not
2 feel that an analysis and response is necessary --

3 CHAIRMAN WALLACE: There's no need to?

4 MS. BERNSTEIN: Yeah.

5 CHAIRMAN WALLACE: That's two responses. You can
6 have two. Whatever is there is there.

7 Any further debate on this? (No response)

8 All in favor say aye.

9 (Chorus of ayes.)

10 CHAIRMAN WALLACE: Opposed? (No response)

11 So ordered. Any further discussions or amendments
12 on 1630.8? (No response)

13 How about 1630.9? (No response)

14 How about 1630.10? (No response)

15 All right. The Chair will move, as the world's
16 foremost expert on being reported out of committee without
17 recommendations, that the draft as just marked up by this
18 committee, be submitted to the full board without
19 recommendation. I think that we've done the best we can
20 with what we've got. I think Mrs. Bernstein has made good
21 points that we don't have everything, and the staff now fully
22 understands what we want before Santa Anna, and we're going
23 to get that.

24 So, with all of that in mind, I would move that
25 we submit the draft that we've just completed as amended

1 to the full board without recommendation.

2 Is there a second?

3 MR. DURANT: I second.

4 MS. BERNSTEIN: I second.

5 CHAIRMAN WALLACE: Any debate on that subject?

6 (No response)

7 All in favor say aye.

8 (Chorus of ayes.)

9 CHAIRMAN WALLACE: Opposed?

10 MS. MILLER: No.

11 CHAIRMAN WALLACE: All right. It is -- the motion
12 is carried. That brings us to the end of the agenda, except
13 for other regulations adopted.

14 What I would like to do at this point, because
15 I don't really think we're going to need to do anything else,
16 but depending on what happens in Mr. Mendez's committee,
17 this committee may want to consider whether we've got anything
18 else to do.

19 I'd like to recess subject to recall at the end
20 of Mr. Mendez's meeting, and if he's got anything that he
21 wants to punt to this committee for further work, we'll
22 consider it at that time.

23 Is there any dissent to that? (No response)

24 Hearing no dissent, so ordered. We stand in recess
25 subject to the call of the Chair.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EL T 5

(Whereupon, at 1:30 p.m., the meeting was recessed, to reconvene subject to the call of the Chair.)

REPORTER'S CERTIFICATE

1
2
3 DOCKET NUMBER:

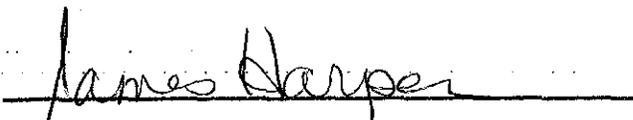
4 CASE TITLE: Operations and Regulations Committee Meeting

5 HEARING DATE: October 25, 1985

6 LOCATION: Washington, D.C.
7

8 I hereby certify that the proceedings and evidence
9 herein are contained fully and accurately on the tapes and
10 notes reported by me at the hearing in the above case before
11 the LEGAL SERVICES CORPORATION
12 and that this is a true and correct transcript of the case.
13

14 Date: November 1, 1985

15
16 

17 Official Reporter
18 ACME REPORTING COMPANY, INC.
19 1220 L Street, N.W.
20 Washington, D. C. 20005
21
22
23
24
25

