THE ROLE OF COMPETITION IN MAKING GRANTS FOR THE PROVISION OF LEGAL SERVICES TO THE POOR

BY
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In the fall of 1988, popular notions about the potential value of competition formed the basis for a dramatic shift in policy about the provision of legal services for the poor through the nation Legal services Corporation (LSC). At the urging of a coalition of politically conservative anti-legal services activists and members of the substantially discredited Board of Directors of the Legal Services Corporation, a Reagan administration proposal that legal services grants be awarded on a competitive basis was accepted by Congress. Although Congress delayed implementation of the provision until President Bush appointed and the Senate confirmed a new Board, it appeared possible that the existing system for delivering legal services to the poor might be fundamentally altered.

This article examines the history and expectations behind the legislation requiring a system for awarding legal services grants competitively. After setting forth the competitive award requirement, it considers the theoretical advantages claimed for competition and concludes that use of a competitive bidding system to make grants for the provision of free legal services to the poor probably will not produce the promised benefits. Non-market, non-profit provision of such services to third party beneficiary clients to accomplish a broad array of value-laden, non-monetary social objectives does not fit the economic model in which competition offers such gains.

If Congress requires use of a competitive system, theory suggests that cost-based criteria will dominate over quality concerns, that system administrators will value easy-to-achieve counts of cases above difficult-to-measure social objectives, and that Legal Services Corporation authority over local program priorities regarding types of cases to handle and professional standards of

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practice will increase. As a result, existing legal services providers for the poor will either evolve into or be replaced by new entities that will give priority to cases with little social, economic or political importance. This new generation of legal services programs will provide high volume and low quality service to individual poor people. The dramatic effectiveness and zealous, client-based advocacy of current programs will give way to ineffectual advice and minimally competent representation. Additionally, the cost of service will increase (particularly in comparison to the benefit obtained by poor people) and the legislative purposes for which Congress has defended the program during the last decade will be undermined. The scales of justice will tip ever more clearly toward the powerful and away from the powerless.

In addition, an examination of the political context in which the competition requirement arose demonstrates that the requirement was not offered and is unlikely to be implemented in "good faith" as an effort to improve the quality, effectiveness or economy of current legal services delivery. Instead, the Corporation's conservative leadership will use the device of competitive bidding in precisely the way they intended when they proposed it — as a tactical device to accomplish portions of their long-term, destructive agenda for legal services.

Congress should not permit the conservative campaign against legal services to parlay its political success in the waning hours of the Reagan administration into a tool for undermining the high quality, effective and economical representation of the poor provided by legal services programs. Congress should revise the current provision during the process of reauthorizing the Legal Services Corporation in 1992. The Corporation should be limited to conducting appropriate studies and experiments regarding a more narrow and focussed use of competitive grant making systems until it has proven that it has the competence and the trustworthiness to implement the results of its study. Competition can have a role in making legal services grants, but not the broad, thoughtless and disingenuous role advanced by current law.

I. THE COMPETITION AWARD RIDERS

Congress enacted the "competitive award" language as a rider to the omnibus appropriations bill for the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies for the 1989 fiscal year.[1] The provision required the LSC to:

> . . . develop and implement a system for the competitive award of all grants and contracts, including support centers. to take effect after September 30, 1989.[2]

The rider was the final product of nearly eight years of conservative attack

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[1] Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186 (1988); H.R. 4782, 100th Cong., 2d Sess., § 605 (1988).

[2] 102 Stat. 2227.

on local legal services programs by President Reagan and his appointees to the LSC Board.[3] After a lobbying blitz in September 1988, House and Senate Conferees dealing with the appropriations bill adopted president Reagan's proposal that competitive bidding be used in making grants. The conferees were not willing, however, to allow a Reagan-appointed LSC Board to implement this requirement. Instead, they directed that only an LSC Board nominated by a new President and confirmed by the Senate could "develop and implement" the grant provision.

The conference committee realized that developing an appropriate competitive award process would be difficult, but concluded that it would be worthwhile to consider the possible gains that competition might bring to the legal services system. Consequently, the committee noted that it had approved the rider "to permit full exploration of competitive system that will continue to meet the needs of poor clients throughout the country."[4]

When George Bush became President in January, 1989, appointment of an LSC Board was not at the top of his agenda. The Reagan Board ultimately held over in office throughout 1989. Clark Durant, however, stepped down as Chairman of the Board and was replaced by fellow Board member Michael Wallace from Mississippi. Wallace had served as Chairman of the Board's committee on regulations; his approach as Chairman of the Board was consistent with his approach in that committee. Chairman Wallace proposed revised regulations concerning local program use of funds from sources other than LSC, concerning attorneys fees and concerning client eligibility for services. He also drafted a new regulation prohibiting local programs from doing any work relating to redistricting (i.e. the redistricting that would follow the upcoming 1990 census).

The LSC's Budget Request for Fiscal Year 1990 sought a special appropriation of $1 million for the development and implementation of a system for competitive grants.[5] Testifying before a House committee in March 1989, LSC President Terrance Wear urged Congress to expand the competition provision by explicitly eliminating restrictions on LSC's power to defund

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[3] The story is told in fuller detail *infra* pp. 20-26.

[4] H.R. CONF. REP. NO. 979, 100th Cong., 2d Sess. 73 (1988). The history of the provision is perceptively presented in Terry Roche's excellent article, LSC's *"Competitive Bidding" Scheme: Where Did It Come From?...What Is It?...Where Is It Going?...And How Will It Help "Real Clients with Real Pain Who Have Real Legal Problems"?* 4 LEGAL SERVICES CRISES AND CONCERNS, No. 1, p.5 (Summer 1989 Update).

[5] Legal Services Corporation, Budget Request for Fiscal Year 1990 (submitted in 1989). LSC promised to use the funds to expand the base of service providers within each service area and for particular types of cases in order to "encourage[e] program adherence to contract terms and principles of managerial efficiency." *Id.* at 22. In addition, LSC indicated a desire to deal with the local programs that are "rigid and resistant to the changes necessary to ensure maximum efficiency and responsiveness to client needs." *Id.* at 21.

existing grantees.

In the same month, LSC published a new newsletter, featuring an article reporting the LSC Board's success in obtaining passage of the competitive award rider.[6] On page three there appeared a full-page letter to "Bar Members" from Terrance Wear, which included this statement: "As President of LSC, I invite you to consider applying for a grant to provide high quality, day-to-day legal services to eligible clients in your area."[7]

In May, LSC staff published for comment a proposed regulation on "Competition and Peer Review Procedures."[8] LSC explained its action as one intended to "facilitate timely compliance with the mandate by Congress [for a competitive award system] after a Board of Directors is appointed and confirmed."[9] The proposed regulation set forth six proposed criteria on which LSC would make competitive award decisions.[10] The criteria included no mention of "quality" or "effectiveness" as standards for reviewing competitors' bids. The regulation also included a provision authorizing awards to two or more providers to serve the same geographic area.[11]

Senator Rudman was furious that the holdover Reagan Board and President Wear had taken action instead of leaving competition to the Board about to be appointed.[12] Acting through a supplemental appropriation for the first time in the seven year struggle to protect legal services, Congress intervened once more to stop the Reagan Board. A rider to the dire emergency supplemental appropriation bill barred implementation of the regulations on private funds and fee generating cases and explicitly directed the holdovers not to "consider, develop or implement any system for the competitive award of grants."[13]

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[6] *See* THE LEGAL SERVICES RECORD, vol. 1, no. 1, at 1 (1989), in author's files. The bottom of the page was a business reply mail tear-off postcard with the checkoff: "Please send me information about participating in the upcoming competition for Legal Services Corporation funds."

[7] *Id.* at 3

[8] Legal Services Corporation, Competitive Bidding for Grants, 54 Fed. Reg. 22787 (1989) (to be codified at 45 C.F.R. pt. 1633) (proposed May 26, 1989).

[9] *Id.*

[10] The proposed 45 C.F.R. § 1633.5(a) included these criteria: appropriate types of cases, clear objectives including realistic projections of the number of cases to be handled, a sound project design, adequate management structure, demonstrated organizational capability and reasonable costs for the activities proposed.

[11] *Id.* at § 1633.3(c).

[12] *See* Roche, *supra* note 5, at 9-10

[13] Veterans Affairs Bill, Pub. L. No. 101-45, 103 Stat. 121; H.R. REP. 2402 101st Cong., 1st Sess. (1989). The Act States:

> None of the funds . . . shall be used by the Corporation Board, members, staff or consultants, to consider, develop or implement any system for the competitive award of grants until such action is authorize pursuant to a majority vote of a Board of Directors of the Legal Services corporation composed of eleven individuals nominated by the President after January 20, 1989, and subsequently confirmed by the United States Senate, except that nothing

On January 22, 1990, acting only 18 hours before Congress returned from its holiday, President Bush used his recess appointment powers for the first time to replace the Reagan Board with his first LSC Board.[14] Yet, by the end of 1990, the President still had not managed to submit the names of the full group of nominees to the Senate for confirmation. As a result, their recess appointments expired when Congress adjourned in the fall.[15] In the absence of a confirmed Board, Congress continued the many provisions of the 1990 affirmative rider into Fiscal Year 1991. But it made one interesting change. The new rider contained the restriction that no regulations made by the LSC Board during F.Y. 1991, even if made by a confirmed Board, could take effect prior to October 1, 1991. This provision seems to afford Congress an opportunity to enact a new affirmative rider, if it so desires, before new regulations can take effect.[16]

In 1991-1992, the issue of developing and implementing a system for the competitive award of grants promises to lead the legislative and administrative agenda of the legal services community. For the first time since 1977, Congress may carry out a full process to consider reauthorization of LSC.[17] In the process, Congressional committees are likely to closely examine the terms of any competitive system. Given the record, Congress appears unlikely to allow LSC unfettered control over the issue. But it is possible that the beguiling attractiveness of competition will blur the critical issues involved

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herein shall prohibit the Corporation Board, members, or staff from engaging in-house reviews of or holding hearings on proposals for a system for the competitive awards of all grants and contracts, including support centers...

The careful reader will note that the new language drops the word "all" from the primary defini tion of the grants and contracts to which the system for competitive awards will apply, although LSC retains the right to conduct in-house reviews or hold hearings on proposals for awards of all grants and contracts. It remains to be seen whether this language change, which continues in the appropriation for Fiscal Year 1991, holds any significance.

[14] *See* Lewis, *Bush Replaces Leadership of Legal Services for the Poor*, N.Y. Times, January 24, 1990, p. A14.

[15] President Bush recess-appointed eight of the eleven to another term, and named three new individuals to fill the remaining positions. See Project Advisory Group, Update, January 3, 1991. The appointees were subsequently nominated for regular terms and their names were submitted to the Senate for confirmation during 1991.

[16] However, in almost every year in the 1980s, congress failed to appropriate funds for LSC before mid-October. If that happened in 1991, there would be a window of opportunity for regulatory action by LSC in early October.

[17] All of the riders imposing conditions on the legal services programs and LSC have been attached to appropriations bills, which are theoretically supposed to contain only provisions related to funding. Constitution - Rule XXI, section 2(b), Jefferson's Manual and Rules of the House of Representatives of the U.S. Congress, 100th Cong., House Document No. 99-279 (1987). The last reauthorization to revise the terms of the underlying Legal Services Corporation Act of 1974, Pub. l. No. 93-355, took place in 1977. Pub. l. No. 95-222.

for the poor and do damage to their best tool in the struggle for justice.

This article seeks to clarify some of the reasons that these decisions loom so large. The conservative forces that have invested a decade in the effort to obtain the right to impose competition are not wrong. A system for the competitive award or operation of grants does have the potential to undermine high quality, effective and economical delivery of legal services — excellence that Congress and the organized bar have fought to foster and preserve.

Competition may have a useful, if limited, role to play in legal services grantmaking, but introducing competition to the process of awarding all annual LSC grants will prove expensive and destructive.

II. THINKING ABOUT COMPETITION IN THE CONTEXT OF LEGAL SERVICES FOR THE POOR

An LSC Board will eventually be confirmed and, then, under the rider, it will be free to make decisions about the role of competition in awarding grants and contracts. When congress passed the rider, it knew enough about the destructive potential of competitive systems in the hands of a hostile LSC Board to suspend development and implementation until a new Board was confirmed. But that same Congress, despite its caution, chose competition, over all the other issues pressed by opponents of legal services, as the one on which to compromise.[18] What is it about competition that seemed so attractive?

A. *The Simple Attractions of Competition*

Think of tenured law professors - the ones that have slipped a lot since they were granted tenure. They teach the same old courses, with a little updating. They allow themselves to get stale and out of touch as their fields continue to change. They don't pay much attention to the ways that their students are also changing: arriving with different histories than their predecessors, presenting new demands and graduating into a practice environment that bears little resemblance to the legal world that surrounded these professors when they graduated from law school.

Why does this happen? Perhaps it is because they don't have to compete in order to earn their living.[19] Their future employment is assured. Without the threat that someone who teaches better, or cheaper, will take their job, they have little or no institutional incentive to undertake new research, develop better or more precise ideas, or teach more effectively. The quality and quantity of their work as law professors therefore declines.[20]

Almost certainly the same decline affects some legal services lawyers. By my observation, it tends to occur in legal services programs that have little

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[18] *See infra* pp. 20-26, for a description of the campaign waged by these opponents.

[19] *See* B. A. WEISBROD, THE NONPROFIT ECONOMY 53 (1988).

[20] Note that most law professors appear to avoid this decline. Perhaps their motivation derives from something other than the terms of their employment.

supervision, weak sense of direction and rarely fire people who fail to perform. These failing legal services lawyers seem to have exhausted their initial supply of energy and commitment. Perhaps they "burn out" under the constant pressures of high caseload, low pay, poor working conditions and low professional status. Or, perhaps, the depressing life stories and intractable underlying problems of many of their clients may have overcome these lawyers' problem-solving creativity. Like the declining tenured professors, if nothing in their legal services institution remotivates these lawyers, they may gradually lose touch with the effectiveness or meaning of their efforts as they slog through their casehandling routines.

Competition is a tool, a means for accomplishing something. An economist might suggest that it is a tool for distributing resources "efficiently," by which the economist would mean "according to the demand." Generally, a competitive mechanism maximizes efficiency by relying on price. For example, an owner of goods or services sells them to the highest bidder. Potential purchasers competing for a scarce good or service drive the price up until the right number of buyers remain willing to make a purchase. The seller offering the good or service at the lowest possible price will make the sale. If potential sellers competing to make the sale to a limited number of buyers exist, on the other hand, the price will fall. Economic "efficiency" involves finding the "right" distribution of supply to meet demand through the mechanism of price.

In the competitive model, organizations as well as individuals behave efficiently in the marketplace. The model posits that, without competition, organizations will maximize profits by increasing their prices and lowering the quality of their goods and services. This makes consumer expenditures less efficient and wastes resources. Put another way, the competitive model holds that a market based on completely efficient competition drives prices down and improves quality until the return to capital reaches the level available from other investments and establishes an equilibrium. Moreover, through competition, consumer behavior becomes more efficient because prices that reflect the market value of goods and services optimize the allocation of consumer resources among alternative uses.

During the Reagan presidency, two major initiatives were mounted to encourage market-based competition as the tool for allocating scarce public and private resources. The administration sought to replace the preferences of government bureaucrats with the competitively produced choices of the marketplace. First, President Reagan's campaign favored "deregulation" whenever possible; David Stockman led the Office of Management and Budget under this banner. They sought to remove legislative and regulatory impediments to free market behavior.

The other Reagan administration initiative involved "privatizing" some government activity. In part, privatizing sought to streamline the allegedly bloated government payroll to reduce bureaucracy, lessen the entrenched levels of administrative paperpushing and return the country to what the administration considered a more appropriate balance between public and

private employment. In addition, it sought to place work that did need to be performed in the hands of private organizations, both for profit and non-profit, that would be subject to the pressures of the marketplace. It was asserted that privatization, because it would bring the workings of competition into play, would reduce the cost and increase the quality of goods and services.

B. *Competitive Markets and Free Legal Services*

Regardless of whether the theory behind deregulation and privatization was appropriately applied elsewhere, this article concludes that it is not properly employed when it is used to impose a competitive model on the process of making annual grants to provide free civil legal services for the poor. But the problems with applying the theory of competition in this context were not immediately apparent to a Congress full of lawyers. After all, attorneys in private practice sell their services to clients for a price. Increased competition among private law firms has preoccupied lawyers and their professional associations throughout the past decade.[21] Of course, the simple economic model of price mediating supply and demand quickly gets convoluted in the real world in which lawyers sell services: a world of regulated markets, restrictions on entry, limited flows of information, infrequent purchasers, and technical services that are made-to-order, hard to view and difficult to measure qualitatively. Nevertheless, economic theory suggests that price competition is possible in the legal market.[22]

Legal services programs do sell services, but the market in which they operate remains very different from the market in which private attorneys and law firms sell services to paying clients. Almost no consumer-based market for legal services to the poor exists.[23] People lacking discretionary

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[21] *See* A.B.A. Commission on Professionalism '. . . *In The Spirit Of Public Service': A Blueprint For the Rekindling Of Lawyer Professionalism* 8-9.

[22] I.e., prices will fall if there is an abundance of sellers compared to demand. Sellers will vie with one another either to improve their services or to convince buyers that their services are superior. Similarly, buyers will get the most for their resources for hiring lawyers if the market is maximally competitive.

[23] A recent legal needs survey conducted for the American Bar Association does disclose some legal services used by the poor that cannot be easily accounted for as the result of free legal help form legal services and pro bono programs. The Spangenberg Group, Inc., *National Survey of the Civil Legal needs of the Poor*, in Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal needs of the Poor and of the Public Generally (A.B.A Consortium on Legal Services and the Public 1989). It seems possible that many of these instances involve fee shifting (a moderate income husband paying for his low income wife's layer), contingent fees (in tort matters) and situations in which the person surveyed is reporting a lawyer use which occurred when the person was not poor. There is no doubt, however that people living beneath 125% of the poverty line do sometimes manage to scrape some funds together when there is no other way to get desperately needed legal help. Among the sources of these funds are relatives, friends and funds set aside for rent.

income have little or no ability to pay for legal services, regardless of how much the seller reduces the price. Moreover, few attorneys will choose to compete on any basis for clients who often utterly lack the ability to pay a fee.[24] The real market in which legal services programs sell their services bears little resemblance to the traditional lawyer-client market.

Instead, the market in which legal services programs are actually selling their services is a market in which the buyers are grant sources like the LSC.[25] The clients of legal services programs are no more than third party beneficiaries in these sales. The relevant transactions in this market are the grant processes and oversight actions of LSC and its grant recipients. The economically muted demand of individuals wanting services registers in the market-place only to the extent that either the legal services programs or LSC elects to act as their agent.

At the same time, grants constitute classic examples of adhesion contracts. The grant recipient must either accept all grant conditions or forego the grant. There is no bargaining about the terms. If the grantor acts without proper regard for the clients' interests, or ignores the terms of the legislation creating the grant program, the recipient possesses little direct power to effectively advocate for change.[26]

Thus, the very characteristics that make open competition a theoretically powerful tool in a legal services market — law firms competing for the business of clients, with price as a mediating mechanism — are absent from the market for free legal services. There are no relevant clients making purchases for a floating price. If competition exists in this market, it is competition for and conditions of any transaction is almost without limit. Individual consumers never posses such power in a free market.

Conservatives have long recognized that, in a market dominated by grantor-recipient transactions, the absence of clients making economic choices poses serious threats to the theoretical attractiveness of the competitive model. Thus, several important analyses of the legal services movement have suggested that

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[24] In the late 1960s, I used to hear representatives of the local bar association complain that legal services programs were stealing some of their paying clients. the complaint died out when it began to appear more likely that the presence of a lawyer for a poor person on one side of a case increased the frequency with which lawyers in private practice were hired, or the fee they were paid, to represent the other side in the case.

[25] *See* WEISBROD, *supra* note 19, at 7 (1988).

[26] But note the probably rare exception to this rule which arises if a federal grantee is able to obtain the support of the Congress, or the President, to counterbalance unwarranted or unwanted agency positions. Legal services programs have been able to use this form of market power during the past decade to ensure that poor people will have access to the kinds of legal services anticipated in the Legal Services Corporation Act. *See infra* note 70, which lists many current restrictions on the contracting authority of the LSC.

the system should empower clients to choose the services they want.[27] These analyses conclude that clients would choose simple, individual services over the higher quality forms of representation often made available by legal services programs today.[28]

The most popular conservative proposals suggest that programs should accept clients on a first-come, first-served basis, distribute vouchers to the poor or require clients to make co-payments.[29] All of these proposals have a common failing: they make no commitment to obtain funding sufficient to provide all of the poor with the services they choose to seek. As a result, each system still requires priority choices of some kind, either during client intake or in the paying current market rates for comparable legal work. All rely on non-monetary motivations to recruit lawyers to do the work.

In two critical ways, therefore, these proposals fail to create a true market in which choice, or competition, could realistically emerge. Indeed, these conservative analysts uniformly refuse to contemplate the cost required to create that market. Thus, each of their proposals is nothing more than a sophisticated rhetorical attempt to eliminate local control of priorities in favor of national priorities.[30]

While conservative proposals to give clients economic choice in a way that resembles the private legal market are unsuccessful, conservatives continue to urge the use of competition in this market. Why? Perhaps because they support the political, social and economic goals of the current LSC leadership. They are aware that in the grant market, with a powerful grantor as the only

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[27] *See* D. J. BESHAROV, LEGAL SERVICES FOR THE POOR: TIME FOR REFORM, 20-23 (Am. Enterprise Inst. 1989)(regarding co-payments); Brakel, *Legal services for the Poor in the Reagan Years*, 17 CLEARINGHOUSE REV. 190 (1983)(regarding voucher plans); and Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. REV. 281, 352-363 (1982)(regarding first-come, first served).

[28] My own experience of client choice is quite different. Given adequate information about the limited resources available to legal services programs and the reasons that some kinds of cases (*e.g.*, spouse abuse, homelessness, attempts to change welfare rules, low income housing development, disability benefit claims) receive priority over others, poor people with meritorious claims that fall below the top of the list often acknowledge the good sense of the program's priorities and the relatively lower priority of their won case. Rejected clients usually feel, however, that there should be more funding for the legal services program.

[29] *See supra* note 27 and accompanying text. Co-payments are payments by clients of a part of the cost of the service they receive. The amount might be as small as a few dollars, and might be waived entirely for public assistance recipients.

[30] First-come, first-served is an imposed priority that favors the mobile, knowledgeable and assertive. When vouchers are limited, a voucher system becomes first-come, first-served or its services are rationed by a new system for deciding who receives the vouchers. For co-payments to be a meaningful screening device, they must be set sufficiently high to deter demand. The national design of a co-payments system would effectively set national priorities.

relevant buyer, legal services programs will compete to survive. If additional suppliers of legal services to poor people appear and compete with the existing providers for LSC's funds, the "price" at which legal services programs will try to "sell" their services to LSC will fall, and the types of services they propose to provide will conform more closely to LSC's specifications.[31] The local control of priorities in types of services and quality of services will be largely eliminated.[32]

C. *Competitive Markets and the Nonprofit Objectives of LSC and Legal Services Programs*

The introduction of a competitive model in grant making encounters a second fundamental problem in the nonprofit organizations and objectives of the legal services system. The theory of free competitive markets assumes a market in which profit is the measure of success. This model assesses results solely or primarily upon the ability of a strategy to maximize profits. The model may acknowledge non-monetary incentives for individual or organizational behavior, but generally sets them aside as unmeasurable.[33]

However, both LSC and the local legal services programs are non-profit organizations. They don't seek to maximize "profit." Instead, they seek to accomplish the purpose of federal funding for civil legal services: the provision of high quality, effective and economic representation to the poor in response to the highest priority legal needs in their own low income community.[34] This

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[31] An alternative way for programs to compete is to diversify their funding sources in order to make themselves less vulnerable to the decisions of any single fund source. This diversification was aggressively pursued during the 1980s, when LSC funding was threatened. In 1980, about 12% of the funds received by civil legal services programs came from sources other than LSC. By 1990, the percentage had risen to 37%. Civil programs received $37,662,000 from non-LSC sources and LSC distributed $266,505,111 to those programs in 1980. Dividing the first amount by the sum of the two amounts ($304,167,111, i.e. the total amount received by the programs) yields the percentage cited. For 1990, civil programs received $182,712,000 from non-LSC sources and $305,907,000 from LSC. Again, dividing the first amount by the sum of the two ($488,619,000, i.e. the total received by the programs) yields the percentage cited. LEGAL SERVICES CORPORATION 1989-1990 FACT BOOK: FEDERALLY FUNDED LEGAL SERVICES TO THE POOR 8 (1990).

[32] This result is ironic in light of the Reagan administration's previously noted preference for removing market control from the hands of federal bureaucrats.

[33] *See* WEISBROD, *supra* note 20, at 33-41; ESTELLE JAMES & SUSAN ROSE-ACKERMAN, THE NONPROFIT ENTERPRISE IN MARKET ECONOMICS 19-31 (1986).

[34] The Legal Services Act sets forward these objectives in Sections 1001 and 1007(a)(1) and (3). Pub. L. No. 93-355, 88 Stat. 378 (1974), as amended Pub. L. No. 95-222, 91 Stat. 1619 (1977). various planning processes have elaborated on the meaning of the phrases. In 1981, the LSC Board (a group appointed by President Carter) adopted a mission statement for LSC:

[T]o provide highest quality legal service to all those unable to afford legal assistance in a manner which best enables poor people to assert their rights and inter-

is a multi-faceted, subtle mission, requiring accomplishment of a complete set of goals. Efforts to objectively measure the success of attempts to achieve these goals face great difficulties or may be almost impossible.[35]

Nor are these their only goals. Both LSC and local legal services programs seek to create access to "justice" for the poor. This goal incorporates such strategies as providing access to the court system for people without the ability to hire counsel, creating the opportunity for citizens to be heard in public councils and private deliberations that affect their lives, enforcing the norms expressed in statutes and regulations for the benefit of the generally disenfranchised,[36] improving the legal system in order to fulfill the promises of our Constitution and laws, and assisting poor people in their efforts to gain control over their lives and to escape poverty.[37]

Moreover, LSC and its grantees must rely on employees to carry out their complex nonprofit missions. Particularly in the local legal services programs, salaries are extremely low compared to all other segments of the legal profession.[38] These employees forego substantially higher potential earnings and choose legal services work because they personally want to maximize goals other than their own profit.[39] Their non-monetary personal goals vary widely,

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ests in ways that they themselves choose.

LEGAL SERVICES CORPORATION: PLAN FOR THE FUTURE 2 (adopted Mar. 1981), copy in author's files.

A similar conclusion was reached in a process sponsored by a legal services program trade association, the Project Advisory Group (PAG), in *SLAM Process* (Study of the Legal Assistance Movement 1976-77): "To assist poor people in such fashion as poor people choose, to obtain social and economic justice". *Quoted in* SYSTEMS FOR LEGAL SERVICES: A STEP BY STEP GUIDE TO PLANNING AND DEVELOPMENT FOR LEGAL SERVICES PROGRAMS 3-13 (Greg Krech, ed., Legal Services Corporation 1980). Copy in author's files.

See also J. A. DOOLEY & A.W. HOUSEMAN, LEGAL SERVICES HISTORY (2d Draft)(Center for Law and Social Policy, No. 1985); and A. SINGSEN, HIGH QUALITY REPRESENTATION: THE FUNDAMENTAL PURPOSE OF LEGAL SERVICES FOR THE POOR (Management Project of the National Legal Aid and Defender Association June 1983)

[35] *See, e.g.*, K. Smith , *Indicators/Measures Related to Productivity in Legal Services Program* (1982), in INCREASING PROGRAM EFFECTIVENESS: WORKSHOP PACKAGE (Katherine Farquar, ed.), Nat'l Legal Aid and Defender Assoc. June 1983); *see generally* WEISBROD, *supra* note 20, at 37-38.

[36] The critical nature of this goal is discussed in Heymann, *The Law Enforcement Mission of Legal Services*, 23 CLEARINGHOUSE REV. 254 (1989).

[37] A version of these goals is expressed in the preamble to the Legal Services Corporation Act. L.S.C. Act, *supra* note 34, § 1001.

[38] *See Fiscal Rewards of the Practice*, NAT'L L.J. Mar. 26, 1990, at S2-S12. The qualifications of attorneys choosing to work in legal services makes it clear to the author that these salaries are taken on by choice, not by necessity. *See infra* at 44.

[39] What matters here, of course, is not the respect or disapproval any of these motivations might occasion but the fact that a competitive model based on maximizing monetary profit will, by definition, not maximize accomplishment of these other purposes for doing the work.

including such objectives as answering to an altruistic or religious "higher" calling, fulfilling parental expectations, enhancing the sense of self worth that comes from working for the secular accomplishment of a "better" society, or gaining the special satisfaction of helping the helpless.[40] Of course, there may also be a few individuals who are making a political or religious statement of self-denial, or who are seeking greater autonomy in work, a particular type of lifestyle that suits their personal preferences, or even as much money as they can make.

The subtle and varied organizational goals of LSC and the local legal services programs, and the personal motivations of their underpaid professional employees, have economic meaning. The organizations and individuals will seek, as economic actors, to maximize the accomplishment of their own goals, just as a private law firm seeks to maximize profit. But accomplishment of these objectives is not easily measured. No "bottom line" exists against which to compare costs in order to determine relative productivity. Yet some determination of just such a subtle productivity is required to provide accountability in the receipt and use of funds from the government or from private contributors.

Non-profit organizations are specifically designed to provide for pursuit of complex, non-market objectives with government or charitable funds.[41] Where no bottom line will be available, a group of individuals, the non-profit board of directors, acts on behalf of the multiple objectives of the organization. It determines how to maximize the organization's ability to achieve a complex mix of goals with limited funds in the public interest. Financial gain, by definition, does not enter the picture.[42] The boards of nonprofit organizations evaluate the "bottom line" by comparing the goals accomplished with the resources expended. In this function, the board of directors of the non-profit organization speaks for the public — replacing the market function of supply and demand, mediated by price, and measured by the bottom line profit.

Will a competitive system of awarding grants enhance accomplishment of the complex LSC and local legal services program objectives at reasonable cost? If not — if, for example, a competitive model will emphasize cost and quantity rather than the full spectrum of goals — then Congress should not impose competition on the grant-making system. Competition for its own sake is not one of the goals of legal services.

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[40] *See generally* JAMES & ROSE-ACKERMAN, *supra* note 33, at 50-62.

[41] *See id.* at 19-50.

[42] One-third of local program board members are individuals eligible for services from the program. In addition, sixty percent of the board members are appointed by the local bar associations that have general jurisdiction over the program's service area. Legal Services Corporation, Governing Bodies, 45 C.F.R. § 1607.3 (1989). Board members serve without compensation.

D. *The Problems of Using Competition To Award Legal Services Grants*

A competitive model theoretically improves the efficiency of resource use by mediating the demand of consumers and the supply of legal services through the mechanism of price. But free legal services are provided in a market in which the users of the services do not even participate, a market in which the only consumer demand is that expressed by the LSC. Moreover, federal legal services are implemented through a nonprofit LSC and a group of nonprofit legal services programs because of the variety of non-monetary objectives sought by the Legal Services Corporation Act. These complex objectives are not adequately recognized or pursued through free market mechanisms, such as competition, that ultimately rely on simple "bottom line" measures. If a competitive model is developed and implemented in LSC's grant making process, the operating dynamics of the model and the clearly articulated motivations of LSC officials ensure the undermining of local program control over priorities for service to local poor people and the devaluation of quality in favor of low cost and high volume.

1. Depriving Local Boards of Control of Local Priorities

Introducing a competitive system for awarding renewal grants to existing programs will effectively remove the control of local priorities from the local board and place it in the hands of the LSC. The transfer of power from local client representatives and lawyers to the LSC President and staff, appointed by the LSC Board, will occur because a competitive process will inevitably include a final LSC decision pursuant to LSC standards about the work that LSC considers most important to do in the local program area. As already noted, there will be no market pressures on LSC to conform its behavior to the provider's preferences or perceptions. The competitive system will replace the current practice, in which local legal services programs are entitled to receive renewal grants unless LSC establishes a cause for denying them refunding.[43] In a competitive system, LSC, as the decision maker, will have the discretion to deny refunding without the necessity of establishing cause.

Congress resolved the national battle over priorities in 1977, long before the Reagan election, in favor of decisions made by local boards of directors, composed of members of the local bar and client representatives. It charged these boards with the responsibility of determining what types of cases and what kinds of legal work the local legal and low income community considered important.[44] Congress assigned this power to the local board because it knew that legal needs vary considerably across the country and because it expected that a local decision maker, closer to the facts, would be more responsive to

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[43] *See* 45 C.F.R. § 1625.3 (1989).

[44] *See* Pub. L. No. 95-222, 91 Stat. 1619 (1977) (codified as amended at 42 U.S.C. § 2996(a)(2) (1988); *cf.* Legal Services Corporation, Priorities in Allocation of Resources, 45 C.F.R. pt. 1620 (1989).

local needs.[45] Implicitly, it found that no national body would be as able to assess these local conditions.

Congress assigned LSC the role of providing guidelines for the priority-setting process, and did not assign it the role of deciding among competing visions of which local needs were the most pressing or which approach to allocating scarce legal services would best serve the local poverty population.

Although LSC adherents of competitive bidding have not spoken explicitly to this issue, their intentions are relatively clear. The LSC materials distributed in the summer of 1988 state that grant requests would be "evaluated according to the kinds of services they will provide" and that competition would shift case priorities from reform litigation and legislative advocacy to providing services to individual poor citizens."[46] The same materials make no mention of the local board or its judgment replaced by national decisions about local needs. The proposed regulation on competition, issued by the LSC staff in May 1989, states as a selection criterion: "The types of cases to be handled by the provider . . . are appropriate cases to be undertaken by a legal services provider," and explicitly reserves the final grant decision to the unfettered discretion of the LSC President.[47]

It is certainly possible to ague that a national grant agency should have the authority to determine local priorities about the types of cases to handle and the forms of service to offer. Indeed, any national, grant-making organization such as LSC will probably find itself chafing against any policy that places case priority decisions at the local level. It is natural to wish to shape a program to one's own values. When the office of Economic Opportunity was creating the original system of legal services programs, much greater national direction on priorities existed, at least regarding the types of work the programs would perform.[48] During my service as Vice President of the

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[45] *See* DOOLEY & HOUSEMAN, *supra* note 34, ch. 3, at 5.

[46] Materials distributed to members of Congress by LSC in the summer of 1988 regarding President Reagan's proposed appropriation for Fiscal Year 1989, titled "The Scandal". Materials forwarded to author by Alan Houseman, Director of the Center for law and Social Policy, by letter dated Sept. 22, 1988, in author's file.

[47] 54 Fed. Reg. 22,789 (1989) (to be codified at 45 C.F.R. § 1633.5(a)(1)) (proposed May 26, 1989). The "appropriate cases" criterion has no substantive content. The proposal makes clear that all peer review assessments of grant applications will be advisory; the LSC President will make all grant decisions. *See* 54 Fed. Reg. 22,789 (1989) (to be codified at 45 C.F.R. § 1633.9(f)) (proposed May 26, 1989).

At the time the regulation was proposed, the then current LSC President, Terrance Wear, contemporaneously published an article articulating his belief that legal services programs "need to concentrate their resources on the day-to-day legal needs of poor individuals" and eschew class actions, lobbying, redistricting and other "esoteric" maters. Terrance Wear, *Concentrating On Day-to Day Legal Needs*, 1 LEGAL SERVICES REC., No. 1, at 10-11 (1989); *see supra* note 6.

[48] *See Guidelines for Legal Services Programs* (1967), described in E. JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES

LSC, the temptation to substitute our own national judgments for local ones was very strong.

Of course, Congress could reconsider and decide that the system's priorities should be set nationally, and Congress has regularly tinkered with specific aspects of program services during annual appropriations.[49] But such a change in policy about the best locus for priority decisions should be made explicitly, after full debate, rather than as the unrecognized consequence of a pressured legislative compromise such as the one made in the fall of 1988.

As a policy matter, a shift from local to national priority setting would be unwise. The local board is far more likely to accurately assess local needs and opportunities than the national staff. In addition, the local board is less subject to the ideological winds that so often blow on the national level. The members of the local board, appointed by the local bar association or drawn from the potential client community itself, should be free to make the local priority choices. Note that this same local control will help to protect local programs against manipulation by national agency leadership of the left or of the right that may seek to impose its political agendas on advocacy for the poor.[50]

Congress should maintain an appropriate division of responsibility. It should specify the basic parameters within which the legal services system will operate. For example, current legislation calls for "high quality," "effective" and "economic" representation of clients.[51] Local boards of directors should decide which of the myriad issues among the poor are most important in the community to be served. LSC should administer grants, monitor performance against generally accepted standards, enforce restrictions of the use of LSC funds and help grantees become more capable of accomplishing their local objectives.[52]

2. Measuring Cost Instead of Measuring Effectiveness

The second flaw in the theory upon which competitive processes are proposed for use in making legal services grants arises because of difficulties in defining or measuring the goals and accomplishments of local legal services programs. Unlike the clear bottom line usually available in for-profit settings, one can only measure success in achieving the complex array of purposes pursued by local legal services programs through careful analysis of actual program activity. Important questions to answer in assessing a program's success include: did the lawyer choose the best available legal strategy and obtain the

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PROGRAM 71-102 (1978).

[49] *See, e.g.*, Pub. L. No. 101-515, § 607 (1990), whose eleven affirmative restrictions on the Fiscal Year 1991 appropriation are listed *infra* note 70.

[50] *Cf.* Legal Services Corporation, *Next Steps For The Legal Services Corporation*, at 171 *et seq.* (1978) (Report of Evaluation Mechanisms Task Force). This report recommended a monitoring system based on the goals, priorities and self-assessments made by the local grantees. See also A.L.I.-A.B.A. Committee on Continuing Professional Education, *Practice Evaluation Project* (Oct. 23, 1990) (Draft No. 6).

[51] *See supra* note 34

[52] *See infra* notes 53-55 and accompanying text.

best available result on the facts of each case; how much is changing a welfare policy worth (how much was it sensible to spend on such an effort); what is the value of educating the low income community about its legal rights, or of helping a low income client understand that she has the power to determine what her advocate will do, or of asserting a legal claim which loses? Only by addressing such questions can one compare results and costs to determine efficiency. But use of a competitive bidding process will encourage LSC to ignore all of these questions and substitute simple comparisons of the measurable costs of completing the most routine cases. Relying upon such inadequate comparisons as the basis for grant decisions will dramatically degrade the quality and effectiveness of legal services.

Monitoring. Assessing program performance is expensive. During the first fifteen years of the federal legal services program, gradual improvements in monitoring techniques created the ability to assess individual case services, examine the appropriateness of local priority setting, review internal procedures for technical and professional adequacy and propose methods of improving local services. These monitoring procedures utilized "peer review" techniques.[53] Experts tested specific local systems and questioned the handling of a substantial sample of cases. They based their rating of a local program's activities on their experience with many similar programs. Because several reviewers would examine each system or case, the monitoring process counterbalanced their individual idiosyncracies.

The Reagan LSC boards abandoned most of these monitoring practices. In their stead, LSC instituted program monitoring primarily designed to ascertain whether local programs had violated any rules or regulations. The monitoring effort sought to establish a basis or reducing program funding, disciplining program leadership or demonstrating to the Congress that the local legal services programs were out of control and should be defunded entirely. It treated questions of quality, effectiveness or value of output as essentially irrelevant.

Partly in response to LSC's recent monitoring practices, the American Bar Association's Standing committee on Legal Aid and Indigent Defendants developed a set of Standards for Monitoring and Evaluation of Providers of Legal Services for the Poor, and the A.B.A. adopted them at its February

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[53] Peer review has also been developed as the most effective method for examining the quality, effectiveness and economy of private law firm activities. *See* VOGT, SILVERMAN, WHITE & SCANLON, FIELD TEST RESULTS OF PEER REVIEW: QUALITY ASSESSMENT OF LEGAL SERVICES IN CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY SINCE ARDEN II 243 (A.L.I.-A.B.A. 1984) (reprinted from A.L.I.-A.B.A. CLE Rev. Sept. 17, 1976); *see also* A.L.I.-A.B.A., *Law Practice Quality Evaluation: An Appraisal of Peer Review and Other Measures to Enhance Professional Performance*, Williamsburg Peer Review Conference (1987); A.L.I.-A.B.A. Committee on Continuing Professional Education, *A Model Peer Review System* (April 15, 1980) (Discussion Draft); A.L.I.-A.B.A. Committee on Continuing Professional Education, *Practice Evaluation Project* (Oct. 23, 1990) (Draft No. 6).

1991 meeting in Seattle. The Monitoring Standards are closely related to the A.B.A.'s 1986 Standards for Providers of Civil Legal Services for the Poor, which set forth criteria for determining whether a legal services provider is operating properly.[54]

The Provider Standards and Monitoring Standards call for LSC to send in a team of monitors to conduct on-site reviews of local program performance, pursuant to an agreed set of criteria for assessing that performance. The process consumes time and money, but it constitutes the only proven method of truly effective measurement of local program performance.[55]

In order to assure that grant decisions would maximize accomplishment of the purposes set forth in the LSC Act or called for by local conditions, a competitive bidding process should test actual bidder performance and capability against both standard criteria for provider behavior and relevant local priorities. Normal bidding procedures, however, rarely go beyond the submission of proposals with supporting documents.[56] Indeed, it is hard to imagine a regular system of bidding that would incorporate a measurement approach adequate to the complex objectives normally pursued by legal services programs operating under the LSC Act. Perhaps a bidding process can only be efficient if it can be done on the basis of submissions and discussions. On-site performance monitoring for a half-dozen bidders per grant would require immense effort.

Information Asymmetries. A grantor evaluating the qualifications or performance of a grantee must obtain sufficient reliable information about the grantee. The grantor will seek information of several kinds, including descriptive statistics and cost and performance reports. Unless the grantor can undertake on-site monitoring, however, the grantor often must rely on the grantee (or bidder's) self-interested representations.

Some kinds of grantee information tend to be more reliable than others. Reliable items include data on expenses, number of cases, staffing and other easily measured program characteristics. But, precisely because of the substantial costs to the grantor in checking out grantee data, a potential grantee may be strongly tempted to exaggerate or even fabricate data on more qualitative elements of program performance.

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[54] A.B.A., *Standards for Providers of Civil Legal Services to the Poor* (1986); A.B.A., *Standards for Monitoring and Evaluation of Providers of Legal Services to the Poor* (1991).

[55] This is just a part of a much larger discussion about how to determine and improve productivity in legal services programs. *See* John A. Tull, *Implication of Emerging Substantive Issues for the Delivery System for Legal Services for the Poor*, 24 CLEARINGHOUSE REV. 17 (1990). The same points emerge in such a discussion as here: the need to define the outputs that are sought and the usefulness of measuring against the local program's own standards and prior performance. *See also* REPORT OF EVALUATION MECHANISM TASK FORCE *supra* note 50.

[56] The LSC's proposed regulation governing competition made no mention of on-site performance review or of the A.B.A.'s Standards for Providers. *See supra* note 8.

The accurate application of economic models usually assumes that there will be open and complete information sharing. The models are compromised to the degree that one actor in the model possesses unique information which the other actors either cannot or will not obtain. Such differences between parties in an economic transaction are called "information asymmetries." They can seriously alter the transactions they affect.[57] The party that lacks essential information can be misled about the value it can expect to receive. The efficiency of resource allocation, promised by the economic mode, will not materialize.

Applied in the legal services context, local programs and competing providers control almost all the information about the quality of their services and the relative importance of different kinds of work in the local community. Consequently, local programs and other bidders will have the ability to promise performance that meets LSC's specifications on such issues without actually being required to demonstrate that performance. LSC will be unable to verify these claims unless it decides to go on-site and examine the quality of performance.

The Effect of Bad Measures On Good Measures. The problem is more complex than it appears. Once a grant has been awarded, grantees continue to operate in the world of information asymmetry. The grantor relies on the provider as the primary source of data. Unless the grantor can measure performance based on qualitative criteria, the grantee has an incentive to "chisel" on that performance in order to put more resources into improving results on measures that the grantor can verify. That is, if the grantor cannot determine whether a grantee provided excellent services or just passable services, the grantee will tend to devote resources to providing only passable services. Since lower quality presumably costs less, chiseling on quality will release resources to produce what the grantor can measure; in the legal services context, that is the number of cases and the correlative cost per case.

LSC demonstrated the nature of this invidious process, which drives programs to reduce the quality and effectiveness of their services and to instead increase the count of cases, in a 1985 proposal. Supported by some Board members, LSC staff proposed redistributing some funding based on a table ranking all legal services programs by the number of three different kinds of cases that the programs produced. LSC would financially reward those programs with the highest numbers.[58] Had LSC implemented this proposal, programs would have faced the strongest kind of pressure to emphasize case counts at the expense of other elements of program service that LSC either

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[57] Burton A. Weisbrod, *Rewarding Performance That is Hard to Measure: The Private NonProfit Sector*, Science, May 5, 1989, at 541; *see also* WEISBROD, THE NONPROFIT ECONOMY, *supra* note 19.

[58] Memorandum from Keith Osterhage to Dennis Dougherty, Acting Secretary of LSC Board, (May 30, 1985) (revised June 17, 1985), published in LEGAL SERVICES CORPORATION COMMITTEE ON AUDIT AND APPROPRIATIONS (June 27, 1985) (in author's files).

had not or could not review.

Using competition as a device for grant making among possible non-profit providers will similarly exacerbate the problems information asymmetries pose. It will create explicit and powerful pressures on LSC, even assuming that LSC acts in good faith, to rely on case count and cost per case. The qualitative differences to determine which provider can best serve the poor.

This problem has an equally dramatic effect on the bidder. Once it becomes clear that the grantor cannot reliably measure the quality of output, and must rely upon bidder representations, instead, the bidder emphasizes cost and makes broad and generally exaggerated statements about the quality of its work. When a grantor reviews the bids, the grantor accepts these statements because it cannot probe them without prohibitive expense. When the grantor then awards a grant on a case count and cost basis, the bidder's subsequent grant performance will also emphasize cost considerations instead of the quality based purposes actually called for by the LSC Act, the A.B.A. Provider Standards[59] or even the ethical precepts of the legal profession.[60] Grantees will "chisel" on quality to succeed in the competitive race for a grant renewal.

Introducing a competitive bidding system in making LSC grants would undermine the quality concerns of legal service programs and replace them with cost concerns. Economical operation is not, however, a significant measure of effectiveness in providing legal services to a poor client. It comprises only one of the relevant factors that LSC should consider when it awards grants. Using economy as the primary measure improperly places that portion of the grantor's interests above all the potential interests of persons eligible to receive services.

Ultimately, the competitive model, and its emphasis on cost, is a destructive measure when employed in LSC grant award processes. It destroys the other measures for which Congress provides funding. It leads to a high volume of case services by encouraging acceptance of only short and easy cases and lowering the quality and effectiveness of the services rendered. It disregards the need for more complex and higher quality kinds of legal work in a given low-income community. In other words, introducing the competitive mechanism will assure second class justice for the poor.

3. Bad Faith

In considering the introduction of competitive bidding to legal services grant making, the discussion so far has assumed that those implementing the new systems intend to improve the quality, effectiveness and economy of legal ser-

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[59] *Supra* note 54.

[60] *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1-1.4 (as amended Feb. 1990) (enjoining lawyers to provide, with zeal, competent, fully prepared services to properly informed clients). The rules' imperatives are qualitative in nature and are unlikely to be the subject of serious review during a bidding process.

vices provided to the poor. If the intentions of those responsible for implementation are, however, to use competitive bidding to disrupt and undermine the existing legal services programs in order to overthrow the congressionally established system of local priorities and high quality representation, then the probability of actually achieving any of the theoretical benefits available is greatly reduced. Unfortunately, the history of the competitive award provision, and of its proponents' attempts to destroy the legal services system during the past decade, leaves little doubt that implementation of the competitive award provision will be yet another occasion on which legal services programs will have to fight to ensure the survival of legal services as a vital, effective advocate for the poor.

The concept of a competitive award requirement, which first surfaced during the summer of 1988, was the latest strategy in a long-standing effort to either abolish the national legal services movement or to hamstring it so completely that its lawyers would be unable to provide high quality, effective and economic services to the poor in cases involving major conservative economic and political interests. The abolition movement came alive after federal funding for legal services began in the 1960s. It had its first major taste of power in the early seventies under President Nixon when Howard Phillips was appointed Acting Director of the Office of Economic Opportunity. It fought a more subtle series of battles during the Carter presidency and then re-emerged with President Reagan's election.[61]

Even before Reagan's inauguration, both the Reagan transition team and a Heritage Foundation analysis concluded that the new president should attempt to abolish the Legal Services Corporation.[62] In the first weeks of his term, President Reagan proposed in his first budget that no federal funds be allocated to LSC.[63] Despite an intense campaign throughout 1981, however, Con-

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[61] The early years of this effort can be traced in E. Johnson, *supra* note 48; Cramton, *Crisis in Legal Services*, 26 VILL. L. REV. 521 (1981); and DOOLEY & HOUSEMAN. *supra* note 34.

[62] One of the more amusing aspects of the Heritage Foundation report was its consideration of the option of taking the local legal services programs over by gaining control of local hiring and replacing the "liberal" and "leftist" lawyers with conservatives. Without any awareness of the irony of the conclusion, the analysis discounted this strategy because there weren't enough conservative lawyers to implement it, at least not enough who were willing to work for the poor at the paltry wages paid for legal services jobs. A.S. Regnery, *Mandate for Leadership*, Project Team Report, The Poverty Agencies: Community Services Administration, Legal Services Corporation, Action (Heritage Foundation, Oct. 22 1980); *see* David M. Kennedy, Legal Services Corporation (A): *The Congress, Harvard University Kennedy School of Government Case Study C94-83-S23*, at 10-11 (1983); Legal Services Corporation NEWS, Jan/Feb. 1981, at 1 (reporting on the summary of the transition team report).

[63] President Reagan's antipathy to legal services predated LSC, beginning during his term as Governor in California. *See* Jerome & Pollack, Political *Interference With Public Lawyers: The CRLA Controversy and The Future of Legal Services*, 24 HASTINGS L.J. 599 (1973). His aide in much of the California struggle against California

gress preserved the LSC,[64] although it cut funding 25% and imposed administrative changes[65] and new restrictions[66] on local programs.

On December 30, 1981, President Reagan used his recess appointment power to put a new LSC Board in office.[67] The new Board promptly adopted a hostile posture toward the local programs,[68] setting a pattern which persisted throughout the Reagan years and continues today under president Bush.

Each year between 1981 and 1987, the President proposed defunding legal services and the Congress refused. Each year since 1981, the LSC Board has sought to curtail the quality and independence of the local legal services programs, and the Congress has intervened to stop the more objectionable Board efforts. Each year of the decade, conservative political forces have attempted to garner sufficient support to eliminate or deeply restrict representation of poor people by legal services programs, and the Congress has been unwilling to go along.[69] At the end of the decade, LSC's appropriation for fiscal year 1991

Rural Legal Assistance was none other than his future adviser and Attorney General, Edwin Meese.

[64] The story of the 1981-82 period is most vividly related in David M. Kennedy's three case studies, Legal Services Corporation (A): *The Congress*; Legal Services Corporation (A): *Sequel - The Senate*; and the Legal Services Corporation (B): *The Reagan Board*, Harvard University Kennedy School of Government, Case Studies C94-83-523, -523S, and -524 (1983).

[65] *E.g.*, 60% of each program's local board was to be appointed by the local bar association with general; jurisdiction in the area served by the program,. and "a substantial amount" of program funding was to be used to encourage private attorney involvement in the delivery of services. *See* DOOLEY & HOUSEMAN, *supra* note 34, ch. 4, at 2-15.

[66] *E.g.*, the LSC Board was directed to establish regulations governing the conditions under which a staff attorney could institute a class action, appeals required prior review and approval by a local executive director, only those aliens possessing a limited number of specific temporary or permanent resident identifications could be accepted as clients, and legislative advocacy was restricted even more severely than under the Legal Services Corporation Act. *Id.*

[67] A president can ensure continuity of government business by appointing individuals to vacant positions during Congressional recesses. U.S. Const. art. II, § 2, para. 3 ("The President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session"); McCalpin v. Dana, No. 82-0542 (D.D.C. Oct. 5, 1982), *vacated per curiam as moot sub nom. McCalpin v. Durant*, 766 F.2d 535 (D.C. Cir. 1985).

[68] Taylor Branch, *Closets of Power*, Harper's, Oct. 1982, at 34, 50.

[69] The legal, social and political history of legal services in the 1980s can be found in such sources as DOOLEY & HOUSEMAN, *supra* note 34; D. BESHAROV, LEGAL SERVICES: A TIME FOR REFORM (1990); Project Advisory Group, *Update* (a newsletter published throughout the decade); *Bar Leaders for the Preservation of Legal Services for the Poor* (newsletter published since 1985); O.G. Hatch, J. Denton, R.J. Isaac, J.T. Bennet & T.J. D. Lorenzo, Robber Barons for the Poor (Washington Legal Foundation 1985). There are innumerable news stories and topical articles as well, but no single compilation has yet done justice to the era's events.

carried the scars of this history, including eleven restrictions on LSC Board discretion.[70]

The last year of the Reagan administration brought a new strategy in the long conservative assault. In the spring of 1988, for the first time in his eight years in office, President Reagan proposed funding for LSC. However, the budget request for fiscal Year 1989 suggested that LSC be cut by $55 million, an 18% reduction, and suggested making major "reforms." Specifically, the proposal would have abolished the national and state support centers that provide sophisticated practice materials, training and litigation support; required more emphasis on individual service and less on class actions and legislative advocacy; imposed a system of highly detailed and universal time keeping to stop alleged misuse of federal funds; and required that all future grants be made through competitive processes.

During the spring of 1988, these proposals made no headway in the committees responsible for LSD oversight and appropriations. But during the summer, LSC's Board Chairman, W. Clark Durant, and LSC President, Terrance Wear,[71] joined forces with conservative activists, particularly representatives of the American Farm Bureau, to make a final push before the fall presidential election. They were remarkably successful.

In mid-September, LSC issued a press release announcing a major effort to obtain a Reagan veto of the LSC appropriation passed by both houses of Con-

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[70] In the FY 1991 appropriation there are 11 affirmative restrictions on the LSC Board. Pub. L. No. 101-515. A list follows:

The appropriation directs the Board to:

(1) distribute funds according to a stated formula;

(2) maintain migrant program funding levels

(3) make all field grants for at least 12 month periods;

(4) give due process hearings before independent hearing officers prior to terminating any program's funding; and

(5) provide reprogramming notification to Congress prior to changing any significant Corporation policies;

It also prohibits the Corporation from:

(6) acting to enforce 1984, 1986 and (partial) 1987 regulations on legislative and administrative advocacy;

(7) acting to enforce any regulation passed after October 1, 1988, regarding fee-generating cases or the use of private funds;

(8) acting to enforce any regulation passed during the FY 1991 prior to FY 1992;

(9) Passing rules on the composition of local program boards of directors;

(10) developing or implementing the competitive bidding requirement prior to October 1, 1991; and

(11) imposing any timekeeping requirements without a regulation.

[71] Wear had been appointed July 1, 1988. His history included a stint as general counsel to the Senate Agricultural Committee during Sen. Jesse Helms' term as Committee Chairman, but no experience with the delivery of legal services for the poor. *See Legal Services Corp. Turmoil,* A.B.A.J. Sept. 1, 1988 at 17; Ponce, *Legal Unit Split Over Vote for New Chief,* Washington Post, July 4, 1988, at A3.

gress.[72] The release was accompanied by a letter to Congressional leaders from James miller, Reagan's director of the Office of Management and Budget, reporting that "the President's senior advisors would recommend that he veto [the appropriation] if it is presented without the urgent legal Services Corporation (LSC) reforms . . . ." Also attached was a letter to the President signed by 178 members of the house of Representatives (including 149 Republicans and 28 Democrats) urging him to veto any bill without the "reforms" and promising to vote to sustain any such veto.

As described in the first section of this article, the Congress responded to these lobbying pressures by agreeing to the competitive award rider. But conservative forces found this partial victory, which omitted the other reforms and denied the Reagan LSC Board the power of implementation, completely unacceptable. With President Reagan about to leave office, the competitive award language wasn't enough. A remarkable September 23 memorandum from noted conservative Paul M. Weyrich[73] revealed the true nature of the "reform" effort of which competitive bidding was only a part.

The memorandum began by noting that conservative forces had fought for more than fifteen years "to eliminate the Legal Services Corporation" because of the "left-wing political agenda" of LSC and OEO. The memo also lauded President Reagan's seven year campaign for "zero funding." Weyrich blamed Senators Warren Rudman and Ernest Hollings for blocking President Reagan's 1989 proposal, and stated that the compromise on competitive bidding "turned the reform of Legal Services over to Ted Kennedy" because Senator Kennedy chairs the Senate Labor and Human Resources Committee which would need to confirm the new President's nominees before a competitive system could be put in place.

The memorandum sought to provide support to the effort to obtain a veto. The language was blunt: "Bill, this is an historic opportunity for the country and for George bush. No issue animates the conservative movement as much as its desire to eliminate or meaningfully reform the Legal Services Corporation." If George Bush would urge President Reagan to "go [to] the mat for his reforms, he will ignite the movement in its broadest sense." The memorandum concluded with a request that Bennett chair the veto effort, "convene a Council of War" and "invite Jerry Falwell, Phyllis Schlafly, Phil Truluck, and others" to join in.

The veto effort was intense.[74] Durant appeared on Pat Robertson's "700 club" on a national cable television channel and said:

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[72] *See* "The Scandal", *supra* note 46.

[73] Memorandum from Paul W. Weyrich to William Bennett (Sept. 23, 1988) (copy in author's files). Weyrich plays key roles in such conservative organizations as the Free Congress Research and Education Foundation and Coalitions for America.

[74] *See Last Chance on Legal Services*, Wall St. J., Sept. 28, 1988, at 26, col.1 (editorial supporting a veto because of the "continuing outrage over LSC"); *see also Legal Services vs. Political Services,* Wall St. J., Oct. 19, 1988, at 25, col. 1 (Letter to the editor by 1982 LSC board Chairman William Harvey).

> I hope that the President will come through, will veto this bill, and send a message to Congress that .... our agency doesn't need this much money to do the job and that the will send a message to Congress that he is tired of these support center . . . ."[75]

Robertson then gave the White House phone number and characterized the issue as follows: his viewers could either support a veto or, "if you think it's good to fund Planned Parenthood and the ACLU with taxpayer's money, tell him to sign the bill."[76] A Legal Services Corporation letter in October claimed that the campaign caused thousands of calls.

Not all lobbyists opposed the conference bill,[77] however, and Congress eventually decided to reject the arguments of the participants in the eight year battle to eliminate LSC. President Reagan signed the bill to avoid putting on hold the whole package of appropriations of which LSC was a part; a veto would have held up the important work of many other agencies.

Although they had obtained only the provision on competition, and not the elimination of support centers or the opportunity to impose major new bureaucratic systems on legal services programs, the conservative opponents of LSC funding soon decided to make the most of what they had won.

The Reagan Board attempted to develop and implement the competitive award rider during 1989,[78] despite Congress' explicit direction that those steps should await confirmation of a Board appointed by President Bush. When a new Board was appointed, early in 1990,[79] it quickly made clear its adherence to the same "reform" agenda put forward in 1988.[80] The Board has, however, recently supported a request for increased funding, in a significant break with its predecessors.[81]

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[75] "700 Club", (broadcast Sept. 28, 1988) (transcript on file with author).

[76] Robertson had campaigned for President during the Republican primaries in the spring of 1988. Durant, who lives in Michigan, had come to notice through work on the 1984 national Republican platform committee. While initially a Jack Kemp supporter, Durant reportedly switched his allegiance to Robertson during the campaign.

[77] Robert D. Raven, President of the American Bar Association in the fall of 1988, called on Congress and the President to reject Durant's campaign. *Statement by Robert D. Raven, President, American Bar Association, Regarding Recent Proposal Relating to the Legal Services Corporation,* Sept. 22, 1988 (published by American Bar Ass'n Div. of Communications and Pub. Affairs).

[78] *See supra* notes 1-13 and accompanying text.

[79] *See supra* note 14.

[80] The Board adopted a statement in support of a conservatively led group calling itself the "Legal Services Reform Coalition." See Project Advisory Group, *Legal Services Update* (Sept. 24, 1990). Reform Coalition proposals besides competitive bidding include elimination of lobbying, abortion and redistricting representation, expensive timekeeping requirements, attorney fees to be paid to any defendant who prevails in an action brought by a legal services client, and restrictions on representation of migrant farmworkers. See H.R. 5336, 101st Cong., 2d Sess. (1990) (introduced by Reps. McCollum, Staggers and Stenhom).

[81] *See* Project Advisory Group, *Update* (Feb. 25, 1991); Roberts, LSC *Asks Con-*

The Bush appointees have yet to be even considered for confirmation by the United States Senate. How they would act, if confirmed, to implement the competitive award rider is unknown. But the rider originated in the depths of the conservative campaign to abolish legal services, and the current board has chosen to associate itself with the efforts of the Reform Coalition to continue that movement. These facts provide a substantial basis for believing that the Board would implement the competitive rider in the spirit which the rider was offered — the spirit of hostility to the existing system of legal services programs. If that belief is justified, then the theory of the competitive model will matter little. Whatever the potential for improved quality, greater responsiveness to client needs or enhanced market efficiency,[82] the reality of implementation will be political. Competitive bidding will be a tool for imposing national priorities regarding legal services — priorities favoring high volume and low quality legal work — on local legal services programs at the expense of the poor that program lawyers represent.

4. An Illustration of the Problems

Consider Table 1, which presents some annual case statistics for two hypothetical legal services programs — Program A and Program B. Each receives $400,000 per year from the Corporation as its sole source of revenue. Which program should be funded if they are competing for a grant?

TABLE 1
Case Data[83]

	PROGRAM A			PROGRAM B		
	Non-Lit.	Lit.	Total	Non-Lit.	Lit.	Total
Housing	1200	500	1700	350	200	550
Income Maint.	1200	500	1700	400	100	500
Family	1300	400	1700	350	150	500
Consum.	580	100	680	220	40	260
Other	970	50	1020	280	10	290
PAI	1200	400	1600	0	175	175
Total	6450	1950	8400	1600	675	2275

gress for 8.5% Hike in Its Budget, L.A. Daily J., February 25, 1991.

[82] The analysis in this article suggests that these proffered benefits are illusory.

[83] Terms in Table 1:

"Non-Lit" - Cases handled without litigation.

"Lit" - Cases in which litigation (court or administrative agency) was required.

"PAI" - Cases handled through the private attorney involvement component of the program, usually by a private attorney.

Program A has seen 8,400 clients in the year, while Program B has seen only 2,275 clients. Program A's cost per case is $47.62, while Program B costs $175.82 per case. Isn't the answer obvious?

The answer isn't obvious because seeing the most people possible, or having the lowest cost per "case," is not the sole or even dominant objective of the Legal Services Corporation Act. As already noted, the Act sets such objectives as quality, economy and effectiveness, and it directs that most substantive priorities be set by the local board of directors. Without information on these other matters, the case counts are meaningless.

Why do the case counts in these programs vary so much? Because the programs have very different priorities and serve very different communities of poor people. Their case counts and costs per case are dependent variables, driven by the differences in more than a dozen independent variables. Some of the independent variables are matters of program philosophy and choice. Examples include levels of quality, complexity of cases accepted and litigations undertaken, services offered in non-litigated cases, volume of community legal education and other non-casework, amount of client satisfaction sought and impact objectives. Other independent variables involve choices about staffing and operating characteristics, such as economy of expenses, experience levels of staff, the use of paralegals and whether salaries are above, at or below comparability with other legal services programs. In addition, some independent variable simply come with the territory. For example, the cost of doing business in the community (California is a much larger state than Mississippi), the distances that must be traveled within the service area (rural Texas requires a lot more time in travel than Lynn, Massachusetts), and whether the client population is relatively homogeneous or heterogeneous.[84]

These independent variables are set forth in Table 2. In each case, the choice or aspect of the variable that will produce higher case counts and lower costs per case is listed on the left, and the choice or aspect that leads to lower case counts is listed on the right.

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[84] In most competitive bidding situations, data about competing providers would be based on histories of service to similar client populations and areas. There will be some exogenous factors that vary, however, even among local provider experiences. In addition, it is possible to imagine "competitions" for performance improvement awards that compare providers in different parts of the country.

TABLE 2

Effect on Case Counts of Selected Independent Variables

Produce High Case Statistics	Effect on CSR VARIABLE	Produce Low Case Statistics
Minimally Acceptable	QUALITY	High
Routine	CASETYPES	Non-Routine
Narrow	SERVICES IN NON-LITIGATED CASES	Broad
Simple	LITIGATED CASES	Complex
Low	VOLUME OF NON-CASEWORK	High
Low	CLIENT SATISFACTION	High
Low	IMPACT	High
High	EFFICIENCY	Low
High	STAFF EXPERIENCE	Low
Low	SALARY COMPARABILITY	High
Many	PARALEGALS	Few
Low	AREA COST OF BUSINESS	High
Small	COVERAGE DISTANCE	Large
Homogeneous	CLIENT CHARACTERISTICS	Heterogeneous

These independent variables share three characteristics central to considering the value of case count data. First, each involves local priority choices regarding the delivery of services to local clients that have been made by the program's local board of directors or local characteristics beyond the program's control. Except for efficiency itself, a program is free to choose either end of the spectrum on any of these factors. Second, case count data is a meaningless measure with regard to any one of the variables, such as efficiency. The effect of the other independent variables simply overwhelms the effect of efficiency alone.

On many important characteristics, Program A and Program B in the hypothetical are very similar. They have the same funding, serve the same number of poor people (43,150), and receive $9.27 per poor person. Both perform high quality legal work in every case. Both handle similar percentages of cases in each of the casetypes they handle. Both produce high levels of client satisfaction with whatever work they do. Both are extremely efficient programs.

But, on the other variables, Program A and Program B are quite different. In each case, Program A has made choices that maximize its number of cases: it uses inexperienced lawyers and many paralegals, and pays them less than comparable wages; it does no community legal education; it does few class actions, represents few community organizations, and turns away complex legal problems in favor of routine ones; it provides lots of telephone advice with both staff lawyers and private attorneys;[85] it serves a compact urban area

[85] Legal services programs must spend an amount equal to 12.5% of the LSC grant on involving private attorneys in the delivery of legal services to the poor. This can be

with a homogeneous population in which the cost of doing business is very low.

Program B, on the other hand, has made choices that give it very low numbers of case: it has an experienced staff, pays comparable wages, and has only one paralegal; it provides no telephone advice. Instead, it emphasizes complex and non-routine litigation matters, community legal education, group representation and class actions; its private attorney involvement plan pays reduced fees to lawyers who handle contested matters. Program B also serves a heterogeneous population scattered over a rural area in a high cost of business state.

As a result of their divergence on these independent variables, the programs have utilized the very different staffing strategies that can be seen in Table 3. Program A has ten case handlers while Program B, with the same budget, has only six. Obviously, this difference in casehandlers has a direct effect on the case count.

TABLE 3
Staffing

Program A		Program B
1	Project Director	1
1	Managing Attorney	1
1	Supervising Attorney	1
4	Staff Attorneys	2
3	Paralegals	1
10	Total Casehandlers	6

Reviewing these two programs, recall the problems with competition theory that were identified above. As between these programs, one cannot tell which set of judgments about local needs is most accurate. Should the choice be made nationally, where there is far less information available, or locally? These programs appear different, but differences have to do with local priority judgments and local operating realities. They both provide high quality services, bring client satisfaction and generally operate efficiently.

If these two providers submitted competing bids, how would a national agency assess the bids? Assessing the relative quality and value of each package of outputs seems impossible. The assertion the hypothetical puts forth, namely that each program is of equal quality and economy, would appear in every bid, but how could one evaluate this assertion? How would a reviewer compare these two bids? It seems apparent that most reviewers would tend to rely either on cost per case and case count measures, or upon preferences for one set of local priorities over another. And if the reviewer has a political agenda to pursue, with competition merely the tool, the reviewer's preferences will be free to dictate the politically "correct" proposal, regardless of client

accomplished through pro bono programs, contracts with private attorneys, or judicare systems. *See* Private Attorney Involvement, 45 C.F.R. pt. 1614 (1989).

need.

Yet, if the programs are equally efficient and equally effective, why is one better than the other? The count and cost data are almost meaningless. Reliance on national political preferences regarding local priority choices is unacceptable under the LSC Act. Because of these problems it appears likely that a competitive system of comparing applicants will produce decisions based on either irrelevant or impermissible grounds.

III. EXPERIENCES WITH THE USES OF CMPETITION IN MAKING GRANTS FOR THE PROVISION OF LEGAL SERVICES DEMONSTRATE THE THEORETICAL PROBLEMS

The Corporation and the local civil legal services programs it funds have had substantial experience with the use of competitive mechanisms in making grants. These experiences have had varied outcomes, but none suggest that the current proposal will operate differently than predicted in the preceding section.

A. *Prior Uses of Competitive Grant Making by the Corporation*

The Legal Services Corporation has utilized a variety of competitive mechanisms in its grant-making practices. These mechanisms have succeeded procedurally — grantees have been selected, have received funds and have carried out their grant activities. The competitive mechanisms used have not, however, been tested or evaluated in any analytical fashion. As a result it is not possible to determine whether the grant award decisions made through these processes were, in any way, superior to those that would have been reached non-competitively.

The major grant program of the Legal Services Corporation involves more than 300 annual grants to nonprofit organizations.[86] Most of the recipients of these grants are responsible for providing civil legal services to eligible poor persons who reside within a defined geographic area. Some of the grants are earmarked for programs that will provide services for Native Americans or migrants. Others are made to state and national "support centers" which either provide statewide back-up for local legal services activity or nationwide back-up in particular substantive areas.[87] Each of these programs may continue to receiver their annual grants unless the Corporation decides to termi-

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[86] In Fiscal Year 1988, 324 programs received such grants. LEGAL SERVICES CORPORATION, 1988-1989 FACT BOOK, *supra* note 31 at 3.

[87] LSC gave grants to 16 national support center in 1991. These centers provide services in the following areas; education, welfare, food, Native Americans, migrants, women and family, youth, consumer, economic development, employment, health, housing, immigration, medically dependent and disabled, senior citizens and veterans law. These centers are described in DIRECTORY OF THE NATIONAL SUPPORT CENTER (National Clearinghouse for Legal Services 1990).

nate their funding or deny them refunding after a due process hearing.[88]

Each of these programs obtained its initial grant through a "competitive" process. For example, between January 1, 1966 and June 30, 1967, the Office of Economic Opportunity's Office of Legal Services (O.L.S.) gave grants to 300 legal services organizations.[89] Some of these grants went to pre-existing legal aid programs, others to new agencies established by local bar associations, community action agencies, municipal departments or community service coalitions. The O.L.S. made final grant decisions based on applications submitted by the prospective recipients. In some cities, only one group applied, but in others, several did. Indeed, in cities such as New York, contentious litigation erupted over the final O.L.S. decision.[90] While O.L.S. took an active role in defining the sorts of programs it wanted to fund, the applications process was open and competitive.[91]

Congress established the Legal Services Corporation in 1974.[92] The corporation decided to enlarge its grant system until every poor person in the country was eligible for services from some legal services program.[93] This "minimum access" plan required that a provider be identified as responsible for service to every county in the country. For the first year of the expansion process, the Corporation used a grant approach similar to that employed by O.L.S.[94] After objections about the lack of due process,[95] however, the Corporation adopted more formal and explicit competitive procedures in 1978.[96] In each county for which LSC considered adding services, it held a public hearing and solicited

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[88] *See* Procedures Governing Termination of Financial Assistance 45 C.F.R. pt. 1606 (1990) and Denial of Refunding, 45 C.F.R. pt. 1625 (1990).

[89] JOHNSON, *supra* note 48, at 71-102.

[90] In re Community Action for Legal Services, 26 A.D. 2d 354, 174 N.Y.S. 2d 779 (1967); *see also* Johnson, supra note 48 at 92-92.

[91] JOHNSON, *supra* note at 48, at 71-102.

[92] Legal Services Corporation Act of 1974, Pub. L. No. 93-355 (1974). The Corporation was established as a "private nonmembership nonprofit corporation" in the District of Columbia. *Id.* at § 1003 (a).

[93] Ehrlich, *Giving Low-Income Americans Minimum Access to Legal Services*, 64 A.B.A.J. 696 (1978). *See* A.J. Strenio and S.B. Hitchner, Jr., Legal Services Corporation (A), Harvard University Kennedy School of Government Case Study Number C16-79-235 (1979) (describing the decision to expand); and Singsen, *Future Funding Options for the Legal Services Corporation*, 12 CLEARINGHOUSE REV. 762, 763-4 (1979) (discussing the funding formula used to distribute the funds).

[94] *See* DOOLEY & HOUSEMAN, LEGAL SERVICES HISTORY, *supra* note 34, ch. 3, at 16-26 (describing the expansion process in some detail).

[95] Among the concerns expressed were that local bar associations and existing legal aid programs weren't given sufficiently direct and personal notice of expansion plans. *Id.* at 22. *See generally* Oversight Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of the Committee on the Judiciary, House of Representatives, 95th Cong., 2nd Sess. (May 22, 1978).

[96] Expansion Procedure, 43 Fed. Reg. 52,301 (1978); *See* DOOLEY & HOUSEMAN, *supra* note 34, ch. 3, at 22-23.

bids through mailings and advertisements. It made grant decisions by comparing applications to criteria developed by the Corporation.

In the majority of instances, LSC expanded its coverage area by adding new geographical responsibilities to the area served by an existing legal services program. But a number of new legal services programs also received their first grants through this process. By 1980, the Corporation was funding 323 programs which served virtually every county the United States.[97] Almost all of these programs continue to operate with Corporation grants today.

In addition to the competitive processes used to fund the existing delivery system, LSC funded a number of special projects through competitive processes during the first five years of its operation. For example, the Delivery Systems Study mandated by Congress solicited proposals for projects that would test such alternative methods for the delivery of legal services as judicare, contracts, prepaid, voucher, legal clinics and *pro bono*. The Corporation reviewed these proposals, selected 38 demonstration projects and funded and evaluated them for three years.[98] Some of the *pro bono* and judicare projects subsequently were given annualized funding.[99]

LSC also employed other quite formal competitive processes for purpose including the Quality Improvement Project in 1978,[100] the distribution of "special needs" grants on a one-time and annualized basis between 1977 and 1980,[101] the selection of new pro bono demonstration projects in 1981[102] and the more recent decisions to make small annual grants to support portions of

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[97] Legal Services Corporation, *Annual Report* 7 (1980).

[98] Legal Services Corporation, DELIVERY SYSTEMS STUDY: A RESEARCH PROJECT ON THE DELIVERY OF LEGAL SERVICES TO THE POOR (1977) (describing the design of the study, including the initial round of solicitations, and outlining, at 20-21, the bidding process). The results of the study appear in Legal Services Corporation, THE DELIVERY SYSTEMS STUDY: A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES (1980).

[99] DOOLEY & HOUSEMAN, *supra* note 34, ch. 3, at 55. *See also* Brakel, *Legel Services for the Poor in the Reagan Years,* 17 CLEANINGHOUSE REV. 190 (1983); DOOLEY, *Legal Services for the Poor: The Debate Between the Staffed Programs and Judicare,* 17 CLEARINGHOUSE REV. 193. (1983).

[100] The Quality Improvement Project funded 32 demonstration projects in 1978 for periods of 12 to 30 months. Expert panels that included lawyers, mangers and client representatives chose grant recipients from among 532 proposals. Legal Services Corporation, QUALITY IMPROVEMENT PROJECT: OVERVIEW (1981). Among the reports on these projects are: Legal Services Corporation, Quality Improvement Project: *Final Evaluation Report, Demonstration Project, Computer Assisted Legal Research and Technological Improvements* (1981); *Legal Services Corporation, Quality Improvement Project: Community Legal Education and Client Involvement Demonstration Projects Final Evaluation Reports* (1981); and Legal Services Corporation, *Quality Improvement Project: Final Evaluation Report, Pro Bono Resource Demonstration Project* (1981).

[101] DOOLEY & HOUSEMAN, *supra* note 34, ch. 3 at 28 and fn. 107.

[102] *Id.* at 54.

law school clinics.[103]

It is tempting, but ultimately unjustified, to suggest general lessons from these experiences. Nevertheless, some supporters of the current local programs have had a tendency to declare these earlier experiences "successes" which demonstrate that properly constrained competition can be effective.[104] To the best of my knowledge, however, none of the "competitive" processes used by the Corporation to make grants has ever been systematically analyzed or subjected to valid scientific study.

Whatever one might wish to conclude about the results of these processes, no comparative data base exists against which to assess the outcomes. That is, it is impossible to know whether expansion grantees chosen through the more formal 1978 process provided higher quality services to clients, operated more economically or did a better job of determining local priorities than either the competitors who did not get the grants would have done or the pre-existing earlier, less formal process. No one has even assessed the relative cost of different approaches to grant making in legal services.

Thus, all that appears clear is that grantees can be selected by many types of competitive processes. Whether such processes produce better providers of free legal services for the poor remains undemonstrated.[105] Moreover, all of the competitive processes previously used by the Corporation were invoked to make either initial or one-time decisions, not to consider whether to continue funding a current recipient. For refunding decisions the Corporation has

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[103] *See, e.g., Legal Services Corporation, Funding Availability for Law School Civil Clinical Programs*, 51 Fed. Reg. 20901 (June 9, 1986); *Legal Services Corporation, Grant Awards for Expansion and Development of Law School Civil Clinical Programs*, 51 Fed. Reg. 28641 (August 8, 1986). There is some dispute about the value of using scarce Corporation funds to support law school clinics. *Cf.* Legal Services Corporation, *Office of Filed Services, Law School Civil Clinical Research Project* (1986) with Jordan C. Budd, *Law Students and Legal Services: An Analysis of the Legal Services Coproation's Law School Civil Clinical Research Project* (1986) (paper in Harvard Law School Library).

[104] *See, e.g.,* Memorandum from Alan Houseman and Linda E. Perle, to PAG Member Programs and other Interested Parties (May 19, 1989) (regarding "Background information on Competitive Bidding"), in author's files. On page 10, the memo cites expansion, the Delivery System Study, Quality Improvement Project similar grants as "instances where LSC has used competition effectively...."

[105] Local programs have also applied for grants from other grantors, competing with other applicants in much the same way as they competed in obtaining their initial LSC grants. Moreover, some local programs have made grants of their own. For example, quite a few programs contract with private attorneys to provide services in outlying counties to which it would be uneconomical to send a circuit-riding staff lawyer. Some of these local programs have let such contracts through bidding procedures. While these experiences may ultimately shed additional light on competitive bidding they appear unlikely to affect the basic theoretical or practical conclusions presented in this paper.

always relied solely upon its monitoring of local program performance.

Finally, all of the prior experience involves competitions in which the ultimate decision-maker has been the chief executive officer of the national grant-making organization (O.L.S. or L.S.C.) acting through his or her top management staff. While the process has sometimes involved peer review of proposals, standards for notice and a hearing, evaluation criteria and other inducia of fairness, ultimate grant choices have always been guided by national priorities, perceptions and political preferences. The Corporation's 1989 proposal for a competitive grant system explicitly continued this pattern.

B. *Limited Experience With Competition Between Providers*

There are three instances in which the Corporation has funded multiple providers to serve the same population and then attempted to evaluate the results achieved by each provider.[106] In the first of these instances, the Delivery System Study, the report offered no direct comparisons within a geographic area.[107]

In the second attempt to compare multiple local providers, the Private law Firm Project, the Corporation has failed to produce any report on the results despite extensive data gathering. The project began about 1983, with Corporation solicitations to selected communities. The design involved one or more local private attorneys or law firms receiving grants or contracts to provide specified services to a contractually defined number of eligible persons during the grant period or agreeing to handle certain types of cases for negotiated fees. The Corporation's hypothesis was that theses private providers would match or exceed local program quality while operating at lower cost.

Ultimately, after negotiations in many cities, the Corporation funded private law firms in five cities.[108] In each case the local legal services program agreed to cooperate with the experiment, to keep comparable records and to participate in an evaluation. However, as of this writing, the Corporation has still not

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[106] The funding of pro bono programs, either as supplemental programs at the conclusion of the Delivery System Study, *see supra* note 99, or through the private attorney involvement requirement, 45 C.F.R. pt. 1614, does result in parallel provider systems in some locations. These have never been seriously evaluated on a comparative basis by the Corporation. Occasional monitoring reports shown to the author have suggested data comparisons of very simplistic kinds, almost always offering nothing more than comparison of cost per case without even rudimentary attempts to determine quality or extent of service variation within the cases. *See also* Memorandum form Keith Osterhage to Dennis Dougherty, *supra* note 58.

[107] *See The Delivery System Study; A Policy Report, supra* note 98. The study compared all providers of one type (e.g. staff attorney) with all providers of other types (e.g., pro bono and judicare) without regard to geography, rather than comparing any one provider of one type with any one provider of another type within the same geographic area.

[108] Des Moines, IA, Jacksonville, FL, Laredo, TX, Orange County, CA, and Portland OR.

carried out such an evaluation or published any report. Given the Orange County and Jacksonville results noted below, it seems possible that the Corporation's political objectives. Perhaps Congress should press the Corporation to release its data before allowing further experimentation with parallel competition.

Two of the local legal services programs conducted their own evaluation of their local project when the Corporation did not. In Orange County, California, the private attorneys who handled cases under contracts and "competed" with the Legal Aid Society of Orange County found that they could not meet the program's quality standards and make a profit.[109] One of the problems they encountered was that the cases referred to them were more complex than they had anticipated.[110] In addition, the private attorneys reported particular dissatisfaction with the low fee schedule and the paperwork associated with obtaining payment under a contract from the Legal Services Corporation.[111] All of the contract attorneys reported that they would not again undertake work of this kind for the price available from the Corporation.[111] Another potentially troubling finding was that the contract attorneys provided significantly less service than the staff attorneys.[112]

Some preliminary results from the Jacksonville, Florida, were reported by Kent Spuhler, Executive Director of the Jacksonville Area Legal Aid.[113] He found that none of the firms involved in the first phase of the project had any interest in bidding on the second phase, that the price of the contract services went up significantly in the second phase, and that the private firms' cost per case was, for the most part, higher than the program's cost per case.

Most important for the purpose of thinking about the effect of competition, however, was a limited form of quality assessment that Spuhler included in his analysis. In social security and S.S.I. disability cases, one private firm reported success (a finding that the client was disabled) in 59% of the cases it handled. The second private firm managed a successful outcome in only 45% of its cases. The local program, by contrast, reported 82% successes. The local program had put in three to five times as much time per case but had a lower total cost per case than either private firm.[114]

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[109] The Orange County study is reported in James W. Meeker, John Dombrink & Beth A. Quinn, *The Orange County Study; A Comparison of different forms of Civil Legal Services Delivery to the Poor* (Program in Social Ecology, Univ. of CA, Irvine, August 1989).

[110] The cases referred were no different than the cases being handled by the legal services program.

[111] MEEKER, DOMBRINK & QUINN, *supra* note 109, at 43.

[112] *Id.* at 81-82.

[113] Address by Cent Suppler, A.B.A. 1989 Annual Pro Bono Conference (Apr. 15, 1989). He subsequently provided the author with charts documenting his conclusions.

[114] These are dramatic results, but their limitations must be clearly stated. They are preliminary, because phase two was not complete at the time of the report. Moreover,

Controversy erupted over another legal service study. An A.B.A. committee's study of parallel providers in San Antonio, Texas, concluded that no inferences regarding competition could be drawn from the results. The study's project director, however, strongly disagreed.[115] In his study, conducted in the San Antonio, Texas, a staff program, three law firms working on a contract basis[116] and a judicare panel [117] (initially described as a voucher experiment)[118] all provided three kinds of divorce services[119] to clients referred to them on a

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they have not been analyzed by anyone other than Mr. Suppler, who is an obviously interested party. Nevertheless, they are reported here because of their tendency to confirm some of the outcomes suggested by both theory and experience elsewhere (specifically, in the defender service contracts).

[115] Special Committee on the Delivery of Legal Services, A.B.A. *Report on the San Antonio Study of Legal Services Delivery Systems* (May 1989). The project's service delivery was funded by the Legal Services Corporation, while the American Bar Association, through its Special Committee on the Delivery of Legal Services, conducted the project evaluation and produced the final report on the project. Stevern R. Cox, at the time an Associate Professor at Arizona State University, was the project director. he ultimately disclaimed responsibility for the report conclusions. *Id.* at v. The author has been a member of this A.B.A. committee since August 1988.

[116] In a contract system, attorneys in private practice contract with a funding source (in this case, the Legal Services Corporation) to represent poor people. The contract will specify the terms of the representations, which may include the number or types of cases, the duration of the contract, the types of services to be rendered, the manner in which the poor people to be represented will be identified, the geographic area to be covered and the relationship with the current legal services program responsible for that area.

[117] A judicare system involves the use of a number of lawyers in private practice agreeing to provide representation to poor persons in exchange for compensation form the grant source. an "open pane" judicare system allows all or most attorneys in the jurisdiction to participate. A "closed panel" system limits the participating attorneys to those that qualify under some criterion (e.g., expertise, willingness to accept a lower fee, passage of some entry qualification). The number of cases to be handled by each attorney is usually unknown at the start of the judicare program. Cases are referred to the lawyers by an intake agent (often the local legal services program or the local bar association).

[118] A voucher system operates by providing eligible individuals (poor persons) with vouchers which can be used to "purchase" the services of any participating attorney. The value of the voucher to the attorney, which attorneys are participating, the kinds of cases that will be accepted and the number of persons who will receive vouchers all must be determined during the design of the plan. *See* THE DELIVERY SYSTEMS STUDY: A POLICY REPORT, *supra* note 98, at 26. The definitions of contract, closed panel judicare, voucher and open panel judicare plans tend to overlap each other, and are distinguished by the percentage of the local bar that are allowed to take cases for a fee under the system. What is supposed to distinguish a voucher system form a judicare approach is the granting of vouchers to eligible persons before the potential clients decide they need services, and possibly, the creation of a secondary market for the vouchers, allowing them to be sold for value rather than used to purchase legal services.

[119] Uncontested divorces, contested divorces in which there was no domestic violence

random basis. LSC chose the contract law firms after a bidding process and assessment by a bid review committee and representatives of the local program. The final rates to be paid were negotiated down from the bid prices.[120] Data was gathered to allow comparison on the cost and quality of the services provided.

Although the demonstration project produced a number of interesting findings, the Committee concluded that no policy recommendations could be made on the basis of the study and that further experimental research was warranted.[121] The Committee report specifically noted that "the study did not examine any issues regarding client choice features of the voucher mechanism or any possible price or quality effects that might arise from competition among attorneys for vouchers."[122]

Professor Steven R. Cox, who managed the San Antonio project, disagreed with some of the Committee's conclusions about the data generated in his research effort. He recommended policy reforms based on the study results, specifically including "use of multiple delivery models to simulate inter-model competition . . . thereby improving the performance of all [the delivery systems competing]."[123] However, nothing in his data or in his strongly-worded discussion of the Committee's refusal to adopt his conclusion indicates why he believes the San Antonio project demonstrated anything about competition between service delivery approaches or the effect of competition on provider behavior.

The San Antonio project paid staff, contract and judicare providers to handle similar types of cases, and then compared the cost, quality and operational characteristics of the service provided.[124] There was no data about the reactions of one provider to the presence of another, nor any evidence of it.[125] Clients were given no choice of provider. The providers were not told the crite-

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and contested divorces in which there were allegations of domestic violence.

[120] A.B.A., *supra* note 115, at 13.

[121] *Id.* at 59.

[122] *Id.* at 58.

[123] Steven R. Cox, *A Tale of Two Views of the San Antonio Voucher Study* p. 19-20 (paper presented to annual meeting of Law & Society Association, June 1989, Madison, WI).

[124] The structural and theoretical difficulties in the Cox analysis are carefully assessed in J.W. Meeker, J. Dombrink & B. Quinn, *Competitive Bidding and Legal Services for the Poor; An Analysis of the Scientific Evidence* (paper presented at the annual meeting of the Law and Society Association, June 1989, Madison, WI).

[125] From a review of the project's data and history, and a number of conversations with people involved in the project, I conclude that there was, in fact, no actual competition among the providers. Instead, the effort was largely cooperative and at least most of the lawyers handling cases paid little or no attention to the future cost and quality assessment of their work as part of the project. Of course, no one involved in the project had any reason to believe that they would either make or lose money as the result of any judgment that might be reached at the end of the demonstration period.

ria which would be used to determine the relative quality of their work.[126] Indeed, a careful examination of Professor Cox's paper reveals that the only support he cites for his conclusion as a "well-established" and "universally accepted" "basic economic principle."[127] As this article demonstrate, the consequence of using competitive mechanisms in an environment like free legal service to the poor is anything but established or universally accepted.[128]

In summary, each of these Corporation projects (Delivery Systems, Private Law Firm and San Antonio) involved legal services providers serving the same geographic area and the same client pool. Nevertheless, none of these projects was designed to test anything about head-to-head competition between existing and new providers. The existing and new providers didn't compete for initial grants because, in each instance, LSC had barred the existing legal services provider from seeking the grant to operate the alternative delivery system. The existing and new providers also didn't compete to attract clients; none of the projects gave prospective clients a true choice or evaluated the providers on the basis of the applicants' choices.[129] In addition, none of the projects gathered data whether attorneys working within the existing and new providers altered their behaviors to otherwise reacted to the presence of another provider.[130]

Finally, the existing and new providers did not compete to determine whether the existing provider would continue to receive the Corporation's annual grant for services in the community. Each project was clearly experimental and of limited duration. LSC gave the experimental or alternative providers no reason to hope it would continue funding them even if they performed extremely well. Similarly, the existing providers were explicitly promised that their Corporation funding would continue, at its current levels, regardless of the outcome of the project. As a result, the existing provider, in fact, often took the role of administrator or facilitator of the experiment rather than that of a fierce competitor seeking to establish that the new provider was inadequate.

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[126] A.B.A., *supra* note 115, at n.18.

[127] Cox, *supra* note 123, at 20. Cox had previously presented an identical position, based solely on theoretical analysis, during a conference in 1987. Steven R. Cox, Price Mechanisms and Legal Services, in D. Besharov, *supra* note 69, at 236 (1990).

[128] The Legal Services Corporation relied heavily on statements form Professor Cox in support of competition during its campaign for "reform" in the summer of 1988. *See* discussion of *"The Importance of Competition"* in "The Scandal," *supra* note 46.

[129] In almost every instance the process of assigning applicants for service to providers was cooperative, and it was often administered by the existing provider. Assignment was frequently random. One attempt to test client preferences failed when many applicants asked the intake processor to make the choice for them. *See The Delivery System Study: A Policy Report, supra* note 98, at A-57 to A-62.

[130] Indeed, none of these projects was designed to look for evidence of competitive behavior. All were established to determine whether the alternative method of delivery was even "feasible," *see id.* at 39-85, or "workable." *See e.g.*, A.B.A., *supra* note 115, at 58.

C. *The Use of Competition to Replace Current Providers*

The Corporation has only limited relevant experience with the use of competitive mechanisms to replace one provider with another. When it has found a current provider inadequate in some way, the Corporation has almost always sought to improve the provider's performance through advice, technical assistance, special grants, financial penalties,[131] or the temporary suspension of funding before, ultimately, seeking to terminate funding or deny refunding.[132] None of these processes generally involves simultaneous solicitation for a new provider.

1. Program mergers

Once exception to this rule arose during the early phases of the expansion period, 1976-1978,[133] when the Corporation forced the merger of several smaller programs into one larger entity. LSC upheld these mergers on the basis of efficiency — the LSC staff believed that the larger entities could provide more effective and economic high quality services.[134] No proof of this postulate was ever developed, however. Instead, individuals with decision-making authority at the Corporation based the conclusion on their experiences working in and evaluating legal services programs. Contrary experiences, which might suggest that some small programs worked very effectively and

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[131] *See, e.g.*, Legal Services Corporation, *Costs Standards and Procedures*, 45 C.F.R. § 1630.8 (1989) (the procedures for disallowing cost which violate grant conditions).

[132] Section 1011 of the Legal Services Corporation Act establishes specific procedures for suspension or termination of funding or denial of refunding. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996(j) (1988) (hereinafter Legal Services Corporation Act). These procedures are elaborated by regulations. *See* Legal Services Corporation, *Procedures Governing Suspension of Financial Assistance*, 45 C.F.R. pt. 1623 (1989); *Procedures Governing Termination of Financial Assistance*, 45 C.F.R. pt. 1606 (1989); *Denial of Refunding*, 45 C.F.R. pt. 1625 (1989).

In addition, since fiscal year 1983, the annual appropriations for the Corporation have contained further provisions regarding hearings in these circumstance. *See, e.g.*, Continuing Appropriations Act, Pub. L. No 101-515 § 607, 104 Stat. 2101, 2148-2153 (1990). Over the years, the Corporation has used these procedures to suspend or terminate the funding of a number of legal services programs. *See, e.g.*, National Clearinghouse for Legal Services, Inc. v. Legal Services Corporation, 674 F. Supp. 37 (D.D. Cir. 1987); Spokane County Legal Services, Inc. v. Legal Services Corporation, 614 F.2d 662 (9th Cir. 1980).

[133] *See supra* notes 86-96 and accompanying text.

[134] *See, e.g.*, Spokane County Legal Services, Inc. v. Legal Services Corporation, 614 F.2d 662 (9th Cir. 1980). The merger and consolidation impetus is described in DOOLEY & HOUSEMAN, LEGAL SERVICES HISTORY, *supra* note 34, ch. 3 at 22 and note 89.

economically, and that some large programs did not, were ignored. As in the general run of expansion decisions during this period, the plenary authority of the Corporation over new funding decisions prevailed. By the time more formal criteria for expansion decisions were adopted in 1978,[135] the merger era had already passed.

2. Denial of refunding based on a "better" program

The regulation governing denial of refunding sets forth the other exception.[136] The Corporation may deny refunding when it "finds that another organization, whether a current recipient or not, could better serve eligible clients in the recipient's service area."[137] LSC has never invoked this provision, even though the regulation provides the power to undertake precisely the sort of competitively-based denial of refunding proposed by the appropriations rider enacted in 1988.

At the time LSC adopted this regulation, however, the Coalition for Legal Services [138] took the position that the Corporation lacked legal authority to initiate a denial of refunding on a basis neither "grounded in the LSC Act nor related to the standards developed for legal services or the profession as a whole to measure professional performance."[139] In addition, the regulation provides no guidance regarding the standards or processes for program comparison that its implementation might require. Perhaps the questions about its legitimacy and the challenges posed by considering its use combine to explain why the Corporation never tried to deny any program's refunding on the basis of this provision.[140]

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[135] *See supra* notes 97-103 and accompanying text.

[136] Legal Services Corporation, *Denial of Refunding*, 45 C.F.R. § 1625.3(d)(1989). The original version of this section was proposed by Board Chairman William Harvey and member William Olsen in the final days of the first Reagan Board, as part of a set of regulations that would also have substantially limited class actions and legislative advocacy. Legal Services Corporation, *Proposed Implementation of Limitations on Uses of Funds*, 47 Fed. Reg. 50,658, 50 669 (1992).

[137] Legal Services Corporation, *Denial of Refunding*, 45 C.F.R. § 1625.3(d).

[138] The Coalition for Legal Services was a lobbying group formed in 1981 to advocate for the preservation of an effective, economic, high quality legal services system in the face of President Reagan's proposal to eliminate funding for the Legal Services Corporation. For several years, the Coalition was a major voice in debates about Corporation proposals.

[139] Memorandum for Coalition for Legal Services to Legal Services Programs and Other Interested Person 7 (undated, but placed contextual in December 1983)(regarding New LSC Denial of Refunding Regulations) (Copy in author's files.)

[140] The Corporation's 1989 proposed regulation on competition does not cite this provision as the legal basis for denying refunding to a program that loses a competitive bid, but if a competitive system is implemented, § 1625.3(d) is likely to be relied upon.

3. Competitive Bids Have Had Disastrous Consequences in Public Defender Services

While the civil legal services system has had limited experience with competitive bidding processes which threaten existing providers with substantial cuts or elimination, public defender programs in a number of jurisdictions have undergone precisely such processes during the past decade. In these jurisdictions, government funding sources have begun to use competitive bidding to control escalating costs or to penalize over-aggressive defenders. The results of implementing competitive bidding have been so unsatisfactory that some courts have found the legal work performed pursuant to contracts let by bid qualitatively or constitutionally inadequate in their jurisdictions.[141]

Robert Spangenberg, head of The Spangenberg Group, a research and consulting firm that specializes in civil and defender service issues, reviewed the experience of many jurisdictions which had used competitive bidding and contracting for indigent defense services.[142] Among the conclusions documented in his report are these:[143]

> 1. Competitive bidding creates an incentive to weighing costs over quality. As a result, even qualified contractors may not receive sufficient funds to provide competent representation.
>
> 3. Competition in the marketplace which has been one of the stated purposes of competitive bidding has not led to efficient, quality legal services. In most cases, over time, the cost has gone up and the quality has gone down.
>
> 4. In most contract systems, the most qualified and experienced practitioners eventually drop out of the system and are ultimately replaced, most often by recent law graduates and marginally competent criminal attorneys . . . . [I]t is becoming increasingly difficult to find qualified attorneys to bid. In some contract systems, highly qualified attorneys participate for one or two years and then drop out because they are unable to

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[141] Arizona v. Smith, 140 Ariz. 355 (1984); Phillips v. Seeley, 43 Cal. App. 3d 104 (1974); *see also, Report of The Blue Ribbon Commission, Sand Diego County*, 51 (1986) (concluding that the San Diego contract system, "even with adequate funding and dynamic leadership, is not capable of meeting the goals of a sound indigent defense system in San Diego").

[142] The best summary of his finds is found in *"Findings concerning Contracting for the Delivery of Indigent Defense Services,"* a memorandum prepared for the Center on Law and Social Policy by The Spangenberg Group (The Spangenberg Group, Newton, MA, 1989). An earlier analysis of contract-bid defender programs appointed to similar conclusions. Richard j. Wilson, *Contract-Bid Programs: A Threat to Quality Indigent Defense Services* (National Legal Aid and Defender Association, March 1982). *See also* Terry Roche, *LSC's "Competitive Bidding" Scheme* 4 Legal Services Crisis and Concerns, No. 1, 18-19 (Summer 1989 Update) (Bar Leaders for the Preservation of Legal Services for the Poor) (reporting testimony regarding the defender experience at an LSC hearing on competitive bidding in June 1989).

[143] The Spangenberg Group, *supra* note 142.

compete economically if they continue to provide quality services.

5. . . . [I]n most cases, contract system costs rise over time to a level that exceeds both that of a public defender and assigned counsel system.

8. Few contract systems take into account the specific qualifications or experiences of the attorneys who bid.

9. From a cost standpoint, assuming the requirements of national standards, public defender programs are less costly than contract systems.

10. Competitive bidding generally creates instability in the indigent defense system.

11. . . . [P]rivate attorneys both in assigned counsel and contract systems have provided less than the minimum requirements of representations due to their stated lack of adequate compensation.

One can readily see that these findings are consistent with the results predicted by theory.[144] Nevertheless, some defender systems have used contract bidding but avoided such disastrous results. In addition, both the American Bar Association's Criminal Justice Section and the National Legal Aid and Defender Association have concluded that contract bidding can be used in some circumstances, if there is adequate attention to the comprehensive standards adopted by both organizations in the bidding process, implementation and prompt evaluation of the grantee.[145] Of course, in the defender context there is no national organization seeking to override local management and there are no sensitive local priority choices because clients are entitled to service. The defender situation may thus be most analogous to that of local legal services programs which contract with private attorneys to provide services to clients in remote counties.[146] In such circumstances, contracting through bidding may well be desirable.

D. *How Periodic Competition Would Affect Legal Services Work*

The author spent four years in one legal services program, six years in a second, three years as Vice President of the Legal Services Corporation and nine years consulting with and representing people working in legal services practices.[147] During these 22 years, some impressions have taken shape which bear on the questions at issue in this paper.

The mechanism of competition is motivation. If a worker's job is on the line, the worker will do whatever is possible to preserve the job. This may involve working longer hours, cutting costs or cutting corners, enhancing concentration[148] or intensity, and otherwise seeking to complete tasks faster or more to

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[144] *Supra* notes 43-85 and accompanying text.

[145] The Spangenberg Group, *supra* note 142, at 2.

[146] *Supra* note 105.

[147] *See supra* note *.

[148] "[W]hen a man knows he is to hanged in a fortnight, it concentrates his mind wonderfully." Ben Johnson, letter to Boswell (September 19, 1777), *quoted in* Bos-

the satisfaction of whomever has the power to decide whether the job can be saved.

All of these statements are as true for legal services workers, managers and organizations, as they are for others. To the degree that legal services programs do not already maximize their productivity, competition might help them do so by motivating their workers in just these ways. But I believe that some characteristics of current legal services work reduce the viability of competition as an effective tool for productivity improvement.

1. Cost Control

Adding either periodic competition for grants or ongoing competition form a parallel provider cannot offer much improvement in direct cost control. The existing programs already operate at startlingly low ratios of overhead to revenue. Only 20% to 30% of all legal services expenditures are for expenses other than labor.[149] In small law firms providing services for a fee, the comparable figure for these non-personnel costs tends to be considerably higher as a percentage of income, ranging in one study from 75% of a struggling solo practitioner's gross income to 39% of the gross income of the most successful law firms of from 2 to 12 lawyers.[150]

Programs tend to rent in low income neighborhoods, occupy partially donated space or operate out of relatively low cost office buildings. They use functional and spare furniture, equipment and supplies. One has only to visit legal services offices to verify that legal services programs are extremely parsimonious. Only their libraries tend to be excellent.

As noted in the next paragraphs, legal services salaries are also very low, particularly for lawyers the largest group of employees. While no study is available, I believe legal service programs are paying significantly below market levels for secretaries, especially legal secretaries in metropolitan areas, and probably at market levels for paralegals.[151] Fringe benefits average a relatively low 18% of salary.[152] Most lawyers share their secretaries with at least one other casehandler and no significant amounts of their own typing, data entry and copying.

WELL LIFE OF JOHNSON (L.F. Powell's revision of G.B. Hill's edition), vol. iii, p. 167, *as reported in* THE OXFORD DICTIONARY OF QUOTATIONS 273 (2d ed. 1953).

[149] Legal Services Corporation, 1988-1989 FACT BOOK, *supra* note 31, at 37. According to the Fact Book, 6.48% of all expenditures in 1988 were for "contractual" expenditures (services to clients or to the program purchased from private attorneys or consultants). Of the remaining expenditures, 25.9% are for no-personnel and 74.1% for personnel and fringe benefits.

[150] Altman & Weil, Inc., THE SMALL LAW FIRM ECONOMIC SURVEY 1987, at 6-7.

[151] The paralegal comparison is hard to draw reliably, because legal services paralegals tend to be independent case handlers while law firm paralegals perform research and document preparation functions.

[152] Legal Services Corporation, 1988-1989 FACT BOOK, *supra* note 31, at 38. Most programs do not have pension plans.

The combination of low salaries and low budget shares committed to overhead means legal services programs have even less room to cut overhead costs. Given the same total revenues, a legal services program is able to hire more lawyers than a law firm by paying lower wages. At the same time, the program's overhead costs, already lower in total than the law firm's, must be divided among a larger number of lawyers. Consequently, the amount spent for overhead for each layer is far less in legal services than in the law firm.

2. Hours and Wages

Most lawyers work about 50 hours per week.[153] Legal services lawyers fit the norm. As a result, competitive situations are unlikely to accomplish any long-term increase in the program's hours of work, although a marginal short-term effect would be possible at the cost of increased stress and possibly reduced effectiveness.

In addition, legal services lawyers earn a very low hourly wage relative to all other lawyers, regardless of years of experience. For example, a 1986 study reported that a legal services lawyer, four years after graduation from the seven law schools studied, earned $9 per hour.[154] No one else earned as little. Comparably experienced sole practitioners earned $10. Lawyers in firms of 2 to 8 lawyers earned $11. Law teachers, and lawyers in firms of 9 to 84 lawyers, earned $16.

The comparisons are worse for lawyers with more experience. Sixteen years after graduation, legal services lawyers earned $17 per hour, while the other earned $23 (solo), $34 (2-8), $26 (teachers), $38 (9-35) and $54 (36-84). Pressure on a legal services lawyers to work longer hours would have the effect of further reducing that lawyer's already dramatically low hourly wage.

3. Intensity and Concentration

As with ours, an increase in the competitive environment would probably also cause a short-term increase in the intensity and concentration with which many legal services workers perform. This would be particularly true for those workers currently operating below their long-term, peak productive potential. However, the long-term cost of increasing the hours, intensity and concentration of workers in a legal services program would far outweigh the short-term benefits that might be obtained.

Several important issues must be considered in carrying out this cost-benefit calculation. First, many legal services employees already work with great intensity. Indeed, "burn out" is an important concern in legal services management and is often attributed to the long periods of physical and emotional

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[153] *See* L.M. Vogt, FROM LAW SCHOOL TO CAREER: WHERE DO GRADUATES GO AND WHAT DO THEY DO? CAREER PATHS STUDY OF SEVEN NORTHEASTERN LAW SCHOOLS 53-60 (Harvard Law School Program on the Legal Profession, 1986).

[154] *Id.* at 67.

intensity common to the frustrating challenges of representing poor clients.[155]

Competition would have an effect on all workers, not just the less productive ones. For fully productive workers, increased intensity for an extended period of time would probably lead to more burn out in precisely that part of the workforce most worth preserving.

Second, dealing with the less productive worker is a central task of management. Methods include efforts to train and develop newer workers, to help individuals through rough times so that they can return to former levels of productivity, and to move people into those tasks that best suit their skills. Experience in legal services programs, which has generated a substantial literature directed at solving such problems, suggests that these other management approaches cost less, better suit the task, and are less likely to harm the already productive workers.[156] Before adopting the dangerous tool of competition to deal with the relatively small group of underproductive workers, the effectiveness of more direct management alternatives should be explored more fully.

Third, when required to work more intensely, many workers adapt by cutting corners. Under pressure form a competitor, and in the absence of either price restraint or substantial external control, a legal services program will have an incentive to reduce the effectiveness and quality of its work in order to succeed on whatever parameters the grant source will notice, such as cost per case.[157] This corner cutting brings with it reduced productivity, poorer results for clients and ultimate system failure when judged against the standards of high quality, effective and economic services for clients.

Finally, using competition to increase intensity and concentration will also prove destructive when considered with the data on effective hourly wages.[158] Skilled attorneys have varied reasons for choosing to work in legal services, but they obviously don't take the jobs in order to maximize their income. Other forms of compensation substitute for lost wages, including enhanced self-worth from helping others, satisfactions from such working conditions as high personal and professional autonomy and relationships with colleagues and clients, and a work environment that comports with personal values. The introduction of competition, leading to hours above average for the profession and increased intensity (excess pressure for super productivity for most of the lawyers), will upset the current balance of monetary and nonmonetary compensation.

The labor market for lawyers is relatively fluid. Experienced legal services

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[155] *See generally*, C. Chernis, STAFF BURNOUT: JOB STRESS IN THE HUMAN SERVICES (Sage Publications 1980).

[156] Some of these conclusions are discussed in my earlier article, *High Quality Representation: The Two Minute Manager* (Singsen & Tyrrell Associates 11984) (reporting on the management techniques of many legal services managers).

[157] *See supra* text accompanying notes 57-60 (discussion of information asymmetry and the incentive to chisel of quality).

[158] *See supra* text accompanying notes 153-154.

lawyers can generally move to less stressful, higher paying positions with relative ease.[159] Of course, this is most true for the most skilled. Skill, however, draws little pay supplement in legal services programs, most of whose pay scales are based on experience rather than merit.

Considered as a whole, this data suggests that introducing competition into these delivery systems will ultimately prove destuctive. In the early stages, marginal increases in intensity may produce increases in output. But, very quickly, effectiveness will diminish and the most skilled will choose to exercise their option and leave.

Eventually, the resulting decline in program effectiveness will probably prompt an organizational reaction to return to more effective levels (in order to compete). The only way to attract higher quality employees will be to increase the level of monetary compensation, since the nonmonetary rewards will be under the pressure of a continuing competitive system. Ultimately, effectiveness will return to competitive levels but productivity will decrease because the cost of services will have increased and the units of service will have declined. Alternately, programs may opt for the competitive strategy of perpetuating their reduced levels of quality — chiseling on quality. In either case, program clients will suffer.

4. Encouraging Innovation

From time to time, all of the quality and quantity reductions that will result form increased competition for grant funds will be partially offset when programs and their competitors seek to develop new ways to provide services that improve quality without increasing cost or that maintain quality while reducing cost. Some of the resulting innovations will be adopted by other programs and will lead to general enhancements of the legal services provider system.

These enhancements are, however, far more readily and less expensively available by offering grants for experimental efforts rather than introducing systemic competition. The Corporation's own experience with special needs and Quality Improvement Project grants[160] fit this description. Indeed, during the last ten years, small amounts of grant funds (some from grant sources other than the Corporation) have led to such major delivery innovations as the Legal Aid/Net bulletin board, a rapid increase in pro se clinics, improved use of telephone systems for intake and advice, case management systems and computer-based master systems for document generation. Given that experience, however, and the contrasting dismal record of competitive bidding in the defender arena, it seems unlikely that the stick of total or substantial denial of refunding will generate more useful innovations than the carrot of a limited

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[159] The "career paths" study documented what had always seemed true form reports of high turnover in legal services jobs. Legal services lawyers move, in significant numbers, to jobs in large firms, small firms and solo practice, and in government, education and business. Vogt, *supra* note 153, at 35.

[160] *See supra* notes 86-105 and accompanying text.

pool of funds for demonstration projects.

IV. PROPOSALS FORTHE USE OF COMPETITION IN GRANT MAKING IN LEGAL SERVICES

During its current session, Congress may pass a reauthorization bill for the Legal Services Corporation for the first time since 1977. In the process, substantive issues now dealt with in the annual appropriations acts may be incorporated into the Legal Services Corporation Act in some form. Conservative legislators have already signaled their intention to make incorporation of competitive grant making an importune objective.[161]

This paper has not attempted to assess all the questions that development of a competitive system will raise, such as the proper standards to use, the nature of a successful bidding process or the integration of services between a new provider and an existing one.[162] Rather, the focus here has been on whether competitive approaches have any proven value in the design of a future legal services delivery system and whether Congress should introduce or expand them now, or ever.

The use of some form of competition in making grants to initiate new service or undertake experimental or demonstration projects is well established. Only the nature of the process, the identity and independence of the decision maker and the standards for judgment are really contested.

But the role and value of having competing providers in the same geographic area, or handling the same kinds of cases, is not at all clear. And the costs of employing competitive bid mechanisms to review and perhaps replace services by existing providers are excessive when compared to the probable benefits.

Instead of a blanket requirement of competitive bidding, Congress should authorize its use only to start new services or to replace a failing current provider. For the improvement of the performance of annual grant recipients, Congress should require LSC to develop and rely on effective monitoring. Congress should also direct LSC to develop standards to guide competitive bidding and to conduct scientifically valid experiments regarding the impact of multiple providers on each provider's quality, economy and effectiveness. Finally, Congress should require LSC to fund and then study the results of local program experiments (on the value of competition) as a device with which to improve their own local performance. In the balance of this paper, each of these recommendations will be briefly discussed.

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[161] Legal Services Reform Act of 1991, H.R. 1345, 102d Cong., 1st Sess., (introduced by Reps. McCollum and Stenholm on March 7, 1991). Section 11(a) proposes new language: "All grants and contracts awarded by the Corporation for the provision or support of legal assistance to eligible clients under this title shall be awarded under a competitive bidding system." The language would apply to new grants or grant renewals.

[162] *See, e.g.*, Roche, supra note 4.

A. *Study the Options Before Implementing Anything*

Despite the considerable claims by the proponents of competition[163] and the Corporation's many uses of competitive mechanisms to initiate new service, the legal services community has almost no comparative data about the effects of competition. Before rushing ahead to implement competitive bidding in any area, Congress should require a careful analysis of competition.

Because of the political overtones of the competition initiative, the study should be conducted by reputable individuals operating independent of both LSC and field program control.[164] A special advisory committee, composed of representatives of the Corporation, program clients, grant recipients, the American, National, Hispanic, Asian and Woman's Bar Associations, academics, and other interested parties, should be convened to select the contractor and oversee the study.[165]

The study, which would be presented to the Corporation Board as a basis for policy proposals, would cover a number of basic issues.[166] First, it would address the knowledge available from current theory and practice, suggest specific demonstration projects and experiments that would further inform planning for competitive processes, and propose initial steps the Corporation might take. Second, it would define the potential benefits that might be achieved

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[163] *See, e.g.*, Cox, *supra* note 123.

[164] At its March 25, 1991 meeting, the Board of the Corporation adopted a resolution directing the Corporation's President and Regulations Committee "to study the issues involved in development and implementation of a system for the competitive award of grants and contracts, including support centers, and issue a report to the Board by October 1, 1991." *"LSC Board Passes FY 1991 COB; Authorized Staff to Study Competition; $1 Million for LSC Passes Congress-Destined for Field Programs,"* Project Advisory Group, Update, March 25, 1991, p.1. This study seems focused on implementation, not consideration of the concept or validity of competition. In addition, it has none of the indicia of impartiality recommended in the text.

[165] § 1001 (5) of the Legal Services Corporation Act states, in part, "the legal services program must be kept free form the influence of . . . political pressures." This principle has been one of the hardest to keep during the Corporation's 17 year history. The advisory committee proposed to oversee the study of competition could provide a new device in the search for freedom form under political influence.

[166] Once the basic study has been carried out, or perhaps as an alternate way to oversee the study, it might be fruitful for the Corporation to propose and all interested parties to accept a negotiated rule-making procedure under the new provisions of the Administrative Procedure Act. Negotiated Rulemaking Act of 1990, Pub.L. 101-648, 5 U.S.C. 583. *See* Breger, *Amendments to Procedure Act Encourage Agencies to Use ADR*, NAT'L L.J., p.22 (March 4, 1991). These provisions establish a process in which all interests are heard, and rules are discussed, in a cooperative, interactive process. The Corporation would temporarily relinquish the power to simply impose rules (although that power would remain as a background condition in the negotiation), and a regularity scheme based on consensus would be sought. In this process it is at least theoretically possible to obtain a less passionate view of competing interest, positions and interpretations, and to seek common ground among the parties.

from optimal implementation of a competitive bidding system and the attendant costs to the Corporation[167] and to the client services.[168] It would compare benefits and costs.[169] Third, the study would recommend what future legislation would be appropriate regarding the use of competition by the Corporation. Because the Corporation's leadership has been and remains so committed to the conservative mission to destroy legal services, all other recommendations involving competition should be held in abeyance until the study has been completed in good faith.

B. *Establish Standards for the Use of Competition*

The study should survey theory and practice in order to propose standards for use in comparing competing proposals in any future competitive grant making. The standards would address due process needs, drawing particularly on the procedures currently in use for hearings when termination of a program's funding is proposed, and the procedures developed in 1978 for the later stages of expansion.[170]

The standards would define the substantive measures by which providers would be assessed. The merger experience of the expansion era should be avoided; the undocumented assumptions of the decision maker (generally LSC) should be put in check. The standards should include measures of quality (input) and effectiveness (output). The standards should be applied to the record of prior activities of each bidder.[171] Once adopted, these standards will also be useful in monitoring by the Corporation, which, in my experience during the last seven years, has been remarkably lacking in concern or competence regarding quality in program representation of clients.

Implementing these standards will almost certainly require the use of peer panels,[172] since objective and verifiable measures on such complex criteria

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[167] For example: staffing, advertising, travel, bidder's conferences, peer review, site visits, data analysis and occasional litigation.

[168] Current grantee funds used to compete for future grants, additional time lost due to monitoring activities associated with assessment by peer review panels, termination funding, and the kinds of cost projected elsewhere in this paper (escalating costs for the successful bidder in subsequent years, rising salary scales in current providers, loss of the most competent staff attorneys, quality decline).

[169] When the Corporation proposed to implement mandatory functional reporting and timekeeping it failed to examine how it would actually make the resulting information useful, or what it would cost to obtain the information. The current situation regarding competitive bidding is identical. The Corporation's failures with regard to functional reporting and timekeeping were severely criticized. General Accounting Office, Legal Services Corporation: *Benefits and Costs of Proposed Information System Improvements Not Clear*, GAO/HRD-88-5, pp. 4-5 (1988).

[170] *See supra* note 96.

[171] The measures developed for the Delivery System Study, *supra* note 98, would need further refinement for this purpose.

[172] Such as those employed to review applications for grants for the Law School

seems unattainable.[173] Selection of the peer panels, however, would be a task best delegated to the advisory committee rather than managed by the Corporation staff. The ultimate decision maker should be given as little control over the standards of decision as possible, to avoid excessive manipulation of the ultimate outcomes.

The degree that existing providers are competing for grants, comprehensive monitoring reports should be used as the primary basis for assessing qualifications. Monitoring reports provide higher quality data that the largely unsubstantiated assertions of traditional applications for funding. Competing agencies, without prior histories as Corporations grantees, should be subjected to similar on-site review and reporting prior to a grant decision. This will help to overcome the persistent problem of information asymmetry.[174]

The study should closely examine the role of the provider cost projections in grant making. Lowest bids (the highest volumes) should not be allowed to be determinative factors in grant awards. Cost per case should be no more than one factor considered along with quality and effectiveness. The study should also determine the weight that should be given to the applicant's record of and proposal for setting local priorities. The quality of prior effort at local needs assessments, including the manner and effectiveness of involvement of client and community agency voices in the process, should probably receive important consideration in grant decisions because priority setting is one of the most important fiduciary obligation facing a local provider under the LSC Act.

The standards for competitive bidding should also include a credible plan for follow-up evaluations of whether the successful bidder has carried out the promises made in its proposal. This should help both to assure against repetition of the defender experience[175] and to hold LSC accountable for carrying out its monitoring responsibilities.[176]

Finally, the A.B.A.'s Standards for Providers of Civil Legal Services to the Poor should be used as a basis for the criteria selected for evaluating competitors.[177] The Standards for Providers systematically set forth the outlines

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Civil Clinical grants and the Quality Improvement Project Grants. *See supra* notes 100 & 103.

[173] The San Antonio experience makes it clear that the peer review panels, and the standards to be applied, should include the voices and perspectives of those with the most complete experience in poverty law practice, legal services staff attorneys and paralegals. Others involved in local delivery of services should also have roles, including board members (attorneys and clients), client groups, individual clients, managers and support staff. *See* A.B.A., *supra* note 115.

[174] *See supra* note 57 and accompanying text.

[175] *See supra* notes 141-46 and accompanying text.

[176] During the 1980s, LSC has not succeeded in fulfilling its responsibilities with regard to monitoring local legal services programs or evaluating such special projects as the Private Law Firm Project or the Law School Civil Clinical Research Project. *See supra* note 53 and accompanying text.; *cf.* A.L.I.-A.B.A. Standards and Peer Review Publications, *supra* note 53.

[177] *See supra* note 54.

and fundamental content of provider characteristics that define a quality legal services program.

C. *Authorize Competition For Some Purpose, But Not For Others*

The study proposed above will search the record on the competition more fully than has been possible in this article. But, if the analysis presented here is correct, the study is likely to conclude that competitive approaches vary in their value and reliability depending on the circumstances, and that more must be learned about some of the possible uses of competition. Only if the Corporation's leadership establishes that it can be trusted to act in a good faith to carry out its duties under the Corporation Act should it be permitted to implement new or expanded systems for competitive awards of grants.

1. Authorize Competition of Make New or One-Time Grants

Whenever the Corporation wishes to initiate a new area or type or service, or to provide funds for innovative or experimental one-time efforts, some form of "competition" will be required. This can be limited as the process by which an LSC staff member decides which organization might best be encouraged to apply for funds (considering the possibilities based on current knowledge), or as a comprehensive as the procedures employed for the Quality Improvement Project or new expansion funding.[178]

Competition will affect each applicant's behavior. Competing applicants will try to make their most attractive case to the LSC, including offers of high productivity, low cost per unit and valuable innovations.

Many of the weaknesses of competitive processes will, however, also be present in the start-up context. For example, LSC will often be at the mercy of the information asymmetries; the applicants can plan to chisel on quality. Perhaps more important, given the recent history of LSC behavior, LSC will be free to dramatically redirect the applicant's local priorities by offering funds only for those types of behavior that LSC favors. The Legal Services Corporation Act prefers local control of priorities, but a competitive process will permit substantial pre-emption of local priority choices by LSC.

The Corporation is making very few new grants at the moment,[179] but it should be required to use clearly defined and reviewable competitive processes for any such grant it does make.[180] To avoid abuses of power, the processes

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[178] *See supra* notes 96 & 100 and accompanying text.

[179] *But see* Availability of Funds for Representation of Migrant Farmworkers in Alabama, Arkansas, Mississippi and Tennessee, 56 Fed. Reg. 10577-10578 (announcing that annual funding is newly available for migrant work in these four states.)

[180] In 1984, the Corporation's noncompetitive grants to establish three new national support centers (each associated with conservative positions or interests) occasioned substantial public and congressional criticism. *See, e.g.*, Remarks of Hon. Bruce A. Morrison, Cong. Rec. E4548 (Oct. 12, 1984); Earley, *Legal Aid Unit is Queried on Aide's Penalty*, Washington Post, Dec. 5, 1984; Legal Services vs. The Poor (Cont.),

should be based upon the kinds of standards recommended in the preceding section.[181]

2. Rely on Monitoring and Performance Improvement Rather Than Competition to Improve Competent Current Providers

When a grantor has an ongoing relationship with a nonprofit recipient-provider of a non-market service such as legal assistance for the poor, there exist more efficient and effective ways than competitive grant making mechanisms to affect the recipient's behavior toward proper statutory objectives. Through the grant relationship, the grantor can assess performance directly. It can then propose modifications, offer both incentives and deterrents for specific aspects of performance, impose grant conditions or directly suspend or terminate funding. All of these options avoid the deficiencies of competitive strategies noted in this article. At the same time, these options are more likely to preserve the LSC Act's preference for local priority setting.

A competently administered system of monitoring should be completely sufficient for all of the Corporation's legitimate purposes with regard to local program activities. To the extent that the Corporation's monitoring activities in the past decade have been questionable, Congress might consider requiring compliance with the new American Bar Association Standards for Monitoring of Providers of Legal Services to the Poor,[182] or even establishing a monitoring function in which independent monitors are employed instead of Corporation staff and consultants. Peer review methodologies are the ones best designed to assess quality and effectiveness of practice, and Congress should require that they be more rigorously applied.[183]

Recognition of the motivation behind proposals for competition provides another reason why competition should not be imposed on competent existing programs at this time. Competition has been advanced as a part of a decade-long struggle to eliminate or dramatically change legal services for the poor.[184] It will advance this destructive agenda by ceding to the Corporation almost unfettered control of the terms on which local legal services programs can operate. Through competition, LSC will be able to override statutory protection of local priority setting and to impose on all local programs conservative national concepts of the kind of work that are valuable.

Congress should prohibit implementation of the proposal of competitive bidding as a method of disbursing grants now going to well-established providers.

Sacramento Bee (editorial), Oct. 30, 1984.

[181] *See supra* notes 170-77 and accompanying text.

[182] *See supra* note 54.

[183] *See supra* note 53. *See also* National Senior Citizens law Center, Evaluating Legal Services Providers: A Handbook (1988); R. Rovner-Pieczenik, A. Rapoport & M. Lane, *How Does Your Defender Office Rate? Self-Evaluation Manual for Public Defender Offices* (National Legal Aid and Defender Association, 1977).

[184] *See supra* notes 61-82 and accompanying text.

Given the presence of more useful alternatives, the predictable costs to programs, and the improper purpose of its proponents, the proposal is premature. If a study of the issues demonstrates a proper role for competition in making grants to existing service providers, Congress can reinstate authority later. At the moment, however, the case for using competitive bidding has not been made.

It should be clear that no recipient should be guaranteed a grant forever. Statutory purposes may change. Today's excellent provider may turn out, after reliable examination during a monitoring visit, to be tomorrow's failure. But there does need to be a basis for proposing supplantation, and competition is a poorly designed tool for finding that basis.

3. Authorize Competition to Challenge Bad Programs

One obvious basis for replacing a local program is very poor performance, and failure to respond to Corporation suggestions about improvement. In such circumstances, it may well be appropriate and effective for the Corporation to notice a proceeding in which some or all of the local program's funding is subject to competition from other providers; the situation is closely analogous to that of providing new funding for an area.

The analogy is clearer if the burden of the existing program's difficulties is understood to rest on the shoulders of its board.[185] Then competition is to improve or replace the local policy maker in order to obtain better local choices about priorities, delivery systems, and management. Effectiveness, economy and quality all must be assured. The emphasis in the standards, when a replacement competition is taking place, should be on maintenance or redevelopment of valid local priorities, effectively implemented. The Corporation's role should be to insist on selection of the organization best able to determine, and then meet, these local priorities.

The other problems of competition will still arise. Pressure on overworked staff will increase, salaries in the affected program will ultimately rise (assuming the program prevails), good attorneys will leave, and cost will remain the same or go up. Because the condition precedent for this application of competition is documented program failure, however, information asymmetry difficulties will be reduced. The Corporation will actually know about the existing provider's flaws.

4. Authorize Experimentation With Multiple Providers

What should be done about the possibility of establishing a second (or third) provider in the same jurisdiction as the current provider?[186] I have already argued that there is little reason to believe that multiple provider competition

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[185] The Board of Directors is the actual recipient, on behalf of the organization, of Corporation funds.

[186] This possibility is included in the Corporation's proposed regulation. Competitive Bidding For Grants, *supra* note 8, at § 1633.3 (c) (1989).

will improve quality, effectiveness or cost.[187] Moreover, the Corporation has conducted no experiments which actually considered the effects of competition between providers. In a few situations in which multiple providers co-existed in the same community, no evidence was gathered on the effect of competition on any provider's performance.

However, because there is so little available information about the actual consequence of head-to-head competition for clients in a legal service market, the Corporation should seek funds from Congress for several limited experiments despite these pessimistic projections. In there experiments, clients within a defined geographic area would need to be entitled to service of certain types of legal problems,[188] and to be free to choose among several competing providers. The providers would know that whom the clients chose would affect the providers' future funding levels. Each of the providers would face loss of some or all of its grants at the end of the experimental period. The current local program would be offered an increase in its annual funding if it performed very successfully. In addition, the providers should be fully informed of the standards that would be used to determine the quality and responsiveness of their work, and at least some of the local programs participating in the experiments should be known to be excellent.

It will be hard to create a situation that will be truly competitive based on client preferences. The experimental time frame needs to extend for several years to avoid loss leaders and lowball bidding. Moreover, the cost of providing a true entitlement to an informed population would be enormous. On the other hand, running the experiments with a small or uninformed population in an unrepresentative area would introduce too many qualifications on the results.

A further problem is suggested by a study of lawyering behavior in the somewhat similar market served by legal clinics.[189] Legal clinics are profit-seeking law firms that compete for moderate and middle income legal business, but they choose to compete by reducing their prices only a little. As they compete, they pay their lawyers substantially higher salaries than legal services programs do and they don't make much of a dent in the need of the poor or moderate income for increased access to lawyer services.

The truth about head-to-head competition seems obvious. Legal services programs are funded poorly. They are able to provide as much service as they do by paying low salaries. No lawyer motivated by profit, the basis for the competitive model, is going to choose for very long to compete at such wages. But to increase wages, the profit-seeking lawyer must either reduce services or

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[187] *See Supra* note 106-59 and accompanying text.

[188] Which types of cases would be subject to entitlement? To assure that the competition is on services that are actually relevant to local needs, the cases should be within the top priorities of the current provider. Since the goal is deterring the effects of competition, this apparent bias toward the current provider should not pose any theoretical difficulty.

[189] *See* Gerry Singsen, *The Survey of Legal Clinics and Advertising Law Firms* (A.B.A. Special Committee on the Delivery of Legal Services, 1990).

reduce quality in each representation, thus losing any fairly judged competition.

Given this relationship among wages, services and a competition experiment, perhaps the only way to structure a test of competition would be to require those with legal service programs to pay higher salaries. But that approach seems absurd. It would abandon the substantial value of the personal sacrifices legal services attorneys have traditionally made and reduce the total volume of services provided to the poor.

Legal services attorneys have always funded a significant portion of the legal services system by forgoing the wages they could earn working in the competitive market. Their altruism is an important legal services asset. In contrast, in a market structured to provide for competition between individual lawyers, some of these current legal services lawyers would choose to leave; they would be replaced by lawyers who would require higher salaries because they were less interested in non-monetary rewards.

D. *Encourage Local Programs to Subject Parts of Their Service Provision to Competition*

Each local board of directors is responsible for using its grants from the Corporation in an economical, effective, high quality manner. Each has an interest in finding appropriate methods to obtain this results. One method that local boards could be encouraged to try would be competition.

Local program managements have already used competitive bids to let contracts to private attorneys for services in outlying areas. Competitive bids are required when acquiring or disposing of certain types of property.[190] There are, in fact, many elements of personal, interpersonal and institutional competition at work in the day to day operations of any legal services program.

There are several ways that a local board of directors might require its staff to compete with other potential providers in the community. Most simply, the staff might be required to demonstrate that their services on a particular kind of case were of higher quality but not greater cost than those of lawyers handling comparable matters. They would make such a demonstration through some form of peer review, which would examine case records and conduct a cost analysis. The consequence of failure might be either increased supervision, changes in the practice of the staff or contracting with private attorneys to handle some of the cases.

A more formal competition would involve making a grant to an alternative provider, or developing expectations of competition between the private attorney involvement program and the staff attorney work.[191] If the private attor-

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[190] Legal Services Corporation, *Property Management Manual for Legal Services Corporation Recipients* (Rev. Sept., 1981).

[191] There are potential costs to the political and personal friction such competition within the program would create. It should be noted, however that the regulation on private attorney involvement, 45 C.F.R §§ 1614.1(c), 1614.6(c)(6), calls for cost justi-

ney component proved more effective and economical and produced work of higher quality, program management o the board might well allocate more resources to its work.

The most structured competition would involve publishing a request for proposals. Lawyers and provider organizations would be encouraged to submit proposals for contracts to provide legal service to the poor that would otherwise be provided by staff attorneys. The funds for such contracts might come from reducing staff salary expenses, from new funds received from LSC or some other grantor, or from funds released in the course of business (through a staff vacancy or a planned underspending). The management and staff of the program would be allowed to compete for the funds as well.

In such a competition, the board might well feel that it could not act impartially because of its long and supportive relationship with the current program management and staff. To address that concern, the board might delegate at least the power to recommend to a panel of experts from outside the program or to an arbitration panel. The standards that would govern decisions in such a process would be similar to those proposed at the national level.[192]

There are two substantial differences between this proposal and those involving LSC-managed competitions. First, the local board has a long record of support for legal services; competition is a device to further that record, not subvert it. Second, consistent with the Legal Service Corporation Act, the competition would be completely within the terms of local program priorities. There would be no danger that those priorities were being supplanted. Moreover, because the local board includes local clients, there would be direct client involvement in the selection of a specific delivery component.

As a possible solution to the requirement of competitive systems for making grants, local program competitive mechanisms face formidable obstacles. They put portions of the existing staff delivery component at risk, so they will threaten staff members. At the same time, the Corporation is unlikely to embrace local competitive mechanisms because they place so much control in local rather than Corporation hands. Moreover, unless neutral experts are given the power of decision, the Corporation will be hard to convince of the bona fides of any local competitive process.

In addition, local programs will view such mechanisms skeptically. The local mechanisms will create very similar dynamics of stress and intensity for over-worked and underpaid lawyers as those that would arise in national competition. They will undercut the sense of shared mission which often invigorates board-staff relationship. In smaller programs, the impact of such adversarial processes may be exaggerate. Cutting costs or increasing hours still won't be a meaningful competitive option. Finally, in programs with unions, the whole process may give rise to charges of an unfair practice.

For the time being, then the most I can suggest is that the Corporation

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fication of private attorney involvement expenditures.

[192] *See supra* note 170-176 and accompanying text.

should explore whether a competition of some kind, managed locally, could make a contribution to thinking about and experimenting with competitive mechanisms for making grants.

V. CONCLUSIONS

Earlier in this article, image of a tenured law professor was offered to demonstrate some common sense reasons for being attracted to competitive mechanisms in many work settings. But another image, one that evokes some what contrary feelings about competition, will help to balance the picture.

Have you ever ridden on the Los Angeles electric streetcar line? It's a famous public transit system, known as the "red cars." The red cars are reliable, efficient, cheap and clean; they use relatively small amounts of energy and produce no smog particles or gasses. That's very important in Los Angeles.

Well, you have not taken a ride on the red cars, at least not in the last 50 years. Why? Because the only place you can find these streetcars today is in "Who Framed Roger Rabbit?", which tells a version of the story of their demise along with its other "hare"-raising tales.[193]

The red cars were destroyed by competition. Specifically, through the joint efforts of corrupt politicians, who were less interested in the public good of Los Angeles residents than in their own private gain, and manufacturers of cars and buses. The Corporations were allowed to buy up the electric streetcar, to sell off the rolling stock and to tear up the rails.[194] As a result, the only public transit that remained was buses. Without competition form the red cars, more buses were ordered and sold.[195]

The relevant image isn't of greed or venal public officials. What happened to the red cars is an example of the way in which difficult to measure outputs of great value to the public are easy to ignore when easy-to-measure dollar transactions offer short-term gains. Los Angeles probably got a good price for the rolling stock and the rails, but no amount of compensation could pay for the next fifty years of sulphur dioxide, carbon monoxide and inconvenience to the riding public. All of the intangibles, the public good — clear air, peace and

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[193] WHO FRAMED ROGER RABBIT? (Touchstone Pictures 1988).

[194] The red car history is related in L.L. Bottles, *Los Angeles and the Automobile* (1987).

[195] In the movie version, the red cars are taken over by "Cloverleaf Industry," which seeks to develop a cloverleaf mall and business district to service car drivers on the first Los Angeles freeway. The purpose of the takeover is explained in the climactic scene between Judge Doom, who owns Cloverleaf Industry, and Eddie Valiant, the hero.

Doom: "Soon, where Toontown once stood will be a string of gas stations, inexpensive motels, restaurants that serve rottenly prepared food, tire salons, automobile dealerships and wonderful, wonderful billboards reaching as far as the eye can see. My God, it'll be beautiful."

Valiant: "Come on. Nobody's going to drive this lousy freeway when they can take the red car for a nickel."

Doom: "They'll have to . You see, I bought the red car so I could dismantle it."

quiet, a lack of reliance on oil, low fare — got lost in the face of the short-term, bottom line gains sought by those making the decisions. So, you cannot ride the streetcars in Los Angeles any more.[196]

A competitive bidding system for legal services delivery is likely to produce the same result, an that is precisely why it has been pushed so vigorously by its proponents.[197] It will emphasize cost and case count and discount quality and impact. The public goods — equal justice for all, a system of laws and not men, enforcement of the laws — will be sacrificed to the more immediate, tangible, countable measures.

Ultimately, the task of improving the quality, economy and effectiveness of services is a challenge for LSC and for each recipient. Evaluation is hard, performance improvement is hard, and operating an effective local program, with very limited resources, is very hard. Quick fixes like competition offer little hope of performance improvement, even if one could overlook the problems of bad faith in the push for competitive bidding and the high probability that competitive bidding would be implemented without any real concern about quality at all.

But history cannot be ignored. Competition has not been proposed for any reason having to do with quality, effectiveness or economy. Competition is intended to make legal services for the poor, as we know it, disappear as completely as red cars. Competition has been proposed in order to change the legal services programs so that quality and effectiveness disappears and the poor stop being able to obtain services that allow them more than "band aid" justice.

Congress should put a hold on the competitive grant-making system it authorized in 1989, and return to the language of the Conference Report; the idea of competition, including its administrative difficulties, should be "fully explored" before any action is taken. Only when the tool of competition has been better evaluated, and the trustworthiness of the LSC Board and staff proven, should Congress even consider any plan for implementation of a competitive grant-makings system that would apply in places served by decent, on-going programs.

In the meantime, LSC will continue to have its many existing tools with which to control whatever program behavior it identifies as illegal or inadequate. LSC has yet to demonstrate the capacity to use these powerful tools competently in support of the mission Congress set for the Corporation 17 years ago. The competitive bidding initiative should be abated while the Corporation learns to effectively monitor quality, effectiveness and economy. Until

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[196] In the last several years, Los Angeles has taken steps to resurrect the electric trolley. *See Rail Line makes Debut Where Car is Supreme*, N.Y. Times, July 16, 1990, at A8, col. 1. The cost, of course, will be immense. This seems quite similar to the experience of cities that have painfully recreated their public defender offices after disastrous experiences with competitive bidding for defender services.

[197] Not for personal gain or venality at all, but certainly not for the purposes Congress intended in passing the LSC Act, either.

LSC has developed this fundamental ability to fulfill its statutory purposes, Congress shouldn't let it play with the red cars.

EPILOGUE

This article was written in the spring of 1991, but is actually going to press in November. In the interim there have been several developments related to competition in legal services. While none of the developments alters the theory or recommendations set forth in the article, it will be useful to the reader to have a current understanding of the situation confronting legal services.

1. *Demonstration Projects.* On July 8, the LSC Board considered a series of principles that would express its position on LSC's reauthorization by the Congress during 1991-1992. A number of the principles concerned portions of the conservative "reform" agenda.[198] With regard to competition, Principle VII stated:

> The Board Directors of the Legal Services Corporation favors authorization by and appropriations from the Congress for the limited implementation of dynamic, constant competition for the provision of legal services and favors the study of, including the use of demonstration projects, static competition and the awarding of grants.[199]

During the summer the Corporation Board considered ways in which it might pursue experimentation regarding competition. In a memorandum dated September 11, for example, the LSC staff suggested to the board that there were two hypotheses about the effect of competition that could be tested in demonstration projects during 1992.[200] These hypotheses were that "high quality" and "more cost-effective services" would be delivered by "programs that compete in the same geographic area for clients."[201]

Staff proposed five "options" for testing the effects of competition in legal services delivery. Option 1 involved competitive bidding for state or national support grants rather than for grants to provide local legal services. Option 2 would use competitive bidding to award grants for a specific type of service (e.g., a pro se program) or a particular legal issue (e.g., domestic abuse). Option 3 would use competitive bidding to select a "second full service provider" for areas that already have grantees. Option 4 would involve two existing legal services programs in competition on specific categories of cases in an area already served by both. Option 5 would be similar to option 4, except that neighboring programs would be set in competition with each other by providing funding to create an overlapping area. In subsequent discussion,

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[198] *See supra* note 80.

[199] Project advisory Group, *Update* at 3 (July 10, 1991).

[200] Memorandum to LSC Board of Directors from Ellen Smead and K.B. DeBettencourt through David Martin (Sept. 11, 1991) (discussing Competition Study Options).

[201] *Id.* at 1.

a sixth option has been suggested; programs in different parts of the country would compete by having their performance measured against common standards.

Most recently, in early November the President signed an appropriation of $350,000,000 for LSC for fiscal year 1992.[202] In its line item detail the appropriation includes $977,000 for "Board initiatives." the House - Senate conference report that accompanied the appropriation explains:

> Such funds may be used to conduct comparative demonstration projects to study, under appropriate standards and criteria, the use of competition in providing effective and efficient legal services of high quality.[203]

It is too early to tell which options may be selected for demonstration projects, where the projects will be located, how the competitive features of the projects will be defined, who will be competing, whether appropriate standards for quality, effectiveness and cost will be adopted and who will conduct the project evaluation. But it seems very likely that the questions posed in this article will receive practical, if temporary, answers and decisions by the LSC Board during the next several months.

2. *Local control of priority setting.* On august 2, 1991, the United States Court of Appeals for the District of Columbia Circuit decided *Texas Rural Legal Aid, inc. v. Legal Services Corporation.*[204] Judge Mika, writing for the court, held that LSC has at least somewhat greater authority under the Legal Services Corporation Act to determine substantive priorities than is suggested in this article.[205]

The case involved a regulation passed by the Corporation in 1989 prohibiting grantee involvement in any redistricting litigation or activity.[206] Three legal services programs brought suit, alleging that LSC lacked authority to promulgate such a regulation. The District Court agreed, and enjoined enforcement of the regulation.[207] The Circuit Court reversed.

One of the plaintiffs' contentions was that LSC lacked authority to enact the regulation because section 1007(a) (2) (C) of the Legal Services Corporation Act commits control of substantive priorities to the grantee. LSC's power, they argued and the District court found, was limited to setting goals related to the procedures by which grantees set their priorities. The Circuit Court held, however, that the Act was ambiguous and that, in the absence of greater clarity, LSC's interpretation of the language (giving itself authority to act)

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[202] Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1992, H.R. 2608, 102d Cong., 1st Sess,. §§ 305, 607 (1991).

[203] Conference Report, to accompany H.R. 2608, H. Report 102-233, 102d Cong., 1st Sess., Amendment No. 121 (Oct. 1, 1991).

[204] No. 90-7109 (D.C. Cir. decided Aug. 2, 1991) (1991 U.S. App. LEXIS 17197).

[205] *See supra* notes 43-52 and accompanying text.

[206] Legal Services Corporation, Redistricting, 45 C.F.R. pt. 1632 (1989).

[207] Texas Rural Legal Aid, Inc. v. Legal Services Corporation, 740 F. Supp. 880 (D.D.C. 1990).

should be give deference.

While this decision narrows the authority of local programs over their substantive priorities, it by no means eliminates it or invites LSC to act without restraint in setting national substantive priorities. The court explicitly denied that LSC's authority over substantive priorities was clear and affirmed that local programs have "a major, and perhaps even preeminent, role in setting program priorities."[208] Finally, Judge Mikva placed emphasis on the fact that redistricting was a singularly political endeavor and thus similar to a number of Congressional restrictions on program "political" activity.

In the context of demonstration projects explicitly authorized by Congress, LSC almost certainly has the authority to determine the particular types of service and cases through which competitive mechanisms will be tested. The most important questions about its choice will be whether they are appropriate to determining the effects of competition. In the longer run, LSC's authority to set substantive priorities either for competitive bidding or for other purposes will be a matter for Congress to consider.[209]

3. *Private law Firm Project.* During the summer, in response to a request form Congressman Frank of Massachusetts, LSC provided a small amount of data regarding the Private Law Firm Project.[210] No serious evaluation or research report on the project was, however, released. Instead, after spending well over a million dollars, LSC offered 12 pages of "Summary" and "Data". Included in the five pages of narrative were a number of claims for the results available elsewhere,[211] and conclusions that strained credulity. In addition, there is almost no supportive documentation for any of the claims. While one may pour over the tantalizing assertions and superficial data, it will be impossible to determine what may have been proven by the Project until a proper, reviewable report is prepared. As to such a report, the Corporation still promises but has not delivered.

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[208] Texas Rural Legal Aid, inc. v. Legal Services Corporation, *supra* note 205.

[209] The reauthorization bill for the Legal Services Corporation Act contains a provision removing all authority for LSC to establish substantive priorities. Legal Services Reauthorization Act of 1991, H.R. 2039, 102d Cong., 1st Sess. § 25 (approved by House Judiciary Committee July 16, 1991).

[210] Legal Services Corporation, SPECIAL DELIVERY PROJECTS BRIEFING BOOK, (April 19, 1991)(delivered to Congress by letter form David H. Martin, LSC President, to Hon. Barney Frank) (June 10, 1991).

[211] *See supra* notes 106-12 and accompanying text.