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## The Politics of Equal Justice

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# THE POLITICS OF EQUAL JUSTICE

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But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. Court in the land, or this honorable court which you serve. Our courts have their faults as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.<sup>1</sup>

## I. THOU SHALL NOT RATION JUSTICE

When it comes to providing equal access to the nation's courtrooms for rich and poor alike, fiction, ironically, is truer than life. The words spoken by Harper Lee's country lawyer, Atticus Finch, describe an idealized notion of equal justice that to this day remains stubbornly beyond the embrace of America's social contract. However, it seems beyond debate that one of the chief functions of government is to secure justice.<sup>2</sup> The corollary of that duty in a constitutional

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1. HARPER LEE, *TO KILL A MOCKINGBIRD* 218 (1960).

2. See Elihu Root, *Foreword* to REGINALD HEBER SMITH, *JUSTICE AND THE POOR* ix (1919).

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democracy such as ours is a commitment to ensure that the least powerful among us—those who are poor—receive just as much justice as the rich and powerful. While most Americans would probably identify access to legal counsel as an important, if not the most important, attribute of equal justice, federal funding to insure legal representation for the poor in civil legal disputes continues to be the political equivalent of the Mason-Dixon line—dividing liberal from conservative instead of North from South, and establishing a well-defined political fault line.<sup>3</sup> In fact, there are few subjects that engender more vituperative discourse among conservative politicians than the Legal Services Corporation.<sup>4</sup> For over two decades this federally funded agency has provided America's poor a small measure of access to the nation's civil justice system—but far less than what is necessary to guarantee equal access.<sup>5</sup>

That the need for equal justice remains unmet for millions of poor Americans cannot seriously be refuted. The federal government reported that in 1999, during our most prosperous period in decades, thirty-one million people were food insecure—that is, they experienced or feared hunger.<sup>6</sup> During the same year, 3.5 million

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No one, however, doubts that it is the proper function of government to secure justice. In a broad sense that is the chief thing for which government is organized. Nor can any one question that the highest obligation of government is to secure justice for those who, because they are poor and weak and friendless, find it hard to maintain their own rights.

*Id.*

3. See HERITAGE FOUNDATION REPORTS, WHY THE LEGAL SERVICES CORPORATION MUST BE ABOLISHED (1995) [hereinafter HERITAGE FOUNDATION REPORT], available at <http://www.heritage.org/Research/LegalIssues/BG1057.cfm>; Rael Jean Issac, *Illegal Services*, NAT'L REV., Mar. 24, 1997, at 42.

4. Letter from Twenty-seven Representatives to Newt Gingrich, Speaker of the House (June 28, 1995) [hereinafter Letter to Newt Gingrich] (on file with author).

5. See LEGAL SERVICES CORPORATION, TWENTY FIFTH ANNIVERSARY ANNUAL REPORT 8, 13, 15 (1998-99) (stating that seventy-one percent of the legal situations faced by low-income households do not find their way to the judicial system); James P. Lorenz, Jr., *Almost the Last Word on Legal Services: Congress Can Do Pretty Much What It Likes*, 17 ST. LOUIS U. PUB. L. REV. 295, 300-01 (1998) (asking whether "equal access to the system of justice" means access equal to the kind of representation that middle class American citizens can afford or access equal to that enjoyed by large corporations and government agencies). One report done in 1994 found that nearly eighty percent of all poor Americans did not have access to counsel. LEGAL SERVICES CORPORATION, SERVING THE LEGAL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS 12-13 (Apr. 30, 2000); see also U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES (1999) (revealing that almost one out of every five Americans is eligible for legal services assistance).

6. See 1999 ANNUAL REPORT OF THE DEPARTMENT OF AGRICULTURE, reported in *Millions Still Going Hungry in the U.S., Report Finds*, N.Y. TIMES, Sept. 10, 2000, at 26. The report included the troubling statistics that seventeen percent of all children and twenty-one percent of all African-Americans went hungry or lived on the cusp of hunger. *Id.*

people—including 1.35 million children—were homeless at one time or another.<sup>7</sup> Forty-two million Americans remained without health insurance.<sup>8</sup> The Census Bureau recently reported that for the first time in eight years, the number of Americans living in poverty increased.<sup>9</sup> Nevertheless, it has been estimated that only one-eighth of the legal needs of poor people are addressed.<sup>10</sup> As Derek Bok, the former president of Harvard University cogently observed, “[t]here is far too much law for those who can afford it and far too little for those who cannot.”<sup>11</sup>

## II. WALKING AGAINST THE WIND<sup>12</sup>

Federal support for legal aid to the poor first took shape as part of President Lyndon Johnson’s War on Poverty.<sup>13</sup> In 1964, the Office of Economic Opportunity (“OEO”)—President Johnson’s principal warhorse in his battle against poverty—for the first time funded lawyers for the poor in civil matters.<sup>14</sup> In the subsequent seven years, the number of poverty lawyers grew more than 600%.<sup>15</sup>

Early federal funding for legal services unleashed a torrent of ground breaking legal reform litigation that helped further the assault on unconscionable working conditions, housing discrimination, and denial of access to the courts. One documentarian of the Legal Aid era (pre-1965) noted without intended irony that “[i]t is always the

7. See THE URBAN INSTITUTE, A NEW LOOK AT HOMELESSNESS IN AMERICA, reported in Nina Bernstein, *Study Documents Homelessness in American Children Each Year*, N.Y. TIMES, Feb. 1, 2000, at A12.

8. See Robert Pear, *Number of Insured Americans Up for First Time Since ‘87*, N.Y. TIMES, Sept. 29, 2000, at A16.

9. See Robert Pear, *Number of People Living in Poverty Increases in U.S.*, N.Y. TIMES, Sept. 25, 2002, at A1.

10. See Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521, 530 (1981) (citing B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 4 (1977)).

11. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

12. The title of E. Clinton Bamberger, Jr.’s inspirational speech delivered at the 1981 University of Pennsylvania Law School Commencement ceremony, excerpted in the NLADA BRIEFCASE, Summer 1981, at 10.

13. William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960’s to the 1990’s*, 17 ST. LOUIS U. PUB. L. REV. 241, 245 (1998) (stating that in 1964, as part of President Lyndon B. Johnson’s War on Poverty, Congress created the Office of Economic Opportunity to operate anti-poverty programs).

14. See *id.* at 245. OEO created the National Legal Services Program, which remained in existence from 1965 until 1974, when the Legal Services Corporation was created. *Id.* at 247, 251-52.

15. See MARTHA F. DAVIS, BRUTAL NEED 10 (1993) (reporting that poverty law changed dramatically in the 1960s when federal grants were provided to legal services programs).

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aim to avoid litigation whenever possible and Legal Aid offices are notably successful in this.”<sup>16</sup> While, prior to the War on Poverty, legal aid lawyers brought only six percent of cases to court, by 1971 legal services lawyers were litigating seventeen percent of their cases.<sup>17</sup> While there is no record of any legal aid cases brought to the U.S. Supreme Court prior to 1967, from 1965 through 1974 legal services programs were involved in 164 cases in the U.S. Supreme Court<sup>18</sup> and were successful sixty-two percent of the time.<sup>19</sup> In the U.S. Supreme Court, legal services programs sought the elimination of welfare regulations that required “a man in the house;”<sup>20</sup> that denied benefits to college students,<sup>21</sup> resident aliens of the United States,<sup>22</sup> citizens who recently moved to a new state,<sup>23</sup> children born to large families,<sup>24</sup> and that failed to provide hearings to all applicants.<sup>25</sup> The Department of Health, Education, and Welfare estimated at the time that three Legal Services cases alone—*King*, *Goldberg*, and *Shapiro*—led to a \$400-\$500 million yearly increase in welfare payments.<sup>26</sup> Programs also challenged in the Supreme Court the grossly

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16. SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* 20 (1990) (quoting EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951)).

17. DAVIS, *supra* note 15, at 10.

18. LAWRENCE, *supra* note 16, at 9 (discussing the history of legal services cases brought before the Supreme Court and noting that before the mid-sixties, none of the interest groups that had occasionally represented indigent clients focused on poverty per se).

19. See *id.* at 127 (specifying that seventy-four of the clients’ legal services program attorneys represented before the Court achieved the specific legal result, if not the doctrine they sought).

20. See *King v. Smith*, 392 U.S. 309 (1968) (holding that an Alabama “substitute father” regulation was invalid and inconsistent with the Social Security Act because it disqualified children otherwise eligible for aid if their mother was cohabitating with a man not obligated to support the children).

21. See *Townsend v. Swank*, 404 U.S. 282 (1971) (determining that an Illinois law excluding needy dependent children attending college from AFDC benefits was in conflict with the Social Security Act and thus invalid under the Supremacy Clause).

22. See *Graham v. Richardson*, 403 U.S. 365 (1971) (ruling that provisions of Arizona and Pennsylvania welfare laws conditioning benefits on citizenship and imposing durational residency requirements violated the Equal Protection Clause).

23. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (finding a D.C. statute requiring one year residence for receipt of welfare assistance violative of Equal Protection Clause).

24. See *Dandridge v. Williams*, 397 U.S. 471 (1970) (declaring that Maryland’s cap of \$250 per month for welfare benefits, no matter what the size of the family, is not violative of the Equal Protection Clause).

25. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the Due Process Clause requires an evidentiary hearing before welfare benefits may be terminated).

26. See LAWRENCE, *supra* note 16, at 89.

inequitable funding schemes for our nation's public schools<sup>27</sup> and the procedural protections offered to students.<sup>28</sup> Legal Services lawyers even had to go to the Supreme Court to seek access to the courts for the poor<sup>29</sup> and for the right of aliens to hold civil service jobs.<sup>30</sup>

From rural California to the Mississippi Delta, to the most impoverished neighborhoods in the nation's largest cities, legal services attorneys were lawyering for their sole constituency: America's poor. They were modernizing landlord tenant relations, protecting meager property rights, protecting civil rights, enforcing voting rights, securing access to the nation's health system for poor children and disabled Americans, and expanding public benefits to protect women, children, the elderly, disabled, and poor immigrants.<sup>31</sup> The stunning changes brought about by the poor's federally funded lawyers generated intense and fierce political opposition in the early 1970s.<sup>32</sup> For politicians like Congressman George Murphy, California Governor Ronald Reagan, President Richard Nixon, and Vice-President Spiro Agnew, federally funded legal services represented something other than equal access to justice—something sinister, anti-American, and anti-democratic.<sup>33</sup>

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27. See *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) (denying a challenge to Texas's funding scheme for public school systems which are tied to property tax values and thus result in inequities for children in poorer school districts).

28. See *Goss v. Lopez*, 419 U.S. 565 (1975) (generally requiring a notice and a hearing before students are suspended from school).

29. See *United States v. Kras*, 409 U.S. 434 (1973) (upholding filing fees in bankruptcies); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (striking down filing fees in divorce actions).

30. See *Sugarman v. Dougall*, 413 U.S. 634 (1973) (holding a New York civil service law in violation of the Fourteenth Amendments' equal protection guarantee in that it only allowed citizens to hold permanent positions in the competitive class of the state civil service).

31. See, e.g., *Memphis Light, Gas & Water Div. v. Croft*, 436 U.S. 1 (1978); *Shea v. Vialpando*, 416 U.S. 251 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (due process in seizure of property); *James v. Valtierra*, 402 U.S. 137 (1971) (upholding a referendum approval for construction of low income housing); *Thorpe v. Hous. Auth. of the City of Durham*, 386 U.S. 670 (1967) (public housing due process rights); *Morris v. Williams*, 433 P.2d 697 (Cal. 1967); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (creating implied warranty of habitability in lease agreements).

32. See Quigley, *supra* note 13, at 253 (describing the restrictions placed on legal services in the 1970s); see also Spiro T. Agnew, *What's Wrong With The Legal Services Program*, 58 A.B.A. J. 930, 930-32 (1972) (arguing that the legal services program had gone beyond a federally funded program providing legal services and become an effort to "redistribute societal advantages aid disadvantages, penalties and rewards, rights and resources").

33. See Quigley, *supra* note 13, at 248-49 (detailing the conflict over providing legal services to the poor under the law reform efforts of the Legal Services Program ("LSP")).

## III. THE POLITICS OF EQUAL JUSTICE

Dismayed by the effectiveness of the Legal Services Program in the Supreme Court, California Congressman George Murphy first introduced in 1967 an amendment that would have limited the Program's appellate work.<sup>34</sup> While the Murphy amendment was defeated in the Senate, that same year Congress did restrict the Program's juvenile justice work.<sup>35</sup> Murphy in 1969 tried—again unsuccessfully—to give state governors veto power over local legal services program funding.<sup>36</sup>

Ronald Reagan had an axe to grind: when he was Governor of California, California Rural Legal Assistance (CRLA) brought litigation leading to an increase in the state's minimum wage and to the establishment of food programs to provide benefits to close to a hundred thousand people.<sup>37</sup> In 1971 Reagan tried to veto funding for CRLA alleging 127 violations of OEO regulations. A three judge panel subsequently found the charges "totally irresponsible and without foundation."<sup>38</sup> In reaction, a bill emerged in Congress to create an independent, government-funded corporation to provide civil legal services. President Nixon, however, vetoed it.<sup>39</sup>

In 1972, Vice-President Agnew, in the ABA Journal, referred to legal aid lawyers as "ideological vigilantes."<sup>40</sup> Agnew was outraged by a New Jersey legal services lawsuit seeking relocation housing for poor people displaced by urban renewal projects. President Nixon's choice to lead the OEO legal services program in 1973—Howard Philips—had as his first order of business a plan to dismantle the program.<sup>41</sup>

34. See LAWRENCE, *supra* note 16, at 116.

35. See *id.* (specifying that while the Murphy Amendment was defeated 52-36, Congress did pass a criminal representation amendment, which resulted in the restriction of juvenile justice work).

36. See *id.* (explaining that the second Murphy Amendment was excluded but that similar attempts to limit it continued throughout the duration of the LSP).

37. Arthur von Keller, IV, *From Whence We Come: History and the Legal Services Advocate*, MGMT. INFO. EXCH. J., Nov. 1988, at 9.

38. *Id.* at 10.

39. See Quigley, *supra* note 13, at 251-53 (explaining that President Nixon was displeased that the Mondale-Steiger bill, which created a national Legal Services Corporation, limited presidential power over the board and provided for legal services without restrictions).

40. See Agnew, *supra* note 32, at 931 (indicating his concern that the federally-funded system would be run by these "ideological vigilantes" who cared more about social reform than their clients).

41. See Quigley, *supra* note 13, at 253 (discussing that Philips "canceled law reform as a goal of legal services and de-funded the back up centers essential to law reform litigation"). Philips was removed from office by court order and funding was

Two more bills were introduced to establish the Legal Services Corporation and to temper the ideological wars erupting over legal aid for the poor—both bills died quiet deaths.<sup>42</sup>

Even the American Bar Association, under the leadership of Lewis Powell, prior to his appointment to the Supreme Court, tempered its support for the establishment of a Legal Services agency with concerns about social activism, political agendas, and professional standards, though these concerns were made with far more subtle and less caustic language than the invective filled rhetoric used by politicians.<sup>43</sup> Ironically, however, it was during the Nixon Administration that the Legal Services Corporation Act ultimately was passed—and eventually signed into law by President Nixon in July of 1974, shortly before he resigned as a result of the Watergate scandal.<sup>44</sup> However, Legal Services' continued survival was not without compromise. In 1973 the Program issued new guidelines that clarified that "[l]aw reform will no longer be a primary or separate goal of the program. . . ."<sup>45</sup>

From its inception, this small federal agency has been under unrelenting political assault. Over the last three decades, Republican presidents continued to appoint board members whose support for an independent and fully funded agency was reluctant and almost always in line with a severely restricted mission.<sup>46</sup> During the Carter Administration, however, the agency reached its high-water mark in political support. Funding was increased, presidential antipathy was gone, and legal services lawyers were once again free to make America a fairer and more just society.<sup>47</sup> The agency's funding went from \$90 million dollars to \$321 million, and the number of local programs across the nation increased to over 300.<sup>48</sup> Nevertheless, the agency

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continued. *Id.*

42. von Keller IV, *supra* note 37, at 10.

43. See EARL JOHNSON, JR., *THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* 39-69 (Russell Sage Foundation 1974) (providing a comprehensive analysis of the development of the federal program, including the ABA and Lewis Powell's roles).

44. See Quigley, *supra* note 13, at 253 (describing the compromises in the LSC bill President Nixon signed, including restrictions prohibiting abortion litigation and litigation involving school desegregation and selective service).

45. See LAWRENCE, *supra* note 16, at 12 n.29 (providing a brief history of the changes that took place during 1966 to 1974).

46. See Quigley, *supra* note 13, at 251-54 (describing the restrictions that have been placed on Legal Services).

47. See *id.* at 254-55 (summarizing the growth of LSC during the Carter Administration and its abrupt decline at the beginning of the Reagan Administration).

48. *Id.* at 254.



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could not entirely escape the reach of congressional opponents. President Jimmy Carter's appointees to the agency's board were blocked, formal reauthorization of the 1974 Enabling Act was denied, and the agency was forced to survive on budget resolutions.<sup>49</sup>

When Ronald Reagan became president in 1980, the agency faced renewed efforts to dismantle and de-fund it.<sup>50</sup> Reagan had profited handsomely in his political fortunes by branding Legal Services lawyers in California as political activists bent on furthering a liberal agenda.<sup>51</sup> The agency's lawyers made significant improvements in the lives of migrant workers whose existence was not that far removed from a state of peonage. Reagan eagerly did the political bidding of powerful agricultural interests who were being sued by the farm workers' lawyers.<sup>52</sup> As the newly elected president in 1980, Reagan named nominees openly hostile to the very agency they were appointed to govern, but the Democratic controlled Senate acted to block confirmation of his board nominees—requiring Reagan to resort to recess appointments.<sup>53</sup> At one point, a Reagan appointed agency chairperson publicly supported abolition of the agency.<sup>54</sup> It was under President Reagan that the Legal Services Corporation experienced its most severe funding cuts and an increased number of draconian restrictions—limiting the ability of the agency to provide effective legal assistance to the nation's poor.<sup>55</sup>

It was not until the Clinton Administration in the early 1990s that the agency could again count on support from the White House, but a friendly White House did not necessarily mean the agency was out of harm's way.<sup>56</sup> In 1996, although the agency had supporters in the

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49. See *id.* at 255 (commenting on the difficulties LSC faced as it expanded at the end of the Carter Administration).

50. See *id.* at 255-56 (noting the Reagan Administration's efforts to reduce funding for federal legal services).

51. See Lorenz, *supra* note 5, at 302 (noting Governor Reagan's dislike of CRLA because it was successful in delaying several of the Governor's conservative policies, such as budget cuts for California's Medicaid program).

52. See *id.* at 302 (noting Governor Reagan's frustration towards CRLA, when for two weeks in 1967, CRLA was able to stop the importation of Mexican contract workers into California).

53. See Quigley, *supra* note 13, at 256-57 (commenting on Reagan's efforts in the early 1980s to eliminate LSC through reduced funding and the appointment of unsympathetic board members).

54. See *id.* at 257 (commenting that in 1987, the hostility and internal strife of the LSC board was so great that abolition of the agency loomed as a reality).

55. See *id.* at 257-59 (noting the Reagan Administration's efforts to abolish LSC through reduced funding, reduced training and support centers, and increased regulations restricting LSC's advocacy for the poor).

56. See LEGAL SERVICES CORPORATION'S TWENTY FIFTH ANNIVERSARY REPORT, *supra* note 5, at 8 (noting that in the early 1990s, the Clinton Administration and

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White House, Republicans, who won control of Congress in 1994, resumed their assault on the agency with renewed vigor.<sup>57</sup> Arguing that LSC programs perpetuated poverty to insure a need for their services, Congress slashed the agency's appropriation and imposed severe new restrictions.<sup>58</sup> The agency suffered a \$122 million reduction in funding in fiscal year 1996.<sup>59</sup> In addition, nineteen new restrictions were imposed on how the agency's lawyers were able to represent the poor.<sup>60</sup> New restrictions and continued threats of defunding would continue to characterize the agency's relationship with the 104th Congress.<sup>61</sup> Under the leadership of Newt Gingrich, the lexicon of Republican reform permanently affixed the verb "abolish" next to the Legal Services Corporation.<sup>62</sup>

In June of 1995, twenty-eight members of Congress, among them former New York Congressman Gerald H. Solomon and current Representative Dan Burton of Indiana, sent a letter to House Speaker Newt Gingrich warning that "there is every reason to believe that this agency will threaten the reforms contained within the Republican 'Contract with America.'"<sup>63</sup> They also claimed that "[t]he Legal Services Corporation is a corrupt agency that is saddling further generations with billions of dollars of debt and entangling millions of Americans in a cycle of government dependency."<sup>64</sup> Republican control of Congress has meant that since 1996, the House Appropriations Committee has recommended a fixed \$141 million budget for the agency.<sup>65</sup> This recommended budget was about fifty percent less than what the agency's actual funding levels were for

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democratic Congress increased LSC's budget, and showed support for keeping LSC in existence).

57. See *id.* at 9 (stating that the newly Republican controlled Congress changed the political climate for LSC, even advocating for its abolition); see also Lorenz, *supra* note 5, at 304-05 (noting that LSC suffered its greatest appropriations decrease when Newt Gingrich led the Republican House of Representatives in the mid-1990s).

58. See Lorenz, *supra* note 5, at 306 (commenting on the harsh restrictions imposed by Congress on who LSC attorneys could represent).

59. *Id.* at 305.

60. *Id.* at 306 (summarizing the new restrictions imposed on LSC, and how many advocates viewed them as "the most crushing of any of the prohibitions [LSC] had suffered in 25 years").

61. See *id.* (noting that the decrease of federal funding to LSC prompted lawsuits against LSC alleging First Amendment violations of both legal services clients and attorneys).

62. See Letter to Newt Gingrich, *supra* note 4.

63. *Id.*

64. *Id.*

65. John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 102 n.4 (2000).

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most of the 1990s, and if approved would have effectively destroyed the agency.<sup>66</sup> Although the House Appropriations Committee's starvation funding recommendation has occurred each year since 1996, a larger appropriation has eventually been secured by amendment and through the conference process with the Senate.<sup>67</sup>

The intense opposition of conservative Republicans to the Legal Services Corporation is captured in a story that circulated in the Legal Services Community in Washington, D.C., shortly after the Republicans gained control of Congress in 1996. The story begins with former New Hampshire Republican Senator Warren Rudman, a long-time supporter of the agency, calling his former colleague, Republican Texas Senator Phil Gramm, to offer congratulations on Gramm's being named chairman of a Senate appropriations subcommittee with jurisdiction over the agency. Rudman is reported to have told Gramm that as soon as he learned of Gramm's new appointment he prayed for the Legal Services Corporation. According to the story, Gramm—perhaps apocryphally—is supposed to have replied, "Warren, not even God's going to be able to save them."

Throughout the 1990s, the efforts of the Republicans to abolish the Legal Services Corporation, like the ocean's tides, would continue to ebb and flow with each new Congress. Former California Congressman, Bob Dornan, long one of the harshest and loudest critics of the Legal Services Corporation likened proposals during the Gingrich era to permit the federal agency to survive to "putting Lenin, Ho Chi Min and Castro in prison. They'll escape, come back and slit your throat. You must get rid of them, put them in Devil's Island underground."<sup>68</sup> It would not be hyperbole to say that over the last two decades, the opposition of conservative Republicans to the Legal Services Corporation has congealed into a single-minded political hatred.

Congressional opponents, unable to outright destroy the agency, have settled on a course designed to encumber it with a wide array of restrictions that severely limit the quality and quantity of legal representation available to the nation's poor. Federally funded legal services lawyers are prohibited from bringing class actions, seeking

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66. Memorandum to Legal Services Programs from Julie Clark, Senior Vice President for Government Relations and Support, National Legal Aid & Defender Association (July 17, 1996) [hereinafter NLADA Memo] (on file with author).

67. *Id.*

68. Hillary Stout, *Legal Services, The Agency That Wouldn't Die, Looks Like It May Survive The Age of Gingrich*, WALL ST. J., July 21, 1995, at A12.

statutorily available attorney's fees, helping clients organize groups such as tenant unions, accepting cases that may generate an attorney's fee, handling voting rights cases, or doing any type of lobbying on behalf of the clients or communities they represent.<sup>69</sup> The mantra of congressional opponents has been accountability and efficiency. Even recently, the agency's current president, former Republican Congressman John Erlenborn, in an appearance before a House Judiciary Subcommittee, characterized the disabling restrictions imposed by the 104th Congress under Newt Gingrich as reforms that reaffirmed "the federal government's commitment to providing free legal assistance to poor Americans."<sup>70</sup> Mr. Erlenborn's testimony earlier this year focused on "effective oversight" and "compliance with applicable Federal law and regulations."<sup>71</sup>

Ironically, however, the Legal Services Corporation may be the only federal agency that can claim over ninety-five percent of its funds are used to provide direct services.<sup>72</sup> And despite the never-ending call for accountability, the agency has been scandal free, unless you treat the political invective and accusations hurled by groups like the Christian Coalition and the Heritage Foundation as fact. Ralph Reed, former executive director of the Christian Coalition, joined in the Gingrich era chorus demanding the agency's abolition.<sup>73</sup> Reed circulated the claim that by representing poor women in divorces, legal services lawyers undermine American values by "subsidizing divorce and illegitimacy."<sup>74</sup> The logic of this is dizzying—as if providing poor criminal defendants with lawyers subsidizes crime. In

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69. Quigley, *supra* note 13, at 261-64 (noting that as a result of the restrictions imposed, class action litigation, challengers to the welfare program, and law reform by "poor people's lawyers" have almost all completely ceased); see LEGAL SERVICES CORPORATION TWENTY FIFTH ANNIVERSARY ANNUAL REPORT, *supra* note 5, at 10; LEGAL SERVICES CORPORATION PAPER: THE IMPACT OF FISCAL YEAR 1996 CUTS ON THE LEGAL SERVICES DELIVERY SYSTEM; see also Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1353-56 (1996), reenacted in the Omnibus consolidated Rescissions and Appropriations Act of 1997, Pub. L. No. 104-208, § 502, 110 Stat. 3009 (1997).

70. John Erlenborn, President, Statement of the Legal Services Corporation 2 (Feb. 28, 2002) [hereinafter Erlenborn Testimony], available at [http://www.lsc.gov/pressr/pr\\_t\\_3102.pdf](http://www.lsc.gov/pressr/pr_t_3102.pdf).

71. *Id.* at 2-3.

72. LEGAL SERVICES CORPORATION, BUDGET REQUEST FOR FISCAL YEAR 2002, *Executive Summary*, available at <http://www.lsc.gov/pressr/budgdocs/FY2002BRF.doc>; Terry Brooks, *The Legal Services Corporation: 2001 and Beyond*, 40 No.1 JUDGES' J. 30, 31 (2001) (stating that the allocations are made to various individual local non-profit corporations around the country that provide direct services).

73. Henry Cohen, *The Legal Services Corporation*, CRS Report for Congress 95-470A, CRS-4 (July 5, 1998).

74. *Id.*

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1995, the Heritage Foundation issued a report entitled, "Why the Legal Services Corporation must be Abolished."<sup>75</sup> In it, the Heritage Foundation claims, "Legal Services has helped destroy the independence and dignity of poor people and to create a permanent underclass."<sup>76</sup>

#### IV. THE PRICE OF JUSTICE IS NOT CHEAP

So, is the opposition to the Legal Services Corporation founded on principle, or is it little more than raw politics? And why does the universally accepted principle of equal access to justice prove so divisive and inspire such vitriolic political discourse? While Congressional opponents of the agency enthusiastically draw the line on using other people's money to pay for lawyers for the poor, they have no reservations about using other people's money to pay for their own lawyers. For years, members of the House and the Senate faced with ethical and criminal charges have used campaign funds to retain the best and most famous lawyers money can buy.<sup>77</sup> Recently defeated California Congressman Gary Condit spent well over \$100,000 in campaign funds to retain the powerful law firm of Manatt, Phelps and Phillips to assist him in navigating the investigations surrounding the disappearance of Chandra Levy.<sup>78</sup>

Another source of money available to members of Congress are legal defense funds. Federal law permits the use of legal defense funds because an individual covered by the Ethics Reform Act of 1989 can accept a gift if it's done under regulations published by the person's "supervising ethics office."<sup>79</sup> The law specifies, however, "no gift may be accepted . . . in return for being influenced in the performance of any official act."<sup>80</sup> The Senate Select Committee on Ethics has issued regulations governing the use of trusts to defray legal expenses.<sup>81</sup> Senate rules allow a member to establish a legal defense

75. HERITAGE FOUNDATION REPORT, *supra* note 3.

76. *Id.*

77. See DWIGHT MORRIS & MURIELLE E. GAMACHE, HANDBOOK OF CAMPAIGN SPENDING, MONEY IN THE 1992 CONGRESSIONAL RACES 24 (1994); Johnny Carter, Note, *To Provide For The Legal Defense: Legal Defense Funds and Federal Ethics Law*, 74 TEX. L. REV. 147 (1995) (describing the broad legality of defense funds); Harvey Berkman, *Legal Defense Funds are Pol's Latest Perk*, NAT'L L.J., Dec. 11, 1995, at A1.

78. See *Why Condit Refuses to Resign*, at [http://www.politicsol.com/editorials/editorial\\_2001\\_08\\_26.html](http://www.politicsol.com/editorials/editorial_2001_08_26.html) (last visited Mar. 3, 2003).

79. 5 U.S.C. § 7353(a)(B).

80. *Id.*

81. See Select Committee on Ethics, Regulations Governing Trust Funds to Defray Legal Expenses Incurred by Members, Officers and Employees of the U.S. Senate, S. Res. 508, 96th Cong. (2d Sess.) (1980) (adopted Sept. 30, 1980; amended

trust when he “reasonably expects to incur legal expenses in the course of any investigation, civil, criminal, or other legal proceeding relating to or arising by virtue of his or her service in or to the Senate.”<sup>82</sup> The rules permit contributions up to \$10,000 from any one source in a fiscal year.<sup>83</sup> A lawyer or law firm can provide pro bono legal assistance in excess of the \$10,000 limit but if a firm does provide pro bono representation, the only burden that attaches is that for six months following termination of the representation, the law firm cannot lobby the Senator it is assisting.<sup>84</sup> No such prohibition, however, applies to lobbying the Senator’s friends down the aisle before the six-month moratorium on lobbying the client expires.<sup>85</sup>

On the House side, the House Ethics Manual provides that a member may use campaign funds to defend legal actions arising out of their campaign, election, or performance of their official duties.<sup>86</sup> The manual permits “the protection of a member’s reputation and presumption of innocence to be a valid political purpose.”<sup>87</sup> Besides the use of campaign funds, the House Ethics Manual allows a member to set up a legal defense fund in the form of a trust.<sup>88</sup> The trust cannot accept contributions of more than \$250 a year absent a waiver from the Committee on Standards and once a waiver is obtained, contributions cannot exceed \$5000 in a single year from any one individual or organization.<sup>89</sup> Although legal defense funds are treated differently among the executive branch, the House, and the Senate, what they have in common is that they permit members of Congress and executive branch officials to use other people’s money to secure equal justice.<sup>90</sup>

Newt Gingrich, Enid Waldholtz, Joseph McDade, Dan Rostenkowski, Nicholas Mavroules, Harold Ford, Wes Cooley, and most recently Gary Condit, along with many other current and former

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Aug. 10, 1988, *reprinted in* 2003 ed., App. I).

82. *See id.* at 3.

83. *Id.* at 5.

84. *Id.*

85. *See id.* (barring only lobbying of the Senator who has received pro bono representation).

86. Ethics Manual For Members, Officers and Employees of the U.S. House of Representatives, The Committee on Standards of Official Conduct, 102d Cong. (2d Sess.) (1992).

87. *Id.* at ch. 2.

88. *Id.*

89. *Id.*

90. *See Carter, supra* note 77, at 153 (listing defense funds created for President Clinton, numerous Senators and Congressmen).

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members of Congress on both sides of the aisle, have all enthusiastically used other people's money to pay for legal representation.<sup>91</sup> On the Senate side, Orrin Hatch, Kay Bailey Hutchison, David Durenburger, Bob Packwood, Alan Cranston, Joe Biden, and Al D'Amato are among those current and former senators who have established trusts to collect donations to pay for legal representation.<sup>92</sup>

Former Senators Bob Packwood and Brock Adams used their funds to defend against sexual harassment charges.<sup>93</sup> Texas Senator Hutchison used her legal expense fund to defend against charges stemming from her tenure as state treasurer of Texas.<sup>94</sup> Representative Wes Cooley used campaign money to pay lawyers to rebut media reports he fabricated his war record.<sup>95</sup> Former House Speaker Newt Gingrich used campaign funds to pay his lawyers hundreds of thousands of dollars at the rate of \$250 an hour to defend him against ethics charges.<sup>96</sup> Members of Congress have paid well over a million dollars of other people's money to guarantee their own access to equal justice.<sup>97</sup> Former Gingrich spokesperson, Tony Blankley, in response to his former employer's legal problems and use of campaign funds to pay legal counsel, pointed out the "price of justice is not cheap."<sup>98</sup> Members of Congress, however, are not alone in their use of other people's money to gain access to justice. Bill Clinton and Hillary Rodham Clinton raised large sums of money through the use of a legal defense fund to pay their lawyers.<sup>99</sup>

91. *Id.* at 153-54; Viveca Novak, *Paying Lawmakers' Legal Eagles*, ORLANDO SENTINEL, Nov. 28, 1993, at G-1; Scott Sonner, *Cooley's Campaign Funds Can Be Used For Legal Fees*, PHILADELPHIA INQUIRER, June 28, 1996, at A-12 (allowing funds to rebut media reports, but not for criminal defense).

92. See Carter, *supra* note 77, at 153-54 (noting that these funds have become common).

93. See *id.* at 168 (stating that all legal defense fund expenditures be connected to either the administration of the fund or to legal defense).

94. *Id.*

95. *Congressman Indicted on Charge of Lying About Service in Korea*, N. Y. TIMES, Dec. 12, 1996, at A29 (reporting that the Representative was indicted on charges that he lied about his service record on official voters' pamphlets).

96. *Inadmissible: Newt's Fees*, LEGAL TIMES, Aug. 14, 1995, at 3 (explaining that Gingrich's charges include using a non-profit organization to fund a college course and signing a book deal with a company that has significant issues before Congress).

97. Berkman, *supra* note 77, at A1 (stating that the total amount raised for Congress was nearly \$6 million).

98. Mary Jacoby, *Ethics Case Costs Gingrich \$120,000 in Attorney's Fees*, ROLL CALL, Aug. 10, 1995, at 1.

99. See Carter, *supra* note 77, at 153; Stephen Labaton, *Clinton Defense Fund Is Shrinking Rapidly*, N.Y. TIMES, Feb. 28, 1997, at A4 (adding that Whitewater expenses were more than \$2 million).

So can anyone seriously dispute the vital importance of legal counsel? There would seem to be almost universal bi-partisan agreement on this issue. The dispute, however, seems to arise over how the poor's legal counsel is paid. Which leads us to ask whether the use of other people's money, either through the use of legal defense funds or campaign funds, is more principled than using federal funds to secure equal access to the courts for America's poor? Certainly a ready distinction can be drawn between the sources of the funds, but just beyond this distinction lies rank political hypocrisy. It's unlikely any Congress member's campaign literature implores citizens to contribute because he might need money to have counsel if he is indicted or accused of unethical conduct. The only reason members of Congress can successfully raise funds for a legal defense fund is *because* of their status as elected federal officials. Would anyone knowingly contribute money to help private citizen Wes Cooley defend his war record? Or help Gary Condit avoid scrutiny over his relationship with Chandra Levy?

The importance of legal counsel and its relationship to equal justice is evident in nearly every facet of American life today. While President Bush and former President Bill Clinton would seem to have little in common, politically or otherwise, both know full well the importance of effective legal counsel and the importance of other people willing to help them pay to secure legal counsel. For Clinton, legal representation allowed him to save his presidency, while for George W. Bush, access to legal representation won him the presidency. Even the bankrupt and universally shamed Enron Corporation can afford to pay millions in legal fees.<sup>100</sup> In the *first four months* after Enron's collapse, the lawyers working on the bankruptcy billed \$61,656,965.00 (million) in attorney's fees in their quest to secure justice for Enron and its creditors.<sup>101</sup> This figure almost equals more than twenty-five of Congress's current appropriations for legal assistance for all of America's poor for an entire year.<sup>102</sup> By way of further comparison, the net operating income of *only* the twenty largest firms in the District of Columbia in 2002 was over one billion dollars.<sup>103</sup> In 1980, the gross national

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100. *Inadmissible: Running Up the Enron Fees*, LEGAL TIMES, June 24, 2002, at 3 (reporting that Enron's lead counsel for bankruptcy is charging over \$23 million in fees and \$2.2 million in expenses).

101. *Id.*

102. Rhonda McMillion, *Focusing Priorities: ABA Leaders Identify 10 Key Issues for Advocacy Efforts in Congress*, 88 A.B.A. J. 60, 61 (2002) (explaining that funding is currently at \$329 million).

103. *What the Firms Got to Keep*, LEGAL TIMES, June 30, 2003, at 30 (stating that



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product of the legal profession in the United States was estimated at thirty billion dollars.<sup>104</sup>

Twenty years later, the amount would surely be in the hundreds of billion dollars. But should you be a farm worker paid less than the minimum wage, an impoverished mother living in public housing facing eviction, a Medicaid recipient facing termination of her benefits, or an illegal immigrant in need of health care, you may or may not have access to a lawyer. First, your area's legal services program may only be giving brief counsel and advice through a telephone hotline because of funding shortages caused by Congress's zero growth funding. Second, your lawyer will be restricted in what type of relief she can pursue because class actions, legislative advocacy, and cases involving claims that permit statutory fees are all strictly prohibited. Third, you might not be eligible because while desperately poor, you may earn a few hundred dollars too much in income, or you may not be a United States citizen.

#### V. WILL THE CIRCLE BE UNBROKEN: POLITICS OR PRINCIPLE?

When Dorothy, the Tin Man, the Lion, and the Scarecrow reached the Land of Oz, and Toto pulled back the curtain on the Wizard of Oz, what they found was a small ordinary man—devoid of the majestic powers of a great, wise, and powerful wizard. When it comes to the subject of Congressional support for equal justice for the Nation's poor, what you find behind the decades old curtain of vitriolic opposition to this tiny federal agency is not principled opposition but hypocrisy—and a specie of hypocrisy that is particularly troubling because its practitioners are willing to deny others equal justice while taking measures to insure it for themselves.

Congress's disparate approach to equal justice for the poor and for themselves is as disturbing as it is shameful. As Congress currently deliberates funding levels for the agency for fiscal year 2004, liberal Democrats led by Senator Edward Kennedy, as well as the ABA, support increased funding in the amount of a fifty-one million dollar increase.<sup>105</sup> In 2003, LSC received \$336 million, which included a

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the highest net operating income was over \$100 million).

104. Lloyd N. Cutler, *Conflicts of Interest*, 30 EMORY L.J. 1015, 1016 (1981) (stating that the figure came close to the monetary compensation for U.S. farmers).

105. See Letter from Senators Kennedy, Biden, Sarbanes, Murray, Levin, Wyden, Bingaman, Durbin, Kerry, Reed, Harkin, Landrieu, Rockefeller, Edwards, Breanx, Stabenow, Daschle, Cantwell, Kohl, Clinton, Feingold, Corzine, Lautenberg, Dayton, Pryor, to Senators Judd Gregg and Ernest F. Hollings of the House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, and Lincoln, requesting an increase of \$51 million in funding for the LSC in Fiscal Year 2004 to meet urgent need (May 23, 2003), at <http://www.lsc.gov>.

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one time \$9.5 million payment to accommodate for changes in the 2000 census.<sup>106</sup> The House Appropriations Subcommittee on Justice, State, the Judiciary, and Related Agencies has approved a budget of \$339 million.<sup>107</sup> The Bush Administration, however, recommends that funding be decreased to \$329 million.<sup>108</sup> This figure is only slightly more than the agency's 1991 \$328.2 million appropriation. Progress continues to be slow and all too often only temporary. The price of justice is not cheap, but the consequences of our failure to provide equal justice for the nation's poor will prove to be even more costly.

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106. *But see Legal Services Corporation Receives \$9.5 million Boost From Congress*, Legal Services Corporation Press Release (Feb. 14, 2003) (reporting that this increase is the first in three years), at <http://www.lsc.gov/pressr/releases/021403pr.htm>.

107. Brennan Center for Justice at NYU Law School Legal Service E-lert, July 11, 2003.

108. *Id.*