

Testimony of

Rebekah Diller

May 22, 2008

Committee on the Judiciary
United States Senate
Statement of
Rebekah Diller
Deputy Director, Justice Program
Brennan Center for Justice at NYU School of Law
May 22, 2008

On behalf of the Brennan Center for Justice at NYU School of Law,¹ I thank the Committee on the Judiciary for holding this hearing and for providing this opportunity to discuss the Justice Gap in America - a crisis that threatens one of our nation's proudest traditions: "equal justice for all."

Last year, our White Paper titled "Access to Justice: Opening the Courthouse Door," documented the many ways in which meaningful access to the courts is increasingly out of reach for low-income Americans. One of our major findings was that low income people in this country cannot secure legal representation in civil cases: mortgage foreclosures, housing evictions, child custody disputes, to name three important categories. I will testify today on the causes of the shortage of lawyers to represent the poor and on the harmful consequences for American communities and for our system of justice.

I. Most Low-Income Individuals Cannot Obtain Counsel to Represent Them in Civil Matters.

The crisis of representation for low-income people in civil cases is thoroughly documented. Yet notwithstanding widespread acknowledgment of the problem, the crisis persists, and grows worse, because of three factors: 1) chronic funding shortages, 2) funding restrictions, and 3) shortfalls in pro bono help.

a. LSC, the largest source of legal aid funds, is underfunded.

The major source of funding in the United States for legal aid in civil matters is the federal Legal Services Corporation (LSC), established by Congress in 1974.² The value in real dollars of the funding appropriated by Congress to LSC has declined dramatically over the last twenty-five years. In fiscal year 1981, Congress allocated \$321.3 million to LSC, which at the time was seen as the level sufficient to provide a minimum level of access to legal aid in every county, although not enough to actually meet all the serious legal needs of low-income people.³ Adjusted for inflation this "minimum access" level of funding would need to be about \$687.1 million in 2005 dollars; yet Congress's LSC appropriation for fiscal year 2008 was a mere \$350.5 million. On average, every legal aid attorney, funded by LSC and other sources, serves 6,861 people. In contrast, there is one private attorney for every 525 people in the general population.⁴

As a result of money shortfalls, in 2004 LSC-funded programs turned away at least one person seeking help for each person served.⁵ This means that approximately one million cases per year are turned away due to lack of funding.⁶ As striking as these figures are, they understate the real number of low-income people who go unserved because they do not include those who do not seek out help, those who were turned away from non-LSC-funded legal aid providers, or those who received limited advice but required full representation.

b. Outdated, ill-conceived, and wasteful funding restrictions prevent LSC grantees from helping people solve legal problems.

In addition to funding shortages, the capacity of legal aid programs to help the poor is impeded by outdated, ill-conceived and wasteful funding restrictions created by Congress in 1996. These restrictions cut deeply into low-income people's capacity to secure meaningful access to the courts.

First, Congress restricted the legal tools of LSC-funded lawyers for the poor. Specific restrictions prohibits the poor from relying on these lawyers: 1) to participate in class actions; 2) to bring claims for court-ordered attorneys' fee awards; 3) to learn about and enforce their rights; and 4) lobby policymakers or legislators (except under very narrow circumstances).⁷

Second, Congress limited the categories of people who can rely on LSC-funded lawyers, excluding: 1) certain populations of legal immigrants, 2) all undocumented immigrants, 3) people in prison, even those about to reenter society, 4) people charged with illegal drug possession in public housing eviction proceedings.⁸

Finally, Congress imposed an extraordinarily harsh restriction on LSC-funded programs -- a poison pill restriction -- that extends the federal funding restrictions to cover the privately financed activities of LSC recipient programs as soon as they accept their first dollar in federal LSC funds. As a result, more than \$450 million in funding from state and local governments, private donations, and other non-LSC sources is restricted under the same terms as the LSC funds.⁹

This "restriction on state, local and private funds" - all the money possessed by LSC recipient programs from sources other than LSC - is virtually unprecedented in its sweep. It is common for government to restrict the activities it funds; but, it is extremely rare and raises grave constitutional concerns when Congress restricts the advocacy that organizations engage in with their own private funds.

Acknowledging that the restriction overreached, LSC issued a "program integrity regulation" to provide grantee programs - at least in theory - with some opportunity to spend their own funds in support of the restricted activities.¹⁰ However, LSC's regulation, itself, imposes conditions so onerous that almost no program in the country has been able to comply. To spend non-LSC funds on restricted work, grantees must create a new organization run out of a physically separate office, with separate staff and equipment.

This model is wholly out of line with the way the federal government treats other non-profit grantees, including, most notably, faith-based organizations. Many non-profits must strictly account for government funds, but virtually none are forced to operate dual systems, isolating their publicly funded activities from their privately funded activities, out of separate offices.¹¹

The restriction on state, local and private funds also undercuts the important function that state and local governments, and private donors, can play in closing the Justice Gap - the restriction prohibits these local authorities from running their own justice systems in the way that they, and their local partners, deem best. In certain states with relatively greater amounts of non-LSC funding, justice planners have sought to create entirely separate organizations and law offices, funded by state and local public funders and private charitable sources, and dedicated performing the categories of work that LSC-funded programs cannot do. But, because the restriction requires this work to be done through completely separate organizations, overhead, personnel, and administrative costs are wasted. Dollars that could finance more services urgently needed by families across the country are eaten up by the costs of running duplicate offices.

To illustrate this problem, consider the example of Oregon, where legal aid programs spend approximately \$300,000 each year on duplicate costs to maintain physically separate offices throughout much of the state. If the restriction on state and local public funds and private money were lifted, the redundant costs could be eliminated. The significant savings from ending the dual operating systems would enable the legal services organizations to provide coverage for conventional legal services cases - evictions, domestic violence cases, predatory lending disputes - in underserved rural parts of the state where there is limited access to legal assistance. More private donors could be brought into the system as well.

Nowhere is the impact of the restriction on state, local and private funds more profound than in the nation's burgeoning subprime mortgage crisis. Communities around the country are reeling from the effects of foreclosures

initiated by predatory lenders. Many predatory lending schemes rely on complex and deceptive lending practices - such as padding mortgages with excessive and illegal fees - that require legal assistance to combat. And many of the victims are particularly vulnerable; predatory lenders often target elderly or disabled homeowners living on fixed incomes for their schemes. Legal aid offices report being flooded with homeowners needing assistance. Yet the restriction dramatically undercuts the ability of subprime victims to obtain legal help that could enable them to keep their homes.

First, because of the restriction on state, local and private funds (in combination with the restriction on claiming attorneys fee awards), legal services offices are entirely unable to demand court-ordered attorneys' fee awards, even though Congress and state legislatures have long recognized, in many statutes, that these fee awards are necessary to deter consumer fraud. As a result, mortgage victims who look to the legal services bar for help, lack the bargaining power needed to deter predatory lenders from engaging in improper practices. Moreover, the legal services bar is denied this revenue that not only punishes bad actors, but that could be used, in turn, to provide urgently needed legal help to additional victims of the crisis.

Second, victims represented by LSC-funded lawyers are barred from participating in class actions, and cannot pursue the class-wide relief that is so obviously necessary when a predatory lender targets a whole neighborhood with an illegal scheme. Instead, individuals are limited to proceeding on a substantially less efficient case-by-case basis.

And, third, the legal services programs are unable to reach out and offer to help to other affected homeowners victimized by same predatory lender, and unable to invite them to join the request for relief being advanced in a pending case.

c. Pro bono assistance provides relief but cannot fill the gap.

Pro bono - legal assistance provided by private law firms for free, or at low cost - provides urgently needed relief to families in need of assistance, but does not, and cannot, substitute for the unique role of the legal services bar.

First, pro bono simply cannot meet the need. Notwithstanding the considerable efforts that have been made to increase pro bono, and despite the vast resources of the major law firms and the large number of attorneys working in the United States, pro bono participation remains low. The average attorney donates less than a half-hour per week to pro bono service, and financial contributions average less than fifty cents per day.¹² Less than one-third of the nation's major law firms even meet the ABA's pro bono challenge of donating three to five percent of total revenues.¹³ Moreover, a substantial proportion of pro bono is done for family or friends, not for low-income communities.¹⁴ Fewer than one in ten attorneys accepts referrals from legal services programs or from other organizations that serve the legal needs of low-income communities.¹⁵

But, more fundamentally, even if law firm pro bono were to increase substantially, it would not supplant the federal government's role, which the Legal Services Corporation Act, nearly thirty-five years ago, described as: promoting equal access to justice, providing representation as a means of improving opportunities for low income people, and reaffirming faith in the rule of law.¹⁶ Despite the plain strengths of the law firms, a permanent gulf exists between the role of the firms in doing pro bono, and nature of the work that consumes the resources of the legal services bar.

The legal services bar possesses highly specialized knowledge that the private bar does not possess. Most legislators know this first-hand because, on a daily basis, they hear from constituents who need legal assistance. Legislative staff routinely refer people with domestic violence cases to organizations specializing in domestic violence, and people with eviction cases to attorneys who possess housing court expertise. Nor is the private bar likely to acquire this expertise - the imperatives of business preclude it.

But, even in the rare cases in which uniquely dedicated firms express a deeper interest in specific areas of poverty law, their contribution is done in partnership with legal services programs that possess broader and deeper knowledge of the subject matter. A random law firm or attorney with a bankruptcy practice, for example, cannot provide the appropriate level of assistance on these other issues without training and experience. The legal services programs that deal with the problems of low-income people day in and day out are the repository of knowledge for the types of cases they encounter and are the lynchpin for most local pro bono efforts.

Finally, the number of poverty law cases is massive - literally, millions of cases a year. There is absolutely no possibility that the private bar, even if it were to possess the relevant expertise, would ever be able to begin to meet the level of need that comprises the Justice Gap.

II. Lack of Representation Has Dire Consequences.

The shortage of legal assistance that results from all these factors can have devastating consequences for the court system's attempt to mete out equal justice and for the lives of low-income people.

a. Lopsided Justice

Our adversarial system depends on vigorous representation by both sides to arrive at the just result. When one side of a dispute is unrepresented, the result is lopsided justice. In many civil courts, low-income people are overwhelmingly unrepresented. A Brennan Center study of New York City's Housing Court, for example, found that tenants facing eviction were unrepresented at least 76 percent of the time.¹⁷ In contrast, most observers estimate that landlords are represented 90 percent of the time. As we have seen from the subprime crisis, default judgments - in which the homeowner does not even appear in a proceeding - are the norm,¹⁸ often because the homeowner has no representation and does not know how to navigate the court system.

Studies have found that lawyers make a substantial difference in the outcome of civil cases. Stanford social scientist Rebecca Sandefur has analyzed every known published quantitative analysis of the relationship between attorney representation and civil trial or hearing outcomes in the United States. She concluded that "lawyer represented cases are more than 5-times more likely to prevail in adjudication than cases with self-represented litigants."¹⁹ An earlier survey of New York Family Court judges, cited by the Supreme Court, found that representation made a critical difference in proceedings to terminate their parental rights: "72.2% of [Family Court judges presiding over termination of parental rights hearings] agreed that when a parent is unrepresented, it becomes more difficult to conduct a fair hearing (11.1% of the judges disagreed); 66.7% thought it became difficult to develop the facts (22.2% disagreed)."²⁰

This phenomenon is playing out over and over again in the subprime crisis that is costing hundreds of thousands of families their homes. To be sure, there are homeowners who owe staggering amounts who will not be able to save their homes merely through legal representation. But there are many others - victims of predatory lenders and other unscrupulous scam artists - who have valid legal defenses that they cannot assert without legal help. Because of lack of homeowner representation, lenders are rarely put to the test of meeting the most basic legal requirements for one of the courts' most extraordinary remedies--taking someone's home. As a result, a federal judge in Cleveland recently wrote, legal proceedings have become a "quasi-monopolistic system where financial institutions have traditionally controlled, and still control the foreclosure process."²¹

Perhaps nowhere can the impact of legal assistance be seen more dramatically than in the context of domestic violence cases. Take, for example, the case of Mariella Batista, a Cuban immigrant who had suffered for years from domestic violence by an abusive partner. Ten years ago, Batista sought help from a local legal services program. Even though she feared for her life, the program had to turn her away due to the 1996 LSC restriction that prohibited representation of most immigrants. The next week, Batista was killed by her abuser outside the family court building.²²

Although Congress has since amended the LSC restrictions to allow for representation of domestic violence victims regardless of immigration status,²³ the lesson persists: denial of access to a lawyer can have tragic consequences. In contrast, when legal services are made available, survivors of domestic violence have assistance obtaining protective orders, custody of their children, child support, and sometimes public assistance. Legal services programs help women achieve physical safety and financial security and thus empower them to leave their abusers. In fact, one recent study found that access to legal services was one of the primary factors contributing to a twenty-one percent decrease nationally in the reported incidence of domestic violence between 1993 and 1998.²⁴

b. Societal costs

The consequences of inadequate access to the courts affect not just the individuals directly involved, but also society at large. When families are evicted from their homes because they cannot obtain counsel in a housing proceeding, for example, their resultant homelessness costs taxpayers in the form of public services.²⁵ In New York City, the average cost of sheltering a single homeless adult is \$23,000 annually--far more than providing counsel to prevent an eviction.²⁶ Medical and other costs rise, too, when individuals, particularly senior citizens, lose their homes because they lack access to a lawyer. When victims of domestic violence are unable to obtain help, the health care, criminal justice, and social welfare systems bear the strain.²⁷ Employers, too, suffer from decreased productivity and increased absenteeism.²⁸ When family homes are foreclosed upon, communities lose up to \$20,000 in tax revenue, unpaid utility bills, and added costs of policing, maintenance and other services.²⁹ Additional costs are borne by neighbors, whose property values fall when a nearby home is foreclosed. Many of these societal costs could be ameliorated if low-income individuals had access to counsel to assist them in resolving their legal problems.

III. Conclusion

For all these reasons, the Brennan Center urges Congress to maintain a fully funded LSC and to remove the wasteful and counterproductive restriction on state, local and private funds.

1 The Brennan Center is a nonpartisan think tank and advocacy organization that focuses on justice and democracy. Through advocacy, research and litigation, the Brennan Center has been deeply involved over the last decade in efforts to ensure equal justice for all in our courts. Our Access to Justice Project is one of the few national initiatives dedicated to helping ensure that low- and moderate-income families have effective and unobstructed access to the courts.

2 See 42 U.S.C. § 2996 et seq.

3 LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 2 (2005).

4 LEGAL SERVS. CORP., *supra* note 3, at 18.

5 LEGAL SERVS. CORP., *supra* note 3, at 5.

6 *Id.*

7 See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104- 134, § 504(a), 110 Stat. 1321, 1321-53 to -56. Congress has carried forward these restrictions each year by incorporating them in the annual appropriations rider for LSC.

8 See *id.* at 1321-55 to -56.

9 See Legal Servs. Corp., Fact Book 2006, at 14 (2007), available at <http://www.rin.lsc.gov/Rinboard/2006FactBook.pdf>.

10 45 C.F.R. § 1610.8.

11 The contrast with how faith-based organizations are treated is particularly striking because the Establishment Clause of the federal Constitution bars the federal government from subsidizing or endorsing a grantee's religious activities. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 609 (1992) ("[O]ur cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform."). Yet, President Bush's Faith-Based Initiative permits religious organizations to run federally funded programs in the same physical space and with the same personnel used for religious activities, such as worship and proselytization.

12 DEBORAH L. RHODE, ACCESS TO JUSTICE 17 (2004).

13 Id. The ABA Model Rules on Professional Conduct establish an aspiration that lawyers will "render at least (50) hours of pro bono publico legal services per year," a "substantial majority" of which should be without fee to low-income communities. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002). However, Rule 6.1 is non-binding.

14 See RHODE, *supra* note 12, at 17.

15 Id.

16 42 U.S.C. § 2996.

17 Kira Krenichyn & Nicole Schaefer-McDaniel, Results From Three Surveys in New York City Housing Courts 7 (2007), available at http://www.brennancenter.org/content/resource/results_from_three_surveys_of_tenants_facing_eviction_in_new_york_city_hous/.

18 In Brooklyn, New York, an expert estimates that 75 percent of foreclosure cases are resolved by default judgment. See Sarah Riley, Solution to Foreclosure Crisis for Low Income, Brooklyn Daily Eagle, May 21, 2008, available at http://www.brooklyneagle.com/categories/category.php?category_id=27&id=18111.

19 Rebecca L. Sandefur, Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes (forthcoming 2008) (manuscript at 3, on file with the Brennan Center).

20 Lassiter v. Dep't. of Social Svcs. of Durham Cty., 452 U.S. 18, 29 n.5 (1981).

21 In re Foreclosure Cases, 2007 WL 3232430, at *3 n.3 (N.D. Ohio 2007).

22 See Leslye Orloff et al., Opening a Door to Help: Legal Services Programs' Key Role in Representing Battered Immigrant Women and Children, CLEARINGHOUSE REV., May- June 2003, at 36, 36.

23 Violence Against Women & Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 104, 119 Stat. 2960, 2978-79 (2005).

24 Amy Farmer & Jill Tiefenthaler, Explaining the Recent Decline in Domestic Violence, 21 CONTEMP. ECON. POL'Y 158, 169 (2003).

25 See NANCY SMITH ET AL., VERA INST. OF JUSTICE, UNDERSTANDING FAMILY HOMELESSNESS IN NEW YORK CITY: AN IN-DEPTH STUDY OF FAMILIES' EXPERIENCES BEFORE AND AFTER SHELTER, § 3, at 13-14, 28 (2005) (finding that almost half of all families in the New York City homeless shelter system had experienced an eviction in the five years preceding their admission to a shelter, and that being evicted made it seven times more likely that a household would enter a shelter that same month).

26 Coalition for the Homeless, Research, Basic Facts about Homelessness, http://www.coalitionforthehomeless.org/advocacy/basic_facts.html.

27 See S. REP. NO. 103-138, at 41 (1993) ("[E]stimates suggest that we spend \$5 to \$10 billion a year on health care, criminal justice, and other social costs of domestic violence.").

28 See H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.), reprinted in 1994 U.S.C.C.A.N. 1839, 1853 ("[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . [,] by diminishing

national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . .").

29 Special Report From the Joint Economic Committee, Sheltering Neighborhoods From the Subprime Foreclosure Storm, p. 14 (2007), available at <http://www.jec.senate.gov/Documents/Reports/subprime11apr2007revised.pdf>.