

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS AND REGULATIONS COMMITTEE
OPEN SESSION

Thursday, January 23, 2014

4:29 p.m.

Hilton Garden Inn Downtown Austin
500 North Interstate 35
Austin, Texas 78701

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson
Robert J. Grey Jr.
Harry J.F. Korrell III
Laurie I. Mikva
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

Sharon L. Browne
Victor B. Maddox
Martha L. Minow
Julie A. Reiskin
Gloria Valencia-Weber

STAFF AND PUBLIC PRESENT:

James J. Sandman, President

Lynn Jennings, Vice President for Grants Management

Rebecca Fertig, Special Assistant to the President

Ronald S. Flagg, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary

Stefanie Davis, Assistant General Counsel, Office
of Legal Affairs (by telephone)

Carol A. Bergman, Director, Office of Government
Relations and Public Affairs

Jeffrey E. Schanz, Inspector General

Thomas Coogan, Assistant Inspector General for
Investigations, Office of the Inspector General

Lora M. Rath, Deputy Director, Office of Compliance
and Enforcement

Janet LaBella, Director, Office of Program
Performance

Robert E. Henley, Jr., Non-Director Member, Finance
Committee

Paul Furrh, CEO, Lone Star Legal Aid

David Hall, Executive Director, Texas RioGrande
Legal Aid

Stacie Jonas, Texas RioGrande Legal Aid

Alison Paul, Executive Director, Montana Legal
Services

Don Saunders, National Legal Aid and Defenders
Association (NLADA)

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(Committee meeting continued to following day)

Motions: 4, 4, 40, 45, 46

1 P R O C E E D I N G S

2 (4:29 p.m.)

3 CHAIRMAN KECKLER: I note the presence of a
4 quorum for the Committee, and therefore call to order
5 the duly noticed meeting of the Operations &
6 Regulations Committee.

7 Our first item of business is the approval of
8 our agenda today.

9 M O T I O N

10 MR. GREY: Move it.

11 MS. MIKVA: Second.

12 CHAIRMAN KECKLER: All in favor?

13 (Chorus of ayes.)

14 CHAIRMAN KECKLER: The agenda is approved.

15 Next we turn to the minutes of our prior
16 quarterly meeting.

17 M O T I O N

18 MR. GREY: Move it.

19 MS. MIKVA: Second.

20 CHAIRMAN KECKLER: All in favor?

21 (Chorus of ayes.)

22 CHAIRMAN KECKLER: The minutes are approved.

1 We'll now turn to our first substantive item,
2 which is an update on the variety of rulemakings that
3 the Committee has. Again, given the constraints of
4 time, we'll have to be brief about that.

5 And I just note that since we do have a number
6 of ongoing rulemakings, it may be necessary for us to
7 have a further briefing, interstitial briefing, prior
8 to the next quarterly meeting.

9 But with that, I will turn it over to Ron
10 Flagg, the General Counsel.

11 MR. FLAGG: Thanks, Charles. If Stefanie
12 Davis, one of my colleagues in OLA, is on the line, I'd
13 ask her to do a very brief briefing on the 1614 and
14 1613 rulemakings.

15 MS. DAVIS: Sure. I certainly am. This is
16 Stefanie Davis in OLA, and I apologize. The sound
17 seems to be cutting out occasionally on my end, so if I
18 need to repeat anything, please let me know.

19 The first topic I'll cover is the 1614 rule.
20 That's the private attorney involvement rule. We had
21 had a couple of workshops last year to discuss the Pro
22 Bono Task Force report and its recommendations for

1 changes to the PAI rule. We also had a comment period
2 that closed on October 16th.

3 A small work group has been working within OLA
4 to consider those comments and the Task Force's
5 recommendations and to draft a proposed rule. So we
6 are working on that draft rule now, and our goal is to
7 have a Notice of Proposed Rulemaking to the Board in
8 April.

9 Are there any questions on the PAI rule?

10 CHAIRMAN KECKLER: Stefanie, thank you. So
11 again, I think that that's something that we can think
12 about in terms of a meeting, in terms of having some
13 paper available for the Committee because it is a
14 complex rule --

15 MS. DAVIS: Yes.

16 CHAIRMAN KECKLER: -- for the Committee, and
17 inviting the rest of the Board available, prior to the
18 meeting so that we can get a little bit of a head
19 start.

20 MR. LEVI: I'm wondering if you won't even
21 want to have a telephonic meeting when that's
22 distributed.

1 MR. FLAGG: Well, one thing we could do is we
2 will, well in advance of April, and in fact in the next
3 couple weeks, have a draft of the proposed rule itself,
4 which we could --

5 MR. LEVI: Walk the Committee through.

6 MR. FLAGG: Right. And we could do that well
7 in advance of April and then --

8 CHAIRMAN KECKLER: Laurie?

9 MS. MIKVA: I haven't really looked to see
10 what the comments are online. But in the past, we've
11 also sometimes gotten a summary of comments, and I have
12 found that very helpful. If they're not extensive,
13 maybe that's not necessary. But I assume they are.

14 MR. FLAGG: Yes. We'll get that to you in the
15 next week.

16 CHAIRMAN KECKLER: Okay. So I think that we
17 don't have to set this right now, and it's partly up to
18 OLA, when you're at a certain stage where you can come
19 to the Committee for some feedback.

20 I think that the choice then is between a
21 briefing or a meeting, and I think it might be better
22 to have a meeting, as John suggested, in the sense that

1 that'll allow the Committee members to have the freedom
2 to go ahead and make comments and to discuss among
3 themselves without that kind of constraint. And if
4 members of the public want to come in and listen, then
5 that's fine as well.

6 If there is some reason that OLA thinks or
7 that members of the Committee think that they would
8 like a briefing just to the Committee, that's something
9 again to discuss. But I think that my tendency at the
10 moment is towards a meeting when OLA and Management are
11 at an appropriate stage.

12 MR. FLAGG: We'll be in touch to set something
13 up.

14 CHAIRMAN KECKLER: Fantastic.

15 MS. DAVIS: Okay. That sounds great.

16 The next topic, unless there's anything else
17 on the PAI rule, is the 1613 Final Rule, which is
18 pending. This is the regulation that governs legal
19 assistance with respect to criminal proceedings and the
20 amendments that we made to the regulation in response
21 to the Tribal Law and Order Act of 2010.

22 That law, as you may remember, expanded the

1 ability of LSC recipients to provide legal assistance
2 to any defendant who is charged with a crime in a
3 tribal court. The Tribal Law and Order Act also
4 expanded tribal criminal jurisdiction to cover higher
5 levels of crimes beyond misdemeanors and to issue
6 extended sentences.

7 The comment period on that rule closed on
8 December 4th. We received very few comments, only
9 seven comments, in response to the Notice of Proposed
10 Rulemaking. Those comments were generally supportive
11 of the rule. We received only two substantive
12 comments, and we don't anticipate making any changes in
13 response to the comments. Again, they were generally
14 supportive.

15 So once again, with this rule, we've reviewed
16 the comments. We're drafting the Final Rule, and our
17 goal is to have the Final Rule to the Board for its
18 consideration in April.

19 Are there any questions on the 1613 Final
20 Rule?

21 (No response.)

22 CHAIRMAN KECKLER: Seeing none, I'm looking

1 forward to seeing it.

2 MS. DAVIS: Excellent. Well, it is short and
3 sweet and I hope not controversial.

4 Then moving on to the most substantive part of
5 what we have to discuss today, that is the draft Final
6 Rule on alien eligibility, which you should all have in
7 front of you.

8 This rule was drafted to amend the alien
9 eligibility rule to account for expanded eligibility to
10 victims of certain crimes, victims of trafficking and
11 severe forms of trafficking, and H-2B visa holders.
12 All of these groups of aliens were made eligible to
13 receive services from LSC recipients by statute in the
14 time since Part 1626 was last amended.

15 We received 15 comments in response to this
16 rule, and the comments were generally supportive of the
17 rule. The most comments that we received were in
18 response to the three requests for information, and I
19 will just go through those quickly since those were the
20 things that we had sought comments on.

21 The first request for comment was on the
22 distinction between the VAWA use of the term

1 trafficking and the term trafficking as used in the
2 Trafficking Victims Protection Act. Commenters
3 generally wanted, if possible, for LSC to adopt the
4 broader definition of trafficking that was contained in
5 VAWA to all of the victims that are eligible for LSC
6 services.

7 We had proposed using a definition of
8 trafficking that pertained to VAWA, and using the TVPA
9 term "victims of severe forms of trafficking" to
10 recognize the distinction that is made between those
11 two types of victims in statute.

12 We continue to maintain those definitions in
13 the Final Rule, in part because there are significant
14 distinctions between how the two are treated under
15 those statutes.

16 Under VAWA, victims of trafficking are only
17 eligible for legal services related to escaping from or
18 ameliorating the effects of the trafficking, whereas
19 under the Trafficking Victims Protection Act, victims
20 of severe forms of trafficking are eligible for the
21 same range of legal services that any other individual
22 who's eligible for LSC services can receive, so any

1 services that are not otherwise prohibited and that are
2 within a recipient's priorities.

3 I'm going to stop there and ask, one, if there
4 are any questions on that provision, and two, if you
5 want me to continue stopping for questions or if you
6 just want me to go through these, given the time
7 constraints.

8 CHAIRMAN KECKLER: We have a question on that
9 point.

10 MS. REISKIN: This is Julie. What kind of
11 trafficking is not severe? No, I'm serious.

12 MS. DAVIS: I'm sorry. My sound dropped out.

13 MS. REISKIN: What kind of trafficking is not
14 severe?

15 MS. DAVIS: The Trafficking Victims Protection
16 Act defines severe forms of trafficking as any sex
17 trafficking that involves a minor under the age of 18,
18 sex trafficking of an adult that is acquired by force,
19 fraud, or coercion, or labor trafficking that is
20 acquired by force, fraud, or coercion.

21 So if an individual, for example, enters into
22 a sex trafficking arrangement without force, fraud, or

1 coercion, if they do it voluntarily, if one of those
2 elements is not involved, they would not be considered
3 a victim of a severe form of trafficking.

4 MS. REISKIN: Can I follow up?

5 CHAIRMAN KECKLER: Yes. Go ahead, Julie.

6 MS. REISKIN: Who determines if there was
7 coercion? That's seems like it could be pretty
8 subjective. It sounds like that almost supposes that
9 someone could voluntarily be trafficked, which doesn't
10 make sense to me. That's almost like saying someone
11 could agree to be raped or something. I don't
12 understand.

13 MS. DAVIS: Right. And with respect to who
14 makes the determination about whether an individual has
15 been subject to force, fraud, or coercion, those
16 determinations are usually made by -- I believe those
17 determinations are usually made by the Department of
18 Homeland Security, since they are the agency that is
19 responsible for determining whether or not an
20 individual is qualified for a T visa, or meets some of
21 the very basic requirements to obtain certification
22 from the Department of Health and Human Services, such

1 as whether a victim is willing to AST law enforcement
2 in the prosecution of the trafficker.

3 They would have to determine whether or not
4 the individual was a victim of severe form of
5 trafficking, so whether they were brought into the
6 trafficking activity by force, fraud, or coercion.

7 MR. FLAGG: I'd just state the obvious. These
8 are definitions that are in the statute and that we
9 feel obligated to track. So this is not something that
10 LSC is interjecting into the arrangements.

11 CHAIRMAN KECKLER: Okay. And so I don't think
12 that there were that many opposing comments to LSC's
13 interpretation of that distinction. Is that correct?

14 MS. DAVIS: That's correct. To the extent
15 that there were suggestions, it was again that every
16 trafficking victim be able to be covered by the broader
17 definition.

18 But as I said, the differences between what's
19 available to victims and the standards for victims
20 under the two statutes were different and distinct
21 enough that we felt it was important to retain that
22 language.

1 CHAIRMAN KECKLER: Thank you. I think we can
2 turn to the next -- oh, Gloria.

3 MS. DAVIS: So the second question was --

4 MR. FLAGG: Stefanie, we have a question.

5 CHAIRMAN KECKLER: I have a question.

6 PROFESSOR VALENCIA-WEBER: I don't know if
7 this is a question, but it might help resolve Julie's
8 question in some degree.

9 My academic work includes teaching immigration
10 law, and if you look at the general trafficking offense
11 listed under section 101(a), that's very much a list of
12 offenses that, if actually proven, are about the focus
13 of a law violation in terms of specific parts of the
14 U.S. -- tribes, tribal territory, military
15 installations. It looks at those.

16 And it's possible, when the Department of
17 Homeland Security, the ICE, is one of the places --
18 immigration and citizenship services would be where you
19 would have investigation and ultimately determination
20 by one of the DHS prosecutors as to how the individual
21 victim fits into either the list of offenses or the
22 TVPA.

1 And notice the TVPA is focused on how the
2 victim was brought into trafficking. That's very much
3 a focus of a victim. And it's possible that under the
4 general list of offenses in 101(a), that the
5 relationship between the victim and the trafficker may
6 have been consensual to start with and then turned into
7 something else, which could turn into trafficking.

8 It may have been an ordinary relational that,
9 under circumstances, turns into the violation that that
10 part of the law focuses on.

11 MS. REISKIN: Thanks.

12 CHAIRMAN KECKLER: Thank you, Gloria.

13 If there's nothing else, Stefanie, we can move
14 on to the next information request and the comments
15 thereto.

16 MS. DAVIS: Great. I would also note that to
17 the extent that our recipients need to be considering,
18 as they're looking at eligibility -- to the extent that
19 they need to look at whether or make their own initial
20 determination about whether or not a victim may have
21 been a victim of a severe form of trafficking, we did
22 include in the regulation the "any credible evidence"

1 standard.

2 So if a victim can make a credible showing
3 that they were subjected or brought into the
4 trafficking activity through force, fraud, or coercion,
5 that may be sufficient under the rule. So I don't
6 think recipients need to be making a definitive call
7 about this. But to the extent that they do need to
8 consider it, there is a standard that they can use.

9 Moving on to the location of the activity, one
10 of the items that we had requested assistance or that
11 we had requested comment on was whether the location of
12 the activity, the criminal activity, for which a victim
13 was eligible for legal assistance was required to occur
14 in the United States.

15 The way that section 502 is drafted, the way
16 that VAWA was drafted, it was drafted in such a way
17 that it said that victims of battery, extreme cruelty,
18 sexual assault, or victims of trafficking within the
19 United States could receive legal services.

20 The interpretation that LSC had put forth in
21 the proposed rule was that victims of battery, extreme
22 cruelty, and sexual assault did not have to experience

1 the assault, battery, or sexual assault within the
2 United States, but that victims of trafficking did
3 because of the qualifier "in the United States."

4 That was also true with respect to victims of
5 severe forms of trafficking in the United States. The
6 TVPA uses that term, "victim of severe forms of
7 trafficking in the United States," in the provision
8 that is relevant to LSC.

9 So we received a number of comments on that.
10 Most commenters opposed our read of the language, and
11 noted that Congress had specifically acted in the 2005
12 reauthorization of VAWA to remove the requirement that
13 an individual be subjected to battery and extreme
14 cruelty in the United States from the statute.

15 We looked at the comments, we looked back at
16 VAWA, we looked at the U visa provision, we looked at
17 the T visa provision, and determined that the statute
18 could be read in a way that indicated that it was not
19 required that the victim had to suffer the qualifying
20 crime in the United States.

21 And in fact, the U visa provision specifically
22 provides that a crime simply has to violate the laws of

1 the United States. It doesn't have to occur within the
2 United States, but it does need to violate the laws of
3 the United States.

4 So based on the comments and our reading of
5 the immigration statute, we have revised the rule to
6 now read that the location of the activity does not
7 have to be in the United States, or any of the
8 qualifying crime.

9 Are there any questions on that point?

10 CHAIRMAN KECKLER: Stefanie, this is looking
11 ahead a little bit to the next point, in which a number
12 of classes of potential eligible aliens are required to
13 be in the United States, but then there's a set of
14 persons who are not required to be in the United States
15 upon receiving services.

16 MS. DAVIS: Right.

17 CHAIRMAN KECKLER: Obviously, we don't go into
18 them too much -- and there's no need for us to in the
19 regulation -- laws of the United States that can be
20 violated outside the United States. But this creates a
21 class of potential LSC clients who are not in the
22 United States and who have suffered harms for which

1 they're seeking some form of redress or assistance
2 outside the United States. Is that correct?

3 MS. DAVIS: I guess the question I would have
4 is, when you are talking about seeking redress outside
5 the United States, are you referring to applying for
6 immigration relief from outside of the United States or
7 for seeking relief from an international authority?

8 CHAIRMAN KECKLER: Well, those are part of the
9 questions. Something happened to you outside the
10 United States. You're not in the United States.

11 MS. DAVIS: Right.

12 CHAIRMAN KECKLER: But you have a United
13 States lawyer, funded by the United States taxpayers.
14 Now, that might be the only read we have of these
15 statutes, but to my mind it's an anomaly.

16 MS. DAVIS: Right.

17 CHAIRMAN KECKLER: And if it's truly a rare
18 anomaly, I'm less concerned about it. But if it turns
19 out to be a little bit more common, I think it's
20 concerning.

21 MS. DAVIS: Well, I can tell you that what was
22 contemplated here is there are two particular

1 situations that we have in mind -- or specifically
2 here, there's one situation, which is that individuals
3 who have been subjected to a crime outside the United
4 States can apply for U visa relief.

5 And so if they are seeking immigration relief
6 from the United States, they do have a nexus and they
7 are seeking some benefit from the United States. And
8 that seems to be permissible, and in fact expected,
9 under the statute.

10 With regards to purely extraterritorial
11 remedies, I don't think that that's really what we were
12 thinking about. I think in our minds there has to be
13 some nexus with the United States. We don't think a
14 purely extrajudicial crime with a purely
15 extraterritorial remedy is envisioned here.

16 MR. FLAGG: I think the other fact pattern
17 which would not necessarily be uncommon would be to
18 have a parent, for example, in the United States
19 seeking asylum and having a child still abroad subject,
20 perhaps, to the same abuser.

21 And I think under the Department of Homeland
22 Security interpretations of the immigration and asylum

1 regs, that child who is outside of the United States is
2 potentially entitled to relief, and correspondingly, we
3 had proposed to give that child, where the parent is
4 already seeking relief and has representation, also
5 representation.

6 CHAIRMAN KECKLER: Right. There are,
7 obviously, laws that are applicable, for instance, to
8 the military operating abroad that would qualify as
9 laws of the United States, and other issues.

10 It may not be a problem. I may just be a
11 little bit overly concerned here. But the fact that
12 there are categories, as I've described, that are --
13 and in the regulation, it's not clearly limited to U
14 visa relief or what the General Counsel has described.

15 That may turn out to be how it eventuates.
16 But it seems like there's some openings there that are
17 a little broader. And obviously, there are laws, as I
18 mentioned, with the military. There are also laws that
19 involve United States citizens going abroad involving
20 sexual activities with minors and so forth.

21 And those people -- that's very abhorrent.
22 They are violating laws of the United States, but not

1 in the United States.

2 MS. DAVIS: Right.

3 CHAIRMAN KECKLER: But the question is, is
4 there congressional intent to have those who suffer
5 from crimes committed by the military or crimes
6 committed by these sex tourists, or whatever they are,
7 be given relief? For instance.

8 MR. FLAGG: I think the intent -- we have
9 drafted these regulations to comport with the
10 interpretations given them by the agencies that are
11 interpreting these statutes every day, the Department
12 of Justice and the Department of Homeland Security.

13 And we are not giving a right to an LSC-funded
14 lawyer in a case in which DHS or DOJ would not
15 recognize a substantive right. So again, we are not in
16 these regulations expanding the substantive rights of
17 people, of aliens or anybody else, under these
18 statutes.

19 CHAIRMAN KECKLER: Okay. That makes sense.

20 Are there other comments and questions?

21 Julie?

22 MS. REISKIN: What about a situation where

1 someone was a victim of severe trafficking, came to the
2 States, is getting represented on some issue, and then
3 they either against their will or voluntarily go back,
4 leave the United States? Can they still get help
5 finishing the issue?

6 MS. DAVIS: I'm sorry. Could you repeat the
7 question? I'm still having issues. I'm trying to dial
8 in from another line.

9 CHAIRMAN KECKLER: I think, if I can restate
10 Julie's question, which is a very good one, is that
11 because these people obviously have associations with
12 countries other than the United States, if somebody
13 were to initiate representation while in the United
14 States but then, either voluntarily or involuntarily,
15 have to leave the United States, is it perceived within
16 the regulation as drafted that the attorney could
17 continue their representation of that person if
18 representation had been initiated by a United
19 States-present individual?

20 MS. DAVIS: I believe it would. And the
21 reason that I say that is that I believe that that's
22 the approach that's been taken with H-2A visa holders,

1 that if there is still a claim that is within the
2 United States, so long as the individual still has a
3 claim pending and initiated that representation while
4 they were in the United States, the representation can
5 continue.

6 CHAIRMAN KECKLER: That sounds right. I think
7 that's something that is probably common enough it
8 might be worth putting in the preamble, a line of that
9 nature.

10 MS. DAVIS: Okay. And --

11 CHAIRMAN KECKLER: Go ahead.

12 MS. DAVIS: Oh, no. Just to go back to the
13 previous point, the previous discussion regarding
14 whether there are limits on who is outside the United
15 States who could be assisted, did you have language or
16 did you have something you were thinking about it that
17 would be worth including in the rule? Or was that just
18 --

19 CHAIRMAN KECKLER: I was raising -- Stefanie,
20 I'm sorry -- I was raising it for discussion. And if
21 there is language that's useful -- maybe there isn't --
22 but I think it's something that, as we proceed along in

1 this area, that everybody just needs to be cognizant
2 of.

3 It's a complex area. It's designed for relief
4 of specific individuals, and we do want to give them
5 their relief. But there are limits.

6 MS. DAVIS: Sure.

7 CHAIRMAN KECKLER: And maybe those limits all
8 are perfectly expressed in our regulation and the
9 Corporation and everybody needs to be aware of them,
10 which I think they are. But I'm open to any language
11 suggestions, of course.

12 MR. FLAGG: Stefanie, why don't you move on to
13 the last question.

14 MS. DAVIS: I certainly will. So the last
15 question that we asked was whether an alien had to be
16 present in the United States in order to receive legal
17 services, to be eligible for legal services. And we've
18 discussed that some with respect to the preceding
19 section.

20 We received eight comments in response to that
21 inquiry. Seven supported the reading that we had put
22 forth. And in the Notice of Proposed Rulemaking, the

1 Corporation had indicated that it looked at VAWA and
2 the U visa provision of the Immigration and Nationality
3 Act and the P visa provision, and determined that the
4 statutes could be read together to say that an
5 individual did not have to be present in the United
6 States in order to be eligible to receive legal
7 services. And seven of our commenters supported that
8 reading.

9 After getting the comments back, we looked
10 again at the immigration laws in this area and
11 determined that it was necessary to make some changes
12 to that provision.

13 With regard to individuals who are applying
14 for assistance under the U visa provision or as
15 individuals who have suffered battery, extreme cruelty,
16 or sexual assault, we determined that they did not have
17 to be present in the United States in order to be
18 eligible for legal assistance from our recipients.

19 However, based on the fact that VAWA uses the
20 term "victims of trafficking in the United States," and
21 the TVPA uses the term "victims of severe forms of
22 trafficking in the United States," we determined that

1 in order to give those phrases meaning, victims of
2 trafficking have to be in the United States in order to
3 be eligible for legal services.

4 They don't necessarily have to be trafficked
5 into the United States, and the trafficking doesn't
6 have to have occurred here. But they must be here in
7 order to be eligible.

8 There is also a further detail or a further
9 nuance to the victim of severe forms of trafficking,
10 and that's because the T visa provision of the
11 Immigration and Nationality Act requires that in order
12 to be eligible for a T visa, an individual must be in
13 the United States on account of the trafficking.

14 So the individual can be trafficked here, or
15 the individual can be brought to the United States by
16 law enforcement to assist in the investigation and
17 prosecution of a trafficker. But the individual's
18 presence must be as a result of the trafficking in
19 order for them to be eligible for a T visa.

20 So given that language in the immigration
21 statutes, we have revised this provision to retain the
22 lack of the presence requirement for individuals who

1 are eligible under VAWA as victims of extreme cruelty,
2 battery, or sexual assault, to state that a victim of
3 trafficking under VAWA must be present in the United
4 States to be eligible, and that a victim of severe
5 forms of trafficking under the TVPA must be in the
6 United States as a result of the trafficking.

7 I know that's very nuanced. Are there any
8 questions?

9 MR. FLAGG: I would just note that I think
10 that I understand from Mr. Saunders that there may be
11 public comment on this last proposal which, as Stefanie
12 outlined, did entail a change in the proposed Final
13 Rule that had not been originally proposed in the
14 Notice of Proposed Rulemaking. And I assume we'll hear
15 about that in the public comment.

16 CHAIRMAN KECKLER: Julie?

17 MS. REISKIN: Same question. Is that answer
18 the same as the question I just asked? If they're here
19 and representation starts, and then they leave for
20 whatever reason, can it continue?

21 MS. DAVIS: I believe the answer is the same.

22 CHAIRMAN KECKLER: Yes. This gets into the

1 prior discussion, which is linked, as I understand it.

2 MS. DAVIS: Yes.

3 CHAIRMAN KECKLER: Because the change in one
4 is linked to the change in the other in order to give
5 effect to "in the United States," which is in the
6 statute and creates a nexus with the United States in
7 those areas that it covers.

8 Some language to consider -- and I wish I'd
9 recorded you verbatim, Ron. But you pointed out that
10 what we're trying to do here is we're trying to provide
11 a procedural assistance to substantive rights that are
12 being created in the Department of Homeland Security
13 and the Department of Justice.

14 And if there's some good language and thoughts
15 on that concept, that might again be worth putting in
16 the preamble. It's not regulatory language, but it's
17 something that is worth thinking about.

18 Does the Committee and the Board have further
19 questions on this?

20 (No response.)

21 CHAIRMAN KECKLER: I'm going to create a
22 public comment on this right now. I'm going to invite

1 public comment on the regulation as a whole, but as I
2 understand, specifically on this question.

3 For the record, just announce yourself.

4 MR. SAUNDERS: Good afternoon. I'm Don
5 Saunders with the National Legal Aid and Defender
6 Association.

7 MS. JONAS: And I'm Stacie Jonas with Texas
8 RioGrande Legal Aid.

9 MR. SAUNDERS: Thank you, Mr. Chairman and
10 members of the Committee. We will be brief. We
11 understand your schedule.

12 We did want to make a quick comment. As you
13 know, we have been very supportive of this change, and
14 we're very appreciative of the work that Ron and
15 Stefanie as done, as well as the whole OLA staff, and
16 are generally supportive of the proposed rule. But
17 since this is a final consideration, we did want to
18 comment on the revision that Stefanie referred to.

19 This, as you can tell, is a very, very complex
20 set of laws and regulations and things of that sort.
21 When the initial position was released in August with
22 an October deadline for comment, I think many

1 commentators were very supportive of the position that
2 you were eligible for legal services if you met the
3 other criteria even if you weren't geographically
4 located within the United States.

5 The change here, I have heard from a number of
6 LSC grantees as well as some non-LSC immigration rights
7 groups who were very concerned with this proposal. But
8 since the comment period ended in October, they asked
9 if we could, at least with respect to this one issue,
10 have an opportunity to provide more thoughtful comment
11 based upon the importance of the change.

12 That is what we are suggesting to you. I'm
13 joined by one of the leading experts in this field in
14 the country, and I don't want to take her time away. I
15 want you to hear from somebody on the ground who deals
16 with these issues every day.

17 So Stacie?

18 MS. JONAS: Thanks. Actually, we came here
19 today to express a concern about the proposed rule, and
20 have realized that we also have a question. And I'm
21 hoping that maybe Stefanie can clarify one thing for me
22 before I say anything further.

1 You mentioned that aliens who qualify for
2 what's known as U visas do not need to be present in
3 the United States in order to receive related legal
4 assistance, but that victims of trafficking do. Now, I
5 think you're aware that victims of trafficking are also
6 eligible for U visas.

7 MS. DAVIS: Yes.

8 MS. JONAS: And so what I would like to
9 clarify is whether this proposed Final Rule would mean
10 that a victim of trafficking who is also qualified for
11 a U visa has to be in the United States in order to
12 receive services.

13 MS. DAVIS: And I think that is a difficult
14 that we struggled with in coming up with the rule that
15 we drafted. And it is not a perfect solution.

16 The solution that we developed in the relevant
17 section is, essentially, if you are qualifying as a
18 victim of trafficking under a U visa -- that is the
19 basis under which you are seeking eligibility -- then
20 you do not need to be in the United States.

21 But if you are seeking legal services, for
22 example, as a victim of severe forms of trafficking

1 who, granted, are also eligible for a U visa, but if
2 you were seeking eligibility for the full range of
3 services that are available to victims of severe forms
4 of trafficking, yes, you would need to be present in
5 the United States.

6 It is not a perfect solution. It's not a
7 great solution. But, as I'm sure you can appreciate,
8 those are the statutes that we have and those are the
9 provisions that we have to work with.

10 Does that answer your question?

11 MS. JONAS: It does, and it's really helpful.

12 And I think that that was a point of a lot of
13 confusion for some of us in the field because the way
14 that the proposed rule is currently written was a
15 little confusing to us on that point.

16 I don't want to take too much time except to
17 say that, obviously, TRLA in our comments, and some
18 other commenters, were supportive of a broader read of
19 the geographic presence requirement for victims of
20 trafficking.

21 We realize that there were these two
22 provisions that refer to victims of trafficking or

1 severe forms of trafficking in the United States.
2 There's very little guidance, really, anywhere as to
3 what that actually was intended to mean.

4 We understood the underlying concern to be
5 having a nexus to the United States, and it seems to be
6 part of your concern as well. In our proposal, it was
7 to try to read it as either requiring that the victim
8 be physically present in the United States or requiring
9 that the trafficking have occurred in the United
10 States.

11 And we thought that would be the most
12 expansive read that would be in keeping with the
13 purposes of the anti-abuse statutes, but would still
14 give some meaning to that.

15 I do understand what you are saying about
16 looking to the T visa language and the requirement
17 under the T visa program that a victim must be in the
18 country on account of the trafficking, although it is
19 also true that the provision that we're looking at in
20 the Trafficking Victims Protection Act allows a victim
21 access to all legal services, not just representation
22 on the T visa.

1 And in fact, a victim of a severe form of
2 trafficking is not required to be in the country on
3 account of the trafficking. That's an extra
4 requirement for the visa.

5 But I do understand better your position now
6 that you've clarified the U visa eligibility. I'll
7 just take two seconds to say, TRLA and the other LSC
8 organizations that we work with on trafficking issues,
9 we do feel that the geographic presence issue is an
10 important one.

11 I will assure you that I think it's very rare
12 that we have cases involving somebody who has no nexus
13 to the U.S, they're both outside of the United States
14 and their crime occurred outside of the United States.

15 In my personal practice, I've never had a case like
16 that.

17 But we do have cases in which representation
18 begins in the United States, and for a number of
19 reasons, especially for people who have come on a
20 temporary visa, never intended to stay here.

21 Victims want to leave because they don't want
22 to be in the country unlawfully or because of family

1 emergency. We have traffickers who will forcibly
2 remove people and take them out of the country. Our
3 attorneys in the Rio Grande Valley who work on the
4 border are only a couple minutes from the border.

5 And as an attorney mentioned to me today,
6 you'll have a trafficker drop somebody off on the other
7 side of the border, separating her from her children,
8 in fear that the trafficker is going to victimize those
9 children as well.

10 And we were deeply concerned that the new rule
11 might mean that that person, by virtue of having been
12 forced out of the country by the trafficker himself,
13 would lose the opportunity for legal assistance.

14 While I think the number of people who are
15 seeking assistance while outside the United States is
16 not really huge, it's not insignificant. And that was
17 a concern that we had. And we didn't think the statute
18 necessarily required the outcome, particularly with
19 regard to the U visa eligibility, which you've now --
20 thank you -- clarified has not been precluded here.
21 And I don't think that there were any commenters that
22 explicitly had expressed support of such a broad

1 prohibition.

2 So we would maintain our position that the "in
3 the United States" language could be read more broadly,
4 and would think that that would be in keeping with the
5 purposes of the statute. But we do also appreciate the
6 clarification that, to the extent a victim of
7 trafficking is still qualified for a U visa, if they
8 are, for whatever reason, outside of the country, they
9 could continue to be eligible.

10 And I would conclude by saying I think it
11 would be fabulous if it was clarified in the preamble
12 that if representation begins in the United States and
13 the person needs to leave, which is really the majority
14 of the cases, that it may continue after the victim has
15 left.

16 CHAIRMAN KECKLER: Thank you for your
17 comments, and I think that's something, certainly, that
18 we've now raised. And so thank you for giving a
19 perspective from the ground about the importance of
20 that.

21 Are there further questions and comments from
22 the Committee?

1 (No response.)

2 CHAIRMAN KECKLER: Hearing none, I think at
3 this time what's asked of the Committee is a
4 recommendation that this Final Rule be passed on to the
5 Board.

6 But I would ask that certainly the issue about
7 continued representation be offered as an amendment to
8 the preamble -- it's been raised -- and also, perhaps,
9 some consideration if there's language to express our
10 linkage between the substantive rights granted by
11 Department of Justice and Department of Homeland
12 Security and the procedural and attorney representation
13 rights that we are trying to provide. If there's good
14 language for that, then I think we'd be interested in
15 seeing that.

16 MS. DAVIS: Certainly. We will work on that.

17 CHAIRMAN KECKLER: So if there are no further
18 proposed amendments and changes to the rule, I will ask
19 that a motion to recommend the rule be offered.

20 MR. GREY: With the proposed amendments
21 forthcoming?

22 CHAIRMAN KECKLER: Yes.

1 M O T I O N

2 MR. GREY: So moved.

3 CHAIRMAN KECKLER: Is there -- Mr. Saunders?

4 MR. SAUNDERS: Thank you, Mr. Chairman. I
5 just wanted to clarify the issues that Stacie raised
6 were broader than simply representation that began in
7 the United States and then the client was no longer in
8 the country, but that we really do need some more
9 clarification, if not an opportunity to comment, on the
10 broader question when that's not the situation.

11 CHAIRMAN KECKLER: Okay, Mr. Saunders. In
12 that case, is there a proposal which would -- the
13 proposal that you're discussing could take one of
14 several forms, which could include a further Notice of
15 Proposed Rulemaking. It could involve us tabling this
16 till the next meeting. I'm open to suggestions from
17 the Committee.

18 MR. FLAGG: Could I make a suggestion? We
19 already have built into this rulemaking process a
20 30-day comment period on a proposed program letter
21 which, I think, nobody has commented on and is pretty
22 straightforward because it's just carrying forward

1 materials that are currently in an appendix.

2 We could, on a limited 30-day basis, request
3 public comment on this what I think is -- well, it may
4 be broader than just a continued representation issue
5 -- quite limited to one provision of the proposal.

6 So it would not be a new NPRM other than a
7 request for comment on this one issue which we've been
8 talking about for the last 15 or 20 minutes. And then
9 we would have this interim Committee meeting, at which
10 the complete rule could be adopted with the additional
11 comments on both the program letter and this one
12 paragraph.

13 CHAIRMAN KECKLER: So as a legal matter,
14 assuming that that were to be the model we would
15 follow, what motion would Management then wish us to
16 make as a Committee at this time?

17 MR. FLAGG: A motion to approve the NPRM as
18 included in the Board book, with the modifications to
19 the preamble that have been discussed, mainly with
20 respect to continued representation where it starts
21 here, to an explicit link between our interpretation of
22 the relevant statutes, mainly the Immigration and

1 Naturalization Act and the interpretations of those
2 acts by the Department of Homeland Security and DOJ;
3 and, in addition, with the modification that the Board
4 would seek comment on the issue with respect to area 3
5 regarding whether an alien must be physically present
6 in the United States to receive legal assistance.

7 And the justification for doing that would be
8 because we have, as Stefanie described, modified the
9 proposed rule from what was in the original NPRM. So
10 for that limited provision that was changed in the
11 proposed Final Rule, there would be 30 days to comment.

12 CHAIRMAN KECKLER: Right. But as a
13 consequence, would the rule, as drafted, go into effect
14 upon approval by the Board?

15 MR. FLAGG: Well, you could do it one of two
16 ways. You could either have the entire rule -- the
17 status quo would remain the same in terms of the rules
18 until the entire rule was approved by the Board
19 subsequent to the 30-day comment period; or, and it
20 depends on how the motion is stated, the proposed Final
21 Rule could go into effect with the exception of the
22 provision of the rule dealing with whether an alien

1 must be physically present in the United States to
2 receive legal assistance. And that one provision alone
3 would not go into effect, and would remain subject to
4 the status quo.

5 So you could do it either one of two ways.
6 You could either have the whole rule go into effect at
7 some period after the comments, or everything go into
8 effect upon approval by the Board now except for this
9 paragraph and the program letter. And either of those
10 would be --

11 MR. LEVI: And you're going to have to decide
12 that within the next seven minutes because this
13 Committee has a hard stop at 5:30 today.

14 And this brings me to another topic, so as
15 soon as you vote that, I do want to discuss time
16 management of this Committee, particularly when these
17 kinds of topics come up. It has occurred now time and
18 again, that when these topics come up, the guesstimate
19 as to the amount of time that the Committee wants to
20 take with them is way low.

21 And therefore, the Ops & Regs Committee from
22 now on, as far as this Chair is concerned, when it has

1 these kinds of issues coming before it, it has to have
2 a pre-meeting with respect to them telephonically
3 before it gets to the formal Board meeting.

4 CHAIRMAN KECKLER: I fully agree with that,
5 John. And --

6 MR. LEVI: Well, it's unfair to the other
7 Committees.

8 CHAIRMAN KECKLER: Yes. Well, I guess my
9 thought on this is that the rule is -- and it's so
10 obvious upon reading the preamble and the changes.

11 The core issue of the United States nexus is
12 completely integrated, one to the other, because either
13 "in the United States" means that the activity took
14 place in the United States in the relevant statutes or
15 it means that the person's in the United States. You
16 could say it means one or the other. My own
17 preference, thought, is that it probably means one
18 thing, whichever one it means.

19 So it seems to me that separating out is not a
20 good idea. So it seems like we have to hold this in
21 abeyance. We can seek further comment on a specific
22 section of it, but we have to hold in abeyance the

1 approval of the rule until we decide what to do with
2 that section.

3 MR. FLAGG: Then I would request that the
4 Committee recommend that additional comment be sought,
5 a 30-day period, with respect to the nexus to the
6 United States issue.

7 CHAIRMAN KECKLER: Okay.

8 M O T I O N

9 MR. GREY: Move it.

10 MS. MIKVA: Second.

11 CHAIRMAN KECKLER: All in favor?

12 (Chorus of ayes.)

13 MR. LEVI: Good. That'll be good. Now the
14 question is what to do with the rest of your agenda and
15 how to hold your meeting, then. So I have to figure
16 that out. We have to figure that out.

17 CHAIRMAN KECKLER: Right. Yes. Well, since
18 we do have three minutes and we do have an obligation
19 to the strategic plan to review how the strategic plan
20 is going --

21 MR. LEVI: Please do that. But I didn't wish
22 to -- the question was --

1 CHAIRMAN KECKLER: And some other important
2 matters. The question is, then, passed back to the
3 Board Chairman of considering our default, for which we
4 have some excuse here but we indeed have some default
5 here. Is there an opportunity on the schedule,
6 remaining schedule of the meeting, to continue this?

7 M O T I O N

8 MR. LEVI: Yes, at 7:00 in the morning.

9 CHAIRMAN KECKLER: I'm a morning person, John,
10 so it's no harm to me.

11 MS. MIKVA: Could we meet during the
12 Institutional Advancement?

13 MR. LEVI: Well, you could, although you're
14 going to lose a number of us.

15 MR. GREY: Let's do it at breakfast.

16 MR. LEVI: But that's okay. But you're going
17 to lose some of the Committee. It's going to divide
18 Jim, too, which I don't really like to do.

19 CHAIRMAN KECKLER: Yes. Breakfast tomorrow.

20 (Several yeses.)

21 CHAIRMAN KECKLER: So a proposal has been made
22 to continue this meeting and adjourn it till 7:30?

1 MR. LEVI: Let me just look what time --

2 MR. FLAGG: There's an Institutional
3 Advancement Committee meeting tomorrow at 7:45.

4 CHAIRMAN KECKLER: Yes.

5 MR. LEVI: Yes, there is. That's correct.
6 There's a close Institutional Advancement --

7 CHAIRMAN KECKLER: So 7:00?

8 MR. LEVI: Well, 7:15.

9 CHAIRMAN KECKLER: 7:15 is when breakfast is
10 scheduled to begin. I was going to give everybody a
11 chance to get coffee, but they'll just have to talk and
12 eat and get coffee all at the same time.

13 MR. LEVI: That's at 7:15? Now, I don't even
14 think you're going to finish what I see on this agenda
15 in 30 minutes.

16 CHAIRMAN KECKLER: 7:00?

17 MR. FLAGG: I think we could do it in 45
18 minutes.

19 CHAIRMAN KECKLER: You think we can do it in
20 45 minutes? 7:00, then. So your suggestion, John, has
21 been carried and I believe seconded by Mr. Gray to have
22 this meeting continued at, bright and early, 7:00 a.m.

1 tomorrow morning.

2 MR. LEVI: It's going to be a breakfast
3 meeting, a breakfast meeting with barbecue.

4 MR. FLAGG: But we actually need to have a
5 vote on that.

6 MR. LEVI: We'll have a breakfast barbecue.

7 CHAIRMAN KECKLER: We need to have a vote on
8 that.

9 MS. REISKIN: That was really smooth, how it
10 became --

11 MR. LEVI: I don't mind.

12 CHAIRMAN KECKLER: So all in favor of
13 continuing this meeting at 7:00 a.m. tomorrow morning?

14 (Chorus of ayes.)

15 CHAIRMAN KECKLER: The meeting stands not
16 adjourned, but will be continued at that time. Thank
17 you all.

18 MR. LEVI: Just look at it this way. It's
19 8:00 a.m. in the East and 9:00 a.m. in Bermuda.

20 (Whereupon, at 5:28 p.m., the Committee was
21 recessed, to resume the following day, January 24, 2014
22 at 7:00 a.m.) * * * * *