THE WHITE HOUSE

WASHINGTON

February 1, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS JGR

SUBJECT: Pay Act and Legal Services Board Appointees

The Pay Act, 5 U.S.C. § 5503 (Tab A), generally prohibits payment from the Treasury to recess appointees appointed to fill vacancies which existed while the Senate was in session. No Pay Act problems are presented with respect to the four new recess appointees to the Legal Services Board (Masson, McCarthy, Santarelli, Shapiro). The vacancies these individuals were appointed to fill arose with the sine die adjournment of the Congress, U.S. Const. art. I, § 2, cl. 3, since that is when the recess appointments of the individuals they viced (DeMoss, McKee, Slaughter, and Dana, respectively) expired. The Pay Act only applies "if the vacancy existed while the Senate was in session." 5 U.S.C. § 5503. These vacancies did not exist while the Senate was in session -- at that time they were filled by individuals holding valid recess appointments (apart from the Pay Act status of those individuals). Thus, for the four new recess appointees, it is not even necessary to argue that the Pay Act does not apply because payment to LSC directors is not "made from the Treasury of the United States." 5 U.S.C. § 5503.

Potential Pay Act problems do exist for the other seven members of the board, who apparently are still on the board by virtue of the holdover provision, 42 U.S.C. § 2996c(b), even though their recess appointments (except for Donatelli and Rathburn) have expired. See Memorandum to Meese, Baker, and von Damm from Fielding, December 17, 1982. (Tab B). These seven individuals -- including Donatelli and Rathburn -- were recess appointed to fill vacancies existing while the Senate was in session. The fact that holdovers were in office at the time does not mean that the vacancies did not exist. See 2 Op. Legal Counsel 398, 400 (1978). None of the exceptions to the Pay Act's prohibition on payment (vacancy arose within 30 days of end of session, nomination pending at end of session, nomination rejected within 30

days of end of session) apply,so the only available argument is that the Pay Act as a whole does not apply, because payments to LSC directors are not made from the U.S. Treasury.

It is the view of the LSC Acting General Counsel that payments to the LSC board are not made from the U.S. Treasury. See Letter from Mary Weissman to Larry Simms, September 20, 1982. (Tab C). The Office of Legal Counsel has not issued an opinion on this question, but in 1980 it "recommended" in a related context that § 5503 not be construed literally as limited to payments made directly from the Treasury. See File Memorandum from Herman Marcuse, September 23, 1982. (Tab D). Such a recommendation -- an appropriately cautious guide to prospective action -- does not, of course, indicate that the Pay Act would be construed broadly to cover LSC appointees.

Attachments

Library References

United States ⇐82(1). C.J.S. United States § 122.

Notes of Decisions

1. Construction

Where the words of a statute fixing the compensation of a public officer are loose and obscure and admit of two meanings, they should be construed in favor of the officer. Moore v. U. S., 1868, 4 Ct.Cl. 140.

2. Contracts or agreements

When an office with a fixed salary has been created by a statute, and a person duly appointed to it has qualified and entered upon his duties, he is entitled, during incumbency, to be paid the salary prescribed by the statute; and effect will not be given to any attempt to deprive him thereof, whether by unauthorized agreement, by condition, or otherwise. MacMath v. U. S., Ct.Cl.1918, 39 S.Ct. 31, 248 U.S. 151, 63 L.Ed. 177.

There can be no implied contract by which an appointee undertakes to perform less than the whole duty, and to receive less than the full pay enacted by Congress. Stocksdale v. U. S., D.C.Md. 1889, 39 F. 62.

3. De facto offices

There may be a de facto officer, but never a de facto office. 1889, 19 Op.Atty. Gen. 443, 449.

4. Increase or reduction of salary

A salary established by statute can neither be increased nor disminished by executive officers. Dyer v. U. S., 1885, 20 Ct.Cl. 166. See, also, Andrews v. U. S., 1911, 47 Ct.Cl. 51.

5. Prerequisites to compensation—Generally

The legal right of an officer to the salary of an office depends upon his being de jure an officer holding or entitled to hold the office. Belcher v. U. S., 1899, 34 Ct.Cl. 400. See, also, Jackson v. U. S., 1906, 42 Ct.Cl. 39; Morey v. U. S., 1900, 35 Ct.Cl. 603.

6. —— Legality of appointment

It is immaterial, so far as compensation is concerned, whether an employment constitutes an office as defined in the Constitution, provided the appointment was made lawfully. Saunders v. U. S., 1886, 21 Ct.Cl. 408, affirmed 7 S.Ct. 467, 120 U.S. 126, 30 L.Ed. 594.

If an appointment be contrary to law, the party cannot recover for services rendered. Weeks v. U. S., 1886, 21 Ct.Cl. 124.

7. —— Rendition of services

One who is employed at a Navy yard at a per diem compensation is not entitled to compensation except for the time during which he actually renders services; and the fact that, after being suspended by the commandant, he holds himself ready to perform such services, gives him no claim against the Government. Murphy v. U. S., C.C.A.Cal.1897, 79 F. 255.

Where one claiming to be an officer rendered no service and held no official relation with the government, money paid him for salary may be recovered back. Miller v. U. S., 1884, 19 Ct.Cl. 338.

§ 5503. Recess appointments

(a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appoint-

ee has been confirmed by the Senate. This subsection does not apply—

(1) if the vacancy arose within 30 days before the end of the session of the Senate;

(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or

(3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

(b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 475.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 56	R.S. § 1761. July 11, 1940, ch. 580, 54 Stat. 751.

Explanatory Notes

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Library References

United States ⇐39(1). C.J.S. United States §§ 17, 44.

Notes of Decisions

1. Vacancies within section

A vacancy caused by death or resignation or by the creation of a new office is within this section. 1907, 26 Op.Atty.Gen. 234.

2. Power of President

The President is authorized to make recess appointments to fill vacancies which occurred while the Senate is in session. 1960, 41 Op.Atty.Gen., July 14.

Former section 56 of this title [now this section] in assuming to act upon the salary of officers appointed during the recess of the Senate, when the vacancies actually existed while the Senate was in session, had to be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution, and in postponing the payment of the salary of the appointee until the Senate had given its assent to the appointment, it conceded the right of the President to appoint, although it undoubtedly embarrassed the exercise of that right by subjecting the appointee to conditions which were somewhat onerous. 1880, 16 Op.Atty.Gen. 522. See, also, 1883, 17 Op.Atty.Gen. 521.

3. - Existence of vacancy wh was in session

Where vacancies on the Inter merce Commission and the Uni Tariff Commission [now Uni International Trade Commissio existed while the Senate was were filled after adjournment o ate by the issuance of recess sions, the appointees could no their respective salaries under s appointments. 1920, 32 Op.Att

4. Holdovers

The general rule is that, w gress has not authorized the hold over, his incumbency deemed to cease at the end of though no appointment of a may then be made. 1882, 17 Op 448.

5. Nominations pending at en sion

The adjournment of the Sena 3, 1960, constituted the "term the session of the Senate" meaning of former section 56 o [now this section], so that pers nominations were pending

§ 5504. Biweekly

(a) The pay period f workweeks. For the purp

(1) an employee in

(2) an employee the Capitol, the Bot for whom a basic ad section 6101(a)(5) o

(3) an individual of Columbia;

but does not include—

(A) an employee the Panama Canal C

(B) an employee of employee in secti ployee or individual tle.

(b) For pay computati nual rate of basic pay payment for employment of 40 hours. When it i

THE WHITE HOUSE

WASHINGTON

December 17, 1982

MEMORANDUM FOR EDWIN MEESE III
JAMES A. BAKER III
HELENE VON DAMM

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Legal Services Corporation Appointments

As you know, on December 8, 1982, the President withdrew the nominations of nine individuals (eight of whom he had recess appointed) to be members of the Board of the Legal Services Corporation (the "LSC Board"). Because the recess appointments of those individuals will expire with the sine die adjournment of this Congress, U.S. Const. art. I, § 2, cl. 3., the legal authority of the LSC Board upon sine die adjournment must be addressed.

This will summarize our view of (1) the legal effect of expiration of the current recess appointments, (2) the legality of "re-recess" appointing our recess appointees to the Board, and (3) the options available for Administration action.

1. Legal Effect of the Expiration of the Current Recess Appointments

The enabling legislation for the Legal Services Corporation, 42 U.S.C. § 2996 et seq., includes a holdover provision for members of the LSC Board: "Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified." 42 U.S.C. § 2996c(b). Although our recess appointments will expire with this Congress, the holdover provision of the LSC Act may enable them to continue to serve as members of the LSC Board until their successors are appointed and qualified. Those successors may be recess appointed, since the statutory holdover provision of the LSC Act does not prevent the President from exercising his constitutional authority to make recess appointments. 2 Op. Off. Legal Counsel 398, 400 (1978).

However, a serious drawback to the retention of the current recess appointees as "holdovers" is the likelihood of a legal challenge to the continuing validity of their appointments and

to any actions the holdover Board may take. 1/ The Justice Department believes that it could successfully defend the holdover LSC Board with respect to these matters, but advises that colorable legal challenges can be advanced. For example, it may be argued that the President, by treating his recess appointees as "holdovers" under the Act, would be evading the clear intent of the Constitution to limit the time unconfirmed recess appointees may serve, since the President would, in effect, be able to retain his choices for Board Members despite the lack of Senate confirmation. In other words, the holdover provision was not intended to allow the President's recess appointment authority to override the constitutional system of checks and balances embodied in the Senate's power of advise and consent. 2/

In light of the present litigation and the anticipated legal challenges to retain the current recess appointed Board Members as "holdovers", Justice recommends that we not retain any Members of the Board as "holdovers" and that new appointments to the Board be made as soon as possible.

If the current recess appointees to the LSC Board are held over and a challenge is successfully made against such holdovers, the Board would be left with only two qualified Members (Rathbun and Donatelli). In that event, there is some question as to whether the LSC Board may transact business with only two Board Members in office. The LSC Bylaws, 45 C.F.R. § 1601.21, suggest that, when there are only two Directors in office, two Directors can constitute a quorum for the transaction of business. The District of Columbia Corporation Act,

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1/ A challenge to the legality of the President's recess appointments of these individuals to the LSC Board was filed in the District Court for the District of Columbia last year by the Carter Administration's Board. McCalpin v. Dana, C.A. No. 82-542. The Government's motion for summary judgment and to dismiss was granted by Memorandum Opinion dated October 5, 1982, and is now on appeal. On Monday, December 13, 1982, plaintiffs filed a Motion for an Injunction Pending Appeal to enjoin the Board from taking any action, other than to preserve the status quo.

2/ At least one District Court has suggested that there are limits of this sort to the President's recess appointment powers. See Staebler v. Carter, 464 F. Supp. 585, 601 n.41 (1979) (The President presumably may not re-recess appoint an individual whose nomination has been rejected by the Senate) (dicta).

however, requires corporations to have at least three directors in order to act, and the LSC General Counsel takes the position that District of Columbia law controls.

2. Re-Recess Appointing Current Recess Appointees to the Board

Based on the language of the Constitution (Art. I, § 2, cl. 3), the President appears to have the power to re-recess appoint our appointees to the LSC Board. 3/ Such an action is complicated, however, by the restrictions of the Pay Act, 5 U.S.C. § 5503, by tradition and by the likelihood of legal challenges to such appointments.

The Pay Act is a Congressional effort to preclude successive recess appointments by exercising the power of Congress over the pursestrings. It prohibits "payment for services from Treasury funds" to recess appointees, except in specified circumstances, none of which are present here. A technical argument can be advanced that these appointees are exempt from the Pay Act's prohibitions on the grounds that LSC funds are not maintained in the U.S. Treasury. The LSC General Counsel takes this position; however, this issue has never been addressed by the courts or the Comptroller General. 4/

Tradition also weighs against the reappointment of our own recess appointees. The Executive Clerk has retained records regarding recess appointments dating back through the Nixon Administration. Never in that period of time have back-to-back recess appointments been made. The most recent example, in fact the only example, of consecutive recess appointments we have been able to document was in 1947, before enactment of the Pay Act.

Finally, there is a strong likelihood of a legal challenge to sequential recess appointments of the same individuals on the

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3/ There may, however, be limits to this power. See footnote 2, supra.

4/ Normally, one would expect the financial ramifications of application vel non of the Pay Act to a part-time board to be inconsequential. It should be noted, however, that in the past year, Members of the current LSC Board have received substantial sums (in excess of $244,000) in consulting fees and reimbursable expenses.

grounds that such action would subvert the Constitutional authority of the Senate to advise and consent to Presidential nominations. Because the nominations of the individuals who will be re-recess appointed were withdrawn before the full Senate had acted upon them, the situation at hand would not present a favorable factual basis for defending Presidential authority to make re-recess appointments. Here, there was no failure by the Senate to act on the nominations of these recess appointees; rather, the President precluded the Senate from acting on the nominations.

3. Options for Administration Action

A. Make new recess appointments to replace those members whose terms will expire when the Congress adjourns sine die (which is expected to occur over the weekend of December 18 or on Monday, December 20, 1982). (The terms of Donatelli and Rathbun will not expire at that time, and would be unaffected by this action.)

This would present the most defensible case from a litigation standpoint and would not preclude subsequent decisions to nominate different individuals, including those from the earlier Board. The principal drawback to this option is that it would almost certainly require a waiver of our policy requirement that full field clearances must be completed prior to any recess appointment.

By recess appointing new members to the Board before the convening of the next Congress, their recess terms would last only to the end of 1983, the adjournment of the 1st Session of the 98th Congress. Making recess appointments in the next Session of Congress would allow the terms of those appointments to run until late 1984, the adjournment of the 2nd Session of the 98th Congress. However, there is obviously no certainty that there will be a recess of sufficient length (roughly 21 days) to allow for recess appointments early in the 1st Session of the 98th Congress. To wait for that event would jeopardize any control over the Board during the interim between adjournment of Congress this year and the next recess suitable for recess appointments, and incur the risk of additional litigation regarding membership of the Board.

B. Re-recess appoint some or all members of the Board and recess appoint new candidates to any remaining vacancies.

This would enable us to reappoint those individuals who support the Administration's position and philosophy. The drawbacks to re-recess appointments are first, that there is a near certainty of a legal challenge in an unfavorable factual setting; second, that the individuals who are re-recess appointed may not be entitled to be paid or reimbursed for

expenses; and third, that tradition weighs heavily against such a practice. Furthermore, the problem of the "excessive fees" received by the current Board and the President's public reaction that "it is highly unfortunate that the expenses for the Board have apparently doubled over the past year" must be considered in any decision to re-recess appoint any current Board members. Obviously, a re-appointment of those members would be portrayed by some as a de facto endorsement of the current Board's fee practices, and the suggestion would be made that the President's prior statement on this matter was mere public relations posturing.

C . Do nothing and allow our present recess appointees to "holdover" under the statute.

This option is not recommended by Justice because of the likely adverse impact on the pending litigation involving the Board, and the legal challenges it would invite. Furthermore, this would leave us in the apparently untenable position of retaining as LSC members the very individuals whose nominations the President withdrew because of dissatisfaction with their actions as Board members.

RECOMMENDATIONS

Make recess appointments of new individuals to all nine vacancies on the LSC Board as soon as the Congress adjourns sine die. Nominate either those individuals or others (including members from the past recess appointed Board). 5/

FFF:SMC:ma 12/16/82
cc: FFFielding
SMCooksey
Subj.
Chron.

5/ To preserve the right of such recess appointees to be paid under the Pay Act, the nominations would have to be submitted within 40 days of the Senate's reconvening (assuming the Pay Act is applicable to this Board).

LEGAL SERVICES CORPORATION
733 Fifteenth Street, N.W., Washington, D.C. 20005

Writer's Direct Telephone
(202)272-4010

September 20, 1982

Office of Legal Counsel
Department of Justice
Room 5224
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Attn: Larry Simms, Esq.

Dear Larry:

Enclosed in accordance with our conversation are the following:

1. Advance Copy of a memorandum from the Commissioner on Aging, Department of Health and Human Services, concluding that the funds from the Legal Services Corporation may be used as the non-federal share to match Title III funds under the Older Americans Act.

2. Letter dated August 29, 1977, from the Chief Counsel to the Comptroller of the Currency, concluding that the deposits of the Legal Services Corporation are not "public money" for purposes of 12 U.S.C. §90.

3. Opinion of Comptroller General dated October 23, 1981, concluding that GAO lacks jurisdiction to review the award of a contract under a grant by the Legal Services Corporation since the Corporation is not an agency of the Government subject to GAO's accounts settlement authority.

4. Opinion of the General Counsel of the Legal Services Corporation dated July 30, 1980, with attached memorandum.

5. Copy of a Memorandum of Understanding Between the Legal Services Corporation and the Department of Treasury.

In our view, the name rationale supporting the various opinions enclosed and our Memorandum of Understanding support the position that 5 U.S.C. §5503 does not prohibit payment

LEGAL SERVICES CORPORATION

to the Board of Directors of the Legal Services Corporation because the payment is not being made "from the Treasury of the United States."

If you need any additional information, please let me know.

Yours truly,

Mary F. Wieseman
Acting General Counsel

cc: Gerald M. Caplan
Clinton Lyons

Enclosures

bdh

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF HUMAN DEVELOPMENT SERVICES
Administration on Aging

WASHINGTON, D.C. 20201

ADVANCE COPY

POLICY ANNOUNCEMENT
AoA-PA-III-80-
September , 1980

RE: Section 1321.151
Section 1321.199
Section 1321.201

LICY SECTION #151 Legal Services
#199 Federal Financial Participation
#201 Non-Federal Share Requirements

BJECT: Use of Legal Services Corporation Funds as Non-Federal Share

CKGROUND: The Administration on Aging has been asked to clarify whether the funds a Legal Services Corporation grantee receives from the Legal Services Corporation may be used as the non-Federal share pursuant to Section 1321.201 to match Title III funds for legal services. In as much as a State Agency allotment for social and nutrition services may only be used to pay a percentage of the cost of these activities (not more than 90% in FY '79 and '80 and 85% in FY '81), a non-Federal share is required. (Section 1321.199) Whether funds received from the Legal Services Corporation may be used to meet these requirements does not appear in these regulations. This announcement provides clarification on this matter.

LICY: Legal Services Corporation funds expended for allowable costs pursuant to 45 CFR 74.52 are acceptable as non-Federal share.

SCUSSION: The Legal Services Corporation Act, Section 1005(e)(1) provides that except as specifically provided by statute, the Legal Services Corporation "shall not be considered a department, agency, or instrumentality of the Federal Government." In an opinion dated July 30, 1980, the General Counsel of the Legal Services Corporation interpreted this section, reviewed the history, structure and financing of the Legal Services Corporation, and stated that the Legal Services Corporation should be regarded as a non-Federal source and that its grants were non-Federal grants for purposes of matching requirements of

the Older Americans Act. In light of the Comptroller General's principle of placing "great reliance on the statutory interpretations of agencies responsible for administering a statute," the Legal Services Corporation's opinion has been accepted by the Administration on Aging.

Robert Benedict
Commissioner on Aging

RECEIVED

9/2/77
date

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

AUG 29 1977

Mr. Samuel L. Foggie
President
United National Bank of Washington
3940 Minnesota Avenue, N.E.
Washington, D.C. 20019

Dear Mr. Foggie:

This is in response to your letter of May 19, 1977, asking whether the deposits of the Legal Services Corporation constitute "public money" under 12 U.S.C. §90 (1970), and whether that corporation may require a national bank to give satisfactory security for the funds deposited.

The Legal Services Corporation was created by the Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378, as a private, non-membership, nonprofit corporation to provide financial support for legal assistance to the poor in noncriminal matters. The law provides that the eleven members of the Board of Directors are to be appointed by the President and confirmed by the Senate, and that neither the members of the Board, nor the corporation's officers and employees shall be deemed employees of the United States. In addition, the corporation "shall not be considered a department, agency or instrumentality of the Federal Government, except as otherwise specifically provided."

The corporation is prohibited from issuing stock or paying dividends and is considered neither wholly nor partially government owned. 31 U.S.C. §§846, 856. No part of its income or assets can innure to any director, officer, or employee, except as compensation for services or expenses.

The Legal Services Corporation is empowered to own property and equipment and to submit annual budget requests directly to Congress. The law provides, however, that nothing within it should be construed to prevent the Office of Management and Budget from reviewing and commenting on the proposed budget. The funds authorized by Congress are presently paid in annual installments; any non-federal funds received by the corporation are to be accounted for and reported as funds separate and distinct from the federal funds.

An annual audit must be conducted, and a copy of that audit should be filed with the General Accounting Office. In years in which federal funds have been granted, the General Accounting Office may conduct an audit itself, which shall then be made available by the Comptroller General to the President and Congress. In all years, copies of annual audits of each beneficiary of the corporation's funds shall be maintained on file at the offices of the corporation and also with the Comptroller General. In addition, the corporation shall publish an annual report to be filed with the President and Congress.

The primary authority which permits national banks to give security for deposits is 12 U.S.C. §90. It provides that:

> All national banking institutions . . . shall be depositaries of public money, under such regulations as may be prescribed by the Secretary. . . . The Secretary of the Treasury shall require the association thus designated to give satisfactory security by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, ...

There is no provision within the statute which authorizes national banks to pledge security in order to secure private deposits. It has been held in situations such as this that the measure of the powers of the national banks is their statutory grant and that powers not expressly conferred are denied. For that reason, national banking associations may not pledge any part of their assets as a means to secure private deposits. Texas & Pac. Ry. Co. v. Pottorf, 291 U.S. 245 (1934).

A determination of the power to collateralize the deposits of the Legal Services Corporation rests on whether the funds are public money. In this case, several common indicia of public money are absent. First, neither the corporation nor its equipment and property is owned by the government. Second, under its chartering statute, the corporation is specifically not considered a government department, agency or instrumentality. Third, there is no direct governmental control or regulation of the funds after payment to the corporation. Parenthetically, the congressional appropriations are paid by the Treasury to the corporation in an annual sum rather than by advances and reimbursements for specific obligations. Its budget requests may be reviewed by the Office of Management and Budget, but that office has no power to revise requests nor to control the manner of expenditure. The General Accounting Office may conduct an audit in years in which federal funds are received, but the records need not adhere to General Accounting Office standards.

For the above reasons, it is my opinion that the appropriated funds become private money for the purposes of 12 U.S.C. 90 upon receipt by the Legal Services Corporation.

Accordingly, United National Bank of Washington, or any other national bank, is precluded from pledging any part of its assets to secure the deposits of the Legal Services Corporation.

I trust this has been responsive to your inquiry.

Very truly yours,

/s/

John E. Shockey
Chief Counsel

cc: Ms. Alice Daniel, General Counsel
Legal Services Corporation

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

OCT 23 1981

FILE: B-204886 DATE: October 21, 1981

MATTER OF: Tann, Brown & Company, Ltd.

DIGEST:

GAO lacks jurisdiction to review the award of a contract under a grant by the Legal Services Corporation, since the Corporation is not an agency or establishment of the Government subject to GAO's accounts settlement authority.

Tann, Brown & Company, Ltd. (Tann) objects to the award of a contract by the East Mississippi Legal Services Corporation (EMLS) to audit EMLS's fiscal year 1981 accounts. EMLS receives substantial grant funds from the Legal Services Corporation pursuant to the Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996-2996l (1976). The audit apparently is needed to satisfy the annual financial audit requirement of 42 U.S.C. § 2996n (c)(1). Tann contends that it submitted the best proposal under EMLS's solicitation for the audit services.

We will not consider the matter.

Our Office's review of complaints by prospective contractors against contract awards by grantees is based on our statutory obligation and authority under 31 U.S.C. § 53 to investigate the receipt, disbursement, and application of Federal funds. See The Montana Energy and MHD Research and Development Institute, Inc., B-199604, August 12, 1980, 80-2 CPD 110. A necessary requirement to our review is that the grantor be a Federal agency whose accounts are subject to settlement by our Office under 31 U.S.C. §§ 71 and 74.

The statute creating the Legal Services Corporation provides, however, that "Except as otherwise specifically provided * * *, the Corporation shall not be considered a department, agency or instrumentality of the Federal Government." 42 U.S.C. § 2996d(e)(1). Thus, the Legal Services Corporation is not subject to our accounts settlement authority. See B-202116, May 1, 1981, 60 Comp. Gen. __. Accordingly, it would serve no useful purpose

rec'd pge 10/23/81

for our Office to review complaints against the awards of contracts under grants by the Legal Services Corporation.

The matter is dismissed.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

LEGAL SERVICES CORPORATION
733 Fifteenth Street, N.W., Washington, D.C. 20005

Dan I. Bradley
President

Writer's Direct Telephone
(202) 272-4010

July 30, 1980

Mr. Joseph A. Dailing
Prairie State Legal Services, Inc.
802 Rockford Trust Building
206 W. State Street
Rockford, Illinois 61101

Dear Mr. Dailing:

This letter responds to your letter of inquiry which was received by this office on April 28, 1980.

You asked whether funds of grantees of the Legal Services Corporation may properly be used to satisfy the "non-Federal share" required by the Older Americans Act. 42 U.S.C. §3024(d)(1)(B). In our view, they may be so used. I understand that you have also requested the opinion of the Commissioner on Aging on this question and I am hopeful that the Agency on Aging will concur with our opinion in its final ruling.

The Older Americans Act requires that grants made pursuant to it for social services, including legal services, must be matched by the grantee with a "non-Federal share" to be contributed by "non-Federal sources." 42 U.S.C. §3024(d)(1)(B). The regulations of the Department of Health and Human Services provide,

> [A] . . . matching requirement may be satisfied by either or both of the following:
>
> a. Allowable costs incurred by the grantee . . . This includes allowable costs borne by non-Federal grants or by other costs donations from non-Federal third parties.
>
> b. The value of third-party in-kind contributions applicable to the period to which the cost-sharing or matching requirement applies. 45 C.F.R. 74.52 (emphasis added).

The regulations further state, "a cost-sharing or matching requirement may not be met by costs borne by another Federal grant." 45 C.F.R. §74.53 (emphasis added).

The Legal Services Corporation is established as a private, non-profit District of Columbia Corporation. 42 U.S.C. §2996e(a). And the Legal Services Corporation Act provides that the Corporation and its employees are not part of the federal government:

> Except as otherwise specifically provided in this subchapter, officers and employees of the Corporation shall not be considered officers or employees, and the Corporation shall not be considered a department, agency, or instrumentality, of the Federal government. 42 U.S.C. §2996d(e)(1).*

The history, structure, and financing of the Corporation all indicate that it is separate and apart from the federal government. (See, enclosed memorandum.) Accordingly, it is our opinion that the Corporation should be regarded as a "non-federal source" and the Corporation grants should be regarded as "non-Federal grants" for purposes of the matching requirement of the Older Americans Act. This conclusion is consistent with the opinion of the Comptroller of the Currency, to which you have referred, which concludes that Legal Services Corporation funds do not constitute "public money" for purposes of 12 U.S.C. §90.

Moreover, it seems to us that to allow Corporation funds to be used to satisfy the non-Federal share requirement is consistent with the Older Americans Act. The Act specifically states that recipients of Legal Services Corporation funds are proper grantees of funds to provide legal services to older individuals. 42 U.S.C. §3027(a)(15). A ruling that Corporation funds may be used to

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* The only exception provides that Corporation employees shall be considered to be federal employees for purposes of certain federal benefit programs. 42 U.S.C. §2996d(b). The Corporation is also subject to the Freedom of Information Act. 42 U.S.C. §2996d(g).

LEGAL SERVICES CORPORATION

satisfy the "non-Federal share" requirement will mean that many legal services programs, which would otherwise be ineligible, will be able to act as grantees of funds under the Older Americans Act.

I hope this answers your questions. If it does not, or if you have further questions, please let me know.

Sincerely,

Mario Lewis
General Counsel

cc: Commissioner on Aging

bdh

I. The Legal Services Corporation is not a federal agency.

Background

The Legal Services Corporation is a private nonprofit District of Columbia corporation created by Congress pursuant to the Legal Services Corporation Act, 42 U.S.C. §2996 et seq., ("LSCA"). The Corporation was created "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. §2996b(a). This function had been previously performed by the Community Services Administration ("CSA"), and before it, by the Office of Economic Opportunity ("OEO"), pursuant to Section 222(a)(3) of the Economic Opportunity Act of 1964.

As the legal services program expanded, from 1966, when it was first funded by OEO, to mid-1975, when it was transferred by CSA to the Legal Services Corporation, it increasingly became subject to political interference and pressures. Accordingly, when the President submitted the first version of the Legal Services Corporation Act, he stated that the Corporation was necessary to insure the continuation of the legal services program "free and independent of political pressures." S. Rep. No. 93-495, 93d Cong. 1st Sess. 4 (1973). This purpose was ultimately accomplished by removing the legal services program from the Executive Branch and transferring it to an independent, nonprofit corporation. The Senate Committee on Labor and Public Welfare indicated that, for all those involved, this was the universally accepted solution:

> Recognizing the need to insulate the Legal Services program from outside pressures, and at the same time to maintain a responsible program accountable both to the public and to the client community, the Administration, Members of Congress, and others have called for the transfer of the Legal Services program to an independent corporation. S. Rep. No. 93-495, 93d Cong., 1st Sess. 3 (1973).

The Committee also stated:

> This Committee concluded after months of consideration, and after reviewing the legislative history of previous corporation bills, that in order to remain effective, in order to provide equal rights under the law to all people, and in order to provide continued faith in our system of laws, the Legal Services program should and must be placed in an independent corporation free from any outside interference, political or otherwise, and under a charter designed to insure that the program is responsibly conducted. Id. at 5-6.1/

Accordingly, the LSCA declares that one of its purposes is to insure that the legal services program be "kept free from the influence of or use by it of political pressures." 42 U.S.C. §2996(5). As the President had requested, the Corporation is "structured and financed so that it will be assured of independence." H.R. Rep. No. 93-247, 93rd Cong., 1st Sess. 2 (1973).

In several important respects, the Legal Services Corporation Act structures the Corporation to ensure its maximum independence. First, the Corporation is created as a purely private institution

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1/ See, also, H.R. Rep. No. 93-247, 93d Cong., 1st Sess. 3 (1973).

separate and apart from the federal government. Second, it is given an independent Board of Directors with complete policy control over the legal services program. And finally, its finances are handled differently from those of federal agencies.

1. The Corporation is a Private Institution

In order to maximize the program's insulation from political pressure, Congress removed it entirely from the federal government and transferred it to a completely private corporation. The LSCA establishes the Legal Services Corporation as a District of Columbia "private nonmembership nonprofit corporation." 42 U.S.C. §2996b(a). The Corporation is given "the powers conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act." 42 U.S.C. §2996e(a). The private nature of the Corporation was emphasized by the Senate Committee on Labor and Public Welfare:

> The Corporation shall be considered a private nonprofit entity for all statutory purposes, including those concerning labor relations, except as provided elsewhere in the Act. S. Rep. No. 93-495, 93rd Cong., 1st Sess. 12 (1973).

Moreover, the LSCA grants the Legal Services Corporation certain powers which are uniquely characteristic of private corporations in general and nonprofit corporations in particular. For example, the LSCA provides that the Corporation shall maintain in the District of Columbia a "designated agent to accept service of process for the Corporation." 42 U.S.C. §2996b(b). The Corporation is also eligible "to be treated as an organization described in Section 170(c)(2)(B) of the Internal Revenue Code

of 1954 and as an organization described in Section 501(c)(3) of Internal Revenue Code of 1954 which is exempt from taxation under Section 501(a) of such Code." 42 U.S.C. §2996b(c). Pursuant to this authorization, the Corporation applied for and has received recognition as a tax-exempt organization. The Corporation is also given the power to "accept in the name of the Corporation, and employ or dispose of in furtherance of the purposes of this title, any money or property, real, personal, or mixed, tangible or intangible, received by gift, devise, bequest, or otherwise." 42 U.S.C. §2996e(a)(2).

An examination of the Nonprofit Corporation Act of the District of Columbia further indicates the breadth of powers given the Corporation which are not normally associated with government agencies. For example, it has the power "to sue and be sued, complain and defend, in its corporate name." 29 D.C. Code §1005(b). The Corporation also has the power to "sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets." 29 D.C. Code §1005(e).

In addition to establishing the Corporation as a private institution governed by an independent Board, the LSCA provides that the Corporation and its employees are not part of the federal governmen

> Except as otherwise specifically provided in this title, officers and employees of the Corporation shall not be considered officers and employees, and the Corporation shall not be considered a department, agency, or instrumentality, of the Federal Government. 42 U.S.C. §2996d(e)(1).2/

2/ That the Corporation is not part of the Federal government is further indicated by Section 3(a) of the transition provisions of the LSCA which provides that ninety days after the Board holds its

Footnote continued on next page.

And the LSCA states that "[t]he members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States." 42 U.S.C. §2996c(c).

Congress intended these provisions to be interpreted broadly. The Senate Committee on Labor and Public Welfare emphasized that neither the Corporation nor its employees were to be considered "part of the Federal Government." S. Rep. No. 93-495, 93d Cong., 1st Sess. 24 (1973). The Conference Report added that they are not to be considered part of "the Federal Government for purposes of any federal law or Executive order." Conference Rept. 93-845, 93d Cong., 2d Sess. 19 (1974).[3/]

2. The Corporation Has an Independent Board of Directors

An equally important feature of the Corporation's independence is the transfer of all policy authority with regard to legal services to an independent Board of Directors. The LSCA vests control of the Corporation in an eleven-member Board of Directors "appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. §2996c(a). Once appointed, however, the LSCA contains several provisions designed to prevent any further exercise of presidential control over the Board. For example, the President has no authority to remove Board members; once appointed, they can

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2/ Continued from previous page.
first meeting, "the Legal Services Corporation shall succeed to all rights of the Federal Government to capital equipment in the possession of legal services programs or activities assisted pursuant to Section 222(a)(3), 230, 232, or any other provisions of the Economic Opportunity Act of 1964." 42 U.S.C. §2996b note.

3/ The only exceptions contained in the LSCA give the Corporation's employees the benefits of federal programs relating to compensation for work injuries, civil service retirement, and health and life insurance. 42 U.S.C. §2996d(f). The Corporation is also subject to the Freedom of Information Act. 42 U.S.C. §2996d(g).

only be removed by a vote of seven members of the Board of Directors, and even then only "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." 42 U.S.C. §2996c(e). Although the President is empowered to designate the first Chairman of the Board to serve for three years, "[t]hereafter the Board shall annually elect a chairman from among its voting members." 42 U.S.C. §2996c(d).[4/] Also, the Board of Directors, and not the President of the United States, appoints the president of the Corporation, who in turn "may appoint and remove such employees of the Corporation as he determines necessary to carry out the purposes of the Corporation." 42 U.S.C. §§2996d(a), 2996d(b)(1).[5/]

The Board is given the power to enforce the LSCA and the Corporation's by-laws provide that "[t]he property, affairs, and business of the Corporation shall be under the direction of the Board." 42 U.S.C. §2996e(b)(1)(A), 45 C.F.R. 1601.7. Finally, in an amendment to the Economic Opportunity Act of 1964 entitled "Independence of [the] Legal Services Corporation," it is provided:

> Nothing in this chapter, except subchapter X [the Legal Services Corporation Act], and no reference to this chapter unless such

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4/ In the case of independent regulatory commissions, the President is empowered to designate one of the members to serve as chairman. See, e.g., 47 U.S.C. §155(a) (Federal Communications Commission).

5/ By comparison, heads of federal agencies serve at the will of the President. For example, the head of the Community Services Administration, which had previous responsibility for legal services, is appointed by the President with the advice and consent of the Senate. 42 U.S.C. §2941(a). Federal officers appointed under such circumstances serve at the pleasure of the President. Myers v. United States, 272 U.S. 52 (1926).

reference refers to subchapter X of this chapter, shall be construed to affect the powers and activities of the Legal Services Corporation. 42 U.S.C. §2971e.

3. Finances

As explained in the attached opinion of the Comptroller of the Currency, the Corporation's funds are handled differently from those of federal agencies.

Conclusion

For the foregoing reasons, it is plain that Congress intended to make real the statement that the Corporation "shall not be considered a department, agency, or instrumentality" of the Federal government." 42 U.S.C. §2996d(e)(1).

DEPARTMENT OF THE TREASURY APPROPRIATION WARRANT

Warrant No. 559-82-20-150-12

Accounting Date December 15, 1981

The Congress having, by the Acts hereon stated, made the appropriations hereunder specified, the amounts thereof are directed to be established in the general and detailed appropriation accounts, totaling in all $ 69,890,000.00 and for so doing this shall be the warrant.

The Secretary of the Treasury

By /s/ David L. Black

JAN 5 1982
(Date Signed)

Comptroller General of the United States

By

(Date Countersigned)

Department of the Treasury - Bureau of Government Financial Operations

APPROPRIATION SYMBOL	TITLE	AMOUNT
	JOINT RESOLUTION	
	Making further continuing appropriations for the fiscal year 1982, and for other purposes.	
Public Law 97-92, 97th Congress	Approved December 15, 1981	
2020501	Payment to the Legal Services Corporation, Legal Services Corporation, Treasury, 1982	$69,890,000.

See Letter from the Division of Finance and Analysis Branch, dated December 28, 1981.

STANDARD FORM 1193
MAY 1973
6 TREASURY FRM 2000

LETTER OF CREDIT

Auth: TREASURY DEPARTMENT CIRCULAR No. 1075, Revised

ISSUING AGENCY	LETTER OF CREDIT NUMBER
Bureau of Govt Financial Operations Room 324, Annex #1 Washington, DC 20226	20-18-0003 AMENDMENT NUMBER 8
AGENCY STATION SYMBOL 20-18-9701	(FOR AGENCY USE)
	EFFECTIVE DATE JAN 2 0

TO: The Federal Reserve Bank,	BRANCH BANK AT
Richmond	

In accordance with the authorization of the Fiscal Assistant Secretary, Treasury Department, there is hereby authorized for the account and responsibility of the issuing agency a letter of credit:

IN FAVOR OF	FOR DEPOSIT ONLY TO
Legal Services Corp 733 15th Street, N.W. Washington, DC 20005	See Reverse ACCOUNT

AMOUNT AUTHORIZED		PRIOR AUTHORIZATION	THIS CHANGE
$1,215,800,000.00	☐ EACH MONTH ☐ EACH QUARTER ☒ WITHOUT TIME LIMIT ☐ _____	$1,146,910,000.00	Increase $69,890,000.00 Decrease $

This letter of credit is irrevocable and the unpaid balance will remain available until drawn in full.

Drawdowns in excess of $5 million are authorized.

The amount of this letter of credit is hereby certified to be drawn against, upon presentation to you of Form TUS 5401, Payment Voucher on Letter of Credit, by the official(s) of the recipient organization whose signature(s) appear(s) on the Standard Form 1194, Authorized Signature Card for Payment Vouchers on Letter of Credit, attached hereto or previously or subsequently furnished you through the Treasury Department.

The amount of each payment voucher paid by a Federal Reserve Bank or branch to a designated commercial bank for credit to the account of the recipient organization shall constitute payment to the recipient organization by the United States.

I certify to the Treasury Department that the payments authorized herein are correct and proper for payment from the appropriations or funds legally committed and available for the purpose, when paid in accordance with the terms and conditions cited above.

DATE CERTIFIED _____

AUTHORIZED CERTIFYING OFFICER
Walter L. Jordan
Assistant Comptroller for Finance
TYPED NAME AND TITLE

1193-10

☆ GPO: 1975—215 055

MEMORANDUM OF UNDERSTANDING

BETWEEN THE LEGAL SERVICES CORPORATION

AND THE DEPARTMENT OF THE TREASURY

This agreement is based on the understanding of the Corporation and the Treasury that the Legal Services Corporation Act authorizes the Corporation to withdraw its entire appropriation at the beginning of the fiscal year, and that a principal purpose of the Congress in providing that authorization is to insure the independence of the Corporation from Executive Branch control. See 42 U.S.C. §2996i, S.R. 95-285 (95th Cong., 1st Sess.) pp. 54-55; S.R. 95-172 (95th Cong., 1st Sess.) p. 3; H.R. 95-310 (95th Cong., 1st Sess.) p. 6.

To achieve that purpose in a manner consistent with desirable cash management policies, the Corporation and the Treasury agree to the following arrangement for disbursement of such amounts as may be specified in Acts of Congress making appropriations to the Corporation.

On October 1, 1980, and at the beginning of each succeeding fiscal year, or as soon thereafter in each fiscal year as there may be an Act of Congress making an appropriation to the Corporation, the Department of the Treasury will issue

an irrevocable letter of credit under the federal reserve system to the Corporation in the full amount appropriated by the Congress for that fiscal year.

The appropriation to the Corporation will be shown as fully obligated on Treasury accounts when the letter of credit is issued.

The funds will continue to be available to the Corporation until expended, even if not fully expended at the end of the fiscal year, as is authorized under 42 U.S.C. §2996i.

— The Corporation will draw down funds on an as-needed basis. Funds will be wire-transferred to a bank in which the Corporation maintains a checking account whenever a request for transfer is made by the Corporation. No justification or explanation will be required for any request.

The rules, regulations, and reporting requirements governing the usual letters of credit issued by federal agencies for other programs shall be inapplicable to the letter of credit issued to the Corporation.

The Treasury will promptly notify the Corporation if, at any time, the Office of Management and Budget or any other Executive Branch authority requests deobligation of Corporation

funds, or seeks to amend the apportionment schedule making the funds fully available at the beginning of the fiscal year.

Either the Corporation or the Treasury may terminate this agreement by giving written notice to the other of its intention to do so. Upon the giving of such notice this agreement shall be deemed terminated. However, termination shall have no effect on the validity of the then outstanding letter of credit or the Corporation's ability to withdraw funds authorized thereunder. Further, termination of this disbursement arrangement shall not be construed to affect the right of the Corporation to withdraw its entire appropriation at the beginning of the Fiscal Year nor shall it be presumed that such right is premised on the existence of this or any other agreement between the parties.

Paul Taylor
Fiscal Assistant Secretary
U.S. Department of the Treasury

Dan J. Bradley
President
Legal Services Corporation

Date: DEC 12 1980