

LEGAL SERVICES CORPORATION  
BOARD OF DIRECTORS

MEETING OF THE  
OPERATIONS & REGULATIONS COMMITTEE  
OPEN SESSION

Sunday, September 30, 2012

2:25 p.m.

Hilton Durham Hotel  
3800 Hillsborough Road  
Durham, North Carolina 27705

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 (by telephone)  
Victor B. Maddox  
Father Pius Pietrzyk, O.P.  
Julie A. Reiskin  
Martha L. Minow

## STAFF AND PUBLIC PRESENT:

James J. Sandman, President

Rebecca Fertig, Special Assistant to the President

Victor M. Fortuno, Vice President for Legal Affairs,  
General Counsel, and Corporate Secretary

Mark Freedman, Senior Assistant General Counsel,  
Office of Legal Affairs

Lynn Jennings, Vice President for Grants Management

David L. Richardson, Comptroller and Treasurer,  
Office of Financial and Administrative Services

Jeffrey E. Schanz, Inspector General

Laurie Tarantowicz, Assistant Inspector General and  
Legal Counsel, Office of the Inspector General

Matthew Glover, Associate Counsel, Office of the  
Inspector General

David Maddox, Assistant Inspector General for  
Management and Evaluation, Office of the  
Inspector General

Ronald "Dutch" Merryman, Assistant Inspector General  
for Audit, Office of the Inspector General

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

Carl Rauscher, Director of Media Relations, Office  
of Government Relations and Public Affairs

Marcos Navarro, Office of Government Relations and  
Public Affairs

Janet LaBella, Director, Office of Program  
Performance

Bernie Brady, LSC Travel Coordinator

Herbert S. Garten, Non-Director Member,  
Institutional Advancement Committee

Frank B. Strickland, Non-Director Member,  
Institutional Advancement Committee

Chuck Greenfield, National Legal Aid and Defender  
Association (NLADA)

Terry Brooks, American Bar Association

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

2 (2:25 p.m.)

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

## 7 M O T I O N

8 MR. LEVI: So move.

9 MR. KORRELL: Second.

10 CHAIRMAN KECKLER: I hear a motion and a  
11 second. All in favor?

12 (A chorus of ayes.)

13 CHAIRMAN KECKLER: Without opposition, the  
14 motion to approve the agenda is accepted.

15 Do we not have any minutes from prior  
16 meetings?

17 MR. FREEDMAN: This is Mark Freedman from  
18 the Office of Legal Affairs. The only meeting for  
19 which the Committee has not approved minutes was the  
20 one about ten days ago. And, quite frankly, the  
21 minutes haven't been prepared.

22

1           MR. LEVI: Because at that meeting, I think  
2 you approved minutes.

3           CHAIRMAN KECKLER: We did. We did approve  
4 the minutes from the prior quarterly meeting. But  
5 that's fine; if we don't have those --

6           MR. FREEDMAN: The Committee is outpacing  
7 staff right now. But we'll catch up, I promise.

8           (Laughter.)

9           CHAIRMAN KECKLER: Well, that's fine.  
10 That's fine. I just note that.

11           Our first item, then, of substantive  
12 business is to consider and act on possible  
13 revisions to the Corporation's bylaws for  
14 implementation of the COOP, the Corporation's  
15 Continuity of Operations Plan.

16           And I'll turn it over to Mr. Mark Freedman  
17 to introduce this issue. As you'll recall, at the  
18 last meeting we took action on the board element of  
19 LSC's COOP plan, and this is a follow-up to that.  
20 Please go ahead.

21

22

1           MR. FREEDMAN: Thank you, Mr. Chairman.  
2 This is Mark Freedman, senior assistant general  
3 counsel from the Office of Legal Affairs. I'm here  
4 reporting on behalf of Richard Sloane, so I will do  
5 my best. But I am going to apologize in advance if  
6 there's a detail that I might not have.

7           As the Chairman mentioned, the board  
8 provisions of the COOP were adopted at the last  
9 board meeting. You'll find those on page 77 of your  
10 board book, which is page 12 of the COOP. That  
11 provides for the emergency meetings of the Board.  
12 And in order to implement that, we need to make  
13 amendments to the bylaws.

14           The provisions on that page talk about  
15 board actions for emergency meetings -- issues  
16 involving public notice, possibly issues involving  
17 being closed. And of course, the bylaws govern the  
18 rules for the meetings, hence the question of  
19 amending the bylaws.

20           The two main purpose sort of those meetings  
21 would be to confirm the succession of officers where  
22 we have had an unfortunate change of personnel,

1 shall we say, and we need to have the Board confirm  
2 who the new officers are to make sure that they have  
3 all the authority that you have.

4           And the second issue that's contemplated in  
5 the COOP is, in an emergency meeting, releasing  
6 funds that might be for one reason or another locked  
7 in the budget for another purpose, and we need to  
8 immediately have board authority to go and release.

9           CHAIRMAN KECKLER: Let me pause you there,  
10 Mark. And so I think that the funds issue, as I  
11 recall, and this came up just in Finance earlier  
12 today, there's a \$75,000 amount that the Board is  
13 supposed to authorize for the President or acting  
14 President to use in a different manner than had been  
15 previously budgeted. So that's the primary --

16           MR. FREEDMAN: That's the primary  
17 motivation, is that if there's a significant enough  
18 emergency, there may be the need to move more money  
19 than the president or the other officers have  
20 authority to do without the Board action.

21           CHAIRMAN KECKLER: Okay. Go ahead.

22

1           MR. FREEDMAN: The bylaws you'll find on  
2 pages -- the relevant provisions -- on pages 84 and  
3 85 of the board book regarding holding meetings.

4           In particular, 4.01(a) talks about regular  
5 meetings and special meetings. 4.02(c) talks about  
6 notice of meetings, and that's one of the major  
7 issues because, of course, if we have an emergency,  
8 the ordinary seven days public notice and  
9 publication in the Federal Register might not be  
10 available.

11           The proposed amendments to the bylaws,  
12 which are then on page 97, would provide a new  
13 section 4.01(a) that would provide for emergency  
14 meetings. And I believe the potential action before  
15 the Committee is to adopt those, if the Committee  
16 feels ready to do so.

17           We have a resolution following the proposal  
18 on page 99. And if the Committee feels comfortable  
19 with it, it could go forward with the resolution.  
20 If there are questions, there are revisions that  
21 could be worked on. I'll give you a quick outline  
22 of these proposed bylaws.

1           The section (a) is stating that these would  
2 be triggered when the Corporation activates the  
3 COOP, and it gives the basic criteria of the  
4 statement in writing of the reasons for the  
5 emergency meeting; an agreement of the majority of  
6 the directors present that this really is an  
7 emergency meeting that calls for these emergency  
8 procedures; and that the meeting is limited to that  
9 which the Board could not have otherwise done under  
10 the ordinary notice procedures. So that's kind of a  
11 little catch protection of, this is not going to  
12 become the exception that could swallow the  
13 procedural rules.

14           Those same criteria are then reiterated in  
15 section (b) for an unanticipated event, and that is  
16 then defined in section (c). And these are three  
17 situations in which there might be a need for an  
18 emergency board meeting without the kind of notice  
19 that's ordinarily contemplated.

20           And then at the end, (e), (f), and (g)  
21 provide for some of the basics of how emergency  
22 meetings might occur; provides for a quorum of at

1 least two directors -- that's the same requirement  
2 that is in the COOP -- and order of succession.

3           You'll notice that (g)(2) on Officers of  
4 the Corporation, we don't have a clear order of  
5 succession there. That's something that the chair  
6 and I were just talking about, and it was one of the  
7 things we wanted input from the Committee on.

8           These bylaw amendments would then make it  
9 clear that if there is one of these emergencies,  
10 there would not need to be the advanced vote by the  
11 Board to hold a board meeting without the ordinary  
12 five- to seven-day advanced notice requirement that  
13 are in the bylaws and in the Sunshine Act  
14 regulations, and the circumstances for doing that.

15           So with that introduction, I think I'll  
16 hand it back to the chair.

17           CHAIRMAN KECKLER: Okay. My first question  
18 is -- the Committee can certainly weigh in on this  
19 as well; thank you, Mark -- is, do we need to have  
20 it be called 4.01(a)? Can it not be 4.12? Is there  
21 any particular reason why we can't just tag it onto  
22 the end of section 4?

1           MR. FREEDMAN: Let me doublecheck. I think  
2 that there is no particular reason. I believe that  
3 it was proposed as 4.01(a) just to nest it in  
4 between meetings and notice of meetings so that as  
5 an organization matter, it pops out there.

6           But I think that's a question of  
7 convenience, and it's true. It breaks the ordinary  
8 pattern here of simply sequentially numbering  
9 everything. I think that's at your discretion.

10          CHAIRMAN KECKLER: Right. I think that at  
11 the end -- some of the end stuff in 4 is basically  
12 about exceptions, things where we cancel meetings,  
13 actions without a meeting. And so, anyway, unless  
14 there's --

15          MR. LEVI: I agree with the chair.

16          CHAIRMAN KECKLER: All right. So unless  
17 there's a big exception, let's propose it and talk  
18 about it as 4.12.

19          MS. REISKIN: That would make it a lot  
20 easier to follow.

21          MR. LEVI: Yes, because otherwise your  
22 bylaws are hard to --

1           CHAIRMAN KECKLER:  Yes.

2           MR. LEVI:  You're going to break off onto a  
3 tangent.

4           CHAIRMAN KECKLER:  Right.  Exactly.  And I  
5 think that's the other point, which is, this is a  
6 hopefully never-to-be-used section.

7           MR. LEVI:  Right.

8           CHAIRMAN KECKLER:  Although it's there in  
9 case it is.  And so I think that would be simpler.

10          MR. FREEDMAN:  So noted.  We'll change it  
11 to 4.12.

12          CHAIRMAN KECKLER:  All right.

13          MR. LEVI:  Otherwise it'll be C-O-U-P, and  
14 that's not good if it's right up there like that.

15                 (Laughter.)

16          MR. LEVI:  You're going to be using it  
17 frequently.

18          CHAIRMAN KECKLER:  Yes.  Right.  Okay.  So  
19 with that said, with that friendly amendment, I'll  
20 open it up for further discussion.  Just to  
21 contextualize it a little bit, again, for certain  
22 kinds of activations of the COOP, this wouldn't be

1 necessary.

2           When we're imagining a situation as  
3 occurred not that long ago in Washington, D.C. with  
4 a shutdown of power, perhaps for an extended period  
5 of time or a couple weeks, even, a week or a couple  
6 weeks, the COOP might get activated. But there's no  
7 particular reason for us to use this plan. We might  
8 have had a board meeting; we might call the board  
9 meeting. But we probably wouldn't need to use this  
10 provision.

11           So I'm just pointing out that there's not a  
12 complete connection, that every time the COOP's  
13 activated, this provision would be activated.  
14 Sometimes yes, but often no. But beyond that, then,  
15 the question is, with the different kinds of  
16 unanticipated events and emergencies, will this get  
17 the job done that needs to get done?

18           I'm opening up the floor to comment at this  
19 point, especially about the provisions that we  
20 actually marked on here to be discussed.

21           Mark, do you know -- so you can see that  
22 there's a couple of comments, sort of callout

1 comments on there. It says, "A majority of the  
2 directors present at the meeting or in total agree."  
3 Now, normally we agree -- how do we agree to things  
4 in situations like this? The question is, can we  
5 agree by email, text, or other method?

6 MR. FREEDMAN: The proposed bylaws here  
7 don't specifically state whether this might be done  
8 in advance of the meeting or done at the meeting.  
9 It's part of the ambiguity here about a majority of  
10 the directors present at the meeting or in total.

11 You might be wondering, well, how does that  
12 relate? How is it that we look at the total members  
13 if we just get a majority at the meeting? That is,  
14 I believe, in part to address the question of, there  
15 may be members who are available, but not available  
16 for that meeting.

17 And this is contemplating the -- one of the  
18 notes that's been recommended by the General Counsel  
19 is that it could be done by a notational vote, for  
20 example, in advance of the meeting so that there's  
21 no question at the beginning of the meeting that  
22 you're authorized to do it. That would be the most

1 formal way of doing it. Now, the bylaws haven't  
2 specified that, or this provision, how formal it has  
3 to be.

4 CHAIRMAN KECKLER: Well, the part of the --  
5 sort of the fall-back resiliency issue here is that  
6 the Continuity of Operations Plan basically  
7 specifies best efforts to contact the directors.  
8 But what if we can't get hold of the directors  
9 because the phones -- you know, the phones are all  
10 out, or whatever's happened -- we all are totally  
11 dependent on electronics, and phones and  
12 telecommunications are gone. How do we get hold of  
13 people?

14 So a notational vote would work if we could  
15 get hold of everybody, at least for a yes or no on  
16 having the meeting. But if we can't get hold of  
17 everybody, can we still hold the meeting?

18 MR. FREEDMAN: I think that's part of the  
19 ambiguity here, is that it contemplates that perhaps  
20 the first item of business at the meeting is having  
21 a vote of those members who are present to confirm  
22 that, yes, this meeting properly fulfills the

1 requirements here. It's somewhat akin to approving  
2 the agenda.

3 CHAIRMAN KECKLER: Okay. Well, and it  
4 seems to me, if we don't specify it and we just say  
5 "agree," are the things that you specify -- I guess  
6 my question is this. Are the things that you  
7 specify, email, text, or other means, implied?

8 MR. FREEDMAN: It's a little bit of a  
9 difficult question. Like referring to the  
10 notational vote, we have some formal requirements,  
11 but as you point out here, we don't want to stand on  
12 formality.

13 So we could add in here a specification,  
14 "or in total agree in advance by reliable means of  
15 communication," which is somewhat nebulous but  
16 addresses the fact that we're talking about a fairly  
17 nebulous circumstance.

18 DEAN MINOW: Well, Mark, you're rightly  
19 trying to anticipate what we can't fully anticipate.  
20 But maybe the way to do that is in two parts, which  
21 is to say, "by the best available means," and if  
22 traditional means are not available, then --

1 something like that, that covers the extenuating  
2 circumstances.

3 CHAIRMAN KECKLER: "Best available means"  
4 sounds reasonable, I think. And that gets into the  
5 issue about making best efforts to communicate  
6 during all circumstances. So total agree, "All  
7 present at the meeting or in total agree by best  
8 available means."

9 FATHER PIUS: Could it be, "In total agree  
10 in advance of the meeting," or just, "In total agree  
11 by best available means"?

12 CHAIRMAN KECKLER: Well, you want to say --

13 FATHER PIUS: Because you had the word  
14 "present at the meeting."

15 CHAIRMAN KECKLER: Right. Yes. Let's try  
16 to make it as unambiguous as possible. So a  
17 majority of the directors present at the meeting or,  
18 alternatively --

19 DEAN MINOW: In communication by best  
20 available means.

21 CHAIRMAN KECKLER: In communication or --  
22 yes, alternatively, in communication by best

1 available means. Yes.

2 MR. KORRELL: Charles, is that in  
3 communication with that meeting by best available  
4 means, or is that just --

5 CHAIRMAN KECKLER: That's in communication  
6 with the Corporation.

7 MS. REISKIN: If there was an emergency, it  
8 would be very unlikely and very inefficient to try  
9 and get us physically together. Right?

10 CHAIRMAN KECKLER: Oh, yes.

11 MS. REISKIN: I mean, it would probably be  
12 a telephone meeting.

13 CHAIRMAN KECKLER: Yes.

14 FATHER PIUS: The question is also whether  
15 it includes just a response by email.

16 MR. KORRELL: Right. So a message goes out  
17 -- we need to have an emergency meeting. We can get  
18 three people to the emergency meeting, either in  
19 person or by phone, but what about the other eight?  
20 Do we just pop it in an email or send a pigeon or  
21 something that says, "Okay with me; it's an  
22 emergency, go for it," or what? I'm just not sure -

1 - I don't have an answer about what it ought to be.

2 I just don't really understand --

3 DEAN MINOW: The effort.

4 MR. KORRELL: Or the disjunctive there.

5 CHAIRMAN KECKLER: Okay. "A majority of  
6 the directors, either present at the meeting or as  
7 contacted by best available means"?

8 MS. REISKIN: Don't you have to get  
9 approval or don't we have to outline first if you  
10 can have the meeting, then -- because once people  
11 are there, you're already having a meeting.

12 CHAIRMAN KECKLER: Well, but the meeting is  
13 not -- you're having a meeting, but it's not a  
14 meeting of the Board. It's not a meeting of the LSC  
15 Board until we agree it is.

16 MR. FREEDMAN: You're raising an  
17 interesting -- in this situation we have, the first  
18 thing that the group has to do is validate the  
19 meeting itself. So there's a certain -- if they  
20 say, "No, we can't do this," then there's an  
21 implicit authority to have a meeting in order to  
22 say, "No, we can't have a meeting." It's a little

1 odd, but I think that as a practical matter, that's  
2 kind of where we get stuck.

3 MR. KORRELL: Mr. Chairman, maybe this is  
4 like the notational vote suggestion. But how about  
5 just, "A majority of the directors reachable by best  
6 available means"?

7 DEAN MINOW: Right.

8 MS. MIKVA: Right. I like that.

9 CHAIRMAN KECKLER: Okay. So let's just get  
10 rid of this. Okay. That's fine.

11 MS. REISKIN: Agree by whatever available  
12 means.

13 CHAIRMAN KECKLER: The majority of the  
14 directors reachable by --

15 MR. KORRELL: Reasonable efforts or -- you  
16 know, reachable after reasonable efforts, or  
17 something like that.

18 CHAIRMAN KECKLER: Yes. "Reachable after  
19 reasonable efforts."

20 DEAN MINOW: Yes. Good.

21 CHAIRMAN KECKLER: All right. That sounds  
22 good. "The majority of directors reachable by

1 reasonable efforts," or "after reasonable efforts,"  
2 something of that nature. Okay.

3 All right. Thank you very much for that  
4 suggestion. And that also affects the second  
5 comment, second callout. "A majority of the  
6 directors reachable after reasonable efforts."

7 MR. FREEDMAN: That would be in the  
8 subparagraphs (2) of both (a) and (b).

9 CHAIRMAN KECKLER: Yes. Subparagraphs (2)  
10 of (a) and (b).

11 Now, the third callout you had, we had  
12 talked about publicly -- now what would the default  
13 -- this is on the second page, page 98, which is  
14 section (d) of the bylaw. What would the default be  
15 in that, publicly posted?

16 MS. REISKIN: Smoke signal.

17 MR. FREEDMAN: Yes. Smoke signal.

18 (Laughter.)

19 MR. FREEDMAN: I should interject here, I  
20 still do have an active amateur radio license.

21 (Laughter.)

22 MR. FREEDMAN: Hopefully I will be around

1 under these circumstances. But I think that our  
2 default is -- we always tend to go to the default  
3 of, well, the web is something that everyone can  
4 access most easily. If the electricity grid is down  
5 or is down in D.C., there's the question, well, what  
6 do we do? How do we tell anybody, or is it even  
7 reasonable for us to?

8           The punt here would be to do what we've  
9 just done and say, "publicly posted after reasonable  
10 efforts via the best available means."

11           FATHER PIUS: Well, it says, "to the extent  
12 practicable."

13           MS. REISKIN: You can post to the web. I  
14 mean --

15           FATHER PIUS: Well, the question is if  
16 there's no access to the web.

17           CHAIRMAN KECKLER: Yes.

18           MS. REISKIN: We'll email you in Rome and  
19 have you do it.

20           (Laughter.)

21           CHAIRMAN KECKLER: "Posted" -- I mean, I  
22 guess the only point, and it seems totally fine as

1 it is -- but the idea of "posting" to me means as  
2 widely disseminated as possible. I don't know if  
3 that is an immediate sort of corollary to "posted,"  
4 or if we need to specify that. But that's what it  
5 means. It means as widely --

6 MR. FREEDMAN: You're thinking of perhaps  
7 emphasizing that "to the extent practicable" is  
8 while considering that the goal is to get to as many  
9 people as possible, whether or not that's bundled in  
10 the phrase "posted" and "to the extent practicable."

11 CHAIRMAN KECKLER: Yes.

12 MR. FREEDMAN: Would you like to say  
13 something specific about that in here, or do we feel  
14 like that combination is sufficient to carry that  
15 implication?

16 CHAIRMAN KECKLER: Well, how about "posted  
17 and disseminated"? I don't know. Those are not  
18 really -- they're not synonymous.

19 PRESIDENT SANDMAN: It already says  
20 "distributed."

21 DEAN MINOW: "Distributed."

22 CHAIRMAN KECKLER: Distributed. Must be --

1 okay. That's fine. Yes, that's fine. Because I  
2 guess the only thing is that "distributed" -- "to  
3 the extent practicable" also modifies "distributed."  
4 So it's to be distributed to the extent practicable,  
5 which -- that makes sense. Okay.

6 So finally, the finally callout -- we can  
7 discuss the other provisions as well -- the final  
8 callout has to do with something we really didn't at  
9 all specify, which has to do with the order of  
10 succession for the officers of the Corporation.

11 Do we need that? Do we need that in here,  
12 in the bylaws? I mean, it's the President or the  
13 acting President. The President is an ex officio  
14 member of the Board. The acting President would  
15 stand in there also as an ex officio member. But no  
16 one else would.

17 So I don't know that we need to define in  
18 here, in this bylaw, who the acting President is if  
19 we just say the President or acting President.

20 MS. REISKIN: I have a question about the  
21 whole succession thing.

22 CHAIRMAN KECKLER: Yes.

1           MS. REISKIN: Can the President designate  
2 someone to be a successor even if he's still around,  
3 like if he's -- I mean, like if something happened  
4 and he was just unavailable to deal with it, but he  
5 was still the President. Could he designate someone  
6 -- because I didn't quite -- it was unclear to me if  
7 he could do that without him like leaving.

8           CHAIRMAN KECKLER: Well, I'll let somebody  
9 answer in a second. There has been in the past an  
10 Executive Vice President, in which case that would  
11 be the person. That's part of their job  
12 description. When there's not an Executive Vice  
13 President, I'm not sure. It seems like that's up to  
14 the Corporation, up to the President, in my mind.  
15 But I'll let anybody else answer that one.

16           DEAN MINOW: I just wonder whether we just  
17 want a phrase that allows for a person to be  
18 designated. Then there should be a designated  
19 person --

20           MS. REISKIN: Right. That's what I  
21 thought. Or a designee is usually --

22           MS. MIKVA: Or a person designated by --

1           CHAIRMAN KECKLER:  So you're suggesting  
2 officers of the Corporation, President or --

3           MS. REISKIN:  His designee.

4           CHAIRMAN KECKLER:  Or his designated --

5           DEAN MINOW:  Emergency person.

6           MR. LEVI:  Or his designee.

7           MS. REISKIN:  What if we just say his  
8 designee?

9           MS. MIKVA:  His designee.

10          CHAIRMAN KECKLER:  His designee.

11          MR. FREEDMAN:  And Vic has pointed out that  
12 the bylaws discussing the Vice President talk about  
13 in the absence of an Executive Vice President, the  
14 president shall delegate to any other Vice President  
15 the authority to perform the duties of the President  
16 during the President's absence.

17          DEAN MINOW:  Something that has crossed my  
18 mind, yes.

19          CHAIRMAN KECKLER:  So the President or his  
20 or her delegate?

21          MR. LEVI:  Yes.

22          CHAIRMAN KECKLER:  All right.  That's fine.

1           The final thing that was called out there  
2 has to do with board committee chairs. And this has  
3 to do with -- Mark talked about this sort of like  
4 immediate order of business. If there's an  
5 emergency meeting and the board chair or the board  
6 vice chair is not present, who then would be the  
7 chair of the Board?

8           But, now, the Board can select somebody as  
9 acting chair. But until they do, somebody might  
10 have to be the chair for a moment, momentarily. The  
11 Continuity of Operations Plan specifies board  
12 committee chairs in a certain order, and also  
13 something that's not talked about here in the  
14 bylaws, which is that they be of the same political  
15 party as the -- the preference is given to those  
16 board committee chairs that are of the same  
17 political party as the chair.

18           MR. FREEDMAN: Right. This is on page 77  
19 in the second paragraph.

20           MR. LEVI: It's the most senior. Most  
21 senior committee chair of the --

22           CHAIRMAN KECKLER: Same political party.

1 Right.

2 FATHER PIUS: Yes. Seniority by the  
3 seniority of the committee.

4 CHAIRMAN KECKLER: I think that's right.

5 MR. FREEDMAN: Page 77. Yes.

6 CHAIRMAN KECKLER: Yes. On page 77, yes.  
7 Because it's the same political party, other  
8 committee chairs, in order of the date of the  
9 establishment of the committees they chair, earliest  
10 first.

11 DEAN MINOW: So we need to know what that  
12 list is.

13 MR. KORRELL: We can just go with oldest.

14 DEAN MINOW: Tallest.

15 CHAIRMAN KECKLER: But I don't know that we  
16 need to go beyond, in the bylaws, specifying that  
17 level of detail with board committee chairs. No.  
18 It's in the plan if it comes up.

19 MR. LEVI: In the absence of Victor  
20 Fortuno, is anybody going to know which committee  
21 was established first?

22 (Laughter.)

1 CHAIRMAN KECKLER: You know, probably not.

2 MR. LEVI: Well, I think that's something  
3 we ought to --

4 DEAN MINOW: There should be a list  
5 somewhere.

6 CHAIRMAN KECKLER: There should be a list.  
7 There is a list somewhere. And that --

8 DEAN MINOW: Victor, can you write it on  
9 the wall somewhere?

10 MR. LEVI: Well, as the committees change,  
11 but still there should be some list of --

12 MR. FORTUNO: Will do. Unfortunately, the  
13 committee names have changed over time, so that  
14 further complicates it. But I do actually have a  
15 fairly rudimentary listing of the dates of  
16 establishments of committees, and so I can make that  
17 available.

18 CHAIRMAN KECKLER: All right. So that's a  
19 non-change there. That's stat.

20 Are there any further comments on it?

21 DEAN MINOW: Did you already change, in the  
22 bylaws, section 4.09? And if not, should we -- that

1 concerned emergency proceedings? This is on page  
2 87.

3 CHAIRMAN KECKLER: Yes. You know, I asked  
4 about that. That's not really -- in theory, that's  
5 a total separate issue, emergency proceedings.  
6 Because this involves disruptive members of the  
7 public. I always wondered where that came from. We  
8 don't need to come up with it.

9 But the question is, just as a title and a  
10 heading, the fact that we already have emergency  
11 proceedings, these are emergency proceedings, if  
12 anything are. I don't know whether --

13 MR. FREEDMAN: It raises a very interesting  
14 question since the emergency proceedings provision  
15 is really the emergency proceedings in case of  
16 disruption. And what we're doing right now is  
17 really the emergency proceedings that one would  
18 normally think of.

19 We could go so far as to rename 4.09 to  
20 make that more clear, that that's emergency  
21 proceedings in the event of disruption.

22 MR. LEVI: I wouldn't even call it

Comment [Watermark1]:

1 emergency proceedings. I would call it --

2 PRESIDENT SANDMAN: Disruption of  
3 proceedings.

4 MR. LEVI: Disruption.

5 CHAIRMAN KECKLER: Disruption. Yes,  
6 disruption of proceedings.

7 MR. LEVI: Yes.

8 MR. MADDOX: So does John have to actually  
9 carry the guy out of the room?

10 (Laughter.)

11 MR. LEVI: Only with your assistance.

12 CHAIRMAN KECKLER: So let's go ahead and  
13 include that change, to change that to disruptive --

14 MR. FREEDMAN: So we can rename 4.09 to  
15 "Disruption of Proceedings."

16 CHAIRMAN KECKLER: Yes.

17 MR. KORRELL: Do we have a sergeant at  
18 arms?

19 (Laughter.)

20 MR. LEVI: And are we going to provide  
21 training for this?

22 MS. REISKIN: Some of us have experience in

1 this area, but on the other side of that.

2 MR. LEVI: I do think -- seriously, it  
3 should be retyped because it's confusing.

4 DEAN MINOW: Yes. It's confusing.

5 CHAIRMAN KECKLER: Yes. It is confusing.  
6 It was confusing even before we had the provision;  
7 it was slightly confusing.

8 MR. LEVI: Right. It's good we all have a  
9 sense of humor.

10 MR. FREEDMAN: So that 4.09 can be renamed  
11 to "Disruption of Proceedings." Yes.

12 DEAN MINOW: Good.

13 MR. FREEDMAN: Put that into items on the  
14 table for possible vote here.

15 CHAIRMAN KECKLER: All right. So are there  
16 further excellent comments? Questions?

17 (No response.)

18 CHAIRMAN KECKLER: If there are not, what  
19 is the Committee being asked to do today?

20 MR. FREEDMAN: I suppose that the Committee  
21 has a choice. The Committee can, with these  
22 amendments, send this to the Board for adoption. If

1 the Committee feels like it wants to consider this  
2 more or if there's anything that it wants to have  
3 staff look into before going ahead and adopting  
4 this, you can always ask staff to do so and then  
5 bring this up at the next meeting.

6 So those are the options. I'm not  
7 necessarily saying it should be delayed; I'm just  
8 saying those are the options.

9 PRESIDENT SANDMAN: Could I make a  
10 suggestion?

11 M O T I O N

12 MS. MIKVA: I would move to recommend it to  
13 the Board that they adopt the COOP with the  
14 amendments.

15 CHAIRMAN KECKLER: Thank you. Is there --  
16 well, before we ask for a second, Jim, you were  
17 going to --

18 PRESIDENT SANDMAN: I think when we're  
19 talking about amendments of the bylaws, the better  
20 practice would be to have the clear language that  
21 the Board is being asked to approve in front of the  
22 Board on the record before the Board votes, as

1 opposed to the record that we have here.

2 MR. KORRELL: And Jim anticipated -- I was  
3 going to ask whether we would have a cleaned-up  
4 version before the board meeting or if that's too  
5 much, given the short time.

6 CHAIRMAN KECKLER: Let's go ahead, and if  
7 we can have a friendly change to your motion,  
8 recommend to the Board that it be presented at the  
9 next quarterly meeting. Would that be acceptable?

10 MS. MIKVA: That would be acceptable.

11 CHAIRMAN KECKLER: Would that be  
12 acceptable?

13 DEAN MINOW: Or at the next meeting at  
14 which a clean copy can be --

15 CHAIRMAN KECKLER: The next meeting --

16 MR. LEVI: We could have a telephonic  
17 meeting on this topic.

18 CHAIRMAN KECKLER: Yes. Okay. The next  
19 meeting at which a clean copy has been provided to  
20 the Board.

21 MS. REISKIN: Is there a notice requirement  
22 in the bylaws to change the bylaws?

1           CHAIRMAN KECKLER: No. I don't think so.  
2 But I agree with Jim. We should see it all there  
3 and know what it is. And we renumbered things  
4 and --

5           FATHER PIUS: So at the next available  
6 opportunity --

7           CHAIRMAN KECKLER: Well, hold on. Is there  
8 a second to that modified motion?

9           MR. KORRELL: So is this the motion that  
10 Laurie made that Martha suggested that we change?

11          CHAIRMAN KECKLER: Yes. It's the motion to  
12 recommend to the Board. But I modified it so it  
13 said the next time --

14          MR. KORRELL: Okay. I will second that  
15 motion.

16          CHAIRMAN KECKLER: All in favor?

17          (A chorus of ayes.)

18          CHAIRMAN KECKLER: Opposed?

19          (No response.)

20          CHAIRMAN KECKLER: Hearing no opposition,  
21 the motion is approved. And we'll get a clean copy,  
22 and the next time the Board comes together -- not

1 tomorrow, but the next time, we'll have something to  
2 present, then, for the bylaws. Thank you very much.

3           The next item of business carries forward  
4 what we talked about at the last meeting, both the  
5 quarterly meeting and our telephonic meeting, having  
6 to do with the further notice of proposed rulemaking  
7 on grant termination procedures, enforcement  
8 mechanisms, and suspension procedures.

9           Last time, we got a briefing on some of the  
10 overall rationale for the rule. And today we're  
11 going to talk about the comments that came in in our  
12 second round of comments, on the further notice of  
13 proposed rulemaking.

14           One thing, before we get started, that I  
15 want to say is whether people agree with the rule or  
16 not, have concerns about it, I think that everybody,  
17 almost, could agree that it has been substantially  
18 improved over the course of time.

19           It's clear, I think, and better. And for  
20 that, we can thank a lot of hard work on the part of  
21 people at the Corporation, and also a lot of  
22 thoughtful comments from the public. So to people

1 listening on the phone and people here who have made  
2 comments, thank you very much. There is an improved  
3 draft rule. Your work has been invaluable.

4 With that, I will turn it over to you,  
5 Mark.

6 MR. FREEDMAN: This is Mark Freedman again,  
7 Office of Legal Affairs. And up here at the table  
8 we have Matt Glover from the Office of the Inspector  
9 General. Also we have available in the room Janet  
10 LaBella, the director of the Office of Program  
11 Performance. And on the line should be Lora Rath,  
12 the director of the Office of Compliance and  
13 Enforcement. So they're available for any questions  
14 that they might be able to address.

15 I'm going to give a ten-minute overview.  
16 The goal here is to get your comments and questions  
17 on the comments we've received and where we're going  
18 for a draft final rule for your consideration. The  
19 comments that have been submitted on the revised  
20 proposed rule are on the website.

21 We've provided you in the board book with  
22 kind of a guide to the comments. Given the time

1 frame we've had between these meetings and when the  
2 comments came in, we don't have full Management  
3 analysis. So that's why you have a guide with some  
4 indications of some reflections from Management but  
5 not a full response.

6 Our intent is to look at the totality of  
7 the comments that we got to the first version of the  
8 rule and the second version of the rule, and  
9 especially some of the major themes, and be able to  
10 give you an analysis of those for your benefit  
11 before you consider the final rule with final  
12 language.

13 MR. LEVI: Can I say, but they have not  
14 motivated further changes?

15 MR. FREEDMAN: There are not further  
16 changes in what you have before you right now.  
17 There are, I think -- jumping right to that, there  
18 are a number of changes that we'll make to the  
19 mechanics of the rule that have come up either in  
20 our ongoing review or in the comments.

21 As Chairman Keckler mentioned, we've had  
22 positive input from everyone here, and I think that

1 unquestionably, the rule itself that you'll have in  
2 front of you will really address lots of the nuances  
3 of how this actually gets worked out. But you don't  
4 have in front of you right now a revised language  
5 since what you saw last, since what we published on  
6 August 8th. You also have in your board books the  
7 timelines and the background information on the  
8 proposal that you discussed at the meeting about ten  
9 days ago.

10 MR. LEVI: But I'm trying to say, is there  
11 going to be further modifications --

12 MR. FREEDMAN: Yes.

13 MR. LEVI: Based -- there will be, and  
14 another draft, following this?

15 MR. FREEDMAN: Yes. I apologize for not  
16 clearly addressing that.

17 MR. LEVI: Okay. That's all I wanted to  
18 know.

19 MR. FREEDMAN: What I'd like to do is take  
20 a few minutes here to pull back a little bit on the  
21 big picture of how this rulemaking fits into the  
22 enforcement scheme because that's touched on by a

1 number of the themes in the comments.

2           The three real principles that we were  
3 working on here was, first and foremost, to fill the  
4 enforcement gap, but not to reopen the whole  
5 question of how enforcement is done. We've got,  
6 really, two gaps.

7           There's the fact that the rule doesn't  
8 provide for any enforcement actions or terminations  
9 of less than 5 percent, and we have the timing gap  
10 of if we have a need to do something, we can suspend  
11 for up to 30 days.

12           Then there's another about five months  
13 before we'd be able to terminate any amount of  
14 funding of 5 percent or greater, which potentially  
15 leaves us a little flat-footed in a situation where  
16 we think there's a violation going on, and there's  
17 nothing we can do about it.

18           And it's worth noting that that's after  
19 we've done an investigation. So usually, we've got  
20 weeks or months to get to the point of saying, now  
21 we want to do something. And hence the concern  
22 about having those gaps and what we can do.

1           Now, the second principle is looking at the  
2 big picture here that we are, of course, balancing  
3 rights of recipients, the need for maintaining  
4 continuity of delivery of services to the eligible  
5 client population, and maintaining the integrity of  
6 our oversight process and support for the federally  
7 funded legal aid program, because I think that we  
8 always have to look at the fact that our oversight  
9 and enforcement has a lot to do with how well we  
10 maintain our support.

11           And the third principle here is the  
12 context, which I think we haven't discussed a lot in  
13 the recent meetings. The LSC Act has provisions  
14 about terminations and suspensions which themselves  
15 were suspended by Congress in 1998. And I'd like to  
16 go into a little detail about that because it's an  
17 important context for thinking about some of the  
18 proposals and some of the comments.

19           The LSC Act originally provided that for  
20 suspensions of less than 30 days, there had to be  
21 notice and an opportunity for the recipient to show  
22 cause why that shouldn't be done. For a termination

1 of over 30 days -- sorry, a suspension of over 30  
2 days or a termination, there had to be a timely,  
3 full, and fair hearing with an independent hearing  
4 examiner, who could be appointed by LSC.

5 In 1998, two years after the sweeping  
6 restrictions, Congress suspended those provisions of  
7 the LSC Act. In doing so, Congress was silent on  
8 what the requirements would be for suspensions of  
9 any amount of time.

10 For terminations, Congress specified that  
11 there still needed to be a notice and an opportunity  
12 to be heard. But that's all, or at least that's all  
13 that they were requiring in the language of the  
14 appropriations act as they were suspending the  
15 provisions of the LSC Act.

16 Now, part of our context there is that from  
17 the very beginning, we have 1618 as our threshold.  
18 Before you get to a suspension or a termination, you  
19 have to go to 1618 and say, are we ready for that?  
20 And the threshold there that has been in place since  
21 1978, I think, is one of three paths.

22 Did the recipient take actions that

1 intentionally violated the rules? Or did the  
2 recipient fail to remedy a violation after LSC  
3 notified them of it? Or did the recipient engage in  
4 a persistent violation of the Act? If one of those  
5 three criteria were met, then we would move on to  
6 suspensions or terminations.

7           Notably, the "knowing and willful" standard  
8 that is currently one of the factors that we have  
9 specified in 1606 about terminations, that isn't a  
10 threshold requirement. That has not been a singular  
11 threshold requirement in any of the formulations of  
12 this enforcement scheme.

13           It's an important factor that may come in,  
14 but we have not had the case where it would be  
15 impossible for LSC to take an action without showing  
16 a knowing and willful violation by the grantee. And  
17 that's rolling all the way back to the first  
18 versions of these regs under the provisions of the  
19 Act in the '70s.

20           In 1998, when Congress sent a pretty clear  
21 message that they wanted to see more aggressive  
22 oversight, or at least they wanted to see us have

1 the power to do that -- and remember, this was also  
2 when they had required competition and had ended the  
3 right to refunding; there were provisions in the LSC  
4 Act about refunding procedures, and there was  
5 functionally a right to refunding going up until  
6 '96.

7           So this is all in the context of changing  
8 us into more of a competitive mechanism, where  
9 grantees had to compete and where grantees faced a  
10 much greater risk of not having ongoing funding if  
11 they weren't meeting the requirements.

12           Yes, ma'am?

13           MS. MIKVA: Can I interrupt you for a  
14 moment? Can you tell me a little more about how  
15 these amendments, congressional amendments,  
16 happened? Was there a request by LSC? Did Congress  
17 come up with it on its own? Do you know?

18           MR. FREEDMAN: I don't know with great  
19 detail. My understanding, as a general matter, is  
20 that as part of the sweeping changes that were being  
21 enacted in '96, there was a focus on mandating  
22 competition. The Corporation was already looking

1 into competition, and it had been something that had  
2 been considered on a number of occasions in advance  
3 of 1996.

4           And actually, the Corporation -- it's a  
5 little funny twist in the competition regulation.  
6 It was being worked on in advance of the 1996  
7 requirement for competition. And if I'm correct,  
8 there was a thought that perhaps if we were simply  
9 doing it, it wouldn't have to be in a statutory  
10 provision.

11           In that context, I think there were  
12 questions about how the right to refunding and  
13 competition interplayed. And so one of the things  
14 that happened two years later in '98 was an explicit  
15 lifting, suspension, of any provisions having to do  
16 with the right to refunding.

17           At the same time as there was this  
18 suspension of those rights to more a sense of  
19 process, my understanding is that it was a general  
20 effort by Congress at the same time that Congress  
21 was asking the Inspector General to engage in a  
22 direct audit of matters involving compliance of

1 grantees. And there was a question about the  
2 compliance functions of the Corporation, to what  
3 extent some of those were going to be also done by  
4 the Inspector General.

5 So that's the bigger picture there. But I  
6 realize I can't answer your most direct question,  
7 which was, what was in the minds of Congress when  
8 they said, suspend these process provisions, and  
9 why.

10 MS. MIKVA: But there was not a request by  
11 LSC. This was initiated by Congress. Is that  
12 correct?

13 MR. FREEDMAN: I don't know. I don't know.

14 MR. LEVI: Vic, do you know?

15 MR. FORTUNO: There was no request by LSC.  
16 And the Corporation was on notice that a number of  
17 new provisions, riders, would be imposed. And so  
18 the Corporation sought to start work on considering  
19 implementation of the various provisions.

20 So when they actually were enacted, the  
21 Corporation was in a position to move swiftly. It  
22 wanted to make clear its commitment to implementing

1 whatever the will of Congress was.

2 MR. FREEDMAN: And the Corporation at the  
3 time -- you'll recall the board of directors that  
4 was appointed by President Clinton really came into  
5 place around '94/'95, right about the same time that  
6 Congress started to change the legislation affecting  
7 LSC.

8 So you had a new board and new staff that  
9 was then looking at implementing -- they had just  
10 implemented all these new restrictions, and then  
11 they implemented this. Okay, we've got to change  
12 how terminations work.

13 I wasn't there at the time; I was just  
14 finishing up at a grantee at the time. But I expect  
15 there was somewhat of a sense of being back in the  
16 1970s when they were writing the new rules because  
17 there was kind of a whole new framework.

18 They were balancing these congressional  
19 concerns with maintaining client services, rights of  
20 recipients. And also, I think, they were closer in  
21 time to the kinds of abuses that may have occurred  
22 at LSC that NLADA has referenced on a number of

1 occasions. That was fresh in people's minds.

2           It's one of the reasons why, in doing this  
3 rulemaking, there's been an emphasis on, let's fill  
4 the gap. Let's not reopen the core rule. Because  
5 there was a lot of work that went into the core  
6 rule. We have the 5 percent and above, and some  
7 very careful balancing. And that would potentially  
8 be a much larger rulemaking, to start looking at  
9 what should those standards be and what should that  
10 balance be at this time.

11           I think that gets to the -- there's two  
12 different areas of the comments. The first area is  
13 commenting on the new proposals. What should the  
14 rules be and the standards be for reductions of less  
15 than 5 percent, the new limited reductions? What  
16 should happen with suspensions that go beyond 30  
17 days into the 90-day period?

18           But most of those comments from the folks  
19 who are critical of the rule have been tied to  
20 changing the standards across the board, changing  
21 the standards that apply in the entire rule.  
22 There's agreement that the standards should be

1 uniform. The big disagreement is, should they be  
2 uniform where they're at right now, or should they  
3 be uniform significantly increased?

4           And I think there quite frankly is a  
5 question as to whether, if we implemented the  
6 proposals from, say, NLADA and some of the  
7 provisions from SCLAID, would we in fact have  
8 standards that were more stringent than they were  
9 before 1998?

10           I know that there have been concerns raised  
11 as to, if we went in that direction, what does that  
12 mean for how we're understanding the mandate that  
13 Congress provided in 1998 when Congress essentially  
14 said, this should be more streamlined, and the  
15 requirements of the LSC Act may be too onerous?

16           As you know, the Inspector General  
17 generally supports this rulemaking. They would  
18 strongly encourage having suspensions be indefinite  
19 until curative action occurs. They would not cap it  
20 at 90 days.

21           SCLAID supports the rulemaking, the need to  
22 fill the gap, but they strongly recommend that we

1 adopt a much broader and stronger set of  
2 requirements, adding some "especially" in issues  
3 involving impact that have not been in any version  
4 of these rules.

5 MS. REISKIN: Excuse me.

6 MR. FREEDMAN: Go ahead.

7 MS. REISKIN: When you say "requirements"  
8 in that way, you're talking about due process for  
9 the recipient requirements. Is that what you mean?

10 MR. FREEDMAN: That's a good question. Let  
11 me specify. I'm thinking there's really two  
12 different areas of the requirements. There's the  
13 process requirements -- for example, the  
14 recommendation that we go back to an independent  
15 hearing officer who is not an LSC employee, as  
16 opposed to merely an impartial one, who could be an  
17 LSC employee.

18 There's also adding more requirements to  
19 the standards to apply. A little historical  
20 context: The rule, when it was originally adopted,  
21 talked about terminations when there's been a  
22 substantial failure, after you've gotten through

1 that 1618 threshold.

2           There was no criteria for what a  
3 substantial failure would be. So in 1998, the Board  
4 actually did -- they did a couple of things  
5 readjusting the rule. One of them was to take away  
6 the requirement of the independent hearing officer  
7 for an actual termination.

8           Another was to add the six criteria we  
9 currently have in the rule, including as -- and  
10 these are criteria for consideration of what is a  
11 substantial failure. And one of them is, was it a  
12 knowing and willful violation?

13           Adding that criteria gave more guidance to  
14 how this would be applied without substantively  
15 adding a new, higher threshold. And one of the  
16 things that the proposals would do is add "knowing  
17 and willful" as a mandatory threshold. Some of the  
18 proposals would go so far as to make that a  
19 mandatory threshold in 1618 so that even for a  
20 suspension, where we're concerned that funds are  
21 being right now misused, we'd have to meet that  
22 higher threshold.

1           Some of the issues that came up in the  
2 comments are things that Management is looking at as  
3 good ways of adjusting the areas that we have the  
4 proposal in. For example, there had been a lot of  
5 discussion of the President's review, and there's a  
6 strong feeling that the President should be the  
7 final review.

8           Even in the original termination  
9 regulation, where there would be an independent  
10 hearing officer, that independent hearing officer  
11 would only have a recommendation, and the President  
12 of LSC would make the final call.

13           To preserve that, we're looking at saying  
14 that in the lesser reductions or in appeals of  
15 suspensions which we're considering, the President  
16 would simply not be involved at the early stages so  
17 that the President could clearly hear the final  
18 appeal.

19           That's not a requirement in the  
20 terminations of over 5 percent because there's this  
21 independent hearing officer step. And so there's no  
22 requirement that the President not be involved early

1 on.

2           CHAIRMAN KECKLER: Mark, let me interrupt  
3 you for a second here. You just mentioned the issue  
4 of appeals of suspensions. And let me ask a  
5 question about that, which is, you've said you're  
6 considering it, and I notice that there's a strong  
7 argument in from I think SCLAID, and I think some  
8 other people have mentioned it as well in the  
9 comments about that.

10           Is there a reason why we didn't have an  
11 appeal? And then I do have a question about any  
12 opinion from the OIG's office about appeals of  
13 suspensions because I know suspensions are a concern  
14 of theirs. Concomitant if you wish, but I'll just  
15 turn it to Mark.

16           MR. FREEDMAN: Let me answer -- I think I  
17 can answer both those points. One is, I think,  
18 jumping to what we're looking at, we're looking at  
19 the possibility of having an appeal to the President  
20 of a suspension once the suspension has gone past 30  
21 days to say, initially we use the existing  
22 procedures, the procedures we've had going back to

1 the '70s.

2           But since we've expanded this from now 30  
3 days to potentially 90 days, saying if we hit 30  
4 days and the grantee still hasn't managed to fix  
5 whatever the problem is, the grantee could appeal to  
6 the President to say, staff is suspending our  
7 funding and we think you should look at this and  
8 hopefully give us some equitable relief here.

9           That would not interrupt a suspension. A  
10 concern was to make sure that the suspension, which  
11 is meant to be a fairly immediate action, would not  
12 be held up by an appeal. And so we're looking at  
13 and are interested in the feedback from the Board as  
14 to having that suspension triggered when we get to  
15 30 days so that there is an opportunity to say, this  
16 is getting to be pretty big.

17           There's also the question of having a  
18 threshold. Maybe it would have to be after 30 days  
19 and if it's more than, say, 20 percent of the  
20 grantee's funding that's being suspended so that we  
21 don't have an appeal to the President when it's less  
22 than 20 percent, when it's a relatively small

1 amount.

2           There's no fixed point on that. That's  
3 just a possibility, in part coming from the thought  
4 from NLADA about having a threshold amount. They  
5 had proposed \$10,000. That seemed a bit low for us.  
6 But those would be too things that we'd be  
7 considering there.

8           As to why we didn't have any appeals in the  
9 past, I think that mostly goes to the structure of  
10 the notion of suspensions, going all the way back to  
11 the LSC Act. The idea there is, there's something  
12 going wrong that we need to do something about right  
13 away.

14           But the suspended funds will be released to  
15 the grantee fairly quickly. And under the original  
16 LSC Act provisions, there would have to be a full  
17 hearing if the suspension went past 30 days.

18           So we didn't have an original appeal in  
19 part because the idea was to be able to act  
20 immediately, but know that the consequences weren't  
21 necessarily so severe until we either -- well, we  
22 didn't end up having any provisions for suspensions

1 beyond 30 days. So presumably, for a severe  
2 consequence, we'd have to trigger a termination with  
3 the more formal procedures.

4 And even here, the suspension would go up  
5 to 90 days. But we'd still need a limited reduction  
6 procedure or a termination of 5 percent or greater  
7 procedure to take what would functionally be a  
8 permanent action regarding a grantee's funding.

9 CHAIRMAN KECKLER: Right. And I think the  
10 analogy that I'm thinking about has to do with  
11 injunctive relief, and the level of process  
12 increases as the injunctive process goes forward.

13 But anyway, did you have a comment?

14 MR. GLOVER: Matthew Glover for the Office  
15 of the Inspector General. We think, in evaluating -  
16 - or in deciding what to do with the suspension part  
17 of this project, the committee should keep in mind a  
18 suspension serves a different function in the  
19 overall enforcement scheme.

20 If you look at the suspension rule as it's  
21 drafted now and largely as it would stay, it's a  
22 forward-looking rule. It looks either to protect

1 LSC's funds in the future, going forward, or to  
2 prompt some action, some corrective action, on the  
3 part of the grantee in the future.

4           And in both cases, to impose a suspension,  
5 there has to be a belief on the part of LSC that  
6 prompt action is necessary. And so we think that  
7 that would foreclose an appeal right immediately  
8 before imposing a suspension because the process  
9 would be delayed, and you would lose the benefit of  
10 prompt action.

11           We think, though, that a review after the  
12 suspension was imposed to protect LSC funds would  
13 not conflict with the purpose of the suspension  
14 rule. And under our proposal, under our preferred  
15 position of a suspension pending corrective action,  
16 we would anticipate that there would be regular  
17 review of what's going on with that suspension to  
18 determine whether it should be lifted at any  
19 particular point in time.

20           CHAIRMAN KECKLER: Thank you.

21           Unless you had something burning, I'm just  
22 going to open it up to questions and comments from

1 the committee members and the Board regarding this  
2 round of comments.

3 MR. LEVI: So the involvement of the  
4 President at the back end. And I wanted to hear  
5 again what you said about what does that do to  
6 limiting the President's ability on the front end on  
7 the suspension issue?

8 MR. FREEDMAN: Here's how we would  
9 anticipate that working. We currently have it --  
10 the current proposal would have that an appeal from  
11 a limited reduction in funding could go to the  
12 President unless the President had been involved in  
13 that initial decision. And upon reflection, we're  
14 thinking that that makes it too complicated. And so  
15 instead, let's work from the beginning.

16 The Corporation starts investigating a  
17 concern. And the President may be aware of the  
18 investigation, what's going on there.

19 MR. LEVI: I should hope so. That's what  
20 I'm worried about.

21 MR. FREEDMAN: If we get to the point where  
22 the Corporation has said, okay. We've got a problem

1 here. The grantee isn't addressing it. Let's start  
2 thinking about a limited reduction -- at that point,  
3 the President gets to say, all right, Vice President  
4 for Grants Management. All right, Director of  
5 Office of Compliance and Enforcement. Go figure  
6 that out. I'll be ready for the appeal.

7           The President is then not involved and is  
8 leaving it to the staff that's working more directly  
9 on these matters for them to decide whether or not a  
10 limited reduction would be an appropriate step, and  
11 to take all the actions about that.

12           Then, presuming the grantee appeals that  
13 decision, the President is in the position to day,  
14 all right. I can take a relatively fresh look at  
15 this, having not been a part of the process.

16           I say that with the slight reservation of  
17 it's a tough choice because if we have the President  
18 involved early on, then functionally it wouldn't  
19 feel right to then have the President review. It  
20 would feel almost like we're playing a charade.

21           And if the President appoints someone to do  
22 the review, because the President was involved,

1 well, some of the comments pointed out, the  
2 President is appointing someone within LSC,  
3 fundamentally. That's someone who works for the  
4 President. And even if it's the Vice President for  
5 Grants Management, who certainly is someone who is  
6 probably going to be comfortable disagreeing with  
7 the President on things, it's awkward, at least.

8           And if the President appoints someone from  
9 outside of LSC, as a number of the proposals have  
10 said, if the President had been involved, then we  
11 have the ultimate decision made by someone who is  
12 not part of LSC, something that we've never done.

13           So it seems as if the best option, and one  
14 that is somewhat consistent with the notion that the  
15 President isn't making day-to-day decisions about  
16 grants, is that in this context, with a limited  
17 reduction of funding, that it's the Vice President  
18 of Grants Management, the Director of Compliance and  
19 Enforcement -- it's the staff that decide to  
20 initiate a limited reduction in funding action. But  
21 that action can't actually take place until there's  
22 been the opportunity for an appeal to the President.

1           So presuming that the grantee would appeal  
2 and challenge the staff decision, the President's  
3 still in the position of ultimately saying, yes,  
4 we're going to do this, or no, we're not.

5           Thinking a little bit about context of how  
6 this might work out, we've had some disallowed cost  
7 proceedings that have been fairly big where the  
8 President has been in a position to essentially  
9 grant some equitable relief, to say, all right.  
10 This number's really big and this grantee's really  
11 working hard; let's make some adjustments.

12           And I bring that up as an example to say  
13 that I expect that the President is going to  
14 strongly support the actions of staff, but also,  
15 that everyone has different roles here. And so it  
16 doesn't seem silly to me to say the President may  
17 review.

18           MR. LEVI: Is this -- now, and that whole  
19 process takes place before the imposition of the  
20 reduction? Okay.

21           CHAIRMAN KECKLER: Precisely. Precisely.  
22 So that would be the distinction between

1 suspensions, injunctive relief, and remedial  
2 monetary type of remedy.

3 MR. FREEDMAN: That's correct.

4 CHAIRMAN KECKLER: Julie, you had a  
5 question?

6 MS. REISKIN: Yes. I guess I'm having a  
7 hard time with this whole concept of an appeal  
8 because to me -- and again, the kind of appeals I'm  
9 used to were more like administrative law judge,  
10 where someone from -- like a citizen is challenging  
11 the government on something.

12 But generally, there's the internal appeal,  
13 which is, you go to the agency and you go to a  
14 management level. And then pretty much it's always  
15 upheld what the agency did.

16 And then there's the external appeal, which  
17 is someone different. And if there isn't going to  
18 be one, if the position is, we're the grantor, we're  
19 responsible, and someone outside the agency really  
20 shouldn't do it, why don't we just say that rather --  
21 -- I mean, why don't we just be honest and say  
22 there's not an appeal?

1           I mean, I would think that monitoring,  
2 supervising, occasionally maybe overturning staff  
3 decisions, is part of the overall supervisory  
4 responsibility of management. So I'm just having a  
5 problem with how is this really an appeal if it's  
6 all internal?

7           MR. FREEDMAN: You raise -- it's an  
8 interesting point about how LSC operates because we  
9 have some aspects of being kind of -- shrinking down  
10 a federal agency because we don't have as large a  
11 bureaucracy, as large of a hierarchy.

12           And so our regulatory scheme reflects that,  
13 where we make sure we have some process in there.  
14 The process of kind of going up the ladder within  
15 LSC is recognizing that the folks on the ground, as  
16 it were, they're very close to the situation.

17           And we want to make sure that decisions of  
18 major consequence like this are being reviewed by  
19 the folks with a larger perspective, not necessarily  
20 for mistakes so much as for judgment and for  
21 perspective.

22           So I think it is true that, on the one

1 hand, LSC, as the grantor, fundamentally within the  
2 LSC process is making these decisions. And there is  
3 not and there has not been a truly independent  
4 external review the way we think of, for example,  
5 getting benefits, where you can go to an ALJ who is  
6 institutionally -- while the ALJ may be within the  
7 organization, is institutionally independent.

8           Here we don't have that. Even in the  
9 original LSC Act provisions, for a termination, a  
10 fully termination, there would be an independent  
11 hearing officer who would have a recommendation.  
12 But the President of LSC was not bound by that. And  
13 it goes to our grant-making prerogative as the  
14 grantor.

15           So it's a balancing act of trying to make  
16 sure that it isn't just some arbitrary decision that  
17 is not reviewed, and the grantees can make sure that  
18 it's really been thought through and considered.

19           It also protects us internally because it  
20 enables staff to feel like they know that when they  
21 make a hard decision, on the one hand, they know  
22 that their superiors are going generally support

1 them; but also knowing that there's going to be an  
2 opportunity for someone to say, hey, quite  
3 literally, somebody at a higher pay grade is  
4 probably going to have an opportunity to look at  
5 this.

6           And that both helps with the integrity of  
7 the actions made by staff, and I think it also  
8 provides some comfort to the staff, knowing that if  
9 a grantee wants, a grantee can go up the change of  
10 command.

11           CHAIRMAN KECKLER: Let me add one more  
12 point about that. I think that, as the disallowed  
13 costs example shows and other things, an appeal to  
14 the President, I don't think, is generally  
15 meaningless. It certainly shouldn't be seen as  
16 that.

17           One aspect that you didn't mention of it is  
18 that the President is accountable to the Board.  
19 Right? And so ultimately, these types of things are  
20 about accountability and they include  
21 accountability, us as members of the Board. But  
22 that's made visible by the President's involvement

1 at the last stage of the appeal, whereas staff  
2 doesn't have that same kind of relationship and  
3 connection, generally, to it.

4 So I think that's an aspect of it, why I  
5 personally would be favorable to the President being  
6 involved as the final decision-maker, as the appeal.  
7 But if board members -- I know time -- yes, go  
8 ahead. I was going to say -- we can -- yes?

9 MS. MIKVA: Go ahead.

10 DEAN MINOW: I don't know how you want to  
11 do it, but I have some questions.

12 CHAIRMAN KECKLER: Okay. Go ahead.

13 DEAN MINOW: I know you're operating within  
14 an existing rule, and modifying that is not always  
15 the easiest way to be straightforward. But I found  
16 it confusing. So just a couple examples.

17 There's a definition section that, for  
18 example, does not define "Substantial failure." It  
19 refers to another section that defined "Substantial  
20 failure." That's a modest example.

21 But another, more basic one is I take it  
22 that the central purpose of this effort to amend

1 this rule is to provide more tools, a wider array,  
2 fill in the gap. And it's not clear from the names  
3 which is the most serious, which is the least  
4 serious. So debarment, termination, partial  
5 reduction -- if one of the goals is to be clear and  
6 to give notice, I don't think it does that.

7 In addition, this very specific question of  
8 the role of the President is part of the larger  
9 issue of the procedures that attach to each one of  
10 these possible sanctions. There are two questions  
11 that I have about that.

12 One is, you may not know at the front end  
13 of an inquiry which will attach. So if you have  
14 different procedures that attach, depending on which  
15 sanction, particularly whether or not the President  
16 could be included at the front end, you may have  
17 created a problem for yourself.

18 Secondly, and on that same point, if you  
19 have different procedures but new evidence or  
20 information emerges along the way, do you have to  
21 switch procedures?

22 Thirdly, just as a drafting point, some of

1 the amendment refers -- take 1606.8 -- to a  
2 termination or debarment, and others refer --  
3 1606.10 -- termination, debarment, or lesser  
4 reduction. I haven't done the analysis to go  
5 through each one of these procedures to see how it  
6 correlates, but it wasn't obvious, on a third  
7 reading, why some of them applied to two and some of  
8 them applied to three of these sanctions.

9 I understand you're operating within an  
10 existing rule and trying to amend it without  
11 collapsing it. But these were things that I found  
12 confusing.

13 MR. FREEDMAN: Thank you, Dean Minow. And  
14 you've put your finger on one of the difficulties  
15 and one of the comparisons between the first  
16 proposed rule and the revised proposed rule. First,  
17 we tried to append the new rule to the existing  
18 rule, and that raised the question of --

19 DEAN MINOW: It's a new rule. Yes.

20 MR. FREEDMAN: Right. And then we tried to  
21 integrate in. But as you point out, we have some  
22 different procedures. So there's a difficult

1 mapping, and I have to say I share your  
2 frustrations. The engineer in my head -- my dad's  
3 an engineer -- wants this to follow a nice flow  
4 chart that's clear, and that's clear right from the  
5 labeling.

6 DEAN MINOW: Well, may I suggest, even if  
7 you cannot change the format of the rule, having  
8 that flow chart would be helpful as you amend the  
9 rule so that as you walk through it, you actually  
10 can check off, did we clarify each one? Because it  
11 wasn't clear to me that that was the case.

12 MR. FREEDMAN: I appreciate that.

13 DEAN MINOW: And also that the procedure  
14 for the preliminary determination, how exactly --  
15 just walk us through it. How does that relate,  
16 then, to a final procedure? And how does that  
17 relate, then, to the standards? And how does that  
18 relate to the evidence that's necessary? It's not  
19 clear.

20 Now, somebody has to have it clear in your  
21 mind. Your goal is to actually be deterring  
22 misconduct as much as it is to have a guidepost for

1 what the Corporation does when there is misconduct.

2 CHAIRMAN KECKLER: Those are great  
3 recommendations, and I really hope that they are in  
4 the preamble. And I think, as I've mentioned  
5 before, there's absolutely no reason in regulatory  
6 preambles that you can't have flow charts. You  
7 can't actually have graphics that show, this is what  
8 you need to do, boom, boom, boom, boom.

9 And just a thought as you -- I know that a  
10 lot of this falls on your shoulders, which is that --  
11 -- you know, make up that flow chart, and then you  
12 might be able to actually then be -- like reengineer  
13 using the flow chart. You've got a diagram, you  
14 know? You've got the engineering -- a wiring  
15 diagram for the regulation. You might be able to --

16 MR. FREEDMAN: I'm a big fan of that. I  
17 find that that helps immensely with regs. And I'm  
18 going to ask Glenn if TIG can make a mobile app.

19 (Laughter.)

20 CHAIRMAN KECKLER: Father Pius?

21 FATHER PIUS: Just a quick observation  
22 question. In 1606.3, we have essentially a five-

1 year statute of limitations on termination. But  
2 that language isn't repeated with the new limited  
3 reduction in funding language so that there is, it  
4 seems, a disparity between whether or not there  
5 should be a statute of limitations. Just throw that  
6 out.

7 MR. FREEDMAN: That's a good point. I'll  
8 look into that.

9 FATHER PIUS: Whether it should be the same  
10 five years or a lesser number since it's a lesser  
11 event.

12 MR. FREEDMAN: Right. Good. Very good.

13 CHAIRMAN KECKLER: Laurie?

14 MS. MIKVA: I guess I just wonder whether -  
15 - I understand that there's some sense that the  
16 decision should be made -- the ultimate decision  
17 should be made in-house. But would there really be  
18 a problem with giving the President discretion to  
19 pick someone outside in the event the President felt  
20 compromised in some way to review?

21 MR. FREEDMAN: I think that that can be --  
22 that can be kept in there. I think it's an

1 interesting question about whether it should be --  
2 whether or not we want to have provisions that would  
3 contemplate ultimate decisions being made outside of  
4 LSC.

5 FATHER PIUS: Could you contemplate it  
6 being made by the OIG, the Inspector General?

7 MR. FREEDMAN: Actually, I understand the  
8 instinct. And I think one of the concerns is that  
9 since the Inspector General has a prohibition on  
10 being involved in programmatic activities, it would  
11 raise --

12 MR. LEVI: Well, the other problem is  
13 whether the outsider would report to the Board,  
14 ultimately. And we hear from the grantee, but we  
15 don't know who this person is. So you'd have to  
16 figure that out if, in fact, the President was going  
17 to go outside the Corporation for someone because  
18 ultimately, we are "ultimately." And I don't know  
19 how -- you have to figure that out, if that's going  
20 to happen.

21 CHAIRMAN KECKLER: Mr. Chairman, you raise  
22 a good point. I mean, I think one -- because,

1 following up, the idea of us being accountable.

2 Right?

3 MR. LEVI: Yes.

4 CHAIRMAN KECKLER: One thing to consider  
5 that follows on Laurie's suggestion is that -- or  
6 anyway, something to think about is the President  
7 could have discretion to seek a recommendation from  
8 an independent party.

9 But then the final responsibility, the buck  
10 stops here kind of responsibility, would be with the  
11 President. But if the President wants an outside  
12 view, for whatever reason, then maybe that could be  
13 mentioned.

14 MR. GLOVER: Mr. Chairman?

15 CHAIRMAN KECKLER: Yes?

16 MR. GLOVER: Could I address that just  
17 briefly?

18 CHAIRMAN KECKLER: Sure.

19 MR. GLOVER: Mark, I think, has done a  
20 great job of addressing the 1998 changes and so  
21 forth with outside people looking at the decisions  
22 about grants. As he mentioned, it's always been the

1 case that somebody in LSC has had a final say  
2 because LSC has the final grant-making authority and  
3 grant-making responsibility.

4 And whatever the arrangement ultimately  
5 ends up being, the OIG thinks it's very important  
6 that LSC maintains final responsibility and final  
7 authority over its grant-making function.

8 MR. LEVI: And I'm certain it could not  
9 have. You couldn't turn to the Inspector General  
10 because that would be a management function.

11 MR. GLOVER: No. I'm saying that we would  
12 not -- we wouldn't want to be involved in it. I'm  
13 just saying that our recommendation is that LSC  
14 itself maintain its --

15 MR. LEVI: Yes. Absolutely. I agree with  
16 that.

17 CHAIRMAN KECKLER: Julie?

18 MS. REISKIN: Yes. The way it works in  
19 Medicaid, because it's a similar thing in the  
20 Medicaid world, there has to be a single state  
21 agency with absolute authority. It is after that  
22 informal hearing, then you go to an ALJ, and then

1 either side can file exceptions.

2           And then it goes back to a separate office  
3 within the Medicaid agency that can overturn it, but  
4 only within specific -- it's like only if there's  
5 like a gross error of fact or something about the  
6 law. So they maintain that, but you still have that  
7 independence, but it goes first. So it's the other  
8 way around.

9           MR. FREEDMAN: And I think it raises one of  
10 the points that often comes up with LSC, which is,  
11 one of our strengths is that we have more  
12 flexibility than a federal agency. We're smaller,  
13 leaner, meaner.

14           CHAIRMAN KECKLER: We're not meaner.

15           (Laughter.)

16           MR. FREEDMAN: Fair enough. We're not  
17 burdened by the panoply of federal regs. But on the  
18 other hand, sometimes when we're criticized, one of  
19 the first questions is, why don't we do it like a  
20 federal agency does it? And so we end up -- the  
21 federal agencies will sometimes have the ability to  
22 have enough of a large structure that you can create

1 more independence within and address some of these  
2 concerns that way. And we, quite frankly, have to  
3 make some closer calls.

4 Now, one other point to that, on the  
5 accountability, because I think this gets to the  
6 chairman's point about the ultimate accountability  
7 somewhat being with the Board.

8 LSC, of course, as we know, is always under  
9 somebody's magnifying glass. And what comes to mind  
10 for ultimate accountability is what Congress may do.  
11 There was a time when there was management at LSC  
12 and a board that were adopting regulations that  
13 Congress didn't like.

14 And Congress -- the appropriations riders  
15 at one point said, the regulations enacted by the  
16 Corporation in the last two years shall not be  
17 enforced, and the Corporation shall not adopt any  
18 more regulations.

19 When we suspended funding for one grantee  
20 because they didn't have an acceptable audit, there  
21 was an inquiry from the Congress person from that  
22 district, saying, why have you done this? The

1 Congress person was happy with our answer. But they  
2 were paying attention. And I think that is worth  
3 keeping in mind, that we d have that kind of  
4 additional oversight.

5 MR. LEVI: Well, we do, but -- and also, we  
6 should keep in mind the fact that the President is  
7 not just the arbiter of disputes and the person with  
8 the club as it relates to -- because the next day,  
9 that person is also the encourager of programmatic  
10 innovation and has to help that grantee because that  
11 grantee may be the only one in a region, and there  
12 are issues in the region, and they're part of -- and  
13 maybe going to the meeting at which that grantee is  
14 expected to be there and present.

15 And it's very important, I believe, as  
16 complex as this is, that the President maintains  
17 that relationship. We're not just the club. We're  
18 also the encourager. And I think if we start having  
19 all kinds of folks in between that relationship so  
20 it can't be direct, that's not a good thing.

21 And I think -- I don't know if Jim has a  
22 sense of that. But I think if we're disappointed in

1 a grantee, we also want to help that grantee so that  
2 we aren't always disappointed in it. And our  
3 President is in the best position to occupy both of  
4 those roles, actually.

5 MR. FREEDMAN: I think it's an excellent  
6 point. And part of what we like to encourage is the  
7 sense of -- the grantee really wants to hear from  
8 the LSC President about what a great job they're  
9 doing, and wants the President to be coming there  
10 and telling their local bar association how great  
11 their grantee is.

12 And hopefully that's the motivation of the  
13 grantee, that they don't want to be in a position in  
14 which they're in front of the President saying,  
15 please don't cut some of our funding because we know  
16 we did something wrong.

17 CHAIRMAN KECKLER: Board members and  
18 committee members can add on this thing. But we do  
19 have a public comment element to this.

20 MR. GLOVER: Mr. Chairman?

21 CHAIRMAN KECKLER: Yes. Go ahead.

22 MR. GLOVER: If I could very briefly, the

1   OIG didn't make an official statement, or hasn't  
2   made one yet.  But I would like to just get a few  
3   points out as quickly as possible so we can move on.

4           CHAIRMAN KECKLER:  Please go ahead.

5           MR. GLOVER:  We've reviewed all the  
6   comments, and we thought that there were some  
7   helpful comments in there.  There were also some  
8   comments that raised serious concerns for us and we  
9   thought put the Corporation at actual risk.

10           We thought, for example, limiting  
11   enforcement mechanisms to knowing and willful  
12   violations, there's a number of problems with that  
13   that Mark has explored.  We also see a problem with  
14   that in relation to LSC's appropriations act, which  
15   place restrictions on what LSC can fund.  And those  
16   restrictions don't contain a similar "knowing and  
17   willful" limitation.

18           So effectively, LSC would be enacting a  
19   regulation -- if it put the knowing and willful  
20   requirement on all of its enforcement mechanisms, it  
21   would be saying, LSC is going to under-enforce its  
22   appropriations act.

1           We are also concerned with the good faith  
2 and reasonable interpretation standard because we  
3 think that that would ultimately swallow up the  
4 whole rule. And we're concerned to see that the  
5 Corporation remains the final arbiter of what its  
6 rules mean. We also think that that might tend in  
7 the direction of the same problem as the knowing and  
8 willful problem.

9           We've talked extensively about the outside  
10 hearing officers. I think we've aired our comments  
11 in response to questions on that.

12           We've also talked about the suspension, our  
13 concerns with the suspension; putting the suspension  
14 -- putting the termination and limited reduction in  
15 funding procedures in place for suspension, we  
16 think, would be completely out of place because we  
17 think suspension serves a different function. And  
18 in deciding what to do with suspension, the  
19 Committee should keep in mind that it is a forward-  
20 looking mechanism.

21           Finally, we're concerned with the proposal  
22 that the dividing line between termination-style

1 process and limited reduction-style process -- the  
2 proposal that that be set at \$10,000 raises some  
3 concerns for us. We think that that would  
4 effectively nullify most of this rulemaking.

5           The predecessor entity to LSC, the Office  
6 of Economic Opportunity, had a rule where it could  
7 discontinue funding for up to 20 percent without a  
8 hearing. In 1998, when 1606 was enacted, notice and  
9 comment was taken. LSC decided that 5 percent was a  
10 good level for the dividing line. It actually  
11 rejected a proposal to set the dividing line at  
12 \$25,000 as opposed to a percentage.

13           I think that the reason is, if you look at  
14 this \$10,000 proposal, it has a disproportionate  
15 impact or a disparate impact on smaller grantees, so  
16 that the smallest grantee could potentially be  
17 subject to a 12.7 percent limited reduction in  
18 funding without the termination proceeding, whereas  
19 the largest grantee would only be subject to a .06  
20 percent reduction in funding.

21           And just based on our quick analysis, more  
22 could be done on that. It appears that those

1 smaller grantees tend to be Native American  
2 programs. So that would be something that the  
3 Committee would probably want to consider.

4           One positive point about something -- or  
5 one point that we'd like to bring to your attention:  
6 The OIG, in its most recent comments, included a  
7 recommendation as a way to deal with some of the  
8 concerns that have been raised about arbitrariness.

9           While we don't think it's a good idea to  
10 presume arbitrariness on the part of the  
11 Corporation, we thought that transparency might help  
12 solve some of that problem. And the publication of  
13 final decisions would allow public scrutiny of those  
14 decisions, would allow grantees to know whether  
15 they've been treated fairly compared to other  
16 grantees who have gone through the process.

17           And it would also have a side benefit of  
18 allowing for the development of a body of something  
19 like decisional law about what we mean by this  
20 regulation and what we mean by our other regulations  
21 that some in the community have complained about  
22 being unclear.

1           So that's the brief overview of our  
2 comments.

3           CHAIRMAN KECKLER: Well, thank you very  
4 much. Those are excellent and very helpful  
5 comments. I wondered about that proportion myself.  
6 I'm glad you ran the numbers.

7           Are there any other public comments on the  
8 rulemaking?

9           MR. GREENFIELD: Good afternoon, Mr.  
10 Chairman. Charles Greenfield from NLADA.

11           You know, in listening to the conversation  
12 earlier that occurred here, I see there was some  
13 discussion about whether it made sense to have an  
14 independent hearing officer being involved.

15           In our comments to the original notice of  
16 proposed rulemaking in January, the end of January,  
17 we cited those other legal services type of federal  
18 grant programs -- the Justice Department's Office of  
19 Violence Against Women, several HUD grant programs  
20 involving fair housing as well as housing  
21 counseling, et cetera.

22           In those situations, they all imposed

1 sanctions and suspensions. And in those cases with  
2 other federal legal services grant-making entities,  
3 they have the ability for a grantee to appeal to an  
4 independent hearing officer.

5           What's interesting is I don't take the  
6 OIG's comments to mean that we shouldn't give due  
7 process to grantees. However, I don't see them  
8 recommending strongly we should give due process to  
9 grantees. Where is that? It's not here because I  
10 guess we are the ones to say that, on behalf of the  
11 grantees, that they need due process.

12           And as many of you on the Committee know,  
13 there are many, many grantees that are concerned  
14 about this -- not because they violate intentionally  
15 the restrictions of the Corporation, but because  
16 they worry about how this will be implemented in  
17 some future time.

18           So if the train is going in the direction  
19 and has left the station, if it going in the  
20 direction that this Committee wishes and the Board  
21 wishes to implement some sort of additional tools  
22 and additional sanctions -- which we oppose, and

1 have stated the reasons for that earlier -- then  
2 there should be some basic due process that allows  
3 for an independent hearing examiner to look at  
4 these.

5           And it's not unusual. That's happening in  
6 other federal programs. As I said one other time,  
7 if GAO and others in Congress want to summarize, you  
8 ought to apply the federal rules, then we ought to  
9 apply them in due process.

10           It is not because the section 1011(2) of  
11 the statute -- which earlier provided for the right  
12 to an independent hearing examiner's appeal, a  
13 hearing examiner for a grantee prior to any  
14 termination -- because that was removed by Congress.  
15 Does not make that a congressional mandate for the  
16 agency not to select whatever process they choose.

17           I do not see that as a congressional  
18 mandate when a provision is eliminated. Maybe a  
19 sign of congressional intent; I would agree to that.  
20 It's simply not a congressional mandate that this  
21 Board or this Committee not impose decent due  
22 process protections when faced with the loss of a

1 significant source of revenue for further delayed  
2 programs.

3 We've talked before. This has a potential  
4 significant and substantial effect on client  
5 services.

6 CHAIRMAN KECKLER: Thank you very much, Mr.  
7 Greenfield. And again, thank you to NLADA.

8 MR. GREY: Let me ask a question, Mr.  
9 Chairman, if you don't mind.

10 I think that we have tried very hard to  
11 consider an approach that is both fair and I think  
12 somewhat contained so that part of what the chairman  
13 said a little earlier about being able to maintain  
14 relationships is important, but also the skill and  
15 knowledge that is part and parcel of the work is  
16 contained as well within the decision-making  
17 process.

18 I wonder out loud, if we adjust or modify  
19 some of this activity to encourage some sort of  
20 dispute resolution, some mediation, and  
21 opportunities for things like offer in compromise,  
22 as opposed to a direct appeal, under the

1 circumstances so that there is consideration before  
2 final determination in ways that allow us to  
3 maintain the relationship, would be a way to address  
4 some of what you're saying.

5 MR. GREENFIELD: Interesting thought, Mr.  
6 Grey, and I think we ought to take a look at that,  
7 if there are ways in which both the desires of the  
8 Corporation and those that work at the Corporation,  
9 and grantees and those that work for grantees and  
10 their boards, can be satisfied that the process is  
11 one that they feel they've had a just opportunity  
12 and a fair opportunity to submit the evidence and  
13 information that they have, and to be able to get  
14 that to the highest levels of the Corporation for  
15 the Corporation to fairly consider that.

16 I'm not saying that should be done instead  
17 of an appeal. I'm just simply saying that I'm  
18 reacting to say that we should look at procedures  
19 that allow for that opportunity.

20 MR. GREY: Thank you.

21 CHAIRMAN KECKLER: Thank you.

22 MR. BROOKS: Yes. I'm Terry Brooks with

1 the American Bar Association Standing Committee on  
2 Legal Aid and Indigent Defendants. And I would like  
3 to convey the Committee's deep gratitude to this  
4 Committee and the Board for its very careful  
5 consideration of all of these issues.

6 I approach the table only to make one small  
7 point, and that is that I was happy -- and I know  
8 the Committee would be happy -- to hear Mr.  
9 Freedman's discussion of the possibility of adding  
10 some appeal process, some additional appeal process,  
11 in the case of suspensions.

12 I was struck by the timelines that Mr.  
13 Freedman prepared and the swiftness with which  
14 suspensions can be imposed. And it struck me that  
15 with a process that can move, within 11 days, the  
16 prospect of services to clients being disrupted  
17 without sufficient time being allowed to move cases  
18 to other attorneys, and to permit the lawyers to  
19 comply with their ethical obligations to provide  
20 service to clients, is very severe.

21 So some sort of appellate process --  
22 perhaps the one Mr. Freedman described, perhaps

1 something between that and what has been proposed by  
2 ABA and others -- would seem to be very important  
3 there. Thank you.

4 CHAIRMAN KECKLER: Thank you. And again,  
5 our thanks to SCLAID for its comments.

6 Are there any other public comments on the  
7 rulemaking?

8 MS. REISKIN: Can I ask a question?

9 CHAIRMAN KECKLER: Oh, yes. Go ahead.

10 MS. REISKIN: What would be, if you know,  
11 the appropriate amount of time? I mean, if 11 days  
12 is the wrong amount of time, what is the right  
13 amount of time? Do you have an idea?

14 MR. BROOKS: I would hesitate to venture a  
15 correct amount of time, and would turn to others who  
16 are much more familiar with situations where there  
17 has to be arrangements made to turn over cases to  
18 another lawyer or to fill that gap. I don't  
19 personally have that experience, and really can't  
20 speak to that.

21 DEAN MINOW: Well, on that issue and also  
22 on Robert Grey's suggestion, I wonder if 1606.7 can

1 be amended to include a provision for informal  
2 negotiated dispute resolution and adjustment of time  
3 frames for the necessary continuity of service.

4           It seems to me that's right at the  
5 appropriate place to put it, where there's an  
6 informal conference. So far it's written only to  
7 deal with the exchange of information and  
8 identification of narrowing of issues.

9           But if an analog is a pretrial conference  
10 in court, the issues that I've just identified are  
11 exactly what a judge would be looking at: Is there  
12 an ADR option? Is there a compromise that's  
13 possible? What's the time frame that makes the most  
14 sense? So why would we tie our hands and not do  
15 that here?

16           MR. GREY: Martha, to follow up on that,  
17 you picked up where I was thinking about. But the  
18 concern that I've got, and I think that you  
19 expressed it earlier, is that we -- I think the idea  
20 is, in this case, that relationships with our  
21 grantees are critical to the success of our overall  
22 mission.

1           And so the process by which we might take  
2 extraordinary action, albeit probably as infrequent  
3 as they've been in the past, but giving us  
4 flexibility to encourage good behavior as opposed to  
5 being caught with our hands tied for bad behavior,  
6 still ought to consider a process that encourages  
7 good behavior as opposed to trying to tie people up  
8 for bad behavior.

9           And I think that the foundation upon which  
10 we build this will be seen either as one or the  
11 other. And I just think that there's been so much  
12 work and development by the courts, and by  
13 sophisticated administrative agencies that I  
14 practice before, in terms of approaching this with  
15 an eye toward maintaining a good relationship with  
16 the regulator and those that are being regulated,  
17 that we ought to really think about this, not just  
18 as a one size fits all.

19           And I think we've tried to do that, Mark,  
20 based on the instructions, I think, that we have  
21 given. But it seems to me that we ought to enlarge  
22 our thinking about this and make sure we feel good

1 about whatever system or approach we adopt that has  
2 the best interest of the organization's mission in  
3 mind.

4 CHAIRMAN KECKLER: Thank you very much,  
5 Robert. And I think it's 1606.7(d), or thereabouts,  
6 that we're thinking about to have -- to be  
7 thoughtful about the informal conference and whether  
8 there's more that can be said about that.

9 And I'll just add my own thing, which is  
10 slightly out of scope. But just as a -- and I'm not  
11 sure it's in the regulation, although you might find  
12 a way to reflect it -- is the idea that the people  
13 holding that might get some training in mediation,  
14 or we might have some people get some training in  
15 mediation, rather than just being sort of enforcers.  
16 But if they're going to go into informal  
17 conferences, we're talking about mediation. They  
18 need to be mediators and not just regulators.

19 Yes?

20 MR. GREENFIELD: Charles, this is Chuck  
21 Greenfield again. If I could just say one  
22 additional thing that I don't know if the Committee

1 has talked too much about -- Terry Brooks mentioned  
2 it, from ABA -- is that there really needs to be  
3 some additional due process built into the  
4 suspension procedures.

5           While the further notice of proposed  
6 rulemaking mentioned the ability to appeal the LSC  
7 President for less than 5 percent sanctions, there  
8 was no such similar change for the 1623 suspension I  
9 think Mark talked a little bit about.

10           So that's something that really has to be  
11 looked at carefully because that is potentially a  
12 much larger amount or proportion, as Matthew said,  
13 proportion of the total grant than the less than 5  
14 percent sanction. So there really is a glaring  
15 absence of much process at all in the suspension  
16 area.

17           CHAIRMAN KECKLER: Right. People have  
18 mentioned that, and I think it's certainly something  
19 that -- again, it's one of these things that has  
20 been -- you know, public input has been very  
21 helpful, and getting a sense of that.

22           CHAIRMAN KECKLER: All right. Well, if

1 there's -- the next item on the agenda is public  
2 comment generally. The way we do this normally with  
3 our rules, if anybody does have some public comment,  
4 I suppose on our COOP plan or any other item of the  
5 business before the committee?

6 (No response.)

7 CHAIRMAN KECKLER: Seeing none, we can now  
8 move to consider and act on any other business.

9 MR. KORRELL: Charles, can I ask a  
10 question? So what do we now envision on this  
11 proposed rulemaking? We've drafted, received  
12 comments, revised; drafted, received comments,  
13 revised; you know, reviewed --

14 CHAIRMAN KECKLER: We are getting closer.  
15 We're getting closer. There's going to be two  
16 pieces of paper. This was somewhat discussed at our  
17 last teleconference meeting.

18 There's going to be two more pieces of  
19 paper that are going to come to us as a Committee  
20 and also to the Board which will be -- there will be  
21 a memorandum describing Management's general  
22 thoughts following this meeting and following

1 comments, summarizing what they're going to do, what  
2 their thinking is on the comments, and how they're  
3 going to respond to them.

4           So there'll be a memorandum on that, and we  
5 may hold a teleconference on that if people have  
6 questions, whatever people need after they get that.  
7 And then, well before the January meeting -- well  
8 before the January meeting, emphasizing -- there  
9 will be a draft final rule, okay, that will be black  
10 and white.

11           We may have some red lines, but there will  
12 be a document that has no red lines in it. It will  
13 be a document that -- there'll be a redlined  
14 document, and there'll be a document with no red  
15 lines, no blue lines, nothing. It will be a draft  
16 final rule, and we'll have a preamble in front that  
17 provides an explanation, interpretation, and  
18 response to comments.

19           And that will come before the Committee in  
20 January. The Board will receive it; it will be  
21 received prior to the regular board book. And so  
22 the whole Board will read it. But the Committee

1 will then consider it at the meeting, make a  
2 recommendation, and then if there's a positive  
3 recommendation, that will be at the board meeting in  
4 January.

5 Yes?

6 DEAN MINOW: It sounds like the perfect  
7 process. In the drafting of that preamble with the  
8 flow chart and the memorandum that the Management's  
9 understanding reflects, I think that having the  
10 high-level considerations of wanting both to have an  
11 ability to say to Congress and any outside viewer  
12 that we are actually on top of the enforcement of  
13 the proper use of our funds and have the proper  
14 tools to do that enforcement, and we also are the  
15 supporters and enablers of improved services and  
16 operations by our grantees, that those two  
17 watchwords should guide the entire process.

18 And if in the course of working through  
19 what are the proper procedures to achieve that  
20 balance, it turns out that this rule cannot be  
21 rewritten in its own contours, do not be afraid to  
22 tell us that.

1 MR. FREEDMAN: Very good.

2 MR. KORRELL: So a question for Mr.  
3 Freedman. Martha, I think, just hit it. Do you  
4 feel like, based on the comments that we've made  
5 today and some of Martha's questions about it, that  
6 this is a doable thing on the timeline that we've  
7 just talked about?

8 By asking the question, I'm not trying to  
9 suggest that the answer should be no. I'd really  
10 like the answer to be yes. We've been working on  
11 this a long time. But if not -- so that's question  
12 one.

13 And then two, maybe, for Charles: If we  
14 make changes along the lines that Martha suggested,  
15 do we need to send this out yet again, or are these  
16 the kinds of changes that we can just include in the  
17 final notice of proposed rulemaking as having  
18 addressed previous comments, and not have to do  
19 another round?

20 CHAIRMAN KECKLER: Let me make a brief  
21 answer to that, although I'll let legal counsel do  
22 that, which is that as long as we don't expand the

1 scope of the rule responding to comments and  
2 accepting some comments and rejecting others, the  
3 explanation -- we're not creating new areas of  
4 regulation and we don't need to go out again.

5 Now I'll let you answer the first question,  
6 which is more --

7 MR. FREEDMAN: I think the measure of how  
8 much trouble I'm in is how many knowing glances I  
9 get from around the table as to what can be done in  
10 this time frame addressing each and every concern  
11 that's been raised?

12 I think what we can realistically do in  
13 this time frame is provide you with a document that  
14 will address many of these issues, a draft final  
15 rule with a preamble that I think would be ready for  
16 prime time.

17 I also think that, quite honestly, it's  
18 probably going to be a document that you will feel  
19 you could pass to the Board and enact at the January  
20 meeting, and that it would be a good rule, and that  
21 it would address a lot of concerns, but that no, it  
22 won't address every concern, or at least not every

1 concern to a sense of real consensus.

2           Some of that, I think, may be things that  
3 we'll never be able to resolve without continuing  
4 this ad nauseam. Some of them may simply be that in  
5 drafting, there are just some things that I won't  
6 manage to be able to figure out, even with kicking  
7 it around with the excellent colleagues I have.

8           Because I want to make clear that I'm happy  
9 to say I'm not drafting this alone in my cubby.  
10 There's a lot of really good input from lots of  
11 folks on the staff.

12           You've seen up here the thoughts and input  
13 from the Inspector General. The same is true for  
14 folks from OPP, from OCE. And I do want to note  
15 that the Inspector General is concerned about  
16 process for our grantees.

17           And there even have been a few discussions  
18 when folks from the Inspector General have said,  
19 "Well, I know this is going to sound weird, but we  
20 really think that there needs to be something better  
21 in here on notification or on process."

22           That is something that's of concern to

1 them, and I think it touches a little bit on Mr.  
2 Grey's point, that we kind of have to write rules  
3 for what to do when things go wrong. We don't have  
4 to write rules about when we're doing things and  
5 they're going right, which creates the problem of  
6 having a set of rules that sound like all we're  
7 doing is finding fault.

8           And I think that Dean Minow's suggestion  
9 about making clear in the preamble that we are  
10 trying to aggressively do both, address what's wrong  
11 and encourage what's right, is an important part of  
12 the preamble.

13           So I think we'll have something that you'll  
14 sink your teeth into, that you perhaps will be  
15 comfortable voting on. You might say you want more  
16 work. But I promise to give you a very difficult  
17 choice.

18           CHAIRMAN KECKLER: Thank you very much.

19           With that, I'd still offer any other  
20 business for the Committee? Other topics?

21           (No response.)

22           CHAIRMAN KECKLER: No? In that case, I

1 will now consider a motion to adjourn the meeting.

2 M O T I O N

3 MR. GREY: Move it.

4 CHAIRMAN KECKLER: Second?

5 MR. LEVI: Second.

6 CHAIRMAN KECKLER: All in favor?

7 (A chorus of ayes.)

8 CHAIRMAN KECKLER: Without opposition, the  
9 meeting is now adjourned. Thank you very much.

10 (Whereupon, at 4:10 p.m., the Committee was  
11 adjourned.)

12 \* \* \* \* \*

13