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No. 82-1227

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEGAL SERVICES CORPORATION, ET AL.,

Appellants,

v.

HOWARD H. DANA, JR., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Whether the district court abused its discretion by not granting a preliminary injunction to former members of the Board of Directors of the Legal Services Corporation (which injunction would have permitted the former Directors to continue to serve on the Board in the place of their successors) on the ground that the former Directors did not make a strong showing that they were likely to prevail on the merits of their claim that the President's recess appointments of their successors were invalid.

This case was previously before this Court upon plaintiffs' motion for a stay pending appeal of the district court's denial of preliminary injunctive relief. This motion was denied by a panel of this Court (Wright, Ginsburg; Bork, not participating) on March 4, 1982.

STATEMENT OF THE CASE

Nature of the Case.

This is an appeal from the district court's denial of plaintiffs' application for a temporary restraining order. 1/ On December 30, 1981, and January 22, 1982, during a recess of the Senate, President Reagan made recess appointments of the ten defendants in this case to the Board of Directors of the Legal Services Corporation. Plaintiffs were the incumbent Directors whose 3-year terms of office had expired and who were replaced by the President's appointees. Plaintiffs filed a complaint in the district court requesting temporary, preliminary and permanent injunctive relief, seeking to prohibit the defendants from exercising their duties as Board members. Although some of the plaintiffs had themselves originally been recess appointees to

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1/ In its March 4, 1982, Opposition To Appellants' Motion For An Injunction Pending Appeal, defendants raised to the Court the jurisdictional defects in plaintiffs' attempt to appeal from the denial of a temporary restraining order. See, e.g., Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1970). For the same reasons set forth in that Opposition, we renew here our argument that the Court does not have jurisdiction over this appeal. For the purposes of our brief on the merits, however, we have assumed arguendo that the district court's denial may be treated as a de facto denial of a motion for a preliminary injunction.

the Board, 2/ plaintiffs contended that the President has neither statutory nor constitutional authority to make recess appointments to the Board. They contended further that they would be irreparably harmed if the defendants were allowed to conduct a meeting of the Board on March 4-5, 1982, and continue to act in their capacity as Board members.

The district court declined to grant a temporary restraining order. Relying chiefly upon Buckley v. Valeo, 424 U.S. 1 (1976), which held that officials performing tasks substantially identical to those performed by the Board members in this case must be appointed in accordance with Article II procedures (which include the recess appointment power), the court ruled that plaintiffs had not met their burden of showing a likelihood of success on the merits. This appeal followed.

Statutory Scheme.

The Legal Services Corporation Act, 42 U.S.C. 2996, Public Law 93-355, 88 Stat. 452, created a non-profit corporation, independent of the Executive branch of the government, to "replace the Legal Services Program [which had been administered by] the Executive Office of the President." H.R. Rep. No. 93-247, 93d Cong., 2d Sess. 2, [1974] U.S. Code Cong. & Ad. News 3872, 3873. As noted by the district court, the Legal Services Corporation's core function is "the nationwide determination of

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2/ Plaintiffs Cecilia Esquer, Steven Engelberg, Hillary Rodham, and Richard Trudell were given recess appointments to the Board by President Carter on January 19, 1978. See Exhibit 1 of Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for a Temporary Restraining Order.

eligibility for congressional appropriations to finance the provision of legal services to the poor." Mem. Opinion, p. 8, note. The governing body of the Corporation is an 11-member Board of Directors. The structure and status of the members of the Board are set forth at 42 U.S.C. 2996c:

> (a) The Corporation shall have a Board of Directors consisting of eleven voting members appointed by the President, by and with the advice and consent of the Senate, no more than six of whom shall be of the same political party. . . .
>
> (b) The term of office of each member of the Board shall be three years, except that five of the members first appointed . . . shall serve for a term of two years. Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified. . . .
>
> (c) The members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States.
>
> (d) The President shall select from among the voting members of the Board a chairman, who shall serve for a term of three years. Thereafter the Board shall annually elect a chairman from among its voting members.
>
> (e) A member of the Board may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for no other cause.

The Corporation receives its funds by direct appropriation from Congress, without the intermediation of any other government agency. 42 U.S.C. 2996i. It may issue regulations, enforce compliance with its rules and the Act by terminating funds to

recipients found out of compliance (42 U.S.C. 2996e(b)(1)(A)); it may conduct hearings pursuant to its own rules (42 U.S.C. 2996j); and it is the final administrative arbiter of questions concerning eligibility for services funded under the Act. 42 U.S.C. 2996e(b)(1)(B).

District Court Proceedings.

(1) Proceedings Leading Up To This Appeal. Plaintiffs' initial complaint was premised upon their contention that the President did not have the power to make a recess appointment to the Board. They contended that the statute creating the Corporation provided only that appointments to the Board were to be made by the President by and with the advice and consent of the Senate, and that the statute did not, therefore, grant to the President the recess appointment power. They contended further that this was constitutionally permissible on the grounds that the members of the Board were not "Officers of the United States," as the Constitution defines that term. They concluded that absent Senate confirmation, the defendants could not lawfully assume their posts, notwithstanding that four of the plaintiffs had themselves assumed their offices pursuant to recess appointments by President Carter.

The district court's opinion denying plaintiffs temporary injunctive relief was comprehensive. The court noted that Congress had followed the Article II format in laying down the

procedures governing the appointment of Board members. It concluded that there was no suggestion that the normal incidents of the Article II format -- including the recess appointment power contained in Article II, §2, cl. 3 -- were not intended by Congress. However, even if the statutory argument of the plaintiffs would have had merit, the district court noted that (Mem. Opinion, p. 6):

> [Plaintiffs] have not explained why it would not be prudent for this Court to read [42 U.S.C.] §2996c(c) in more restrictive manner in order to avoid a possible constitutional conflict between the parameters of congressional authority under the Necessary and Proper Clause and the functional breadth of the Article II appointment power recognized in Buckley.

The court went on to note that in Buckley v. Valeo, supra, the Supreme Court had taken an expansive, functional approach to determining the scope of the constitutional term "Officers of the United States." The court noted that the Board of Directors of the Legal Services Corporation performed discretionary functions, particularly regarding the determination of eligibility for public funds, which were indistinguishable from those functions that the Supreme Court held, in Buckley, could be performed only by officers appointed in strict accordance with the procedures mandated in Article II of the Constitution. The district court concluded that "plaintiffs have not sufficiently explained why the functional analysis in Buckley of the Article II appointment power does not compel the conclusion that LSC Directors are 'Officers of the United States' within the purview of Article II,

§2, cl. 2." Mem. Opinion, p. 7 (emphasis supplied). On these bases, the district court declined to grant temporary injunctive relief to the plaintiffs.

An appeal from this denial was noted, and plaintiffs on March 4, 1982, filed a motion with this Court seeking, as preliminary injunctive relief pending appeal, the same temporary relief denied by the district court, namely, an order to permit them to continue to serve on the Board in the place of their successors, until such time as their successors' nominations had been confirmed by the Senate. This motion was denied by this Court on the ground that plaintiffs "have not demonstrated the requisite likelihood of success on the merits, generally for the reasons stated by the district court.. . ." 3/

(2) Proceedings Subsequent To This Appeal. On March 22, 1982, plaintiffs filed an Amended Complaint, in which they added two additional counts. They argue that whether or not the President has the authority to make recess appointments to the Board, the appointments in this case would be invalid because there were no statutory "vacancies" which could be filled by recess appointments. In addition, they argue that these appointments fail to satisfy certain statutory provisions requiring the Board to be appointed "so as to include eligible clients, and to be generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public." 42 U.S.C. 2996c(a).

3/ The Court's March 4, 1982, order is reproduced in an Addendum to this brief.

As of April 5, 1982, the date of the filing of this brief, the district court had yet to rule upon plaintiffs' motion for a preliminary injunction. Cross-motions for summary judgment were filed by the parties and were pending before the district court.

ARGUMENT

Standard of Review and Summary.

It is well settled that a preliminary injunction constitutes "extraordinary relief." Virginia Petroleum Job. Ass'n v. Federal Power Com'n, 259 F.2d 921, 925 (D.C. Cir. 1958). The granting of such extraordinary relief is within the sound discretion of the district court. The role of the reviewing court is limited. The Court "will not set aside the action of a District Court in either denying or granting an application for a preliminary injunction unless the action of the District Court was in clear error or in abuse of discretion." Cox v. Democratic Central Committee of the District of Columbia, 200 F.2d 356 (D.C. Cir. 1952). This presents to the reviewing court "a narrow question, and a great burden on appellants." Society for Animal Rights, Inc. v. Schlesinger, 512 F.2d 915, 917 (D.C. Cir. 1975). The standards governing the district court's exercise of discretion are (Virginia Petroleum Job. Ass'n v. Federal Power Com'n, supra, 259 F.2d at 925): 4/

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of

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4/ Although Virginia Petroleum Jobbers involved a motion to stay an administrative order, the factors set forth there also apply to motions for preliminary injunctions. A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C Cir., 1969).

> its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of . . . judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? . . . [Emphasis supplied.]

Plaintiffs made none of these requisite showings, and the district court did not therefore abuse its discretion in denying plaintiffs preliminary injunctive relief. 5/

I. Irreparable Injury. Plaintiffs have made no attempt to show irreparable injury. Their only relevant assertion is that if they are correct on the merits of this claim, they and not the defendants should be administering the Corporation. While this is certainly injury in fact sufficient to establish standing to prosecute their claim, there is no indication that anything "irreparable" will be occasioned should plaintiffs ultimately prevail in this suit and at that time be restored to the offices of Directors of the Corporation.

II. But, in any event, plaintiffs have failed to make a strong showing that they are likely to prevail on the merits. To the contrary, the defendants have demonstrated that Congress

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5/ Instead of a "strong showing" of likely success, a movant need only meet the lesser standard of making a "substantial case on the merits," when the other three factors tip sharply in the movant's favor. Washington Metropolitan Area, etc. v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). As the panel, in its March 4, 1982, order denying plaintiffs' motion for a stay pending appeal has already noted, that lower standard has no application in this case, since plaintiffs "have failed to demonstrate that the relief requested will prevent irreparable harm to them without causing similar harm to the other parties." See Addendum.

intended for the President to have the power to make recess appointments to the Board of Directors of the Legal Services Corporation. The history of the enactment of the Legal Services Corporation Act is marked by considerable debate over the make-up of the Board of Directors of the Corporation and the manner of their appointment. President Nixon insisted that the 11-member Board be appointed "in the constitutional way," by the President, with the advice and consent of the Senate. He vetoed an early bill that would have restricted the appointment powers of the President, and subsequent compromise proposals which contained lesser restrictions on the President's power of appointment were threatened with vetos and failed to win congressional passage for that reason. Finally, the Congress acceded, and passed the Administration's bill without change to the appointment provisions, acknowledging that the President's appointment power was "unfettered." Thus, the legislative history demonstrates that the Congress intended, without restriction, to grant the President the power to appoint members of the Board of Directors "in the constitutional way". Because the power to make recess appointments is an incident of the President's appointment power under Article II of the Constitution, it follows that the Congress intended the President to have this power.

This construction of the Act is solidly supported by administrative practice. Without congressional objection, prior administrations have made recess appointments to the Board of

Directors of the Legal Services Corporation, and to corporations with similar statutory structures, such as COMSAT and the Synthetic Fuels Corporation. This construction of the Act is made all the more compelling by the serious constitutional questions which arise if the Act is interpreted to deprive the President of his recess appointment powers granted by Article II of the Constitution. United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971).

Plaintiffs' contentions to the contrary are insubstantial. Plaintiffs rely almost exclusively upon that clause of the Act which recites that Board members are not, by reason of their membership, to be deemed "officers or employees of the United States." However, there is not any support for the contention that the term ("officers") was intended in its constitutional sense, or that a further implication concerning the applicability vel non of the President's recess appointment power was contemplated. To the contrary, the context of this term as well as the way in which similar phrases are used in comparable statutory schemes suggests strongly that Congress had in mind the statutory definition of these terms, by which eligibility for certain statutory entitlements and privileges are determined. In addition, plaintiffs' reliance on the intent of Congress that the Corporation be independent of the Executive branch is misplaced. Congress intended the appointment process to be one which insured accountability, not independence; moreover, the full independence of the Board members is insured by virtue of

the inability of the President to remove them from office, and is therefore not inconsistent with the President's exercise of the recess appointment power.

Nonetheless, assuming arguendo that plaintiffs' construction were correct, then the Act would be unconstitutional. This issue is controlled by Buckley v. Valeo, 424 U.S. 1 (1976). Buckley holds that officials whose powers include "rulemaking . . . and [making] determinations of eligibility for funds," are "Officers of the United States" in the Constitutional sense and must be appointed in accordance with the requirements of Article II of the Constitution. The Board members in this case have as their "core function", as the district court noted, "the nationwide determination of eligibility for public funds." Mem. Opinion, p. 8 note. Therefore, the Board members are "Officers of the United States", and are subject to the President's Article II recess appointment power. Plaintiffs' attempt to distinguish Buckley on the ground that the rulemaking and funding-eligibility determination functions only need to be performed by an Officer of the United States when exercised in conjunction with executive enforcement powers is incorrect. Not the least of the reasons why this is wrong is the express language in Buckley that "each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law . . . [and] may therefore be exercised only by persons who are 'Officers of the United States.'" 424 U.S. at 140, 141 (emphasis supplied).

III. Injury to the Defendants and the Public Interest. Finally, whatever injury plaintiffs may be able to claim for themselves, it is plain that granting them relief will cause absolutely identical injury to the defendants; and, "[r]elief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents." Virginia Petroleum Job. Ass'n v. Federal Power Com'n, supra, 259 F.2d at 925. Moreover, the public interest is best served by denying the preliminary injunction. Should plaintiffs be granted their preliminary relief and fail to prevail on the merits (or should their claim become moot by virtue of the Senate's confirmation of their successors), then the disruption occasioned by displacing one set of Board members by another would needlessly occur twice: once as a result of preliminary relief, and once again when the defendants again assumed their offices. The public interest lies in the constancy of Board membership, and the risk of double disruption and the attendant consequences for the administration of the Legal Services Program should not be undertaken absent the most extraordinarily compelling showing by plaintiffs. This, plainly, has not been made.

I

PLAINTIFFS HAVE NOT SHOWN OR ATTEMPTED TO SHOW THE IRREPARABLE INJURY NECESSARY TO SUPPORT THE GRANT OF PRELIMINARY INJUNCTIVE RELIEF

Plaintiffs have not attempted to make any showing whatsoever of irreparable injury. Their sole representation on this matter in their brief to this Court is that if the defendants have not

been lawfully appointed to their positions, then defendants' "assertion of such control . . . irreparably injures the Corporation and the plaintiff directors, and ought to be enjoined." 6/ Appellants' Brief, p. 26. This confuses their claim on the merits with the showing necessary to support a grant of preliminary injunctive relief. It is true, of course, that if defendants are correct in the contention that their recess appointments by President Reagan are valid, then it is impossible for plaintiffs to show any injury to themselves at all by defendants' continuing to occupy their offices.

However, the converse does not logically follow. It is not true that if the recess appointments are invalid, that irreparable injury to plaintiffs will necessarily occur. Plaintiffs, for example, have not shown what, if any, actions defendants can or may intend to take in connection with their administration of the Legal Services Corporation whose consequences would be "irreparable" should plaintiffs regain the offices of directors in the ordinary course of the judicial consideration of their claim.

6/ At p. 26, note 37 of their brief, plaintiffs appear to incorporate by reference plaintiffs' discussion of "irreparable injury" which was set forth in ¶¶ 17-27 of their Motion For Injunction Pending Appeal. This, however, adds nothing to their showing. That motion was concerned exclusively with the alleged irreparable injuries which would happen if a March 4-5 meeting of the Board were permitted to occur. The motion was denied and the meeting was conducted. Minutes of the meeting were filed with the district court and plaintiffs received copies. Plaintiffs have not attempted to argue that their dire predictions concerning the consequences of the meeting have occurred, or that this meeting suggests any injuries which might continue to occur. Their silence permits the inference that no such harm was occasioned.

Indeed, plaintiffs virtually concede in their brief that this appeal from the denial of a temporary restraining order is primarily designed to obtain from this Court a decision on the underlying merits of this claim. Plaintiffs state (Appellants' Brief, p. 7):

> Plaintiffs continue to press this appeal because (1) they continue to believe that they are entitled to interim injunctive relief pending resolution of the merits, and (2) the public interest in the prompt resolution of this dispute will be served by an early determination by this Court of the underlying legal issue as to the requirement of Senate confirmation of directors of the Legal Services Corporation. [Emphasis supplied.]

However, plaintiffs' desire for an early resolution on the underlying merits of their claim should not be a relevant element of this appeal. 7/ This appeal concerns the denial of a temporary restraining order and even considered as a de facto denial of a preliminary injunction, such preliminary relief requires as a threshold matter a showing of irreparable injury. Plaintiffs have made no such showing, and their appeal

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7/ In assessing the propriety of plaintiffs' suggestion that this Court use this appeal as a vehicle to determine "the underlying legal issue as to the requirement of Senate confirmation," the Court may wish to consider (1) the issue of Senate confirmation may lead to very significant constitutional questions implicating the relation between Congress' authority under the Necessary and Proper Clause and the President's authority under Appointments Clause of Article II; and (2) the plaintiffs are presently proceeding on the merits in the district court on the basis of an amended complaint which contains two additional counts that have no constitutional dimension whatsoever. Thus, if plaintiffs should succeed on either of these latter counts, and this Court were to follow plaintiffs' suggestion and reach the constitutional issues, the Court would have unnecessarily resolved questions of the utmost moment, contrary to sound principles of judicial restraint.

should therefore be dismissed on this basis alone, without any further consideration of the four factors set forth in Virginia Petroleum Jobbers. However, as we discuss below, plaintiffs have also failed completely to make the requisite showing regarding likelihood of success, harm to others, and the public interest.

II

PLAINTIFFS HAVE NOT SHOWN A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM

Congress adopted the Article II format in establishing the procedures for the appointment of Board members. The power of the President to make recess appointments is an incident of the President's Article II powers, and absent a contrary expression, must be assumed to be intended when the Congress adopts that format. Moreover, a contrary construction which deprived the President of this power, in light of the functions performed by the Directors, would be unconstitutional and void.

Plaintiffs' contrary arguments are now asserted for the third time. The district court found that they did not show any likelihood of success and refused to grant a temporary restraining order. The plaintiffs then urged these same arguments before a panel of this Court in support of their request for a stay pending appeal, and the panel held that these arguments did "not demonstrate[] the requisite likelihood of success on the merits, generally for the reasons stated by the District Court in its March 3, 1982, Memorandum Opinion." See Addendum. For the same reasons, they should once again be rejected.

A. Congress Intended The President To Have The Authority To Make Recess Appointments To The Board Of Directors Of The Legal Services Corporation.

1. The Legislative History Of The Legal Services Corporation Act As Well As Traditional Rules Of Statutory Construction Compel The Conclusion That The Congress Intended The President To Have The Power To Make Recess Appointments Of Board Members.

In 1971, the President's Advisory Council on Executive Reorganization, the Ash Commission, submitted a report recommending the establishment of a non-profit Legal Services Corporation. 8/ Up to that time, the Legal Services Program had been administered within the Executive Office of the President by the Office of Economic Opportunity. Ash Commission Report, p. 61. However, the legal representation provided under this program sometimes required that suits be brought against the various departments of the government, generating actual or apparent conflicts of interest. The Commission believed that such conflicts jeopardized the effective operation of the program, and suggested that the President propose "legislation to establish a public corporation to administer the Legal Services Program . . . modeled on the amendments to the Communications Act of 1934 which established the Public Broadcasting Corporation." Ash Commission Report, p. 135.

Subsequently, on May 5, 1971, the President proposed legislation to Congress for the purpose of creating a Legal Services Corporation. The President discussed specifically the question of the appointment of the governing Board of Directors of the Corporation, noting that "[t]rue independence for [the

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8/ The President's Advisory Council on Executive Organization, Establishment Of A Department Of Natural Resources--Organization For Social And Economic Programs (1971) (hereinafter, the "Ash Commission Report").

Corporation] demands a governing body drawn from a wide spectrum and safeguarded against partisan interference after its appointment." 7 Weekly Compilation of Presidential Documents 728 (May 10, 1971) (emphasis supplied). The legislation introduced on behalf of the President in the House, H.R. 8163, contained virtually all of the provisions ultimately enacted into law as 42 U.S.C. 2996c concerning the structure of the Board, the manner of its appointment, and the status of its members. 9/ The bill proposed an 11-member Board of Directors, appointed by the President with the advice and consent of the Senate, who would be removable only by vote of the members of the Board for specified causes. 10/ However, the Congress initially resisted this proposal, and the mode and manner of the appointment of the Board became the subject of a protracted struggle.

In place of the administration bill, the House Committee on Education and Labor reported to the floor H.R. 10351. This compromise bill provided for a 17-member Board of Directors, six of whom would be appointed by the President from members of the public at large, the remainder of whom would be appointed by the President from lists submitted from various interested

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9/ The text of H.R. 8163 is set forth at 117 Cong. Rec. 13788-90 (May 6, 1971). Compare Section 902 of H.R. 8163 with 42 U.S.C. 2996c.

10/ The administration bill also contained the provision that Board members, on account of their membership, not be deemed "officers or employees" of the United States. H.R. 8163, §902(c). None of the many bills proposed as alternatives to the administration bill contained this language.

organizations. [11/] These provisions were ultimately passed by both the House and Senate. [12/]

This bill was vetoed by President Nixon. In his veto message, the President stated (7 Weekly Compilation of Presidential Documents 1634-35 (December 31, 1971)):

> The restrictions which the Congress has imposed upon the President in the selection of directors of the Corporation is also an affront to the principle of accountability to the American people as a whole. Under congressional revisions, the President has full discretion to appoint only six of the seventeen directors. . . . The sole constituency a Director of the Corporation must represent is the whole American people. The best way to insure this in this case is the constitutional way--to provide a free hand in the appointive process to the one official accountable to, and answerable to, the whole American people--the President of the United States, and trust to the Senate of the United States to exercise its advice and consent function. [Emphasis supplied.]

After the President's veto was sustained, compromise bills (H.R. 12350 and S. 3010) were introduced and passed in the respective Houses of the 92d Congress. A conference committee proposed adoption of the Senate version of the bill, which would

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11/ H.R. 10351 reflected a compromise between the provisions of H.R. 8163 and H.R. 6360, the so-called "bi-partisan" bill. H.R. 6360 would have given the President authority to appoint only 5 members of a 19-member Board; 6 members would serve ex officio, the balance being appointed by other appointing authorities. See H.R. 6360, §904 (reproduced at Economic Opportunity Amendments of 1971: Hearings on Oversight Into Administration Of The Economic Opportunity Act Of 1964 and Consideration of H.R. 40, H.R. 6360, H.R. 6394, and H.R. 8163 Before the Special Hearing Subcommittee No. 2 of the House Committee on Education and Labor, 92d Cong., 1st Sess. 5 (1971)).

12/ The actual bill passed by the House was S.2008, amended to contain the provisions of H.R. 10351. 117 Cong. Rec. 34737 (October 1, 1971).

have allowed the President "full discretion to name ten members of a 19-member Board, subject only to the constraint that six of the ten must be attorneys and the remaining members would be nominated by the President from the recommendations made to him. All nominees must be confirmed by the Senate." S. Rep. No. 92-792, 92d Cong., 2d Sess. 2 (1972). However, this continued limitation on the President's power of appointment led to the threat of another veto, and the 92d Congress recessed without passage of a Legal Services Bill. See generally George, Development of the Legal Services Corporation, 61 Cornell L. R. 681, 693 (1976).

In 1973, the administration proposed legislation (H. R. 7824) to the 93d Congress regarding the Legal Services Corporation. The provisions relating to the appointment, status and make-up of the Board of Directors were virtually identical to those proposed in 1971. See 9 Weekly Compilation of Presidential Documents 664 (May 11, 1973). The Congress this time did not contest the administration bill's provisions regarding appointment of the Board members (119 Cong. Rec. 40460 (December 10, 1973) (remarks of Senator Mondale)):

> For over 2 years, those of us who believe strongly in the legal services program have been insistent that there be some checks on the President's discretionary appointment power to the Legal Services Corporation Board of Directors. . . .
>
> In the committee-reported bill, the President has complete discretion in his appointments to the Board, subject only to Senatorial advice and consent. This represents a major concession on the part of those favoring a strong, independent legal services corporation.

The Congress acceded to President Nixon's insistance that he be given power to appoint the members of the Board of Directors "in the constitutional way," and passed H.R. 7824 which was enacted into law. At every point during its consideration of H.R. 7824, the Congress emphasized that it intended no restrictions whatsoever on this authority. 13/

But the President's constitutional power to appoint officers of the United States by and with the advice and consent of the Senate includes as "a supplement" the power to make recess appointments. The Federalist Papers, No. 67 (Alexander Hamilton). Necessarily, therefore, in granting the President the authority to appoint members of the Board of Directors of the Legal Services Corporation "in the constitutional way," the Congress impliedly granted him the power to make Article II recess appointments. This construction is especially forceful in light of the Congress' repreated expressions that it was not attempting to restrict the President's appointment power.

Traditional rules of construction independently lead to this same conclusion. First, in the thousands of pages of debate and hearings over the provisions of the Legal Services Corporation Act, the role of the President in the appointment process plays a particularly leading role; yet, not one of the dozens of

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13/ See, e.g., 119 Cong. Rec. 40461 (remarks of Sen. Kennedy): 119 Cong. Rec. 40476 (remarks of Sen. Javits: "the committee bill[] follow[s] exactly the administration's proposal [regarding appointment to the 11-man board]"); 120 Cong. Rec. 1391 (remarks of Sen. Kennedy); 119 Cong. Rec. 20693 (remarks of Cong. Erlenborn); 120 Cong. Rec. 938 (remarks of Sen. Nelson: appointment power of President is "unfettered").

congressmen and senators who spoke to this issue ever indicated that the Congress intended to restrict the power of the President to make recess appointments. As observed by Judge Harold Greene in Staebler v. Carter, 464 F.Supp. 585, 592 (D.D.C. 1979):

> [It is] difficult to believe that, had the Congress intended to take the significant step of attempting to curtail the President's constitutional recess appointment power, or even to legislate in the area of that power, it would not have considered the matter with more deliberation or failed to declare its purpose with greater directness and precision. No such deliberation or direction can be found in this legislative history.

Likewise in this case, had the Congress intended the President not to have the recess appointment power, it is inconceivable that, in all of the available legislative history, that proposition would not have found some mention.

Moreover, this construction is solidly supported by administrative practice. On January 19, 1978, President Carter made five recess appointments to the Board of Directors of the Legal Services Corporation. Four of the plaintiffs were among these recess appointees. See Exhibit A, Memorandum Of Points And Authorities In Opposition To Plaintiffs' Motion For A Temporary Restraining Order. President Carter sent the names of these individuals to the Senate for confirmation when the Senate returned to session, and the appointments were confirmed without any indication by the Senate that it believed recess appointments were inappropriate. Similarly, President Kennedy in 1962 made recess appointments of incorporators of the Communications

Satellite Corporation 14/ (Id.), and on October 3, 1980, President Carter made 5 recess appointments to the Board of Directors of the United States Synthetic Fuels Corporation (Id.) without subsequent objection by Congress.

This interpretation of the Act is made all the more compelling by serious constitutional questions which would be occasioned by the plaintiffs' construction. As is discussed in detail below, for Congress to create a Board of Directors to administer a significant federal grant program, and to attempt to insulate these Board members from the full range of appointment authority provided by the Constitution, would give rise to fundamental separation of powers questions under Articles I and II of the Constitution. In light of such serious questions, and especially in circumstances where the legislative history gives

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14/ The Communications Satellite Act, 47 U.S.C. 732, 733(a), provides that the incorporators of this profit-making corporation (and 3 of 15 directors) are to be appointed by the President, by and with the advice and consent of the Senate. No objection was made to recess appointments of the incorporators by President Kennedy. Moreover, an opinion of the Attorney General (42 OAG 165, Oct. 25, 1962), in the course of concluding that the incorporators held private posts and were not Officers of the United States, noted without objection that they had received recess appointments. 42 OAG at 165 n.2. The basis of the Attorney General's failure to object to the mode of appointment can only have been that the adoption by the Congress of the Article II format grants the recess appointment power to the President. See 42 OAG at 166 ("The method of appointment . . . is, of course, derived from . . . Article II.")

This Attorney General Opinion is incorrectly cited by plaintiffs at page 24 of their brief as standing for the proposition that "the President has no power to make recess appointments." [Emphasis supplied.] This reading confuses the Opinion's holding on the question of whether the incorporators (and directors) of this profit-making corporation are public officers with the separate question of the President's statutory powers of appointment.

not the slightest indication that Congress intended to provoke a constitutional challenge, a sound respect for the principles of judicial restraint requires a court, if fairly possible, to avoid the constitutional issues: "[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided." United States v. Thirty-seven Photographs, supra, 402 U.S at 369 (emphasis supplied). An interpretation affording the President a power to make recess appointments is considerably more than "fairly possible." Therefore, it is necessary for the Court to adopt that construction which avoids resolution of difficult constitutional issues involving the most sensitive relationships between coequal branches of the Federal government.

2. Neither The Intended "Independence" of the Corporation Nor The "Officers and Employees" Clause Supports The Contention That Congress Did Not Intend The President To Have The Power To Make Recess Appointments To The Board.

Plaintiffs make two arguments in support of their contention that Congress did not intend the President to have the power to make recess appointments to the Board. They rely on 42 U.S.C. 2996c(c), which provides that the "members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States," and also upon those portions of the legislative history emphasizing the congressional intent that the Board be independent of the Executive branch. Plaintiffs argue the power to make recess appointments is inconsistent with these two provisions.

(a) The "Officers and Employees" Clause. Plaintiffs' argument appears to be that, by this clause, Congress displayed its intent that Board members were not, for constitutional purposes, to be considered "Officers of the United States," and that it meant thereby to "limit Executive Branch control over the Legal Services Program" by "modif[ying] the powers of appointment the President would have had if the Corporation were part of the government and its directors 'officers of the United States.'" Appellants' Brief, pp. 10, 12. This is incorrect for several reasons.

(i) First, the presence of this clause in the Act is due solely to the insistence of the President. In none of the bills introduced in Congress by which the Congress intended to limit executive appointment authority is there any parallel to the officer and employee clause. The fact that the President, in the course of insisting upon his authority to make appointments to the Board "in the constitutional way," deliberately insisted upon the insertion of this clause in the administration bill which was ultimately passed by Congress strongly suggests that the clause was neither intended nor perceived as a limitation on the appointment authority.

(ii) Moreover, the clause uses, as if interchangable, the terms "officer" and "employee." It is plain that being an "employee of the United States" has no constitutional

significance whatsoever. [15/] Therefore, in order to accept plaintiffs' construction, it would be necessary to assume that the President and Congress intended one segment of the clause to have a constitutional dimension ("officers") while the remaining segment ("employees") had only a statutory dimension. But this is contrary to traditional rule of noscitur a sociis, which requires words to be construed with an eye to their context. [16/]

(iii) In addition, plaintiffs' construction is inconsistent with what legislative history exists concerning the clause. There is virtually no express comment upon the clause in the

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15/ Both "Officer of the United States" and "Employee of the United States" do have a statutory significance. Both terms are defined at 5 U.S.C. 2104, 2105. As this Court has noted, in order to "obtain the benefits of [the statutory protection due federal employees and officers, individuals] must come within the definition of employee [or officer] set forth in 5 U.S.C. §2105(a)." National Treasury Employees Union v. Reagan, 663 F.2d 239, 246 (D.C. Cir. 1981).

16/ Plaintiffs claim to rely upon the "long-established rule that when the term 'officer of the United States' is used in a statute, it means officer in a constitutional sense unless Congress explicitly states to the contrary." Appellants' Brief, p. 9. There is no such rule. The two cases relied upon by plaintiffs (United States v. Germaine, 99 U.S. 508 (1879) and Steele v. United States, 267 U.S. 505 (1925)) were both cases involving the construction of penal statutes. As noted in Hendee v. United States, 22 Ct. Cl. 124, 140 (1887), Germaine thereby "confined the Court to that technical accuracy in the meaning of words which is required in penal statutes," and is of no precedential value in construing a civil statute 22 Ct. Cl. at 140. Hendee recognized that the phrase "officer of the United States" is "frequently used in a broader sense than the technical one fixed by the constitutional method of appointment, and that use of it is occasionally found in statutes." 22 Ct. Cl. at 142, 141.

Congressional hearings, reports and debates on the Act. 17/ But it is several times mentioned that the mode of appointment of the Board of Directors of the Legal Services Corporation was designed on the model of the Public Broadcasting Corporation. See 117 Cong. Rec. 13785 (May 6, 1971) (remarks of Cong. Quie upon introduction of administration bill); 7 Weekly Compilation of Presidential Documents 728 (May 10, 1971); Ash Commission Report, p. 135. The act establishing that Corporation contains a similar provision regarding the members of its governing board (47 U.S.C. 396(d)):

> (2) The members of the Board shall not, by reason of such membership, be deemed to be employees of the United States. They shall, while attending meetings of the Board or while engaged in duties related to such meetings or in other activities of the Board pursuant to this subpart[,] be entitled to receive compensation at the rate of $100 per day including travel time . . . .

While there is no legislative history directly concerned with this provision, its context makes clear that the "employee" language is intended to exclude Board members from the myriad of statutory benefits afforded to federal employees -- i.e., job protection, retirement benefits, promotion schedules and other attendant job privileges -- in the course of establishing a

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17/ The sole comment on the clause appears to be a question by Senator Fannin, during the course of extended criticism of the bill, asking whether this provision was connected with the provision in the bill giving the Board members the right to appoint their chairman. 120 Cong. Rec. 1388, 1389 (Jan 30, 1974). Senator Fannin was not concerned with the bill in committee, and his questions were not responded to by the bill's sponsors.

limited, fixed compensation scheme for the members. [18/] Because the Public Broadcasting Act served as a model for the Legal Services Corporation Act regarding the make-up and appointment of the Corporation's Board of Directors, it may be assumed, in the absence of any comment upon the subject at all, that the "officer and employee" section of the Legal Services Corporation Act intends, as does the Public Broadcasting Act, merely to exempt the Board members from the statutory benefits and privileges which obtain to those who meet the statutory definitions of "Officer of the United States" (5 U.S.C. 2104) or "Employee of the United States" (5 U.S.C. 2105).

Thus, in light of the indications that this clause refers only to statutory entitlements, and in light of express statements that Congress intended no limitations on the President's appointment powers, this clause cannot be understood as a limitation on the President's power to make recess appointments.

(b) The Independence of the Corporation. Plaintiffs also argue that the Congress intended that the Board members have

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18/ More or less similar status provisions, always in the context of some compensation scheme, are found in several statutory schemes. See, e.g., Advisory Board of the National Institute of Corrections, 18 U.S.C. 4351(d) (Board members not "officers or employees of the United States" in context of compensation scheme); United States Metric Board, 15 U.S.C. 203(H) (payments to Board members do not render them "employees or officials" of the United States); National Periodical System Corporation, 20 U.S.C. 1047(c); Advisory Board, National Insurance Development Program, 12 U.S.C. 1749bbb-1(D); see also, National Cancer Advisory Board, 42 U.S.C. 286b(a)(2)(A)(8); National Neighborhood Reinvestment Corporation, 42 U.S.C. 8104(E); Synthetic Fuels Corporation, 42 U.S.C. 8713(c).

certain qualifications, and that "the importance of these provisions in protecting the independence of the Corporation would be vitiated if the president could circumvent the Senate's insistence on adherence to these standards by simply making recess appointments. . . ." Appellants' Brief, p. 14. This misses the mark. First, the appointment process was not designed to insure the independence of the Corporation, but, to the contrary, was insisted upon by the President and acknowledged by the Congress to "provide[] strong elements of accountability [to the Congress and the President]." 119 Cong. Rec. 40476 (Dec. 10, 1973) (remarks of Sen. Javits, emphasis supplied); H.R. Rep. No. 93-247, supra, 3, [1974] U.S. Code Cong. & Ad. News 3874. But, in any event, the independence of the members of the Board is guaranteed by 42 U.S.C. 2996c(e), which provides that "[a] member of the Board may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for no other cause." This is the principal and traditional method of insuring the independence of an agency, commission or corporation from the political influence of the Executive branch. Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958); Buckley v. Valeo, supra, 424 U.S. at 136 (". . . members of independent agencies are not independent of the Executive with respect to their appointments.") That the President's recess appointment power is not perceived as a threat to independence is underscored by the fact that the power extends even to Justices of the

Supreme Court, members of lower courts and the independent regulatory agencies, appointees with needs for an extraordinary degree of independence. Staebler v. Carter, supra, 464 F. Supp. 585; United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).

Thus, neither of the plaintiffs' arguments disturbs the conclusion that Congress intended the President to have the authority to make recess appointments to the Board. This conclusion is firmly supported by Congress' expressed intent to leave "unfettered" the President's authority to appoint to the Board "in the constitutional way," and is confirmed by Congress' acquiescence in recess appointments made to this and similar boards during previous administrations.

B. Assuming Arguendo That Congress Intended To Limit The Power Of The President To Make Recess Appointments To The Board, The Act Is An Unconstitutional Violation Of Article II, §2, Which Governs The Mode Of Appointment Of Officers Of The United States

Assuming arguendo that plaintiffs were correct and that Congress intended in the Legal Services Corporation Act to divest the President of the power to make recess appointments to the Board, the Act would violate Article II, §2 of the Constitution. Article II, §2 provides, in pertinent part:

> [The President,] by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Thus, the Constitution makes the recess appointment power extend to all offices held by "Officers of the United States," which require appointment by the President by and with the advice and consent of the Senate. Buckley v. Valeo, supra, 424 U.S. 1, establishes that, if an officer performs a function which can be performed only by an Officer of the United States, he must be appointed in accordance with the exclusive requirements of Article II of the Constitution. The duties of the members of the Board of Directors of the Legal Services Corporation, which include the discretionary determination of eligibility for public funds, can only be performed by Officers of the United States. Therefore, the President's constitutional power under Article II to make recess appointments extends to the offices of the Board of Directors of the Legal Services Corporation, and any attempt to restrict this power would be unconstitutional and void.

1. Buckley v. Valeo

The analyses and principles set forth in this Supreme Court decision control the resolution of the constitutional issue in this case. One of the central issues in Buckley concerned the mode of appointment of members of the Federal Election Commission. The members of this Commission were not appointed in conformance with the provisions of Article II, which, the Court held, was the sole permissible method of appointing "Officers of

the United States" to their respective offices.[19/] The term "Officers of the United States" was held "to embrace all appointed officers exercising responsibility under the public laws of the Nation." 424 U.S. at 143. The principle taught by Buckley, therefore, is that officials who are intended to exercise the functions of Officers of the United States must be appointed to office in accordance with the Article II methods of appointment.

The application of this principle in Buckley is particularly instructive. The Court noted that the Commission performed three categories of functions (424 U.S. at 137):

> [1] functions relating to the flow of necessary information -- receipt, dissemination, and investigation; [2] functions with respect to the Commission's task of fleshing out the statute -- rulemaking and advisory opinions; and [3] functions necessary to ensure compliance with the statute and rules -- informal procedures, administrative determinations and hearings, and civil suits.

Functions of the first type, relating essentially to information gathering, are of a type which could be [] performed by a congressional committee and could therefore "be performed by persons not 'Officers of the United States.'" 424 U.S. at 139. However, the latter two categories of functions, were not "merely in aid of the legislative function of Congress." 424 U.S. at

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19/ Of the six voting members of the Commission, two were appointed by the President with the advice and consent of both the Senate and the House of Representatives; two by the Speaker of the House; and two by the President pro tempore of the Senate. The Secretary of the Senate and the Clerk of the House were ex officio, non-voting members. Buckley v. Valeo, supra, 424 U.S. at 113.

138. Some of the Commission's powers -- its discretionary power to seek judicial relief -- were executive powers, entrusted to the President and subject to his direction. 424 U.S. at 138. The other administrative powers of the Commission were, like the powers of the Legal Services Corporation in this case, somewhat legislative or judicial in character, and of a kind "usually performed by independent regulatory agencies or by some department in the Executive Branch . . . ." 424 U.S. at 141. These powers included (424 U.S. at 140):

> [1] rulemaking, [2] advisory opinions, and [3] determinations of eligibility for funds and even for federal elective office itself. [Emphasis supplied.]

The Court ruled that each of these functions could only be performed by an officer of the United States in the Article II sense of the term (424 U.S. at 141):

> [E]ach of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. . . . [N]one of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States." [Emphasis supplied.]

Thus, the Court concluded that the appointment provisions relating to the Commission members were unconstitutional, as they did not conform to the exclusive provisions set forth in Article II, §2.

2. Application of Buckley To This Case.

Buckley squarely applies to this case. Whether the members of the Board of Directors of the Legal Services Corporation are

"Officers of the United States" and their appointment subject to the provisions of Article II of the Constitution depends upon the functions they perform. These functions are set principally forth at 42 U.S.C. 2996e and 2996f. Most importantly, the Corporation, under the direction of the Board, administers a federal grant program previously administered by the Executive Office of the President and funded by direct appropriations from Congress. 42 U.S.C. 2996e, 2996i.

> . . . the Corporation is authorized -- (1)(A) to provide financial assistance to qualified programs furnishing legal assistance to eligible clients, and to make grants to and contracts with -- (i) individuals, . . . and (ii) State and local governments . . . for the purpose of providing legal assistance to eligible clients under this subchapter and (B) to make such other grants and contracts as are necessary to carry out the purposes and provisions of this subchapter. [42 U.S.C. 2996e(a).]

In addition, the Corporation is authorized to issue regulations, and it has the primary "authority to insure compliance of recipients and their employees with the provisions of [the Act] and the rules, regulations, and guidelines promulgated by [the Corporation]." 42 U.S.C. 2996e(b)(1)(A). The Corporation may hold a hearing, conducted pursuant to its own rules and before hearing examiners it has appointed, to determine questions of compliance; it may terminate assistance to those found out of compliance. 42 U.S.C. 2996j, 2996e(b)(1)(A). The Corporation is also the final administrative arbiter of questions concerning eligibility for services under the Act. 42 U.S.C. 2996e(b)(1)(B).

"[R]ulemaking . . . and determinations of eligibility for public funds" were, in Buckley v. Valeo, supra, 424 U.S at 140-41, held to constitute "performance of a significant governmental duty exercised pursuant to a public law," and "may therefore be exercised only by persons who are 'Officers of the United States.'" The duties of the Board of Directors of the Legal Services Corporation are of the same nature as the duties of the Commission members in Buckley. Buckley therefore compels the conclusion that the duties of the Board of Directors of the Legal Services Corporation can only be performed by "Officers of the United States." Consequently, they must be appointed in accordance with the requirements of Article II, which includes the power of the President to make recess appointment for "all vacancies." Constitution, Article II, §2, cl. 3.

3. Plaintiffs' Arguments Do Not Support A Contrary Conclusion

Plaintiffs' attempts to distinguish this case from the decision in Buckley distort the analysis of that case and lead to absurd results. Plaintiffs claim that the decision in Buckley turned exclusively upon the fact that the Federal Election Commission was given Executive enforcement functions. They claim that the Commission's power to determine eligibility for public funds was merely a power in the service of this enforcement function, and that only because of this subordinate relation was it necessary that this power be exercised by an Officer of the United States. They conclude that if the discretionary distribution of public funds is not subordinated to an enforcement function, it need not be performed by an Officer of

the United States, but may be performed by anyone Congress designates or even by Congress itself (Appellants' Brief, pp. 19-20):

> The District Court was wrong to apply . . . Buckley to this case because the Legal Services Corporation's making of grants is not a power that operates in aid of a basic function of enforcement of public law, as was the case with the Federal Election Commission. On the contrary, the making of grants is the chief activity and function of the Corporation. That function, the distribution of funds, is well within those functions that Congress may carry out by itself in furtherance of its spending power. [Emphasis supplied.]

Plaintiffs' theory leads to the absurd result that, for example, the Departments of Health and Human Services, Education, and the Veterans' Administration, all of which are concerned almost exclusively with the distribution of funds, may be removed from the Executive Branch where they are administered by Officers of the United States, and administered by congressional committees, at the discretion of Congress; plainly this is wrong.

(a) First, even if enforcement were of signal importance, it is only necessary to note that the Legal Services Corporation, at the administrative level, has powers of enforcement at least as important to its overall administration of the Act as were those of the Federal Election Commission.

(b) More importantly, however, the decision in Buckley did not turn upon the enforcement powers of the Commission and the relation of other powers to it. Indeed, the Court took exactly the opposite approach, noting that there were many powers which the Commission could exercise, which were merely in aid of

congressional legislative authority, and others that it could not exercise, since they constituted the exercise of significant duties in the administration of public law. The Court treated the powers individually. It concluded that the Commission's enforcement power "may be discharged only by persons who are 'Officers of the United States' within the language [of Article II of the Constitution]" (424 U.S. at 140), and then went on to an independent consideration of administrative powers of "rulemaking . . . and determinations of eligibility for funds," which the Court regarded as "more legislative and judicial in nature than are the Commission's enforcement powers." 424 U.S. at 140, 141. It came to the independent conclusion that "each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law . . . [and t]hese administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'" 424 U.S. at 141 (emphasis supplied). Accordingly, the administration of a federal program involving primarily the discretionary distribution of annual congressional appropriations pursuant to a public law is, in itself, a function which can only be performed by an Officer of the United States.

(c) The judicial authorities cited by plaintiffs in support of their argument that Congress may create offices "not controlled by 'Officers of the United States' to carry out Congress' spending and other powers" (Appellants' Brief, p. 20) are remarkable in one respect: none of them discusses this

issue. [20/] For example, in support of the proposition that it is constitutional for Congress to "create[] private corporations whose purposes include the spending of federal funds even though the corporate directors were not subject to the President's Article II appointment powers," plaintiffs cite McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Appellants' Brief, p. 21. So far, however, from standing for this proposition is McCulloch, that Chief Justice Marshall's opinion never even discusses the appointment of the Board, let alone in connection with the functions of the Board members. Indeed, the only part of that opinion pertinent to this case is that, under the Necessary and Proper Clause, Congress may employ a corporation to carry into execution the powers of the government. 17 U.S. at 421-22. However, as the Court noted in Buckley, McCulloch does not stand for more (424 U.S. at 132):

> Congress has plenary authority in all areas in which it has substantive legislative

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20/ The only source cited by plaintiffs which actually bears upon the constitutionality of recess appointments to the Board of the Legal Services Corporation is a study conducted by the Congressional Research Service, The President's Power To Make Recess Appointments To Fill Vacancies On The Board Of Directors Of The Legal Services Corporation, 124 Cong. Rec. 7688 (March 20, 1978). Appellants' Brief, p. 25. The study concluded that the President could not make recess appointments to the Board of Directors, because the Corporation had no authority to prosecute violations of law and because "the functions of the Corporation are not 'significant' governmental duties exercised pursuant to public law." Id., 7690. This conclusion has no significance because the report fails to note or consider the fact that the functions of the Corporation include rulemaking, authority to compel compliance with rules and statutes by administrative means, authority to settle eligibility questions, and that the Corporation was administering a federal grant program which had previously been performed by an agency (the OEO) which was a part of the Executive Branch.

> jurisdiction, M'Culloch v. Maryland, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction. [Emphasis supplied.]

Here, of course, such a constitutional restriction does exist, in the form of Article II, §2, which governs the mode of appointment of Officers of the United States.

Moreover, as the Court in Buckley made clear, Congress has the discretion to create offices not under the control and direction of Officers of the United States "only in aid of those functions that Congress may carry out by itself." 424 U.S. at 139 (emphasis supplied). But the only power, generally speaking, that Congress has "by itself" is the legislative power. That is, Congress may make laws about spending or other matters. But, this legislative power does not extend to the administration of those spending programs or other programs over which Congress has legislative authority. Buckley v. Valeo, supra, 424 U.S. at 139. If Congress could, as plaintiffs assert, either assign to itself or create offices not directed by Officers of the United States for the purpose of "carry[ing] out Congress' spending and other powers" (Appellants' Brief, p. 20), then the Executive and Judicial Branches would no longer function as effective checks on the exercise of power by Congress.

Thus, plaintiffs' arguments are wrong, and if the Act were construed to allow for the appointment of the Board of Directors of the Legal Services Corporation in a manner inconsistent with the Constitution's mandated procedures, that Act is repugnant to the Constitution and void.

III

GRANTING PLAINTIFFS PRELIMINARY RELIEF WOULD CAUSE THE SAME INJURY TO DEFENDANTS WHICH PLAINTIFFS WISH TO AVOID, AND THE PUBLIC INTEREST WOULD BE SERVED BY DENYING PLAINTIFFS PRELIMINARY INJUNCTIVE RELIEF

A. Injury To The Defendants From The Granting Of A Preliminary Injunction.

Whatever injury plaintiffs would have been able to claim for themselves, it is plain that granting them relief will cause defendants to suffer precisely the same injury; and, "[r]elief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents." Virginia Petroleum Job. Ass'n v. Federal Power Com'n, supra, 259 F.2d at 925.

B. The Public Interest Will Be Served By Denying The Request For Preliminary Injunctive Relief.

The public interest in this case lies in the continued smooth and efficient functioning of the Legal Services Program. Constancy in the membership of the Board, which is the governing body of the Corporation, is an evident and indispensable element in this efficient operation. Obviously causing one set of Board members to be replaced by another set will lead to considerable disruption and jeopardize the ability of the Corporation to perform its functions properly.

Should plaintiffs be granted their preliminary relief and fail to prevail on the merits (or should their claim become moot during the course of judicial review by virtue of the Senate's confirmation of the nominations of their successors), then the

disruption occasioned by displacing one set of Board members by another would needlessly occur twice: once as a result of preliminary relief, and once again when the defendants again assume their offices. This possibility of double disruption and its attendant consequences for the administration of the Legal Service Program, should not be risked absent the most extraordinary and compelling showing by plaintiffs. This plainly has not been made.

CONCLUSION

The plaintiffs' appeal from the denial of an application for a Temporary Restraining Order should be dismissed on the grounds that the order is not appealable. In the alternative, for the foregoing reasons, the district court's judgment should be affirmed.

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April 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 1982, I served the foregoing Brief for the Appellees upon counsel involved by causing copies to be mailed, postage prepaid, to:

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A D D E N D U M

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1227 **September Term, 19** 81

Legal Services Corp., et al.
Plaintiffs/Appellants

v.

Howard H. Dana, Jr., et al.
Defendants/Appellees

Civil Action No. 82-0542

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 4 1982

GEORGE A. FISHER
CLERK

BEFORE: Wright, Ginsburg and Bork, Circuit Judges

O R D E R

On consideration of appellants' motion for injunction pending appeal and the opposition thereto, it is

ORDERED by the Court that the motion is denied. Appellants have failed to demonstrate that the relief requested will prevent irreparable harm to them without causing similar harm to the other parties. See Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921, 925 (D.C. Cir. 1958) ("Relief saving one claimant from irreparable injury, at the expense of similar harm caused by another, might not qualify as the equitable judgment that a stay represents."). Therefore the lower standard for likelihood of success on the merits, as set forth in W.M.A.T.C. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), does not apply. We find that appellants have not demonstrated the requisite likelihood of success on the merits, generally for the reasons stated by the District Court in its March 3, 1982, Memorandum Opinion. Interim relief is not appropriate at this time. It is

FURTHER ORDERED by the Court, sua sponte, that this case shall be expedited. The parties are ordered to submit to the Court within three days of the date of this order a suggested briefing schedule.

Per Curiam

Circuit Judge Bork did not participate in the foregoing order.

United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, D.C. 20510

October 8, 1984

Mr. Donald P. Bogard
President
Legal Services Corporation
733 Fifteenth Street, N.W.
Washington, D. C. 20005

Dear Mr. Bogard:

After polling the members, the majority of the members the Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Subcommittee, denies the reprogramming requests dated September 12, 1984 relating to the following regulations:

45 CFR Part 1601: By-Laws of the Legal Services Corporation

45 CFR Part 1612: Restrictions on Lobbying and Certain Other Activities

45 CFR Part 1622: Public Access to Meetings Under the Government in Sunshine Act

The Subcommittee expects the Corporation to take no further action to enforce, implement, or operate in accordance with these regulations as submitted. With respect to 45 CFR Part 1612, the Subcommittee believes that the restrictions contained in Public Laws 97-377, 98-166, and 98-411 are self-explanatory and can be enforced in the absence of implementing regulations. Thus, the Corporation retains the ability to police illegal legislative and administrative advocacy. The Subcommittee is, of course, willing to entertain a new proposed regulation on the subject and to discuss its specific concerns with the Corporation at any time.

Sincerely,

WARREN B. RUDMAN
for the
Commerce, Justice, State, and
the Judiciary Subcommittee

WBR/tpm

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, D.C. 20510

October 8, 1984

Mr. Donald P. Bogard
President
Legal Services Corporation
733 Fifteenth Street, N.W.
Washington, D. C. 20005

Dear Mr. Bogard:

This is a partial response to the ten reprogrammings submitted to the Committee on Appropriations relating to regulations promulgated by the Corporation which went into effect after April 27, 1984.

No objections have been raised by members of the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies regarding 45 CFR Part 1611 (Revised Appendix) and 45 CFR Part 1629. The Committee has concerns regarding 45 CFR Part 1600, 45 CFR Part 1628, and 45 CFR Part 1629. While the Subcommittee has chosen not to deny approval for the reprogrammings, its concerns are articulated below and the Subcommittee would like these concerns addressed at the earliest possible moment.

The Subcommittee believes the definition of "financial assistance" enunciated in 45 CFR Part 1600 is inconsistent with other provisions of the Legal Services Corporation Act and its relevant legislative history. Financial assistance clearly applies to any grants or contracts made by the Corporation relating to the provision of legal assistance. The Subcommittee would note with special concern the prospect that the Corporation, based on the proposed new and limited definition of "financial assistance" would attempt to deny a recipient a hearing pursuant to Section 1011 of the Act in a case where funding was terminated or refunding denied. Although the Corporation has raised questions regarding the scope of section 1011, the resolution of that issue must be decided by Congress and the Corporation should not attempt to narrow the scope through its regulatory authority.

The Subcommittee's second concern relates to the interaction of 45 CFR Part 1609 (Fee-Generating Cases) and 45 CFR Part 1628 (Recipient Fund Balances). By including the fees received in a fee-generating case in a recipient's fund balance the year in which the fee is received (45 CFR Part 1609.6) and then imposing a somewhat arbitrary 10 percent ceiling on fund balances (45 CFR Part 1628.3), the Corporation has created a situation where fees paid to a recipient, particularly near the end of the recipient's fiscal year, would ultimately be recovered by the Corporation itself. The Subcommittee believes that such fees should be retained by the recipient.

Since the Subcommittee supports both the concept of encouraging recipients to refer fee-generating cases to qualified members of the private bar and the effort to encourage recipients to manage their funds better, it has chosen not to reject either regulation. However, the interaction of the two regulations poses a serious problem which the Corporation must address. We look forward to receiving your comments on the subject.

Sincerely,

WARREN B. RUDMAN
for the
Commerce, Justice, State, and
the Judiciary Subcommittee

WBR/tpm

NEAL SMITH
MEMBER OF CONGRESS
FOURTH DISTRICT, IOWA

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Congress of the United States
House of Representatives
Washington, D.C. 20515

CHAIRMAN
APPROPRIATIONS SUBCOMMITTEE FOR:
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DEPARTMENT OF JUSTICE
DEPARTMENT OF STATE
FEDERAL JUDICIARY
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R.R. RETIREMENT BOARD
NATIONAL INSTITUTES OF HEALTH
SOCIAL SECURITY
PUBLIC HEALTH SERVICE
MISCELLANEOUS RELATED AGENCIES

MEMBER
COMMITTEE ON SMALL BUSINESS

October 1, 1984

Honorable Donald P. Bogard
President
Legal Services Corporation
733 Fifteenth Street, NW
Washington, DC 20005

Dear Mr. Bogard:

This is in reply to your letter of September 17 in which you proposed a change in the program structure of the Consolidated Operating Budget (C.O.B.) of the Legal Services Corporation.

I understand that this proposal involves changes in budget categories as follows:

- The former "Provision of Legal Assistance" category would be separated into two major budget categories: "Delivery of Legal Assistance" and "Support for the Delivery of Legal Assistance". The purpose of this separation is to reflect more accurately the disposition of the Corporation's grant funds.

- The former "Support for the Provision of Legal Assistance" would be retitled "Corporation Management and Grant Administration". The purpose of this change is to provide a name more descriptive of the functions performed with the funding included in the category.

I also understand that no grantee will be affected by this reformatting of the budget structure.

Since these changes in the program budget structure should help to describe more accurately the use of funds appropriated to the Corporation and since no grantee will be affected in any way by these changes, the Committee has no objection to this proposal. We appreciate your keeping us informed of the activities of the Legal Services Corporation.

Sincerely,

Neal Smith

Neal Smith, Chairman
Subcommittee on the Departments of
Commerce, Justice and State, the
Judiciary and Related Agencies

United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, D.C. 20510

October 8, 1984

Mr. Donald P. Bogard
President
Legal Services Corporation
733 Fifteenth Street, N.W.
Washington, D. C. 20005

Dear Mr. Bogard:

No objections have been raised by members of the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies Appropriations in relation to your reprogramming, submitted September 13, 1984, to shift additional funds into the "Field Programs" budget category.

The Subcommittee notes, however, that if those funds are used for the basic field programs, which most members would feel is the preferred option, that the distribution of those funds is governed by the statutory allocation formula. It would be helpful to the Subcommittee if the Corporation would inform the Subcommittee of the exact plans for the distribution of those funds.

Sincerely,

Warren B. Rudman

WARREN B. RUDMAN
for the
Commerce, Justice, State, and
the Judiciary Subcommittee

WBR/tpm

NEAL SMITH
MEMBER OF CONGRESS
FOURTH DISTRICT, IOWA

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House of Representatives
Washington, D.C. 20515

CHAIRMAN
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R.R. RETIREMENT BOARD
NATIONAL INSTITUTES OF HEALTH
SOCIAL SECURITY
PUBLIC HEALTH SERVICE
MISCELLANEOUS RELATED AGENCIES

MEMBER
COMMITTEE ON SMALL BUSINESS

October 1, 1984

Honorable Donald P. Bogard
President
Legal Services Corporation
733 Fifteenth Street, NW
Washington, DC 20005

Dear Mr. Bogard:

This is in response to your letter of September 13 in which you proposed a reprogramming of funds for the Legal Services Corporation.

I understand that you plan to reprogram $965,212 into the "Field Programs" program for those field program grantees that are currently at the lower end of the funding scale. I also understand that funding for field programs will be augmented with an additional $252,251 through reallocations within the "Field Programs" category to make the total increase for field programs $1,217,463.

I further understand that the $965,212 will be derived from the following transfers:

- o $375,073 from Program Development and Experimentation. This amount, currently earmarked for development of supplemental delivery systems, will not be spent in FY 1984.

- o $90,139 from Regional Training Centers. This amount is available through a discrepancy in the computations in establishing funding levels for the centers. Each center will receive the funds in FY 1984 to which it is entitled.

- o $500,000 from the Office of Field Services and Unallocated reserves. These funds are available as a result of certain cost savings.

The Committee has no objection to this reprogramming. However, it is the Committee's intent and understanding that this reprogramming of funds for one-time grants to field programs will in no way affect the allocation of the FY 1985 appropriation for the Legal Services Corporation as specified in the funding formula in Public Law 98-411. If your plans are different from this understanding, you should consult with us before you begin this reallocation of funds.

Thank you for keeping the Committee informed of the program changes within the Legal Services Corporation.

Sincerely,

Neal Smith

Neal Smith, Chairman
Subcommittee on the Departments of
Commerce, Justice and State, the
Judiciary and Related Agencies

United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, D.C. 20510

October 8, 1984

Mr. Donald P. Bogard
President
Legal Services Corporation
733 Fifteenth Street, N.W.
Washington, D. C. 20005

Dear Mr. Bogard:

Members of the Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies have raised no objections to the reprogramming submitted on September 17, 1984, relating to the restructuring of Legal Services Corporation's Consolidated Operating Budget (C.O.B.).

Concern was expressed, however, that the restructuring not be used as a means to circumvent the statutory spending ceilings on categories of the Corporation's budget contained in Public Law 98-411. From the Subcommittee's perspective, it is clear as a matter of law that those statutory spending ceilings would apply to the same budget categories irrespective of whether they have been renamed or relocated in the C.O.B.

Implementation of the proposed new C.O.B. would be taken to mean the Corporation concurs with this interpretation. If you have any difficulty with this condition, please inform the Committee on Appropriations immediately.

Sincerely,

WARREN B. RUDMAN
for the
Commerce, Justice, State, and
the Judiciary Subcommittee

WBR/tpm

THE WHITE HOUSE

WASHINGTON

October 15, 1984

NOTE FOR JOHN ROBERTS

This is an additional comment LSC just received on several of their regulations, this time from the House side. The letter, unlike Senator Rudman's, does not purport to deny LSC authority to enforce the regs in question.

SG

Steve Galebach

NEAL SMITH
MEMBER OF CONGRESS
FOURTH DISTRICT, IOWA

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PUBLIC HEALTH SERVICE
MISCELLANEOUS RELATED AGENCIES

MEMBER
COMMITTEE ON SMALL BUSINESS

October 11, 1984

Honorable Donald P. Bogard
President
Legal Services Corporation
733 Fifteenth Street, N.W.
Washington, D. C. 20005

Dear Mr. Bogard:

This is in response to your letter of September 12 in which you enclosed copies of regulations of the Legal Services Corporation effective after April 27, 1984 and which the Corporation intends to enforce and implement in FY 1985.

We have reviewed these regulations and after consulting with other committees sharing an interest in these matters, we believe that several of them may be inconsistent with the intent of Congress as provided in the Legal Services Corporation Act, and the language of the FY 1985 Appropriation Act (P.L. 98-411) as applicable to the Corporation.

The regulations which concern us are:

1. Part 1612 - Legislative and Administrative Advocacy.

This new regulation appears to impose restrictions on representation by legal services attorneys that go beyond what Congress intended in the Legal Services Corporation Act and the provisions of the FY 1984 and FY 1985 Appropriation Acts. For example, the restriction that limits responses to public officials to those instances where officials put their requests in writing appears to have no statutory basis. In addition, we are concerned about restrictions in the regulation on consultations with organizations, legal assistance to client groups, communications with clients, recordkeeping, and administrative representation.

2. Part 1614 - Private Attorney Involvement.

The Committee is concerned about this new regulation because it appears to undermine the local control of legal services programs by mandating a minimum requirement that may not have any relationship to a program's operations. In addition, we note that most of the bar associations who commented on the regulation opposed it and stated that there was no need to increase from 10% to 12.5%, the percentage of a local program's funds that must be allocated to private attorney programs.

3. Part 1620 - Priorities in Allocations of Resources.

The Committee is concerned that the new regulation may be inconsistent with Section 1007(a)(2)(C) of the Legal Services Corporation Act. This provision requires all legal services programs to establish priorities concerning the categories or kinds of cases which the program will undertake based on the needs of the client community and the funds available. The new regulation requires "substantially equal access to the same type of services and levels of representation, unless differences in level of services are based on differences in client financial resources". The regulation does not define what "substantially equal access" means.

Because of our concerns in these areas, we request that the Corporation not implement these three regulations.

Sincerely,

Neal Smith

Neal Smith, Chairman
Subcommittee on the Departments of
Commerce, Justice and State, the
Judiciary and Related Agencies

Legal Serv.

THE WHITE HOUSE

WASHINGTON

December 6, 1982

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Resolution from County Judges and Commissioners Association of Texas, Calling for Abolition of Legal Services Corporation

Bruce Coleman, Commissioner of Deaf Smith County, Texas, has written the President to complain about Texas Rural Legal Aid and its efforts to effect social change at great cost to the county rather than serve the needs of indigent clients. Commissioner Coleman transmitted with his letter a resolution adopted by the County Judges and Commissioners Association of Texas, noting abuses by Legal Services agencies and calling upon the President and Congress to abolish the Legal Services Corporation. I have prepared a reply for your signature, based on previous letters you have signed on the Legal Services Corporation.

Attachment

THE WHITE HOUSE

WASHINGTON

December 6, 1982

Dear Commissioner Coleman:

Thank you for your recent letter to the President, transmitting a Resolution from the County Judges and Commissioners Association of Texas. That Resolution noted that many counties have found Legal Services Corporation funded agencies to operate in a highly controversial manner, increasing county costs rather than serving indigent client needs. It concluded by calling upon the President and Congress to abolish the Legal Services Corporation and send two-thirds of the money directly to counties to be used to meet the legal counsel needs of the indigent.

As you may know, the President generally has no authority over most Legal Services Corporation matters. Neither the President nor any other outside party may direct a Legal Services attorney as to the handling of any particular case. Although the President does appoint, with the advice and consent of the Senate, members of the national Board of Directors of the Legal Services Corporation, the law provides that the Board shall be independent in reaching its decisions.

The President has, however, often expressed concern about the potentials for abuse in Legal Services programs of the sort noted in the Resolution. He proposed substantially greater reductions in Federal funding for these programs than the Congress was willing to adopt. The President has also tried to appoint to the national Board persons who share his concerns that publicly funded legal assistance programs serve the needs of the indigent for legal counsel and do not become vehicles for political and social lobbying or other abuses of taxpayer dollars.

Thank you very much for making us aware of your views and the views of the County Judges and Commissioners Association on this important subject.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Bruce Coleman
Commissioner, Precinct 3
County of Deaf Smith
Courthouse, Room 201
Hereford, Texas 97045

FFF:JGR:aw 12/6/82

cc: FFFielding
JGRoberts
Subj.
Chron

ID # 22555 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

Roberts 11/25

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Bruce Coleman

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Resolution re: Legal Services Corp.

ROUTE TO:		ACTION			DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD		Type of Response	Code	Completion Date YY/MM/DD
CU	Holland	ORIGINATOR	DD 82/11/30				/ /
CU	AT 18	Referral Note: D	DD 82/12/01			S	82/12/14
		Referral Note:	/ /				/ /
		Referral Note:	/ /				/ /
		Referral Note:	/ /				/ /
		Referral Note:					

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

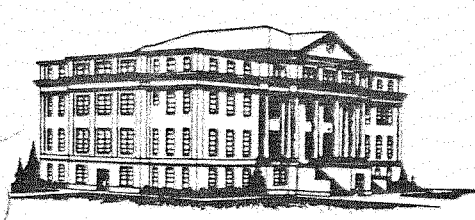
DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81



County of Deaf Smith

COURTHOUSE ROOM 201 HEREFORD, TEXAS 79045

COUNTY JUDGE
W. GLEN NELSON

COMMISSIONERS
BILL BRADLY
PRECINCT NO. 1

AUSTIN ROSE, JR.
PRECINCT NO. 2

COMMISSIONERS
BRUCE COLEMAN
PRECINCT NO. 3

JAMES VOYLES
PRECINCT NO. 4

November 24, 1982

112655

The President of the United States
White House
1600 Pennsylvania Ave.
Washington, D. C. 20500

My Dear Mr. President:

For the countless reasons we could enumerate upon request, the Deaf Smith County Commissioners' Court, the West Texas Commissioners' and Judges' Association and the State Commissioners' and Judges' Association have passed the enclosed resolution.

Through NACo we have been working to require Legal Services Corporation to cause Texas Rural Legal Aid to work for our indigent's legal needs rather than their practice of attempting to force their views of needed social change upon local government. We have spent untold local funds defending ourselves in Federal Court in poorly founded causes.

We call your attention that the enclosed resolution is the approved position of the County Commissioners and Judges of Texas. Many other states are of like mind.

We will send you NACo's position as it developes and is finalized in July of next year.

Sincerely,

Bruce Coleman

Bruce Coleman
Commissioner, Precinct 3
Deaf Smith County, Texas

BC/ws

R E S O L U T I O N

WHEREAS, the County Judges and Commissioners Association of Texas recognizes the need for legal counsel by our indigent citizens; and

WHEREAS, counties are mandated to provide certain kinds of indigent legal counsel without having an adequate source of tax funds to meet this need; and

WHEREAS, many counties have found Legal Services Corporation funded agencies such as Texas Rural Legal Aid to operate in a highly controversial manner often increasing county costs rather than serving indigent client needs; and

WHEREAS, the President and Congress in their New Federation thrust, are advocating the return of programs and necessary funds to local government;

NOW, THEREFORE BE IT RESOLVED, that the County Judges and Commissioners Association of Texas go on record asking the President and Congress to abolish the Legal Service Corporation, and send 2/3 of the money directly to the counties to be used to serve indigent legal counsel needs at the direction of combined local bar association and local elected government; and

ADOPTED this 15th day of October, 1982.

Peggy Garner

PEGGY GARNER
Co-Chairman, Resolutions Committee

THE WHITE HOUSE

WASHINGTON

December 6, 1982

Dear Commissioner Coleman:

Thank you for your recent letter to the President, transmitting a Resolution from the County Judges and Commissioners Association of Texas. That Resolution noted that many counties have found Legal Services Corporation funded agencies to operate in a highly controversial manner, increasing county costs rather than serving indigent client needs. It concluded by calling upon the President and Congress to abolish the Legal Services Corporation and send two-thirds of the money directly to counties to be used to meet the legal counsel needs of the indigent.

As you may know, the President generally has no authority over most Legal Services Corporation matters. Neither the President nor any other outside party may direct a Legal Services attorney as to the handling of any particular case. Although the President does appoint, with the advice and consent of the Senate, members of the national Board of Directors of the Legal Services Corporation, the law provides that the Board shall be independent in reaching its decisions.

The President has, however, often expressed concern about the potentials for abuse in Legal Services programs of the sort noted in the Resolution. He proposed substantially greater reductions in Federal funding for these programs than the Congress was willing to adopt. The President has also tried to appoint to the national Board persons who share his concerns that publicly funded legal assistance programs serve the needs of the indigent for legal counsel and do not become vehicles for political and social lobbying or other abuses of taxpayer dollars.

Thank you very much for making us aware of your views and the views of the County Judges and Commissioners Association on this important subject.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

Mr. Bruce Coleman
Commissioner, Precinct 3
County of Deaf Smith
Courthouse, Room 201
Hereford, Texas 97045

FFF:JGR:aw 12/6/82

cc: FFFielding
JGRoberts
Subj.
Chron

HAROLD S. SAWYER
5TH DISTRICT, MICHIGAN

JUDICIARY
SUBCOMMITTEE ON CRIME,
RANKING REPUBLICAN MEMBER
SUBCOMMITTEE ON COURTS,
CIVIL LIBERTIES AND
ADMINISTRATION OF JUSTICE
VETERANS' AFFAIRS
SUBCOMMITTEE ON HOUSING AND
MEMORIAL AFFAIRS
RANKING REPUBLICAN MEMBER
SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS

Congress of the United States
House of Representatives
Washington, D.C. 20515

WASHINGTON
123 CANNON HOUSE C
WASHINGTON, D.
(202) 225-

MARY F. LO
ADMINISTRATIVE

HOME OFFI
166 FEDERAL B
GRAND RAPIDS, MIC
(616) 451-8

DISTRICT REPRESE
JOHN R. WES

December 17, 1982

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

The conduct of your recess appointees to the Legal Services Corporation Board is an embarrassment to us and is becoming a political liability to you. We are alarmed by the growing public perception of the Administration's and our party's lack of sensitivity for the poor and elderly which is exacerbated by the recent actions of the Legal Services Corporation Board.

As you know, the recess appointees to the board have billed and received from the corporation over $156,000 in consulting fees over the last 11 months. This figure is double the amount of the last board's consulting fees (which I feel was equally unjustified It now appears that federal law prohibits the payment of any salary to these board members who do not meet the requirements for any payment for services under federal law limitations on payment to recess appointees. These billings have all been at a rate of $29 per hour. The Chairman, Harvey, who fears flying, bills this rate for his full drive-time between Indianapolis and Washington. The 23 year old college student, Rathbun, also bills his "consulti at $29 per hour for over $1000 during his first partial month.

To make matters worse, Chairman Harvey recently disregarded a boar directive and negotiated a flagrantly excessive contract with the person of his own choosing as president of the corporation (a forme student of his). This contract includes $57,500 annual salary, membership in a private club, one year's severence pay (including fringes) regardless of the reason for dismissal and without reduction for other substitute earnings during the year, all living expenses in Washington until June (with no test of reasonableness), and two trips to Indianapolis per month until June. These activiti highlight the lack of integrity and sensitivity of these persons who should be donating their time on behalf of the destitute member of our society who need access to the legal system.

These abuses are beyond defense. The only possible solution is the immediate removal of all board members and the new president. The board members must be required to repay the corporation the consult fees, which were obtained in violation of federal law. The new Leg

Services Corporation president's contract must be nullified bec it is excessive and was negotiated in violation of the corporat board directives.

Mr. President, we find your need to "beg" these persons to join the board and their additional hours of service to be irrelevan to the issue of consulting fees, in light of the fact that ther are many conservative attorneys who are more highly qualified t serve on the board than the current members and who would be ho to do so without any compensation. The board members of all 32 donee agencies serve without either pay or expense reimbursement We certainly cannot expect pro bono volunteerism from attorneys in our localities when this Administration allows the Legal Ser Board members to make a profit on the backs of a program designe to help our poor and elderly. It appears to be the application of a "suck up" as opposed to a "trickle down" theory.

We are even more distressed over the Administration's apparent refusal to consider the names of attorneys that we have submitte to you for consideration in the past. We are also aware that th American Bar Association has also submitted names that have been disregarded.

The Congress has mandated the continuation of the Corporation an its funding level of $241 million. The $100 million block grant program which the Administration prefers is not a viable option. We urge you to accept the Corporation and work with us to obviate the need for any legislation deemed necessary to protect the Corp ation from mismanagement and harm. We are fearful that if the problem is not corrected this issue will be used by all of our opponents in the next election.

A delegation would like to meet with you regarding the removal of the board, the repayment of the consulting fees, the removal of t corporate president, the nullification of his contract, and the selection and confirmation of qualified members of the Legal Services Corporation Board. This meeting should be scheduled in the immediate future.

Yours very truly,

Harold S. Sawyer
Member of Congress

BOARD OF DIRECTORS OF THE : nonprofit corporation) : MEMBERS: 12 (11 appointed by the President)

NAME	State	Term Expires	Nominated	Confirmed	Commissioned	Vice
(Certificates are maintained and prepared by the Records Office)						
KUTAK, Robert J. (R)	Neb.	7/13/81	1/18/79	5/2/79	5/3/79	Reappointment
McCALPIN, F. William (R)	Mo.	7/13/81	1/18/79	5/2/79	5/3/79	RCCramton, tm. exp.
ORTIQUE, Revius O., Jr. (D)	La.	7/13/81	1/18/79	5/2/79	5/3/79	Reappointment
SACKS, Howard R. (I)	Conn.	7/13/81	1/18/79	5/2/79	5/3/79	JMBroughton,Jr., tm. exp.
SHUMP, Ramona Toledo (*)	Kans.	7/13/81	1/18/79	5/2/79	5/3/79	GCStophel, tm. exp.
ENGELBERG, Steven L. (D)	Md.	7/13/83	6/23/80	NOT CONFIRMED		Reappointment
ESQUER, Cecilia Denogean (D)	Ariz.	7/13/83	6/23/80	NOT CONFIRMED		Reappointment
RODHAM, Hillary Diane (D)	Ark.	7/13/83	6/23/80	NOT CONFIRMED		Reappointment
TRUDELL, Richard Allan (D)	Calif.	7/13/83	6/23/80	NOT CONFIRMED		Reappointment
WORTHY, Josephine Marie (I)	Mass.	7/13/83	6/23/80	NOT CONFIRMED		Reappointment

* Unaffiliated

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: corporation - INDEPENDENT) : President

NAME	State	Term Expires	Nominated	Confirmed	Commissioned	Vice
(Certificates are maintained and prepared by the Records Office)						
ENGELBERG, Steven L. (D)	Md.	7/13/80	1/26/78	3/20/78	3/22/78	Recess
RODHAM, Hillary Diane (D)	Ark.	7/13/80	1/26/78	3/20/78	3/22/78	Recess
TRUDELL, Richard Allan (D)	Calif.	7/13/80	1/26/78	3/20/78	3/22/78	Recess
WORTHY, Josephine Marie (I)	Mass.	7/13/80	1/26/78	3/20/78	3/22/78	Recess
McCALPIN, F. William (R)	Mo.	7/13/81	10/11/78	NOT CONFIRMED		RCCramton, tm. exp.
KANTOR, Michael (D)	Calif.	7/13/81	10/11/78	NOT CONFIRMED		GSSmith,Jr., tm. exp.
KUTAK, Robert J. (R)	Neb.	7/13/81	10/11/78	NOT CONFIRMED		Reappointment
ORTIQUE, Revius O., Jr. (D)	La.	7/13/81	10/11/78	NOT CONFIRMED		Reappointment
SACKS, Howard R. (I)	Conn.	7/13/81	10/11/78	NOT CONFIRMED		JMBroughton,Jr., tm. exp.
SHUMP, Ramona Toledo ( )	Kans.	7/13/81	10/11/78	NOT CONFIRMED		GCStophel, tm. exp.
KANTOR, Michael (D)	Calif.	7/13/81	1/18/79	5/2/79	5/3/79	GSSmith,Jr., tm. exp.

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NAME	State	Term Expires	Nominated	Confirmed	Commissioned	Vice
(Certificates are maintained and prepared by the Records Office)						
ESQUER, Cecilia Denogean (D)	Ariz.	7/13/80	12/12/77	NOT CONFIRMED		RMontejano, term expired
ENGELBERG, Steven L. (D)	Md.	7/13/80	12/12/77	NOT CONFIRMED		SDThurman, term expired
RODHAM, Hillary Diane (D)	Ark.	7/13/80	12/12/77	NOT CONFIRMED		WJJanklow, resigned
TRUDELL, Richard Allan (D)	Calif.	7/13/80	12/12/77	NOT CONFIRMED		MJBreger, term expired
WORTHY, Josephine Marie (I)	Mass.	7/13/80	12/12/77	NOT CONFIRMED		MWCook, term expired
ESQUER, Cecilia Denogean (D)	Ariz.		RECESS	-------	Order 1/19/78	RMontejano, term expired
ENGELBERG, Steven L. (D)	Md.		RECESS	-------	Order 1/19/78	SDThurman, term expired
RODHAM, Hillary Diane (D)	Ark.		RECESS	-------	Order 1/19/78	WJJanklow, resigned
TRUDELL, Richard Allan (D)	Calif.		RECESS	-------	Order 1/19/78	MJBreger, term expired
WORTHY, Josephine Marie (I)	Mass.		RECESS	-------	Order 1/19/78	MWCook, term expired
ESQUER, Cecilia Denogean (D)	Ariz.	7/13/80	1/26/78	3/20/78	3/22/78	Recess

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BOARD OF DIRECTORS OF THE : nonprofit corporation) : by President) :

NAME	State	Term Expires	Nominated	Confirmed	Commissioned	Vice
DONATELLI, Frank J. (R)	Va.	7/13/83	RECESS	---------	By ORDER: 10/22/82	MSandstrom, rsgnd
RATHBUN, Daniel M. (I)	Va.	7/13/83	RECESS	---------	By ORDER: 10/22/82	JMWorthy

U.S. GOVERNMENT PRINTING OFFICE : 1980—O-334-630

NAME	State	Term Expires	Nominated	Confirmed	Commissioned	Vice
(Certificates are maintained & prepared by Executive Clerk's Office)						
DeMOSS, Harold R., Jr. (R)	Texas	7/13/83	3/1/82	WITHDRAWN-12/8/82		Recess
McKEE, Clarence V. (R)	D.C.	7/13/83	3/1/82	WITHDRAWN-12/8/82		Recess
SANDSTROM, Marc (R)	Calif.	7/13/83	3/1/82	WITHDRAWN-5/18/82		Recess
DANA, Howard H., Jr. (R)	Maine	7/13/84	3/1/82	WITHDRAWN-12/8/82		Recess
EARL, William L. (D)	Fla.	7/13/84	3/1/82	WITHDRAWN-12/8/82		DESatterfield,III
HARVEY, William F. (R)	Ind.	7/13/84	3/1/82	WITHDRAWN-12/8/82		Recess
OLSON, William J. (R)	Va.	7/13/84	3/1/82	WITHDRAWN-12/8/82		Recess
PARAS, George E. (D)	Calif.	7/13/84	3/1/82	WITHDRAWN-12/8/82		Recess
STUBBS, Robert Sherwood, II (D)	Ga.	7/13/84	3/1/82	WITHDRAWN-12/8/82		Recess
SLAUGHTER, Annie Laurie (I)	Mo.	7/13/83	4/19/82	WITHDRAWN-12/8/82		Recess
(MSandstrom resigned 5/6/82, no eff. date; acc. 6/30/82, eff. 5/8/82.)						

U.S. GOVERNMENT PRINTING OFFICE : 1980—O-334-630

NAME	State	Term Expires	Nominated	Confirmed	Commissioned	Vice
(Certificates are maintained & prepared by Executive Clerk's Office)						
SANDSTROM, Marc (R)	Calif.	7/13/83	RECESS	--------	By ORDER: 12/30/81	RATrudell, tm. exp.
DANA, Howard H., Jr. (R)	Maine	7/13/84	RECESS	--------	By ORDER: 12/30/81	RJKutak, tm exp
HARVEY, William F. (R)	Ind.	7/13/84	RECESS	--------	By ORDER: 12/30/81	HRSacks, tm exp
OLSON, William J. (R)	Va.	7/13/84	RECESS	--------	By ORDER: 12/30/81	FWMcCalpin, tm. exp.
PARAS, George E. (D)	Calif.	7/13/84	RECESS	--------	By ORDER: 12/30/81	MKantor, tm exp
STUBBS, Robert Sherwood, II (D)	Ga.	7/13/84	RECESS	--------	By ORDER: 12/30/81	RTShump, tm exp
SATTERFIELD, David E., III (D)	Va.	7/13/84	RECESS	--------	By ORDER: 12/31/81	ROOrtique,Jr., tm. exp.
DeMOSS, Harold R., Jr. (R)	Texas	7/13/83	RECESS	--------	By ORDER: 1/22/82	SLEngelberg, tm. exp.
McKEE, Clarence V. (R)	D.C.	7/13/83	RECESS	--------	By ORDER: 1/22/82	HDRodham, tm. exp.
SLAUGHTER, Annie Laurie (I)	Mo.	7/13/83	RECESS	--------	By ORDER: 1/22/82	CDEsquer, tm. exp.

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