Federal Funds for Public Interest Law: Plausibility, Politics and Past History

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The advent of public interest law firms has been described as "one of the most significant recent developments in the legal profession."[1] While defying precise definition, "public interest" law is generally concerned with providing legal advice and representation to the underrepresented—a wider clientele than the poor[2]—and is largely a reaction against the perceived failure of private corporations and government institutions to consider and respond to the needs of the public.[3] The magnitude and scope of the public interest law effort cannot yet be ascertained, but it appears likely that there will be continuing pressure for its expansion. The growing social consciousness of younger members of the bar and law students,[4] and the increasing concern of the organized bar over the impact of public interest law firms[5] may be indicative of the potential longevity of present trends.

Two of the most important limiting factors governing the expansion of public interest law practice are the availability of funds and the types of restrictions that often are attached to such funds. The individuals whose interests need to be protected by public interest lawyers usually cannot pay any fees or fees sufficient to allow an attorney to represent them adequately while maintaining a reasonable standard of living for himself. Consequently, only those lawyers who are willing and able to allocate a portion of their own, or their firm's, resources to such work, and those who are able to obtain operating funds through contributions, donations and grants are able to engage in such endeavors. Assuming that funds are available, the scope of a lawyer's public interest work may be restricted by the funding source itself. For example, large law firms which are able to participate in public interest law through an internal allocation of funds may be obliged to decline

1. Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971).
2. *Id.* at 1107-08.
3. *Id.* at 1096-97. *See also* Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1070-71 n.3 (1970).
4. *See* Robson, *Private Lawyers and Public Interest*, 56 A.B.A.J. 332 (1970).
5. Tucker, *Pro Bono Publico*, 30 LEG. AID BRIEFCASE 11, 12 (1971).

representation of potential *pro bono* clients whose interests conflict with those of fee-paying clients. Similarly, if operating funds are obtained through donations, contributions or grants, the use of such funds may be subject to prohibitions or restrictions imposed by the grantor as conditions of the donation.

Private funding sources have so far been adequate to encourage pioneering public interest law efforts and provide a certain degree of independence from outside interference.[6] Paradoxically, as the need for representation in the public interest grows and exceeds the private resources available, it is likely that people will look increasingly toward the government for support.

In considering a proposal for government funding of public interest law firms it is important to recognize that such support may establish any one of a variety of relationships. So while the terms funding and direct support are used here interchangeably, the extent of federal influence and control that results will be studied in terms of the method through which the financial assistance is provided.[7] This discussion will examine the reasons why the federal government should consider funding public interest law, the problems inherent in any federal participation in this controversial field, and the advantages and disadvantages of direct government funding. The federal government has already provided direct support in the narrow public interest context of legal services to the poor. The federal role in supporting legal services in the broader public interest might well parallel the development of the legal-services-for-the-poor prototype and, therefore, the latter will serve to illustrate possible common lines of development and problems.

THE CONCEPT OF FEDERAL FUNDING

Breakdown of the Public Interest Factor of Administrative Agencies

The failure of government agencies to recognize the public interest and act accordingly is one example of government unresponsiveness that might be alleviated by government support of public interest law. The apparent inconsistency of such a suggestion is lessened if agency failures are attributed to an inability, rather than an unwillingness, to respond to the public interest.

Administrative agencies were created "in the public interest" to balance the complex interests of the public, locally and nationally, against private interests that were frequently in opposition to the general public good.[8] The effects of the administrative process on the day-to-day

6. Halpern & Cunningham, *supra* note 1, at 1112.
7. See text & notes 112-13 *infra*.
8. Address of Chief Justice Hughes to Practitioners Before the Interstate Commerce Commission, Nov. 1, 1930, in F. FRANKFURTER & J. DAVISON, CASES AND MATERIALS ON ADMINISTRATIVE LAW 16 (2d ed. 1935).

activities of ordinary citizens is pervasive, touching their lives with greater frequency and significance than the judicial process,[9] although this may not be generally recognized by the public. Consequently, administrative agencies should implement policy only by reasoned decisions which consider all of the interests involved.

Federal agencies may make rules with varying degrees of public participation if the public is a party interested in the decision.[10] In many instances the agency must notify interested parties of the subject matter of the proposed rule and give them an opportunity to participate in rulemaking.[11] The method of participation may be "through submission of written data, views, or arguments with or without opportunity for oral presentation."[12] The purpose of this notice and opportunity for input from diverse sources is to permit the agency to benefit from exposure to the views of all concerned parties and to prevent the rulemaking proceedings from being unduly narrowed by specific interests.[13]

These procedures have been viewed as rendering the rulemaking procedure both efficient and democratic by allowing interested parties to present facts and ideas which may lead to greater understanding of the issues by the agencies before rules are finalized.[14] Unfortunately, in many administrative actions, there is a dangerous tendency to assume that compliance with procedural formalities automatically produces correct decisions.[15] In the final analysis, the quality or correctness of an administrative decision is determined not only by the reasoning of the decision makers, but also by the alternatives and interests presented to them by interested parties.

Although originally conceived as guardians of the public interest, administrative agencies at all levels of government too frequently make decisions affecting the public interest based upon inadequate information. This is attributable to the superior position that certain private interests enjoy before such agencies and the limited access of the public to the machinery of the administrative process.[16] While the public may be afforded the theoretical opportunity to present its views, as a practical matter individuals and groups of individuals who might contribute to a better understanding of the public interest do not have the means or ability to compete with private interests.[17] In these situations of interest imbalance, the administrative agency tends to render decisions that are favorable to those interests that are competently represented.[18]

9. *See* K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 13 (1960).
10. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 139 (3d ed. 1972).
11. 5 U.S.C. § 553 (1970).
12. *Id.* § 553(c).
13. *See* Pacific Coast European Conference v. United States, 350 F.2d 197, 205 (9th Cir. 1965) (dictum), *cert. denied*, 382 U.S. 958 (1965).
14. K. DAVIS, *supra* note 10, at 142.
15. *See* F. MARX, THE ADMINISTRATIVE STATE 183 (1969).
16. *Id.* at 140-41.
17. *See* R. MARTIN, PUBLIC ADMINISTRATION AND DEMOCRACY 140-41 (1969).
18. F. MARX, *supra* note 15, at 140.

Administration at all levels of government may be necessary for the regulation of our complex society, but it does not follow that citizens must accept administrative inadequacy as a necessary part of the system. Government support of public interest law would help to minimize mistakes and optimize the quality of decisions and actions. By widening the pool of recognized interests, government would improve the ability of administrative agencies to perform their original task—protection of the public interest.

The Corporation for Public Broadcasting[19] and the legal services program of the Economic Opportunity Act of 1964[20] provide precedents for the government's entry into areas of operation previously dominated by the private sector when such federal participation is in the broad public interest and promotes the general welfare. Indeed, the development and operation of the legal services program serves as an illuminating example of the advantages and disadvantages of federal support and control of public interest law projects.

Past Experience—Legal Services for the Poor

Federal involvement in providing relief from the effects of poverty began when the administration of Franklin D. Roosevelt recognized that federal intervention was needed to relieve the widespread suffering accompanying the Depression.[21] Federal interest waned, however, and the government abdicated its leadership position after World War II when it appeared that prosperity would eliminate poverty.[22] Poverty in the United States did not disappear, however. In the early 1960's, a rising volume of public protest over the human and economic waste caused by poverty created a public atmosphere which forced the federal government to re-assess its role and resume leadership responsibility in combatting the problems of the poor,[23] including the provision of legal services.[24] In 1964 the enactment of the Economic Opportunity Act[25] manifested a recognition of the federal government's role in attacking the causes of poverty—a concentrated effort to combat the root of poverty rather than simply relieving its stress.[26]

The addition of a legal services component to the Office of Economic Opportunity (OEO) program had been established by late 1964,

19. 47 U.S.C. § 396 (1970).
20. 42 U.S.C. § 2809 (1970).
21. Leach, *The Federal Role in the War on Poverty*, 31 LAW AND CONTEMP. PROB. 18 (1966).
22. *Id.*
23. *Id.* at 19.
24. *Hearings on S. 2007 Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 1603 (1971) (statement of Mr. Frank Carlucci, Director, Office of Economic Opportunity) [hereinafter cited as *1971 Hearings*].
25. 42 U.S.C. §§ 2701-2994d (1971).
26. Leach, *supra* note 21, at 18.

but uncertainty prevailed as to the exact nature of its structure, financing and operation.[27] Federal participation has provided an expanding base of financial support for legal services programs, greatly relieving the financially beleaguered[28] traditional legal aid programs,[29] and has become an essential source of funds, enabling legal services to be provided to a substantial client community.[30]

Because of local familiarity with local problems, community involvement was perceived as an essential element of the legal services program. But friction between local community programs and the federal government arose from uncertainty surrounding the question whether the program's purpose was to be oriented essentially to service or to law reform.[31] A program that is service oriented is primarily concerned with providing better representation to individuals, while a program that is law reform oriented endeavors to restrict its individual-client case load in order to devote attention to cases which are specifically selected for their potential impact as instruments of legal or social reform.[32]

There has been considerable vacillation on the part of OEO in determining program emphasis. Initially, it was hoped that legal service projects could adequately perform both law reform and a variety of service functions. In practice, however, the service function consumed virtually all the time of project attorneys.[33] The OEO recognized this imbalance and in recent years has increasingly shifted emphasis to law reform activities.[34] The re-assertion of the importance of law reform was consistent with the overall goal of OEO to attack the causes of poverty at its roots,[35] but at the same time has created greater political tension than would be experienced under a stronger service orientation. It can be anticipated that the strong reform orientation of public interest law firms will likewise be more politically abrasive than if their primary objective were to be service.

The success of the OEO legal services program has been widely acclaimed.[36] In spite of its success, or perhaps because of it,[37] the legal

27. Stumpf, *Law and Poverty: A Political Perspective*, 1968 WISC. L. REV. 694, 695. *See* Hannon, *National Policy Versus Local Control: The Legal Services Dilemma*, 5 CAL. WEST. L. REV. 223 (1969).

28. Financing has been a recurring problem for legal aid programs. *See* Voorhees, *Legal Aid: Past, Present and Future*, 56 A.B.A.J. 765 (1970).

29. For a history of the growth of legal aid in the United States see E. BROWNELL, LEGAL AID IN THE UNITED STATES (1951).

30. *See* Voorhees, *supra* note 28, at 767.

31. Hannon, *supra* note 27, at 224-25.

32. *Id.*

33. *Id.* at 228-29.

34. Hannon, *The Murphy Amendments and the Response of the Bar: An Accurate Test of Political Strength*, 28 LEG. AID BRIEFCASE 163, 167 (1970).

35. *See* Hannon, *supra* note 27, at 230-31.

36. *See 1971 Hearings, supra* note 24, at 1457 (statement of Senator Mondale), 1476 (statement of Jacob Fuchsberg, American Trial Lawyers Association), 1695 (prepared statement of Terry F. Lenzner, former director of OEO legal services). Under federal direction, the program has accommodated a wide range of civil

services program's brief existence has not been free from controversy or criticism. Legal services attorneys have represented their clients aggressively in numerous class actions against federal, state and local governments and influential members of local communities. In so doing, they have often alienated important groups and individuals who have sought reprisals against both the program and its attorneys by attempting to discredit them in the eyes of the public and local funding sources.[38] Political interference has been felt at all levels of the legal services program. At the national level, and at times from within the OEO itself, there have been attempts at "regionalization" of the program. Such regionalization would, in turn, increase the chances of political influences because any given legal services office would be under the control of a regional director who would be more exposed to local political influences than would a national administrator.[39] Regional control would facilitate the restriction of attorneys to a service function which is less controversial politically than a law reform function.[40] All attempts at regionalizing the legal services program have been rebuffed by the strong opposition of project attorneys, the organized bar, influential members of Congress, and the press.[41]

Disputes involving state and local governments have been a major source of complaints against the legal services program.[42] There have

matters including housing, consumer protection and administrative and family problems, as well as providing representation in tort cases and juvenile proceedings. *Id.* at 1630. Although the program has been inadequate in meeting the entire universe of need, it has been progressively expanding since its inception and it has been estimated that in 1971 it would process over 1 million cases, meeting approximately 20 per cent of the universe of need. The universe of need is based on the number of cases which would be presented to the legal services programs if the poor were fully informed of their rights and remedies, and if sufficient services were available. An American Bar Foundation study in 1966 indicated that a conservative estimate of the universe of need would be 5 million cases. In 1966 the legal services program handled 300,000 cases, an estimated 6 percent of the universe of need, compared with 20 percent in 1971. *Id.* at 145.

37. *Id.* at 1695 (statement of Terry F. Lenzner): "I have always felt that the inherent irony in the Legal Services Program was that the more successful it became, the more criticism it received and the less likely it was to survive."

38. For a general discussion of the nature of the opposition to the legal services program and the actions taken against legal services projects and attorneys see Robb, *Interference with Legal Services for the Poor,* in *1971 Hearings, supra* note 24, at 1467 (ABA Exhibit 3); Sullivan, *Law Reform and the Legal Services Crisis,* 59 CALIF. L. REV. 1, 24-28 (1971).

39. Sullivan, *supra* note 38, at 25-26. Professor Sullivan analyzes the heightened chances for adverse political influences as springing from the close relationship that exists between an OEO regional director and state and local officials in directing community action programs: "They [regional directors] tend to be highly sensitive and responsive to the demands of politically dominant elements within the state and local government and seek trade-offs between the interests perceived by state and local officials and the goals of the poverty community constituencies." *Id.* at 26.

40. Boasberg, *The Washington Beat: Upheaval in OEO's Legal Services Program,* 3 URBAN LAW. 135, 136 (1971): "It is in the field of law reform where Legal Services program attorneys have most often generated controversy by attacking traditional governmental, social and economic institutions."

41. Robb, *supra* note 38, at 1469.

42. A number of legal services program attorneys regard many of the interests

been resultant attempts by state governors to cut back funds for objectionable programs or to block their funding entirely,[43] the most notable of which was a gubernatorial attempt to block the California Rural Legal Assistance Program.[44] Serious efforts on the national level to vest exclusive program veto power in the state governor resulted from this controversy.[45]

In almost all of these political confrontations, organized bar groups have come to the defense of the legal services program,[46] but it has become clear that the organization cannot continue to operate at an optimal level under such persistent political attack.[47] The necessity of insulating the program from political influences has been recognized by organized bar groups and others who are concerned with the continued success and effectiveness of the legal services program.[48] Such detachment would likewise be important to insure the integrity and effectiveness of any legal services program designed to protect the public interest.

Prerequisites to Federal Funding

It is conceivable that any entry of the federal government into the area of public interest law would require the coincidence of conditions

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of state and local governments to be inimical to the poor and minorities. Boasberg, *supra* note 40, at 140.

43. 42 U.S.C. § 2834 (1970) provides that grant requests must be submitted to state governors for their approval or disapproval. There are additional provisions for the Director of OEO to override a gubernatorial veto. *Id.*

44. Robb, *supra* note 38, at 1467-68.

45. The "Murphy Amendment," proposing absolute veto power in the state governor, 115 CONG. REC. 29,894 (1969), is said to have been a direct result of the California Rural Legal Assistance controversy. Robb, *supra* note 38, at 1467. The amendment passed in the Senate 45-40. 115 CONG. REC. 29,897-98 (1969). Its equivalent in the House, a part of the Green-Quie-Ayers "substitute bill" to the Economic Opportunity Amendments of 1969, was defeated 167-183. 115 CONG. REC. 38,865 (1969).

Senator Murphy had earlier sought to deny legal services attorneys the power to bring actions against "any public agency of the United States, any State, or any political subdivision thereof" by proposing an amendment to the Economic Opportunity Amendments of 1967, S. 2388, 90th Cong., 1st Sess. (1967). 113 CONG. REC. 27,871 (1967). The proposal was defeated by a vote of 52-36. *Id.* at 27,873.

46. *See 1971 Hearings, supra* note 24, at 1461 (statement of Mr. Edward L. Wright, President, American Bar Association); Hannon, *supra* note 34, at 164; Segal, *The Higher Calling of the Bar,* 28 LEG. AID BRIEFCASE 156, 157 (1970); Voorhees, *supra* note 28, at 766.

47. *1971 Hearings, supra* note 24, at 1457 (comments of Senator Mondale, presiding *pro tempore*):

> While legal services has survived past attacks on its independence and integrity, each challenge has drained its energy and resources. As long as the program remains vulnerable to political attack or manipulation, this damage will grow worse until it could be fatal.
>
> No attorney can meet his professional responsibilities if there are outside restraints on cases or issues he can raise. No large corporation would tolerate such outside interference. The poor should not have to tolerate it.

48. *Id.* at 1461 (statement of Mr. Edward L. Wright, President, American Bar Association): "These recurring attacks on the Legal Services program have helped to shape [the ABA's] view that the Legal Services program should be provided with a new and independent home."

similar to those which gave rise to the OEO legal services program. Those conditions would include public and government recognition of the larger problems that might be solved by providing legal services to those who are aggrieved and could not otherwise afford them, the support of the organized bar, and the ability of the federal government to offer a meaningful contribution to the solution of such problems through support of public interest law. In weighing all of these elements and in considering the possibility of their coincidence, it must also be considered whether the benefits accruing from federal government support outweigh the control liabilities that are likely to be included in the same package.

The first of these conditions might be termed "problem recognition." In the case of legal services to the poor, the first step in federal participation was the realization that poverty affected a large segment of the American society and that the enormity of the affliction was such that state and local governments could no longer be expected to confront it alone.[49] While the problems were most intense at the community level, the local ripples spread and overlapped, creating a national impact. Problems of similar dimensions affecting our present population include not only poverty, but also environmental abuses, consumer problems, urban problems and other social grievances that generally have an adverse effect on the quality of life of the citizens of this country. The argument for federal participation in these areas through support of public interest law may be even stronger than in the poverty situation. In addition to the inability of local and state governments to cope effectively with such large scale problems, in the public interest situation a large portion of the problem is attributable to the failure of government institutions to discharge their obligations to protect the public interest.[50]

Recognition of these larger problems will be insufficient in itself, however, to justify direct federal support of public interest law firms. Just as the potential of legal services to strike at the roots of poverty was a paramount concern in including such a program within the Office of Economic Opportunity,[51] a prime consideration bearing on the desirability of government intervention into the area of public interest law will be whether such an endeavor can provide a means through which these problems may be solved. In a limited way the government has, perhaps, already recognized such potential in public interest law and reflected cautious approval of such a concept by defining terms under which public interest law firms may receive tax-exempt status as charitable organizations.[52]

49. See text & notes 21-23 *supra.*
50. See text & notes 8-18 *supra.*
51. See text & notes 24-27 *supra.*
52. *See* Note, *The IRS Man Cometh: Public Interest Law Firms Meet the Tax Collector,* 13 ARIZ. L. REV. 857 (1971).

Ultimately, federal support of public interest law firms will hinge largely on the performance of existing private efforts. Many firms have already enjoyed varying degrees of success, but the public interest effort is still in an embryonic stage of development and will undoubtedly be closely scrutinized by both public and private concerns for indications of its long-range potential. If existing firms are successful and continue to gain public support, the chances of federal participation will be greatly increased.

As in the development of the legal services program, the support of organized bar groups would be particularly helpful to public interest law firms.[53] Support by these organizations would signify approval of the law firms' goals and methods, making them more acceptable to a larger segment of the population and assuaging the apprehensions of the legal community.[54] Those apprehensions derive primarily from the novelty and unknown nature of public interest law.[55] Although it is difficult to determine at this juncture what the future reactions of national and local bar organizations to public interest law firms will be, the American Bar Association, with the assistance of the Ford Founda-

53. From somewhat modest beginnings, the efforts of the American Bar Association, the National Legal Aid and Defender Association, and other groups within the organized bar increased the number of local legal aid offices from 61 in 1923 to a total of 241 civil legal aid offices and 115 defender services in 1963. Voorhees, *supra* note 29, at 765. For a discussion of the early efforts of the American Bar Association to foster the growth of legal aid, see E. BROWNELL, *supra* note 29, at 29.

54. Harry Stumpf, who undertook a study of the political aspects of the OEO legal services program has characterized the role of the organized bar in the development of the program in the following manner:

> The attorney is perhaps the most influential participant in the application and utilization of law. His decisions, customarily formulated through the national and local bar associations, determine to a large extent who is to have access to the machinery of justice, at what price, under what conditions, and to what ends. It follows that any program seeking a reallocation of justice and access thereto must come to terms with the traditional role and ideology of the national and local bar.

Stumpf, *supra* note 27, at 707.

55. Stumpf's explanation of the response of the organized bar to the legal services program indicates that not even the idea of providing legal services to the poor has been wholly acceptable to the bar:

> While bar associations at state and local level have frequently supported and indeed have initiated new [legal services] programs in their jurisdictions, there are numerous instances of strong bar opposition. Some local bar Associations have refused to support any program at all. When, on rare occasions, programs have been funded over local bar opposition, both legal and political tactics have sometimes been employed in attempts to hinder or suspend program operations. Opposition to federally funded legal services has been voiced on economic, professional, and ideological grounds.

Id. at 708. Stumpf also offers illustrations of the types of local oppostion that may be met by legal services programs: (1) To the marginal private practitioner the legal services program may threaten his livelihood; (2) the established lawyer may ground his objection on the belief that such a program is socialistic and unnecessary; and (3) the organizations in general may feel that the legal services organizations violate the *ABA Code of Professional Responsibility*, with respect to advertising and soliciting, stirring up litigation and group practice. Stumpf, *supra* note 27, at 708-09.

tion, has shown some interest in the area.[56] The primary activity of the ABA in this respect has been the establishment of the ABA Project to Assist Interested Law Firms in *Pro Bono Publico* Programs, which disseminates information on the operation of public interest law firms and the impact of public interest elements within private firms.[57]

The thrust of public interest law has been and will no doubt continue to be reform oriented. It is concerned, if not with the redistribution of political power, at least with a re-evaluation and improvement of present economic and governmental conditions. Public interest law is inherently political in nature, primarily because of the interrelation of the problems that it is designed to solve and the underlying causes of those problems, and is likely to foster political opposition and interference in much the same fashion as has the legal services program.[58] One of the primary reasons for the growth of public interest law firms has been the unresponsiveness of government institutions to the needs of those segments of society which have until the present been underrepresented. In attacking the operations of government agencies and instrumentalities, public interest law firms therefore threaten the existence of those institutions in their present unresponsive form, thereby coalescing the opposition of the conservative elements of government and the private sector that have a significant interest in preserving the status quo.

Public interest law firms will also question the unresponsiveness of private corporations to public needs. Any confrontation with such large and powerful interests invites political opposition. This opposition may come directly from those institutions whose policies or conduct is questioned, or indirectly from those in government positions who are readily accessible to such organizations and who have developed sympathetic attitudes toward them.[59] The clear opposition of public interest law firms to existing government and corporate practices would surely function as a deterrent to government participation in such a program.

Even if it is assumed that opposition to government support of public interest law firms can be overcome, the pervasiveness of their political orientation would present difficult problems in structuring a federal vehicle for the disbursement of funds that would not be highly

56. *See* Tucker, *supra* note 6, at 11.

57. ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, PRO BONO REPORT 1 (Oct. 15, 1971).

58. See text & notes 37-45 *supra.*

59. Green, *The Law Must Respond to the Environment,* 47 TEXAS L. REV. 1327, 1339 (1969):

> The abuses of group power still remain and seemingly increase as rapidly as new controls are developed and even more rapidly if the legislative process or the regulating agency itself is made captive by the group it is designed to regulate. Some of our foremost citizens and officials believe the development of administrative controls that promised so much has proved a failure that only accentuates the abuse of power by dominant groups.

sensitive to political considerations. There is a danger that direct federal funding of public interest law firms might undermine the public interest if a program could not be developed in which firms could operate independently without overregulation and political emasculation.

THE MECHANICS OF FEDERAL FUNDING

A number of factors must be considered in connection with the mechanics of direct government subsidy of public interest firms. For instance, direct support by the federal government might provide the law firms with a broad funding base, but at the same time impose restrictions on them, threatening their independence and effectiveness. The difficulties encountered in trying to insulate the OEO legal services program from political interference may be indicative of the problems that would be encountered in a broader public interest context.

The most seriously considered proposals for freeing OEO legal services from political interference have been those calling for the creation of an independent, federally funded, nonprofit corporation. Proposals for the creation of such a corporation were introduced in both houses of Congress by bipartisan groups[60] and groups representing the administration.[61] The resultant bill called for the creation of a Legal Services Corporation as part of the Economic Opportunity Amendments of 1971.[62] The amendments were vetoed by the President on December 9, 1971.[63] An examination of the legislation proposing the Corporation,[64] subsequent congressional hearings, the presidential veto message and the congressional reaction in the wake of the veto demonstrate the difficulties inherent in any attempt to create a legal service organization which is to operate in the public interest and simultaneously remain relatively free from political control.

The bipartisan bill expressly proposed to provide a vehicle for delivery to the poor of legal services free from political influences, "extraneous interference and control."[65] A similar but less emphatic purpose was indicated by the administration bill.[66] Both bills were in

60. S. 1305, 92d Cong., 1st Sess. (1971); H.R. 6360, 92d Cong., 1st Sess. (1971). These two bills are hereinafter referred to in the text as the bipartisan bill. Another bill that largely conformed with the main points in the bipartisan bills will not be discussed. *See* H.R. 9202, 92d Cong., 1st Sess. (1971).

61. S. 1769, 92d Cong., 1st Sess. (1971); H.R. 8163, 92d Cong., 1st Sess. (1971). These two bills are hereinafter referred to in the text as the administration bill.

62. S. REP. No. 92-523, 92d Cong., 1st Sess. 41-52 (1971); H.R. REP. No. 92-682, 92d Cong., 1st Sess. 41-52 (1971).

63. 117 CONG. REC. 21,129 (daily ed. Dec. 10, 1971) (text of Presidential Veto Message).

64. While the bipartisan proposal called for the creation of a National Legal Services Corporation and the administration proposal called for the creation of a Legal Services Corporation, both will be referred to in the text as the Corporation.

65. S. 1305, 92d Cong., 1st Sess. § 901(4) & (6) (1971).

66. *Compare id., with* 117 CONG. REC. 3629 (daily ed. May 6, 1971) (remarks of Rep. Quie, R. Minn.).

agreement that the Corporation would contract with or make grants to the organizations that would provide legal services[67] and that the Corporation would supersede the OEO legal services program.[68] While apparently sharing these common purposes, the two groups differed significantly on the means by which the end result would be achieved and whether there should be changes in the nature of the legal services program. The Corporation represented not only a hope that the impact of political influences on legal services could be eliminated, but also a possible threat to the nature and quality of the services to be provided to the client community if drastic substantive changes were made in the existing program.

The administration bill provided for an 11-man board of directors, all appointed by the President with the advice and consent of the Senate,[69] although no more than six of the appointees would have been from the same political party.[70] Proponents of the administration bill stated that the method of selection of directors was patterned after that of the Corporation for Public Broadcasting,[71] which was said to be "effective and free to a great extent from political pressures.[72] The latter statement is of questionable validity in light of recent criticism of that organization's timidity in programming.[73] The administration selection procedure was widely criticized for its failure to insure representation of groups who would be significantly affected by the operation of the Corporation,[74] and its readily apparent susceptibility to political influence by present or future administrations.[75] Without question a President who is making the selection of board members or replacing them as vacancies occur will be inclined to choose those who share his views on the operation of a legal services program and on which areas of the program warrant emphasis or de-emphasis.

The bipartisan bill avoided this problem. It provided for the establishment of a six-man trusteeship to perform the initial steps necessary for incorporation.[76] The incorporating trusteeship was to be

67. *See* S. 1305, 92d Cong., 1st Sess. §§ 906(a)(1) & (b)(1) (1971); S. 1769, 92d Cong., 1st Sess. § 904(a)(3) (1971).
68. S. 1305, 92d Cong., 1st Sess. § 913(3)(a) (1971); S. 1769, 92d Cong., 1st Sess. §§ 909(5) & (6) (1971).
69. S. 1769, 92d Cong., 1st Sess. § 902(a) (1971).
70. *Id.*
71. 47 U.S.C. § 396(a)(6) (1970).
72. 117 CONG. REC. 3629 (daily ed. May 6, 1971) (remarks of Rep. Quie, R. Minn.).
73. *See* NEWSWEEK, Oct. 18, 1971, at 127, cols. 1 & 2; N.Y. Times, July 11, 1972, § 2, at 17, col. 1.
74. *See 1971 Hearings, supra* note 24, at 1458 (statement of Senator Mondale, 1514 (statement of Jacob Fuchsberg, American Trial Lawyers Association).
75. *Id.* at 1458 (statement of Senator Mondale), 1477 (statement of Jacob Fuchsberg, American Trial Lawyers Association), 1514 (statement of Mr. Fuchsberg, American Trial Lawyers Association). For comments defending selection of the entire board by the President see *id.* at 1607-09 (statement of Mr. Frank Carlucci, Director, Office of Economic Opportunity).
76. S. 1305, 92d Cong., 1st Sess. § 903(b) (1971).

composed of members of the following legal organizations: the president and president-elect of the American Bar Association, and the presidents of the National Legal Aid and Defender Association, the American Association of Law Schools, the American Trial Lawyers Association and the National Bar Association.[77] These same individuals, by virtue of their respective offices, would provide stability by serving as permanent members on the board of directors.[78] To provide for representation of the client community and project attorneys, provisions were made for the creation by the initial trusteeship of a Client's Advisory Council[79] and a Project Attorneys Advisory Council, each of 11 members.[80] Each council was to select three members of the board of directors.[81] The remaining members of the board would consist of five members who would represent the general public, appointed by the President with the advice and consent of the Senate, one member selected by the Chief Justice of the United States after consultation with the Judicial Conference of the United States,[82] and one executive director of the Corporation.[83]

The bipartisan bill thus guaranteed some balance to the board of directors and afforded some protection from adverse political influences. The three major groupings of directors appeared to present the possibility of a broad spectrum of political influences rather than their elimination. The philosophy of the appointing President would most likely be reflected by the attitudes of the directors he appointed. The directors representing legal organizations might have diverse political opinions on the manner in which legal services should be provided. Notwithstanding the fact that an essential element in the success of the OEO legal services program had been the support of the organized bar, the presidents of these organizations[84] or their designees would not necessarily be familiar with or committed to the problems of the client community that the Corporation sought to serve. Those members of the board of directors drawn from the clients of the Corporation and the project attorneys would represent definite and ascertainable interests.

77. *Id.*
78. *Id.* § 904(a)(2).
79. *Id.* § 903(c)(1).
80. *Id.* § 903(c)(2).
81. *Id.* § 904(a)(3).
82. *Id.* § 904(a)(1).
83. *Id.* § 904(a)(4). The executive director would be an attorney who would be selected by the board and serve at its pleasure. *Id.* § 904(c).
84. *See* text & note 77 *supra.* Recognizing that the presidents of the bar organizations to be represented on the Corporation's board of directors might have commitments too heavy to allow them to devote sufficient time to Corporation matters, the compromise bill provided for organizational representation by the respective presidents or their designees. Additionally, the conferees dropped the president-elect of the American Bar Association as a director while retaining the president of that organization or his designee as a director. S. REP. No. 92-523, 92d Cong., 1st Sess. 43 (1971); H.R. REP. No. 92-682, 92d Cong., 1st Sess. 43 (1971).

Their presence would ensure a thorough consideration of the ramifications of policy and operational decisions. Nevertheless, when considering the goal of freeing legal services from political influences, it is difficult to deny that in according representation to these groups definite political interests were being injected into the process.

Noting that the directors are clustered into groups of presidential appointees, representatives of the legal organizations, and delegates of the client community and the project attorneys, it is difficult to avoid the conclusion that a legal services program is political in nature.[85] It would be impossible to choose directors who were politically neutral. In fact, the danger in attempting to fill a board with disinterested directors may well be that a synthesis of the most cogent interests would be precluded and the end product would be an inferior one. Therefore, although the employment of the corporation concept may be desirable as a means through which the Congress might strive to eliminate political influences from public interest programs, realistically and practically the most acceptable result would be a balance of political influences.

The compromise bill that was finally approved by House and Senate conferees provided for a board of directors composed of seventeen individuals appointed by the President with the advice and consent of the Senate. The appointments would have been made as follows: six from the general public, not less than three of whom were lawyers admitted to the highest bar of a state; two from lists submitted by the Judicial Conference of the United States; two from a list of individuals eligible for assistance under the title, compiled by the Client's Advisory Council; two from a list of former legal services project attorneys, submitted by the Project Attorney's Advisory Council; and one member appointed from each list of nominees submitted by the American Bar Association, the National Legal Aid and Defender Association, the Association of American Law Schools, the National Bar Association and the American Trial Lawyers Association. Each list was to include no less than three nor more than ten names for each position to be filled.[86]

These selection provisions would have provided the President with some latitude of choice. When the Legal Services Corporation fell with

85. Stumpf, *supra* note 27, at 703:

> [T]he aims and operations of the Legal Services Program are inextricably involved in, and are a part of the political system at all levels. . . . The program seeks to provide access to the judicial system for millions of citizens who, for a variety of economic, social, and psychological reasons, have heretofore been 'legally alienated'. The goal is to provide aggressive, sustained, and readily available advocacy for the poor in order to reassert forgotten rights, establish new rights and remedies, and in brief, to redistribute the societal advantages and disadvantages via the legal system. *This is not simply related to politics; it is politics.* [Emphasis added.]

86. S. REP. No. 92-523, 92d Cong., 1st Sess. 43 (1971); H.R. REP. No. 92-682, 92d Cong., 1st Sess. 43 (1971).

the veto of the Economic Opportunity Amendments of 1971, however, the President stated that the board selection provisions were one of the four objectionable aspects of the amendments that prompted his action.[87] He described the proposed Legal Services Corporation as "irresponsibly structured" and asserted that the only way that the public interest could be served was to provide for the appointment of directors by the President, with the advice and consent of the Senate, but without any restrictions requiring him to choose from lists provided by "various professional, client and special interest groups."[88] This philosophy would require accountability only to the executive rather than to the groups that are most vitally concerned with the provision of legal services. The potential for recognizing the interests involved and designing responsive policies would have been greatly enhanced by the presence of interested groups on a balanced board of directors.

The quality and types of services that would have been provided to the client community would have been dependent not only upon the policy decisions of the board of directors, but also upon the limitations imposed on the Corporation by the enabling legislation. These limitations would have largely determined whether a client using the services of the Corporation would have received services equal in quality to those which could be provided to a paying client by a private attorney. The limitations affecting the types and quality of services provided must be scrutinized to determine whether they would have affected the accomplishment of the stated goals of the program.

One express limitation sought to be imposed by the administration proposal prohibited legislative advocacy on behalf of a client without the express invitation of a legislative body, an appropriate committee or a member of the legislature.[89] While it was stated that the proposal was designed only to eliminate "self-generated or self initiated lobbying"[90]—and it would not prohibit legislative activity on behalf of a specific client or group of clients[91]—that intention was contrary to the explicit language of the bill.

Such a provision would have denied the Corporation client a remedy that is available to a person who retains a private attorney.

87. The President stated that he based his veto of the Economic Opportunity Amendments of 1971 on: (1) prohibition against the President "spinning-off" OEO programs to other government departments; (2) the mandatory funding levels for 15 categorical programs which would have required OEO executives to support programs which might not have proven productive; (3) the method of selection of directors for the board of the Legal Services Corporation, and (4) the "Child Development Program" provided for in Title V. 117 CONG. REC. 21,129 (daily ed. Dec. 10, 1971) (text of Presidential Veto Message).

88. *Id.*

89. S. 1769, 92d Cong., 1st Sess. § 905(a)(6) (1971).

90. *1971 Hearings, supra* note 24, at 1498 (statement of Mr. Frank Carlucci, Director, Office of Economic Opportunity).

91. *Id.*

It would relegate the Corporation attorney to a passive role in which he might be forced to deny his client the most effective remedy available to him and forgo the opportunity to benefit incidentally others experiencing similar problems. There was no apparent reason for withdrawing this type of legal remedy from a Corporation client while it remained available to the client of a private attorney. The bill finally approved by Congress and sent to the President provided that Corporation attorneys could undertake legislative activities if they did so on behalf of clients or groups of clients.[92]

Another provision in the administration bill would have prohibited the Corporation from making grants to or entering into contracts with "so-called 'public interest law firms which intend to expend at least 75 per centum of their resources and time litigating issues either in the broad interests of a majority of the public or in the collective interests of the poor, or both.' "[93] The provision is vague and its meaning was not elucidated in Senate hearings on the Corporation bills. On its face it appears adverse to law reform in general and class actions in particular, at least insofar as they would consume a substantial portion of the time and resources of a potential grantee. Such a provision seems paradoxical when it is considered that the present caseloads of legal services attorneys are overwhelming[94] and that the class action suit represents a method by which many individual members of an aggrieved group may effectively assert their rights,[95] without a multiplicity of suits.[96] Many of the most significant and far-reaching accomplishments of the legal services program were brought as class actions.[97] Additionally, the National Legal Aid and Defender Association has recommended that overloaded legal aid projects focus their efforts toward actions that will benefit the largest number of clients, thereby maximizing the effective use of their limited resources.[98]

Class actions are frequently brought against the state, local and federal governments, however, and have been a great source of political agitation.[99] Governments do not like being sued by their citizens, especially when the funds for the suit are provided by the federal

92. S. REP. No. 92-523, 92d Cong., 1st Sess. 47 (1971) (by implication); H.R. REP. No. 92-682, 92d Cong., 1st Sess. 47 (1971) (by implication).
93. S. 1769, 92d Cong., 1st Sess. § 905(b)(3) (1971).
94. *See generally* Bellow, *Reflections on Case-Load Limitations,* 27 LEG. AID BRIEFCASE 195 (1969); Clark, *Legal Services Programs—The Caseload Problem, or How to Avoid Becoming the New Welfare Department,* 47 J. URBAN L. 797 (1970); Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit the Caseload,* 46 J. URBAN L. 217 (1969).
95. Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684 (1941).
96. *See* F. JAMES, CIVIL PROCEDURE 494, 494-95 (1965).
97. *See e.g.* King v. Smith, 392 U.S. 309 (1968).
98. *See* Bellow, *supra* note 94, at 201-02.
99. *See* Robb, *supra* note 38, at 1467.

government.[100] While expenditure of government funds for such purposes is laudable as indicating an "openness to self correction,"[101] it may also be viewed by many as merely a source of unnecessary political friction. By discouraging class actions, the proponents may well have been seeking to avoid such friction.

While the anti-lobbying provisions and the limitations on class actions may have been motivated by a desire on behalf of some to make the legal services program apolitical, and therefore less likely to be the subject of controversy, they may also reflect an over-all dislike of the notion of legal services. In either case, the effect would have been to remove the legal services program from the political arena—the very place in which the largest problems of the poor may best be solved.[102] Attempts to make the legal services program apolitical ignore the underlying political nature of the program itself[103] and deny the poor the full benefits that legal services could provide.

The administration bill additionally sought to make Corporation attorneys apolitical by imposing restrictions not only on activities in which they could participate during time funded by the Corporation, but also during their "free time."[104] In attempting to impose limitations and controls upon the private lives of Corporation attorneys, the proponents sought to curtail what they believed to be objectionable activity on the part of legal services attorneys—activity that it was felt undermined public support of the program in general.[105] In undertaking to intrude upon the private lives of the attorneys, however, the administration created a proposal that was of doubtful constitutional validity under the first amendment.[106] The compromise bill contained a similar provision prohibiting Corporation employees, while engaged in Corporation activities, from partisan or non-partisan political activities "associated with a candidate for public or party office," and from voter

100. *See* Sullivan, *Law Reform and the Legal Services Crisis*, 59 CALIF. L. REV. 1, 25 (1971).

101. *Id.* at 24.

102. *1971 Hearings, supra* note 24, at 1567 (statement of David Dugan, Camden, New Jersey, Regional Legal Services).

103. Stumpf, *supra* note 27, at 703: "Whether politics is viewed as allocation of societal values or the process of determining who gets what, when, and how, the daily process of the legal system in granting and withholding advantages, rewards and deprivations (including wealth, power, security, and well-being) are patently political."

Stumpf stated as his conclusion in the above cited work "that the aims and operational realities of the Legal Services Program are inextricably involved in, and are a part of, the political system at all levels." *Id.* at 702. See also the materials in note 85 *supra*.

104. *See* S. 1769, 92d Cong., 1st Sess. §§ 905(a)(5) & (a)(7) (1971).

105. *1971 Hearings, supra* note 24, at 1625-26 (statement of Mr. Frank Carlucci, Director, Office of Economic Opportunity).

106. Consideration of the constitutionality of political limitations on attorneys rendering federally-funded legal services to the poor is not within the scope of this comment. For a discussion of the possible unconstitutionality of any political restrictions on legal services attorneys see Clark, *supra* note 94, at 814-15.

registration activities other than legal representation. The board of directors would also have established guidelines governing the "private political activities of full time employees.[107] Reasonable limitations on the partisan political activities of Corporation attorneys would indeed seem desirable and necessary in order to lessen the potential for political reprisals against the Corporation similar to those which characterized the California Rural Legal Assistance controversy and the Murphy Amendment.[108] It also follows that the greater the likelihood that the attorney's private political activity would conflict with the political interests of powerful groups and individuals, be they governmental or private, the more restricted the attorney's role would likely become if political friction were to be avoided to the fullest. Actions taken to avoid such conflicts beyond limitations on work-time partisan politics, however, may seriously affect the ability of the individual attorney to seek solutions to the problems of his clientele, and impinge on the credibility of program motives.

The problems encountered by Congress in structuring the Legal Services Corporation, and the limitations sought to be imposed on the Corporation, although not all were included in the compromise bill, illustrate some of the potential problems that may be encountered should the federal government decide to fund directly legal services in the broader sense of the public interest. When the services provided are inherently political, it becomes very difficult to insulate a program against political interference without simultaneously apoliticizing it to the point of possible ineffectiveness. The more apolitical such a program becomes, the less likely it is to achieve the purpose for which it was designed.

In this respect federal participation in the broad public interest may be subject to greater limitations than legal services for the poor. A significant distinguishing feature between the two programs lies in the explicit focus of public interest law on problems arising from the activities of government and business. The legal services program presents a unique example of a creature of government that assumed as part of its role the necessity to attack the very institution that created it. Although suits against the government were clearly within the law reform function of legal services as it materialized and came to the fore, the course of the program as originally conceived was sufficiently uncertain to minimize the possibility of frequent confrontations between the program and its proponent.[109] Once suits against the government

107. S. REP. No. 92-523, 92d Cong., 1st Sess. 48 (1971); H.R. REP. No. 92-682, 92d Cong., 1st Sess. 48 (1971).

108. See text & notes 43-45 *supra*.

109. 115 CONG. REC. 29,896 (1969) (remarks of Senator Murphy, R. Cal.):

> I have not questioned the propriety or the need for law reform. However, it was my understanding at the time the legal services program was proposed, that it was to provide individual legal services for some poor

were recognized as part of the legal services program's role, it became difficult to remove the power from legal services program attorneys.[110] In contrast, the opposition of public interest advocates to government unresponsiveness will be clear at the outset and the Congress will be more hesitant in according such a power to attorneys serving the public interest with the assistance of federal funds.

The creation of an independent corporation such as the Legal Services Corporation would be a most desirable attempt to minimize the inevitable political conflicts that would be engendered by direct funding of public interest law. It is likely, however, that a proposal to create such a corporation would encounter similar difficulties, and suffer the same fate, as the Legal Services Corporation. Even assuming that the function of the board of directors of such a corporation in determining policy matters would not have been entirely pre-empted by congressional guidelines and limitations, selection of those interests to be represented on the board would be difficult. Who could be said to represent the public interest? Selection of directors representative of private interests could be avoided by leaving the selection to elected officials, who by virtue of their offices represent the public. Should the selection process take this direction, the choice would probably belong to the President, as the highest elected representative of the public. The partisan political problems accompanying such a system are apparent.[111]

Realistically, the potential difficulty of selecting board members to represent the public in the policy decisions of such an organization might be rendered moot at an early stage of the legislative process. Given the myriad of political considerations exposed by the foregoing analysis, it is likely that a federally funded project, or one empowered to disburse funds to private firms and practitioners operating in the public interest, would operate in a narrow and well-defined area. To the extent that such limitations would require the surrender of principles necessary for effective operation in the public interest, such as limitations on legislative advocacy and the power to bring class action suits, federally funded programs might cause greater harm than good by providing merely another unresponsive, bureaucratic organization to take its place among the ranks of those that already exist. A government organization that purported to operate in the public interest, but

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fellow who could not afford a lawyer. This is why I so enthusiastically joined in its support.

The program was not to set up a bank of lawyers to enjoin the California State Legislature, or the Secretary of Labor, or the Governor of the State, or to come in and try to attempt to write complete legal reform. That is a different breed of operation so far as I am concerned. . . .

110. See note 45 *supra.*

111. See text & notes 69-75 *supra.*

which could not and did not, would only further undermine public confidence in the responsiveness of government.

CONCLUSION

The development and experience of the legal services program of the Office of Economic Opportunity not only illustrates the effects of government control over the large-scale *pro bono* effort in respect to the poor, but may also be indicative of the feasibility and desirability of direct federal support of public interest law firms. The legal services program has been successful but has evoked adverse political responses, particularly in connection with its confrontations with government agencies and powerful vested interests. Efforts to insulate the program from political interference by creating a National Legal Services Corporation have proven unsuccessful. In fact, removing legal services attorneys from the political arena might dilute the program's emphasis on law reform and deprive the client community of remedies that would be afforded persons engaging private attorneys.

The highly political nature of public interest law, which arises from the nature of its primary targets—government and influential private interests—makes it unlikely that direct federal support of public interest law firms will be politically acceptable. Nevertheless, if the federal government should assume an active role in the provision of legal services in the public interest, it is essential that it provide these services free from any limitations that would hamper their effectiveness.

There are alternatives that may serve to provide limited funds for public interest law firms, without disturbing the present somewhat attenuated relationship between government and the public interest advocates. These alternatives might encourage the growth of public interest representation, while at the same time imposing relatively few federal strictures and minimizing the chances for direct interference with the programs. One alternative to direct federal funding presently in effect is to accord public interest law firms tax-exempt status under section 501(c)(3) of the *Internal Revenue Code of 1954*. This alleviates the political pressures of direct governmental funding, but at the same time presents problems of its own. Potentially one of the most troublesome of these is the possibility that the Internal Revenue Service might somehow get involved in "defining" the public interest.[112] Another alternative would be a tax incentive program where private attorneys or public interest law firms would maintain their independence, but would be allowed certain favorable tax considerations because of their public interest work.[113]

112. *See* Note, *The IRS Man Cometh: Public Interest Law Firms Meet the Tax Collector*, 13 ARIZ. L. REV. 857, 862-65 (1971).

113. *See generally* Comment, *The Private Bar, the Public Interest, and Tax Incentives: Monetary Motivation for Action*, 13 ARIZ. L. REV. 953 (1971).

The common drawback of both the tax-exempt status and tax incentive proposals, however, is that it is unlikely that either method would generate the amount of funds necessary to meet the demand for public interest advocacy. They do not represent new sources of funds, but only devices for stretching the purchasing power of present funds and encouraging the present private sources of funds to divest a little more. For this reason, and in spite of its possible pitfalls, direct federal support should be carefully considered as possibly the only method that can provide adequate funds to meet the demand for public interest advocacy.