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Forgotten Americans: The Future of Support for Older Low-Income Adults
What is the Role of the Courts and of Advocates in the Realization of Social Policy for Low-income Older People?
NSCLC and Center for Medicare Advocacy
October 19, 2007

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MICHAEL KELLY: —how difficult it is to change laws once they are enacted and how privatization is—threatens to unravel the whole concept of social insurance. Our final segment of the day will focus on how easy it is to change laws once they are enacted [laughter]. And a phenomenon that's, I think related to privatization, namely the unraveling of progressive social legislation.

The topic is one that NSCLC and CMA have intimate knowledge of, which is the role of the courts in the implementation of the social contract for older Americans. This is a phenomenon, I think, not well understood by policy makers. And we'd like this program, this afternoon, to raise some consciousness about this issue.

Our presenter is Simon Lazarus, who is counsel to NSCLC primarily associated with our Federal Rights project. Simon has had experience on the White House Policy Staff and is a trustee of the Senate for Law and Social Policy. He has been a Washington lawyer for over two decades and much to our benefit, remains a Washington lawyer with NSCLC.

And we have four commentators on Si's [misspelled?] paper. Tim Jost is Professor of Law at Washington and Lee University Law School and considered as I think even was

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acknowledged earlier in the day one of the country's leading authorities on health care law.

Our next three commentators are committed and currently active Legal Services lawyers who are savvy, experienced litigators for both CMA and NSCLC. Sally Hart specializes in health benefits law at the William E. Morris Institute for Justice in Tucson, Arizona. She serves as consulting counsel to CMA.

Gill Deford is Director of Litigation at CMA. Gill is taking the lead in that huge C2 [misspelled?] case by CMA and NSCLC against the Centers for Medicare and Medicaid services that was mentioned earlier today.

And Gerald McIntyre currently heads the NSCLC, Los Angeles office, I should mention that Sally and Gill are alumni of that office where he moved. He moved to Los Angeles after Legal Services experience in the Bronx and upstate New York. Gerry [misspelled?] specializes in Social Security and Supplemental Security Income work.

With that very brief introduction of our presenter panel; take it away, Si.

SIMON LAZARUS: Well, now for something completely different. If you didn't know before you came here, you know now that our system of entitlement to adequate health care is fraying very badly. You know that we have an intense debate

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going on in the country about what to do about that and we heard a great deal about that this morning. But what we don't hear in that debate and what we didn't hear this morning, so that's why we're going to be completely different late this afternoon, is anything about what the role of the courts has been in making or breaking the great entitlement programs that we're concerned with preserving and extending and enhancing.

And while it certainly is the case that Congress, which is the focus of everyone's attention, is the venue where we go to pass these laws and improve them or to try to keep them from passing as the case may be. The fact is, the courts—the fact is that our organizations spend a great deal of our energy in court. And the other fact is that over the half century since these great programs were put in place, the courts have hosted endless wide-ranging, fierce battles about these programs; about the terms of them, the governance of them, what benefits are available and in particular, what remedial options are open for beneficiaries to vindicate their rights.

And the further fact is that there is good reason why the litigators in our respective organizations and others like them spend so much time in court. Because the decisions the courts have rendered in these cases have significantly affected the scope, the effectiveness and the impact of the great entitlement programs.

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What I'm going to do in this talk is try to throw out some generalizations about what the nature of the effects have been for good or ill and where we stand looking forward in terms of where those effects are going.

And I'm going to focus on two programs. One is Medicaid and the enforcement of beneficiary rights in court. And the other is employer sponsored health benefit programs. And the reason I'm focusing on those is one can only cover so much. And I don't know very much about the other programs but hopefully I'm going to be helped out in that regard by other people on the panel. And I want to make -- I'll just summarize the beginning, the stratosphere level points I want to leave people here with.

First of all, and at least looking at these two programs, the courts have had a tremendous impact for good in some cases, and for ill in others. And the second point is that we are now, at a very significant historical turning point in terms of the role of the courts with respect to safety net programs. In a nut shell, we are at a point where we could go from relatively bad to much worse. I think worse, perhaps, than many people have imagined. And so I want to focus a little bit on what that means and what we might do to avoid the much worse.

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And that's the third point I'd like to spend a little time talking about what the action agenda might consist of. Well, I think also in terms of what kind of effects the courts have had, and looking at it historically, after these great programs were enacted in the 1960's and '70s. The liberal courts, the liberal Supreme Court that was then in place as one might expect, its objective was to try to make them work. And particularly with respect to Medicaid, the courts in that period made a very big difference in terms of increasing the effectiveness of the program. The Rehnquist court focused on reigning these programs in and in particular on reigning in the ability of beneficiaries and private advocates to effect the enforcement of the programs and the implementation of the programs in court.

Now, we are at a point where we have the Roberts court. And the Roberts court, the new justices Alito and Roberts both in what they've done in the brief year or two since they've been on the court and to some extent, what they did before they got there, have signaled that there is a great risk that they could direct the court into going from trying to reign these programs to trying to do them in. And although that sounds a little hysterical and probably it is, they really can't absolutely do them in, they don't have that much power. They

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can make very serious trouble and they may try to do that. So I'm going try to talk about that a little bit.

And I think that it's important to look forward and see that not only is the court shifting right but the electorate is shifting left and in particular it's shifting left on issue related to health security. Poles have shown that a large majority of the public now supports the idea that there should be an aggressive government role in providing health care. So we're looking for—we're looking at a time when there may have been a disconnect between the attitude of the Supreme Court toward progressive programs like these and the attitude of the electorate. But the prospect is that that disconnect could become much sharper and stay that way for a long time. And this, I would point out, is a movie that we have seen before, or at least we have read about it in our American History class, those of us who took American History.

Just one century ago, during the first third of the 20th century, that Supreme Court set its face against liberal social legislation at both the state and federal levels. And it pushed very hard this reactionary agenda for three decades. And it was turned around only by a political tidal wave that was led by Franklin Roosevelt in the late 1930's. And that should be very instructive to us. The Supreme Court can be a very powerful institution and it can have goals of a sort we've

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not really been accustomed to thinking that the courts could have and it could be a very dangerous adversary as it was a century ago.

The new breed of conservative activists that are inhabiting the court now and their supporters in advocacy and academic institutions and on the Hill, they have avoided the in your face attitude of the judicial reactionaries of a century ago. They've not played what is the court's ace. That is to say they've not by and large held laws unconstitutional. Instead, their strategy has been to try to throw sand in the gears of the machinery of the welfare state. They have proliferated obstructionist rules that purport to be just about procedure and governmental structure. It's not a very flashy strategy. It's what Justice Scalia derisively called last term, part of an obfuscation approach to exercising judicial power. But it's already proven very potent and it could prove much more so in the hands of a judiciary that is significantly more dominated by very ideological conservatives then the Rehnquist court was.

I'd like to just delineate a little bit, how you would categorize what the role of the courts have been in terms of affecting these entitlement programs. Basically there are three areas where the courts have an effect, I think.

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One, they can define the scope and the substance of the program. And both in Medicaid and with respect to employer sponsored benefit plans, they've had very significant effects and again, good and ill.

Secondly, they can have a tremendous effect on remedies and on enforcement by individuals who are beneficiaries and targets of these programs. If there aren't any effective remedies, then the substantive requirements and obligations don't mean very much or may not mean very much. And so through that route the courts can have and have had a very big effect.

And finally, there's another area, which is kind of a weird area but it's very significant. The courts in our system have the ability to decide that you're in the wrong place to try to do anything about this problem. Either the Congress was in the wrong place or the states were in the wrong place or the person who's trying to enforce a federal or a state law is in the wrong place. And that is through the court's ability to, the Federal Court's power to police the boundaries between federal and state power. And this is a very obscure and complicated area and that fact is something that has given the courts, in their efforts to use this boundary policing function, to achieve substantive policy objectives has given them a lot of power because no one understands that really what they're doing except for a small cadre of lawyers.

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And in particular, this area which we call federalism has really been very significant in the evolution of the strategies of this new breed of conservative activists. They've developed a schizophrenic approach to federalism. On the one hand, the conservative block on the court has sought to constrain Congress's power to enact and the ability of citizens to enforce national legislation. And on this side of their agenda, they have portrayed themselves as defenders of states rights and they have obstructed the ability of individuals to enforce laws like Medicaid against the states, as all the litigators in our audience here know very well. And they've to some extent, restricted the ability of Congress to legislate. There has been some attention to this particular area of the conservative activist's agenda and people in this room can claim some credit for that over the last several years, we've made big efforts to spotlight the activist federalism offensive of the conservatives on the court and we've made some headway in that regard.

But at the same time that the court has been trying to restrict federal progressive legislation by standing up for states rights, without missing a beat, the court has developed a very aggressive set of doctrines to enable it to preempt, that is to say invalidate state laws that either conflict or "frustrate" federal laws. The court has aggressively deployed

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these preemption doctrines. And in the main, its trigger happy use of this preemption power has been used to strike down state regulatory laws at the behest of industries or businesses seeking regulatory relief.

And if one puts side by side, the crocodile tears that are shed for state dignity and autonomy in cases where the court is slapping down Medicaid or Civil Rights plaintiffs who are trying to sue states, if you put that on one side, then you take cases in which mainly business plaintiffs are coming in and asking the court to set aside states laws on the ground that they somehow or another get in the way of federal laws, in those cases, the same justices who are hawks about reigning in our lawsuits against states, say that it is absolutely clear that this court can exert jurisdiction to invalidate a state law that needs to be preempted.

And this is part of a secret that has been hiding in plain sight for a long time. Preemption cases get no attention in the general press and I think that we're somewhat to blame for that. But I recently discovered, to my amazement, in reading a study by a conservative scholar who is a proponent both of the court's federalism doctrines and its preemption doctrines, that over the course of William Rehnquist's tenure as Chief Justice, preemption cases comprised eight percent of the Supreme Court's dockets, which is an astonishing figure.

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That is a great deal of the business that the court is about and people don't really know that.

I would just also note, most people don't really understand what the court is doing with this schizophrenic federalism doctrine, but a few people have noted it. And one who put it particularly well is Professor Ernest Young of the University of Texas, who is a conservative, but a consistent state's rights oriented conservative. And he has said, "This libertarian vision sees federalism as a tool of deregulation with the potential to keep national and state governments within relatively narrow bounds." And part of my message here is that if we were to get a court with a majority that was really devoted consciously to that objective, it could do a great deal of damage. And so it's very important for us to call attention to that and to try to figure out what to do about it.

The paper that you'll—rather Norm's [misspelled?] paper that is in your notebook goes into some detail about just what the court has done to Medicaid enforcement and to employer sponsored benefit plan beneficiaries who are seeking remedies for violations of their rights. And I'm not going to repeat all of that here, just give a little bit of the flavor. In the Medicaid area, the whole tactic has been to create an

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incredible web of procedural obstructions to Medicaid beneficiaries trying to enforce their rights.

And just all I want to do there is just quote one of my favorite scholars again. It's Michael Greve of the American Enterprise Institute, who's a very prominent advocate of both the court's federalism doctrines and its preemption doctrines. He labeled all of these rules the court's anti-entitlement doctrines, which was very kind of him. And he notes in this same passage that these anti-entitlement doctrines are connected such that plaintiffs who manage to evade one obstacle are bound to stumble over another. And of course, we all, the litigators know that. But Michael is here telling us that yes, your right, it's on purpose. But it's a very clever kind of on purpose because it's hard to explain that to the public, it's hard to explain that to Congress, it's hard to do anything about it but we should work on that.

With respect to the second area that I'm focusing on, namely employer sponsored benefit plans, I guess some people here might wonder why that would be in this conference. Is it an entitlement program? And thanks to Tim Jost, I think, I think that it is very appropriate to say that that is exactly what it is. First of all employer sponsored benefit plans are entitlements. You're entitled to it because it's a contract.

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And secondly, the fact that most Americans actually are covered by these plans right now, is a creature of very deliberate and important federal government policy, both through the tax deduction for contributions and through ERISA the Employee Retirement Income and Security Act of 1974, which is certainly one of the landmark safety net reform statutes of the 20th century.

And here we really have a picture of how the courts can affect what these laws mean in practice. And again I'm not going to go into detail, but I'm going to read a couple of statements by former Chief Judge of the Third Circuit, Edward Becker, who died, I guess, a year ago. And Judge Becker, for those of you who don't know, was a very distinguished republican appointee, he was appointed to the District Court by President Nixon and the Court of Appeals by President Reagan, so he's hardly a radical firebrand. He was Senator Specter's best friend, very frequently quoted by the Supreme Court.

Judge Becker said in a remarkable decision about three years ago that the Supreme Court's interpretation, emasculation really, of the remedies provisions of ERISA have converted it into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs directly contrary to the intent of Congress. And he actually has a longer statement

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from the same case, which I can't help but read a little bit of. As construed by the court, he says, ERISA creates strong incentives for HMOs to deny claims in bad faith or otherwise stiff participants. This is in a judicial opinion. [Laughter] I mean this is pretty remarkable rhetoric. ERISA and it does this because not only has the Supreme Court eviscerated ERISA's own remedy provisions, but it preempts the state torte of bad faith claim denial. It's preempted virtually all state remedies, so there really, literally are no remedies for many violations.

So with respect to ERISA the court has basically administered this double whammy. It has extremely narrowly construed ERISA's own remedial provisions and then it has preempted the state law, common law, torte law and statutory remedies that were available before ERISA was enacted. Supreme Court Justices Ruth Ginsberg and Steven Breyer recently said of the court's handy work, virtually all state law remedies are preempted but very few federal substitutes are provided. And that is the state that the court has left us in. And so the result is, the net is, is that beneficiaries of these plans, which is most of us, are quite literally worse off and often much worse off then they were before ERISA was enacted when they had only state, statutory and common law protections to rely on. I should say, we're not going to talk about it, but

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ERISA is only one of many regulatory arenas in which the court has wielded this preemption veto over state law initiatives.

And there are significant cases up before the Supreme Court this term. One is about to be argued early next month, an important preemption case. And there are potentially two very significant ERISA cases before the court.

So at this moment and in this very—this could be a very significant term of the court in this area, because we will get something of a clue whether the Roberts court is going to ratchet up the Rehnquist court's drive to limit and narrow these programs and set out to really break them as much as it can. And what it could do, it could eliminate private judicial enforcement all together or get as close to it as it can get and it can get very close to that. The Rehnquist court limited private judicial enforcement. The Roberts court could just take it out all together.

The court could hollow out the substance of a lot of these federal laws, especially their remedial provisions so that they really don't really mean very much. And a good example of the kind of thing it could do is what it did do late last spring in the Ledbetter case when it construed the statute of limitations provision in Title VII of the Civil Rights Act and equivalent Title by inference of the Age Discrimination and Employment Act to require that discrimination victims file

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claims within 180 days of the act of discrimination. Of course, no one ever finds out that they've been discriminated against in the real world workplace in 180 days. So that will cut the number of such claims to a very low number. And it's through devices like that that a serious hollowing out strategy could be pursued. So briefly, how much time do I have? How much time have I taken? I'm okay? And people are still awake, good.

Okay, I'll talk a little bit about what my thoughts are on how we should think about what we can do. And the bottom line, by the way, is very similar to the bottom line that you were hearing this morning, and that is, we have to politicize this stuff and we have to do it a politically effective way. But in more detail, I'll just look at three dimensions, three areas, the courts, Congress and progressive advocacy communities.

First, in the courts, all is not yet lost. For both Medicaid and employer, the Medicaid issues that we're concerned with here and employer sponsored benefit plan beneficiaries, advocates that I know of and work with are pursuing highly sophisticated legal strategies. They're doing a brilliant job and there is a realistic basis for believing these strategies may work. The chances are not zero. I won't go into what the strategies are. There are people who can talk about it. There

discussed, these strategies are discussed in my paper and I'm not going to go into it now. But there is a chance or maybe more than a chance in both areas. But one has to say that the trajectory is not encouraging and the realistic likelihood is, one is unlikely to get better decisions from the courts and one could easily get much worse decisions from the courts if there's no effective intervention from Congress.

So let's look at Congress. And that is Congress is critical, I think, to any realistic expectation that the Robert's courts conservative block can be dissuaded from scratching it's activist itch. And the outlook there is hopefully better than what the picture has been in the past.

The court by aggressively misconstruing these statutes, the court has been picking a fight with Congress. The court has been thumbing it's nose at Congress, rendering decisions like the Ledbetter decision, it's just going like that. And I mean, as a matter of fact, in that case, it was not only willfully undermining the Civil Rights Act, but it was disregarding a 1991 fix that Congress passed for almost exactly the same misinterpretation, a fact of which the court was of the five to four majority was well aware. And it's impossible, it's hard, to imagine that Justice Scalia in rendering the extraordinary eviscerating interpretations for ERISA that he has, doesn't understand that this is not really what Senator

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Javits and his colleagues had in mind when they acted ERISA in 1974.

But unfortunately up to this point, Congress has for the most part turned the other cheek or just stuck it's head and the sand and not noticed. And one thing that we certainly can say that if Congress does not begin, at least, to make a very serious fuss about the court's insipient right-wing activism and does not appear mad enough to get even, then nothing will matter, nothing else we can do is going to make any difference, really. And I should say one other thing about the congressional situation which is a greater problem and this problem was alluded to somewhat in the discussions this morning and that is the problem of chronic congressional gridlock.

Gridlock in this area is a chronic and a systemic problem with Congress right now. And that fact could be a major enabler for runaway activism on a 21st century Supreme Court because there are really two aspects of it. One is the power of interest groups to veto legislation of this sort that they don't approve of as former Congresswoman Kennelly said, it's a lot harder to change a program than to stop it. And that is why because people get vested interests in the arrangements the way they are and they fight like crazy to keep them that way. And so it's very difficult to change and that difficulty is significantly reinforced, as we all know because

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of the fact that you now need 60 votes to get anything at all controversial through the Senate.

So the net of all of this is that you're just looking at a sort of a structural feature of the politics of these issues going forward. It may be very difficult to convince militant conservatives on the court who have a real agenda that they have much to fear. And so this can be a real problem and as a matter of fact, the Ledbetter situation is an unfortunate example, I think.

The Ledbetter decision, unlike most decisions of this sort really galvanized the public. They really could understand what it meant to say that people who are victims of discrimination in the workplace weren't going to have an effective way of doing anything about it even though they thought they had that right under the law. And immediately Senator Clinton and a lot of other people said we're going to fix this, we're going to change it, we're going to overrule it and the House, in fact, did pass a bill to overturn that decision at the very end of the summer session before the recess. But that bill is now mired in the Senate and Senators Kennedy and Specter have told advocates that if they can't come up with 60 votes it’s not getting out of their committee because they're not going to waste time on it. And that's a pretty good situation. Many of these issue are not going to

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have the kind of public resonance that this particular one did. So this is a problem.

Anyway, let's look at the final leg of, I guess, the political triangle and that's ourselves. And the fact is, that we who are advocates for vulnerable constituencies, the constituencies affected by these programs, we are the only hope for turning congress around so the Congress turns the Roberts court back to the straight and narrow path of trying to implement and enforce programs instead of marginalizing them. And this is a big challenge. And I'd just like to lay out a few thoughts that I have about that.

I would say that the right attitude is not to blame the political system and so forth, that the fault is not in our stars, it's in ourselves and we need to go forward with that attitude because I think it's actually valid. A critical problem, I think, is that many progressive advocacy groups and constituencies and funders operate and think in silos. Now this is not universally true, there are exceptions. Many of the people in this room work the Hill and work the courts in tandem and they do so very effectively. But the silo problem is a very pervasive problem in the progressive advocacy community. And people referred to that this morning; also, they talked a little bit about that. And looking here, we have two kinds of advocates in this room. We have people who mainly

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focus on the Hill and people who mainly are in court. And it's my impression after four years of working with NSELC that to a very significant extent, the litigators tend to do what they do which is litigate, which they do very well. And policy advocates and lobbyists tend to focus on the Capitol Hill agenda or state legislative agendas and the really do not pursue an integrated strategy and so a lot of policy advocates are not really aware of what's going on in the courts or why it matters. And a lot of the people who litigate do not think about how to politicize the issues that they're working on. So I think that that's a very important, very important thing on which to focus.

And I'd like to contrast the way we operate in this regard with another set of liberal advocates, which is the culture warriors. They tend, those groups tend to fight in court but also to keep their court issues up front with the media, the public or politicians think about what the courts do that matters. And we all know what the results are but I'll just quote Jeffrey Tubin who's just written a very good book on the Supreme Court, some of you may have read. And he says that in the past three decades, there were two kinds of cases before the Supreme Court, there were abortion cases and there were all the others. Abortion dominated the nomination and confirmation

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process and it nearly delineated the difference between the national Democratic and Republican parties.

And obviously that degree of perceptions reflects something in society but it also reflects the good work of the people who were promoting that issue. The fact is that if the public understood that when they are being stiffed and can't get serious health problems handled by their HMO even they know that they're entitled to getting handled, if in addition to hating the insurer the knew or they'd been told they should hate Justice Scalia also, it might make a difference and it would be valid. And I think, without any question, that those are the kinds of terms that we really should be thinking if we're going to try and fix our situation in the courts with the prospect of a very consciously politically conservative judiciary staring us in the face for the next three decades or so. So that is a general point that I will leave you with.

As I said a little bit earlier, the threat of this situation has been a secret hiding in plain sight for well over a decade with the jurisprudence that the Rehnquist court has been developing. The potential to torque that jurisprudence way to the right and make it's effects much more radical has been obvious to anyone who wants to study it. And I think it is up to us, who really understand that to out this secret effectively and to bring the issues that we've been fighting in

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court to the public and to the bar of politics, to the bar of politics, where they belong, so [applause].

And I just want to say that the people who are going to be speaking now know a great deal about some of the things I was talking about and also they know a great deal about complimentary things that I didn't talk about.

TIM JOST: Sure, go ahead, thank you. First I'd like to thank Simon for his excellent talk and commend to you the paper. I've seen several iterations of this paper, it was good to start with, and it's just gotten better and better. And what I'm going to say is going to respond in part to some things, parts of the paper he really didn't talk very much about. I'd also commend to you his article in the 2006 DePaul Law Review, which gets more into these federalism issues.

I'd like to talk about history and it's a history that I think some of us in this room lived through and many in this room did not live through and maybe some in this room don't know much about. And what I'd like to suggest is that although major focus of Simon's paper and his talk today was federalism that the real issue is entitlement and federalism is, in a sense, a lead in to that issue. There's of course—and what I'm going to talk about is safety net programs for the poor, the elderly poor, but the poor in general which is what we're talking about this afternoon in contradistinction I suppose in

a bit to the social insurance programs we were talking about this morning.

There's of course a long history of assistance to the poor in the United States and in particular the elderly poor, going back to the Elizabethan Poor Laws. During the 19th century however, there were two primary trends that became evident. First for a variety of reasons, the poor were increasingly regarded with ever greater resentment and distrust. Americans believed that there was no excuse for being poor in the United States. There was an increasing emphasis on the distinction between the worthy and the unworthy poor and increasing insistence that the unworthy poor should be refused assistance and an increasing reluctance to help the worthy poor lest we inadvertently help the unworthy poor.

The programmatic response to these trends represents the second major change in the treatment of the poor in the 19th century and that was the emergence of the poor house which was briefly alluded to this morning. Throughout the first half of the 19th century counties attempted to cut back in cash in kind assistance to the poor increasingly confining indigents into poor houses. The poor house was based, as was relief through much of the 19th century on the principle of less eligibility, the belief that the conditions of the poor should be kept so

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miserable that nobody would prefer relief to work. Sounds familiar, doesn't it.

Though various forms of aid were offered to the poor throughout this period, assistance was clearly offered as a gratuity and not as an entitlement. Relief was distributed at the discretion of local officials; no individual had a legal claim to it. Indeed, in some cities, relief was awarded by local politicians to influence voters, if not votes. The belief that welfare was a gratuity continued well into the 20th century. A description of the Ohio State Old Age Pension program as it existed in 1935 noted that applications were made to the county board which personally considered each application to look at the worthiness of the applicant. The applicants had to be state residents for 15 years and residents of the county for at least one year could be denied a pension if they had neglected their children, deserted their spouses or been convicted of drunkenness. And those who were granted a pension could have it revoked if they wasted it.

This was the background against which the Social Security Act, public welfare programs for the elderly, disabled and dependant children were adopted in 1935. Many of the key provisions of the current Medicaid statute, including requirements that assistance be provided under a state plan that is of state wide operation, that there be a single state

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agency to administer the program, staffed through a civil service system, that all be afforded an opportunity to apply and that aid be provided with reasonable promptness and that states provide for fair hearings for those denied assistance or who's assistance is taken away date back to the 1935 act. These provisions were carried over into the Kerr Mills Act in 1960 and then into Title IXX, the Medicaid provisions in 1965.

Title IXX brought about, however, substantial changes as well. It required states, for example, to remove all residency requirements, ending finally centuries of the settlement tradition in welfare benefits, that they were only available to people in the locality. It required states to cover a specific range of services, including hospital and physician care. It recognized specific rights in individuals such as the right to a fair hearing and imposed specific obligations on the states such as the amount, duration and scope requirement.

The original Medicaid statute did not recognize and express federal cause of action for recipients. This may have been because Congress was more concerned about expanding aid to the states that had been given through the Kerr Mills program than in founding a new entitlement program. It may also have been, however, because it really wasn't until the mid-70's, about 10 years later that the Supreme Court really became

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focused on what was necessary for a private right of action under federal law. And Congress may have simply assumed that one existed. In any event, it did not take long for the Supreme Court to sort things out.

Between 1968 and 1975, the Supreme Court decided 18 cases involving the Aid to Families with Dependant Children program. These cases were brought through a concerted effort of welfare reform advocates led by the legendary Ed Sparer. Their agenda focused on radically changing the nature of federal aid assistance programs from welfare programs to social insurance programs through the development of a substantive constitutional right to welfare.

While the agenda largely failed, the cases brought during this period firmly established federal jurisdiction over welfare claims. The first of these cases to reach the Supreme Court was King versus Smith. This case challenged as contrary to the Social Security Act in the United States constitution an Alabama regulation that disqualified children from receiving AFDC if their mother cohabited with a man who was not the children's parents. It was not exactly clear what cohabitation meant but it had something to do with sex. And one welfare worker said that once every six months was enough. Mrs. Smith was working as a cook; she was working everyday from 3:30 in the morning until 12:00. She was making $16 to $20 a week for

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her four children but she had had a relationship with a married man and that got her kicked off of welfare. In unanimously striking down this regulation, the Supreme Court held that the Alabama statute violated the Social Security Act. In reaching that decision, the court established several very important principles.

First the court recognized that federal law established under the Congress's spending power was the supreme law of the land. In footnote 34 of the case, the Supreme Court stated, "There is, of course, no question that the federal government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which it's money allotments to the state shall be disbursed and that any state law or regulation inconsistent with such federal terms and conditions is to that extent unlawful."

Second, the Supreme Court held that AFDC applicants were not required to exhaust remedies of a state fair hearing before filing an action in federal court. The applicants were freed, not only from having to sue in state court but even from having to pursue state administrative remedies.

The court in King versus Smith reserved judgment on whether 40 USC, section 1983 suits could be brought challenging state AFDC provisions soley on the basis of nonconformity with the Social Security Act, absent a constitutional claim. The

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existence of the Right of Action for Statutory Violations, under section 1983, was not firmly established—finally established until over a decade later when the Supreme Court in Main versus Thiboutot squarely decided that the language of 1983, allowing redress for violation of the constitution and laws included violation of the Social Security Act. When that case was finally decided though, the court eluded to seven previous cases that assumed that to be the case.

A final important decision in the Supreme Court's welfare jurisprudence was the rejection of the rights privilege distinction which was fundamental to welfare law in the 19th century. Goldberg versus Kelly which recognized the constitutional right of welfare recipients to notice and pretermination hearings established welfare benefits as statutory entitlements and expressly rejected the notion that public assistance was a privilege rather than a right.

Congress has never adopted legislation expressly recognizing a federal cause of action for Medicaid and thus a federal entitlement to it. In two instances in the 1990's, however, one being the Suitor fix, which probably most of us know about where after the Supreme Court's decision in Suitor v Artist M. [misspelled?], the Congress adopted a statute rejecting that decision in saying that just because a federal statute requires approval of a state plan doesn't mean that

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there is no private cause of action under 1983. And then the second time was in 1995 and 1996 when Congress explicitly repealed the right of action to enforce the Medicaid statute, thus it seems to me, acknowledging the existence of such a right and that statute was vetoed by President Clinton.

Simon has discussed the disturbing developments in Supreme Court decisions continually cutting back on 1983 jurisdiction, federal jurisdiction in the federal courts to challenge state Medicaid laws and regulations and the behavior of state officials. I'm not going to go over that history but would like to underscore two facts about the history of welfare law and in particular, the early Supreme Court decisions that are worth remembering.

First, for the first decade of welfare law jurisprudence, the Supreme Court relied not on the enforcement of federal statutes under 1983 but rather on the supremacy clause to strike down state laws and regulations. As access to the federal courts to enforce federal statutes through 1983 becomes increasingly constrained, we need to remember this. And I know a number of people in this room have been actively pursuing that.

Second, and I think this is the most important, the early cases were not so much about federalism in a narrow sense as they were about entitlement. They were about rejecting the

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intrusive, arbitrary demeaning and inhumane way in which the states administered the welfare law. The cases were fundamentally about human dignity. The cases ended up in federal court because the settlement tradition and the tradition of local administration of welfare was tightly entangled with the tradition of humiliation and arbitrariness. And this could not be disentangled in state court.

And if could be permitted one anecdote; years ago, when I was at Legal Assistance Foundation in Chicago, we did bring a case which I was an attorney on to challenge the violation of Illinois law by the way in which the state welfare program was being administered. And when the judge, the circuit court of cook county judge finally realized what I was arguing, and I can't remember his name except that his first name was Moose [misspelled?] [laughter]. But when he finally realized what I was arguing, he said "Do you mean that you think I'm going to order the state of Illinois to raise welfare grants?" Well, it's not going to happen in many states in the country, possibly in some.

But to the extent that state and local governments still deny the most vulnerable among us entitlements, this battle for human dignity is carried on. And this is the battle which the NSCLC and the Center for Medicare Advocacy have been

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fighting for decades for older Americans and I wish you well in this continuing battle. Thank you. [Applause]

SALLY HART: Stay here, if that's okay. And we're going to switch gears a little bit because Gill and I are going to talk rather more specifically about Medicare litigation and I think it'll be kind of fun, at least for us, because we'll be telling some war stories which we always enjoy. Many of the cases that I'll be talking about and Gill will be talking about are cases that were brought either by National Senior Citizens Law Center of by the Center for Medicare Advocacy.

What we're trying to establish, and trying to find in these cases is patterns in court decisions, looking at the claims that were made in the cases and how the courts came down in them. We'll be trying to draw some conclusions about historically what kinds of issues succeed and what kinds of issues don't succeed in court. And then, more particularly, with Gill's presentation, what kinds of issues and cases we might successfully be bringing now in the current judicial climate.

So let me go back to what I think is the beginning of Medicare litigation, a case called Martinez versus Richardson, which was a 1973 case, a little too early for the National Senior Citizen's Law Center to be in the Tenth Circuit, which is where the case was decided. It was actually brought by N-

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Help [misspelled?]. But was it was a case involving home health benefits for Medicare beneficiaries. And in that case, the Tenth Circuit held that Medicare beneficiaries were entitled to a hearing, fair hearing, before their home health benefits could be denied.

And so in many ways, what it was, was an application in the Medicare area of this line of cases that Tim discussed earlier, particularly Goldberg versus Kelly where the benefit, here a Medicare benefit, not a Medicaid benefit was held to be an entitlement, a property right and it could not be deprived without—taken away without due process which required a hearing. Another good thing, interesting thing about that case that may contrast with some of our current experiences is that exhaustion of remedies was not required. The court saw that it would be too harmful to the beneficiary to have to wait and try to go through a hearing process or maybe there was no hearing process so that it wouldn't be necessary to do that before filing the case in federal court. And another interesting thing about that case is that the basis for jurisdiction in federal court was under the Mandamus Act, not under the provision of the Medicare Act that provides for judicial review.

Another, older case that established some good prescient was a case called Grey Panthers versus Schweiker,

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which was in the D.C. Circuit a couple of times, it went up and it went down again. And it was a nationwide class action brought by a number of Medicare beneficiaries in different jurisdictions in the District of Columbia, district court. And interestingly enough, I realized as I was rereading this, the original issue in that case was whether it was it was constitutional for beneficiaries to be denied a fair hearing when the amount at issue was under $100. We did not win on that issue. Instead, the judge decided that the notice that was given to beneficiaries before they had their hearing or when the benefit was denied was not adequate. And so it did not start out as a notice case but it ended up as a notice case and established the principle that beneficiaries had to get not just any old notice but a fair adequate notice that fully explained the basis for denial and told them about how they could appeal that denial.

Then moving on, a more recent case that, again, sort of established a framework in a new area was a case called Greholva versus Schelaila [misspelled?] which was a case involving managed care, Medicare Managed Care, which had, by that time, been in existence for maybe eight or ten years. And in that the principle that was established in that case was that a beneficiaries was entitled to notice, a good adequate notice, before managed care benefits could be denied and a

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right to an expedited or a—it wasn't exactly called a pretermination hearing but an expedited hearing was at issue. And that case was successful at the district court level and at the Ninth Circuit level. The Supreme Court remanded it for exploration of the issue whether there could be state action when a decision to deny benefits was made by a private Medicare Managed Care plan. And the issue was never completely decided in that case because when it got back down to the district court level, a good settlement was reached with the government. But I believe it was pretty clear from the fact that the government was eager to settle that they were very uncertain that there was a real challenge on state action grounds to Medicare Managed Care plan decisions. But in some sense, I think that issue may still be out there somewhere and not fully resolved.

Another good notice case that perhaps is instructive and again, we're kind of moving closer and closer to present day, is a case that started out called Healey versus Thompson and ended up as Lutwin versus Thompson and it was a case that was in Connecticut and went to the Second Circuit. And that was also a nationwide class action and the issue was also the adequacy of notices provided to home health beneficiaries. Again, the reimbursement system had changed and it was somewhat a different—the issue actually was different even though it

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still involved home health beneficiaries some what then the Martinez case. And in that case, the district court and the Second Circuit ruled that notice had to be adequate, had to be timely, had to have all the good content that would be specific enough to give the beneficiary information about why benefits were denied but declined to rule that a hearing had to be held—a pretermination hearing to be held. So I think that was a very disappointing decision and perhaps reflected a change in judicial attitudes towards this kind of remedy for a benefit like the Medicare benefit.

Another case that involved notice issues more recently is a case called Whiteshirt versus Levitt [misspelled?] and it again involved notice problems in hospital discharge decisions. There certainly was some doubt as to how the case would have turned out if it went to decision in court and the government was eager to settle and so that was resolved with a settlement agreement that did provide for adequate notice but got into some problems with the regulation that would be required to implement that decision. We still do have a notice that's better than it was before but the concern of having a true resolution of an issue like this depend on the government's reading of comments on it's proposed regulations, particularly since in that case, the hospital industry produced hundreds and

hundreds of letters presenting their point of view as to what the notice should look like is of concern.

I'll just tell you about a few more cases. A case that—several early cases, earlier cases, that were very useful were a case called Sarrassat versus Sullivan which was a settlement agreement that was reached in a case where Medicare beneficiaries were finding it impossible to have claims for nursing home benefits submitted when the nursing home believed that Medicare was not likely to cover the benefits because the claim had to be submitted by the nursing home. And if it chose not to submit the claim, there was no process for the beneficiary to go around the nursing home and submit a claim to Medicare and get a Medicare decision. And in the settlement agreement, the government began to require the nursing homes to provide notices to all beneficiaries when they believed that Medicare would not cover the benefit and give the beneficiary an opportunity to demand that a bill nevertheless be submitted. And so set the prescient for a procedure being required whereby a beneficiary could, at a minimum, have an opportunity to have a claim for Medicare benefits resolved. It couldn't be dependant on the whim or the perceived financial interest of the nursing home.

And another case, a 1986 case, that is interesting is a case called Lenose versus Heckler [misspelled?] and that was a

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case that was interesting because it involved a Medicare manual provision concerning ambulance services that had not been promulgated pursuant to the Administrative Procedures Act. And in addition, was in direct conflict with the statute it's self. The court in that case held that the administrative procedures act was violated and the rule that denied payment to those beneficiaries was struck down.

Two or, I guess, three more cases that I think are very interesting and I'll try to summarize them together. A case called Vorster versus Bowen, 1989, a case called Zinman versus Schelaela, [misspelled?] 1995, and a case called Eringer versus Thompson [misspelled?], 2004, all of those cases involved challenges to different administrative or Medicare rules that denied benefits to people in one way or another. The Vorster case was particularly interesting because it challenged the usage by Medicare of utilization screens by which claims were denied initially. And the way a screen would work for instance would be that if you went to the doctor more than four times in one month, the Medicare contractor had a screen on it's utilization that would be triggered and the fifth claim would be denied. And the notice that you got would say something kind of vague, like too many services for your condition or something like that. But it never really explained that really, they had no evidence about your condition, they were

really just using a screen that said when that many services is provided, we're going to question it.

And the outcome of that case, as well as the other two that I describe and really didn’t realize it until I started looking at them. But in all three of those cases, we did not succeed in our challenge to the agencies policy. But we did succeed again on notice issues. In each one of those cases, the court pulled out the fact that the beneficiary wasn't receiving a full and adequate description of why their services had been denied and said, okay, we're ruling that you have to give the beneficiaries better and more complete notices that explain to them what happened and give them the right to appeal so if they have other evidence that they can submit, they'll have a chance to get their benefits covered. So I think at that point I will turn things over to Gill to talk about current issues.

GILL DEFORD: When I was a staff attorney at NSCLC, about 25 years ago, I was making a presentation to the board for some reason. And I start off by saying, for those of you who don't know me, and I was cut off by a very gruff voice, who was the Chairman of the Board who said, how about for those of us who do know you [laughter] and so I've learned my lesson. For those of you who don't know me and for those of you who do know me, my name is Gill Deford. I'm Director of Litigation at

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the Center for Medicare Advocacy. I work for senior citizens for about 18 years, from the '70s to the early '90s. Sally, I think, started there about 1973 or '74, I started about 1976. I want to talk about not necessarily, as Sally said, what the present issues are, but what I've seen—the developments in litigation in that, I can't calculate that much, 30 years approximately, time that I was there. I think it's interesting, first off, it's educational that we're here late on a Friday afternoon, we talked in the morning, we were all fresh and eager about big policy issues. Then around lunch time, we talked about legislative advocacy and how to resolve some of the big policy issues.

And now, very, very late on a Friday afternoon, we get to the stepchild which is litigation [laughter]. And I think that's [laughter] I'm not, this is not a woe-is-me speech, this is a reality speech. I think Si set the tone here. And then I will get to that point.

But first, I want to talk about what I think the two major developments are in litigation in that time period. One is that the tremendous number of difficulties or hurdles that we now—

MALE SPEAKER 1: Gill, you know, in general it's better to be known as a litigator then a lobbyist [laughter].

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GILL DEFORD: By whom [laughter]? The first issue for me is the difficulties we now face in litigation. And then related to that is how, I think, the purpose of litigation has really changed in this time period. And Si was hinting at that but I'll go into some more detail. But let me just tell you about the problems that, and for those of you who are not really litigating, that we're facing on sort of a day-to-day basis doing litigation.

Si mentioned the very conservative Supreme Court and that's certainly a very big factor. But I think equally or even more important, are the lower courts. I mean the lower courts for the last 25 years, except for a brief period, have been peopled by extremely conservative federal judges. I'm talking exclusively about the federal courts now. The federal district and applets courts are very, very conservative and go further than the Supreme Court in many instances. So we are up against a tremendous hurdle and they're throwing one hoop to jump through at us after another.

In federal litigation now, in cases involving Medicare and a lot of other issues in federal litigation, the first thing you see is a motion to dismiss. I don't recall that when we started as a regular event. It seems to me, you filed the complaint, you did some discovery, you did a summary judgment motion. Now, nothing happens until that motion to dismiss is

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resolved. And that's time consuming and it also means that the case doesn't really get started for anywhere from six to twelve months after you file it.

They throw standing and mootness at you. Sometimes, I don't even understand what their standing arguments are but they're constantly saying your plaintiffs can't bring this case, they simply are not in position to bring it. If that doesn't work, they try mootness because as soon as that complaint was filed, they went out, CMS went out found the plaintiffs and took care of whatever problem you're claiming they had. So if you haven't filed a class action motion at the same time that you filed a complaint, your plaintiffs have probably been mooted out.

Another constant problem is organizational standing. A lot of times, we want to use an organization instead of individual plaintiffs for various reasons and they always contest the standing of organizations. Often that can be beaten, but again, it takes a long time, it takes a lot of additional work.

In 1983 cases, mostly I'm talking now about Medicaid cases, as Si indicated, the problem is whether or not a given portion of the Medicaid statute is enforceable. So even though until, literally I think about 15 years ago, if you brought a Medicaid case, you were almost certainly going to have the case

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considered on the merits. Now the first thing you deal about is whether the portion of the Medicaid statute that you're trying to enforce is, in fact, enforceable. And each provision of the Medicaid statute gets looked at individually for these various factors to decide that.

In the Social Security Act cases that Sally and I are mostly doing in Medicare, but this also comes up in Title II and SSI cases as well, they have a whole series of problems to throw at you.

Their favorite on now is what they call presentment which is jurisdictional. And presentment means that no matter how irrelevant and unimportant it was, you plaintiff, all your plaintiffs, had to have gone to the agency at some point in the past and said I don't like the fact that you're denying me these benefits and even be more specific than that. So in other words, in order to be in federal court, your plaintiff some time in the past, had to specifically claim the nature of the problem that you now want to litigate in court.

That can throw a lot of people out right there because a lot of people who've already been found eligible don't know what they have to say to the agency in order to satisfy presentment. Of course they also didn't know they had to satisfy presentment. You don't find that out until after you've filed the litigation.

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Exhaustion of administrative remedies is another big problem. You're supposed to go all the way through. Get a redetermination, get a reconsideration, get an ALJ decision, get a Medicare appeals counsel decision. Often exhaustion can be waived but again, it is a time consuming and difficult process and the government almost always raises exhaustion.

Now they've got a new one. The latest one they're throwing at us based on the jurisdictional provision is venue. Often we've brought cases, we have plaintiffs from all over the country on the theory that it best demonstrates the problem we're trying to resolve is, in fact, a national problem. So you may have ten plaintiffs from eight different states. Their now arguing, or at least they argued in one case and I assume we'll see it again, they're now arguing that the venue provision of the jurisdictional statute which is 42 USC section 405(g), requires that the plaintiffs can only bring the case in the state or district, the federal district in which they are resident. And they're saying that it has to be true for all of the plaintiffs. Well, this could be a real problem, it could end up knocking out some or all of your plaintiffs. We've always had at least one resident plaintiff because we thought that was sufficient. But they're now suggesting you may need more than that.

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Those are some of the jurisprudential hurdles they're throwing at us and it's happening more, it's like a smorgasbord. The motion of dismissal have ten different issues so you've got to spend—and they won't develop them for more than a page or two but you've got to spend all of your time researching these issues and coming up with explanations to why exhaustion is not necessary, why there was presentment. It's a very, very as I say, time consuming process and it doesn't go anywhere.

The other major problem we face is that if you do get to the merits, as everybody knows now, there's this staggering kind of deference that the courts have developed, Supreme Court beginning with the Chevron Oil Case in about 1984. And essentially the deference that they apply to an interpretation of a statute is, unless the agencies interpretation is literally off the wall, we have to defer to that interpretation. So if by some miracle you get by all the jurisprudential problems, you're then faced with the fact, unless you have a very, very strong argument, you're probably going to lose on the merits. So those are the hurdles I see that we've been facing over the last 25 or 30 years—have been developing over the last 25 or 30 years.

And that leads me to my second point which is that I think, at least, as I look at and think about it and reflect on

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what's happened, the purpose of the litigation we do has changed. In the '70s when I was first starting, there was an affirmative purpose to litigation. You were out to accomplish things, to change things for the better, to do things which had never been done before to make it better for your clients. The '70s was the decade right after Goldberg versus Kelly when it seemed possible to get almost anything out of the federal judiciary. And we called that law reform. Law reform could really make things happen. You could use litigation to make things happen.

Just some quick examples, Sally mentioned the Grey Panthers case and modestly neglected to point out that she was 95 percent responsible for that case. That case found a constitutional right to notice for Medicare beneficiaries, for a group of Medicare beneficiaries who were not entitled to notice that they were being deprived of some sort of benefit or deprived of coverage. I think that was a pretty amazing development. I can't imagine a court doing that now. Another case from the '70s that Paul Nathanson, who's then the Director of NSCLC, sort of encouraged us to bring, or not us, two other attorneys in the office, Bruce Miller [misspelled?] and Neil Dodavits [misspelled?], is a case against a giant private pension plan, a Southern California Construction Laborers pension fund.

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And this was a case on an arbitrary and capricious theory. That's what we had to show. That's what they were showing that the vesting standards of this pension plan were arbitrary and capricious. And they demonstrated that 97 percent of the participants in the plan could not get a pension, could not meet the vesting standards. And the Ninth Circuit ultimately held that that rule was invalid. And as a consequence, literally thousands of men, mostly in their fifties, who had become disabled because they had been doing construction labor for 25 or 30 years, thousands of men who wouldn't have gotten any pensions at all, suddenly became entitled to very hefty pension. That's something I can't imagine a federal court doing these days.

Another case that NSCLC was doing at this time, doing a [inaudible] was a case called Elliot [misspelled?], in the Ninth Circuit, and Yamosaki [misspelled?] in the Supreme Court. And that was the right to a hearing to a prior oral hearing before an overpayment was recovered. Again, that strikes me as something that the courts these days would never have allowed. And that was a big case that came down about 1979. And then that case was then followed in several other benefit programs to make sure there was a right to a hearing before benefits were recovered. That's what we were doing then.

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Now, what we're doing are reactive cases. You almost never hear the word, the term law reform any more. We are doing the best we can to correct bad things that the federal government, and in Medicare's case CMS, is doing. We're not really able to do the affirmative things that we used to do, in my view. We're only able to really try to stop the bad things from happening. Mike Kelly, this morning, referred to litigation as a last resort. I think that's accurate as far as it goes, I think last ditch might be a better way to look at litigation these days. It's very, very hard to win. And for the most part, I find that, in these bigger Medicare cases, the best you can hope for is a settlement because even if you're able to get to the merits and even if by some miracle that you're able to win on the merits and get by the deference standard or whatever the particular hurdle is, the chances that you're going to win on appeal are going to be pretty slim. So settling cases now is probably the best way to go in most instances.

Just give one final example which I'm very, been very affected by, for much of the last year and a half, our office has been involved in a case in D.C. in which, oddly enough, ironically enough, we're trying to establish the right to waive recovery of overpayments, an issue which I thought had been resolved 30 years ago in Yamosaki. And this is a classic case

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where we won in the district court and then we lost in the Court of Appeals because the court said the client hadn't presented. She hadn't satisfied presentment. And I think this is very typical of the problems we face. The presentment argument was never raised by the government. It was brought up by the Court of Appeals on its own motion. So we're litigating the same issue on the merits we were litigating 30 years ago, the right to seek waiver of recovery of an over payment and we're forced to deal with issues that even the government doesn't think of that the courts are coming up with on their own.

So I'm sorry for that very negative look but it does seem to me that things have vastly changed in the 30 years since we started doing this.

MICHAEL KELLY: Gerry [misspelled?], can you be very, very brief? Want to leave some time to—

GERALD MCINTYRE: There, thank you. I'll be brief. Just one addition to what Gill said, we've seen them argue that presentment is required not just—and exhaustion, not just for your named plaintiff but also for class members, which you'll never—obviously is impossible.

I just want to give a few ground level examples of some of what Si was talking about and a little, maybe not exactly, but some of it is what Si was talking about.

Let me give you an example of one issue to start. And that is, protection of Social Security benefits from creditors. There has long been a provision, and this is something that has been taken care of by Congress and by some state legislatures, there has long been an anti-assignment provision in the Social Security Act which protects Social Security benefits from garnishment, attachment or other legal process. In addition to that, there in at least a couple of states in California and Connecticut, there is state legislation that protects money that's in a bank into which Social Security funds are directly deposited. It protects other funds regardless of source. So it seems the matter is taken care of. Washington Mutual and it has a number of—as well as a number of other banks, but Washington Mutual is the leader had a policy of encouraging people who had direct deposit of Social Security benefits to over draw there accounts, okay, knowing that there would be directly deposited Social Security benefits coming in. And they would just be able to grab the next month's Social Security deposit to reimburse themselves, so in other words, using Social Security as a government guarantee loan program. And this would leave people with nothing to live on.

All right, well we decided to challenge that. And we have here the federal statute and the state statute, we did it in California. But we knew that there was a problem with the

state statute. The state statute was very well drafted, clearly covered our situation. But, the problem was, Washington Mutual is a Savings and Loan. After the Bush administration came in, they amended the regulations that govern thrifts. And what do they do? They, by regulation, there was nothing in the Homeowner Delone [misspelled?] Act, which governs thrifts, but by regulation, they preempted all state laws governing deposit relationships. There goes the California statute and the subsequently enacted Connecticut statute. So we knew we were going to lose on that one and, indeed, we did.

The other question though, the federal statute, well, the federal statute, there's a problem there that the Social Security Administration decided to, they have no regulation dealing with this, but they did have something in there in their claims manual which is not subject to public notice and comment. They had something in their claims manual which said that basically, this really only covers judicial actions which was not what people thought really before, it only covers judicial actions and it really doesn't cover any self-help remedy. So, where are we? Well, the court actually in a separate case that was decided around the same time, the Supreme Court decided that this claims manual provision was

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entitled to deference and that is the interpretation of the Social Security act.

So basically, even though Congress and the state legislature had both dealt with this issue, both delt with it in complimentary fashion, there was no enforceable remedy. So that's one example. Do I have time to just to a couple—

MICHAEL KELLY: One more.

GERALD MCINTYRE: One more, okay. I want to give you another example of a case that we got involved in after it had started. This is a case out of Washington State. The State of Washington, facing a budget crisis decided that one place they could save a little bit of money was by eliminating the state supplement to the SSI program for elders. What they did, they wanted to—there's a maintenance of effort provision in the Social Security Act. If a state has been providing state supplementation, they must continue to do so by a formula, one of the formulas is total funding. And what they did is they decided they would use this money, use it to fund programs for people with developmental disabilities who had been funded under a separate state program, and many of whom were not SSI recipients. So they couldn't be getting actually state supplementation of SSI and we'll just call it the state supplement. So that was what they did. The lawyer who brought the case initially had filed—had brought a 1983 action in the

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meantime of course, there was Gonzaga, he called us up and said whoa, after he got his motion to dismiss. So we helped him kind of cobble together a preemption argument at the last minute, got that in.

Now what does that mean though? Well, you think you saved the day through preemption? Actually in this case we didn't. But in some of these cases we're arguing, you can proceed on a preemption cause of action, turning, basically saying what's good for the goose is good for the gander. But there is a significant difference.

If you bring a 1983 action, you can get attorney's fees if you're the prevailing part under the Civil Rights Attorneys Fee Act. On the other hand, if you have a preemption claim, there's no basis for attorneys fees. Now, why should that matter? Well, it matters significantly if we're to keep public interest organizations afloat. And attorney's fees have become much more difficult to obtain. We also have, on the attorney's fee issue; there was a case a few years ago that the Supreme Court decided to call Buchanan [misspelled?]. And what that did is it wiped out the catalyst theory for attorney's fees. Before if you filed an action and you obtained the results you wanted either by the defendant agreeing to provide the results, you basically got the results you were seeking, you were still

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able to claim attorney's fees. But under Buchanan, you had to have some sort of judicial imprimatur.

So where is—there are two problems here. Not only does it mean public interest organizations are less likely to get the attorney's fees they need to keep themselves going but it also means, where is the incentive for defendants to comply with the law when I can just wait until they're sued and then comply? So, on that note, I will end. [Applause]

MICHAEL KELLY: Questions, comments, brick bats from the floor to any of our commentators or presenters?

FEMALE SPEAKER 1: What do you think about the fact that Bruce Laddic [misspelled?] remembers we sued him? And while I do not believe at all in bringing frivolous suits, if we have actual good people harmed, and a good basis for bringing the case in court so it's not frivolous at all and we can somehow fund the activity, does simply being able to litigate serve as an important tool to get—as ombudsmen or to insure rights of our clientele?

MICHAEL KELLY: Tim.

SIMON LAZARUS: I was just going to, let me just—Tim can go first but Kathryn or Kevin should is Vicky—

MALE SPEAKER 2: I don't know.

SIMON LAZARUS: Who else is working on?

MALE SPEAKER 2: Gill is too.

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SIMON LAZARUS: Okay, Gill is also working so Gill should respond. The [inaudible] very valuable.

GILL DEFORD: Well, I would just say that it, if there's a good case and we have the resources to bring it, yes, it's fine. But I dint think the fact that we can bring litigation now really deters them from doing anything. I mean, I think, especially in the last seven years, it's pretty clear that the agencies do what they want because they know there are not enough people out there to really stop them. And as Gerry just mentioned, there's very little incentive to change your policy until you're forced to. And I don't think we're really affecting their behavior. But I think that doesn’t mean we shouldn’t bring the cases.

SALLY HART: I think it really depends a lot on the individual situation. Oh, thanks. I think it depends a lot on the individual situation. I mean, what Gill's saying is very true in some situations but there are other situations where we still get some mileage out of these old decisions. And if we bring cases that lose, especially if we take them up higher, we could make it clearer to agencies that they can get away with things that they may still think that they can't do. And I'm thinking for instance states and it isn't just the federal government that this is all about. And I can't imagine a

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situation in which I would appeal an unsuccessful case to the Supreme Court.

MICHAEL KELLY: Tim.

TIM JOST: You know, I may still be remembering the wonderful days when I was litigating which you were talking about as sort of the glory days of litigation. But in those days, it was sometimes the case and I would imagine in some states it's still sometimes the case, when you're suing a state agency that is basically sympathetic and is not that unhappy to be sued because it gives them some leverage with their state legislature. And maybe Bruce felt a little differently about being sued than Levitt feels about being sued.

MICHAEL KELLY: Yes, Steve.

STEVE HITOV: [Inaudible].

MICHAEL KELLY: This is Steve Hitov, of the National Health Law Program.

STEVE HITOV: I'm Steve Hitov with the National Health Law Program. I'm not quite as negative about litigation as you might [inaudible]. And I think an advantage that you often get from litigation, along the lines that you're talking about, even if you don't technically win. It's sort of an off shoot really, Tim, of what you were saying, is even if the state doesn’t want to be sued, when you're going through the process of the suit, even if at the end of the days, you lose it, I

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have found that any number of times when I look two years later, they're doing just what it was I sued them [inaudible]. And so they were very happy that they could kick my derriere and say no, I don't have to do it but then they were doing it. And I think that that's a value of litigation we haven't discussed, which is that it forces the agency to actually focus on their policies. If there are people who are [inaudible] they're not going to change. But if it's—if you can educate them as to a better way to do it, even if you can't convince the court that they have to do it that way, it's been my experience that they often end up doing it that way and not 20 years later [inaudible] rather short time period.

MICHAEL KELLY: Paul, did you—

PAUL: Yes. Well, just a comment [inaudible] upon that and what Gill had said, the filing of a lawsuit in Los Angeles on Labor Day against the Construction Pension Fund, front page "Los Angeles Times," caused then Senator Deukmegain, later as you know Governor, to do legislative hearings about pension issues which made people at the national level worry about the fact that you were going to get state lawsuits and state regulation going on and therefore really played a role in terms of pushing the ERISA agenda, this was pre-ERISA. And it seems to me that what, and I remember Senator Deukmegain calling our office, conservative Republican, asking to be connected to our

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plaintiffs because he needed witnesses at his legislative hearing. So I see this seamless connection between litigation being utilized obviously if you have legitimate reasons, for publicity. I don't know if that's still possible in this day, but that's one of the war stories.

MICHAEL KELLY: I do think one of the themes that we've heard today is, I don't know whether you call it politicizing, organizing, connecting with, but trying to take our case to the public, to Congress and the like. That somehow we've—the lonely litigator has to team up in some ways with the—and I think that's kind of a difficult and important agenda item that we need to consider as advocacy groups, that advocacy now has to be a much more broad based coalition connected enterprise so that the litigation actually has a particular strategic role in a larger effort to achieve, if I may say the word, law reform.

MALE SPEAKER: [Inaudible] and [laughter] I don't think, I can't remember [inaudible] in conjunction with or [inaudible] Massachusetts we were always working with the coalition for basic human needs and I think virtually all those cases came out of community based litigation [inaudible].

MICHAEL KELLY: Any other comments, question? Yes, Harper.

HARPER JEAN: [Inaudible] and I'm going to actually ask, well this is more in reference to Si's remarks about the

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role of Congress. As Si; as you noted, that by and large the doctrines that the conservative Supreme Court and the lower courts are throwing up in our way, that allow the government to raise the motion to dismiss this saying maybe we did break the law so what can you do about it, are by and large statutory doctrines which theoretically need to be getting fixed. The courts in fact, keep saying, if you don't like it, go to Congress, not our problem, go to Congress, they can fix it. They just need to be more clear.

Well the courts, and as you said in the Ledbetter case, there had already been an attempt by Congress to fix this problem and then a court didn’t seem deterred. They passed this big Act in 1991 that said the court's been misinterpreting the laws, we want to fix it. The court just came right back and misinterpreted it more or less the same way. You remember the similar experience with the Suitor [misspelled?] fix that the court has—the Supreme Court has not had the opportunity to misconstrue but it's basically ignored and the lower courts have given it short shrifts. So to the extent that the courts and particularly the Supreme Court, but also the lower courts, are able to just sort of keep bouncing it back to Congress and say well, we recognize you changed the law but it's not clear enough or there still is [inaudible] problem. There's a way in which I wonder if we, for example, were to pass a Ledbetter fix

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some how get it through the Senate. Well, what the court would come up with just the way that it had ignored what the Congress had done before it enacted the [inaudible] decision which had followed Ledbetter to just can find a way to follow Ledbetter after Congress [inaudible]. And I think—so legislative fixes are not going to [inaudible]. So I know [inaudible] discussed maybe other ways that Congress can have a voice on this even if it can't just fix the statute and have the courts obey. But I wondered if maybe you think—what else Congress could do if just passing an amendment [inaudible].

MICHAEL KELLY: That's for you, Si.

SIMON LAZARUS: I should tell everyone that Harper, Harper Jean worked with me on this paper and is responsible for all of the good things that are in it and none of the mistakes. And she raises a good general question which I generally eluded to which is, although the framers said in the federalist papers that the courts are the least dangerous branch and they believed that Congress was the most dangerous branch, the truth is, we can see in this area there are a lot of reasons why that is not necessarily true. Nevertheless, I would say that once roused, Congress is a very powerful adversary. And before we write it off, we ought to at least try to rouse Congress. I mean if they don't make an issue of it, if none of them know what's going on, then there is really not much of a problem

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there for courts that are willfully emasculating and misconstruing the laws that Congress passes. But if the committees that are affected by these decisions rally rage and scream about them, and there are things that can be done. I mean, we can get really nasty. Senator Leahy has been very compliant with Chief Justice Roberts's urgent plea for raising judicial salaries which most of us, all of us, think is probably a good thing and will raise the quality of justices. But I would think it would be perfectly legitimate to raise in the context of that issue, and in fact, I recommended it some adverse comments about the activism of the courts and why it is we're going to want to raise salaries of people who disregard the laws we write. So I think there's a lot that could be done. But it has to get energized about the issue first and really is up to us to do it. I mean, this is really a lighting a candle instead of cursing the darkness situation. And I think that Gill, what I was saying about the silo issue, those of us who are litigators, and I'm not a litigator, and do our jobs really well. But we've got to find a way to move these issues to a different forum because the overall trajectory isn't very promising. So we've got to find ways to politicize these issues and work with people who know how to do that.

TIM JOST: If I could respond on a couple of sort of hopeful notes, although I think basically I'm as pessimistic as

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everybody else. But a number of us in this room last year worked on some legislation involving consent decrees because there's a lot of consent decrees out there that were entered into in times when the courts were a bit more open to the claims of our clients. And we turned that back. I mean there was a, basically legislation was proposed that was going to get rid of all consent decrees. And we stopped that.

And secondly, we may someday again elect a president that will appoint some justices—well, maybe not justices right away but at least some judges who are more sympathetic to the claims of our clients and King versus Smith was decided by a unanimous Supreme Court and four of the justices thought we should have gone further and recognized a constitutional right to welfare. So maybe some day things will change.

SIMON LAZARUS: Let me make one last point, Mike, because you were asking for ways to politicize. Well, one of the things that I've worked on a great deal, I worked on for the first three years or so I was in this job was judicial nominations. And I was part of the—I was the senior representative in the coalition of liberal groups that were scrutinizing and often opposing, or sometimes opposing Bush nominees. And I have to say, my objective, our objective was to try to raise the profile of the federalism issue, which we did a reasonable job of doing.

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I didn't really know anything about the preemption issues, frankly. Now I have to say that some of these ERISA cases, frankly, would have been great to go after Roberts and Alito with those situations and zero in on them. People can really understand that stuff. And I really think that the people who are involved in litigating these cases and loosing because they're getting these very conservative appointees on the courts, they should have been there and we should be finding ways to do that now.

MICHAEL KELLY: Okay, I'm going to give it over to Judith now to what's called wrap-up.

JUDITH STEIN: I want to thank you all very much and Michael again for getting here and helping out us out in this esteemed and very well spoken and written paper of Si and panel. Thank you very much [applause]. Just, let's see 20 minutes and then we do have a reception, I hope you'll all stay and fet yourselves, congratulate yourselves for spending this day with such intense effort and thought together. I do want to keep you attention. Part of payment, you see these green forms? This is green because get to the reception—no. These are our evaluation forms. And the project officers for the—

MALE SPEAKER: It's what you need to do to enroll in [inaudible].

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JUDITH STEIN: —for the Common Wealth Fund are here. And we need to have an evaluation, please, if you would please. They're on your table and if you would please fill them out and put them on the box with the display—on the display table—Michael is it our—on the Center for Medicare Advocacy's display table—oh, there's a box on each table. Please put the evaluations there. And also please do take a mug and if you feel it's not something you can travel with, if you'd put it back, Chip [misspelled?], can you raise your hand? Put it by Chip's so that we can get them boxed back up.

Now, reframe me. Pulling things together from the day and perhaps some next steps together is what we want to spend a little bit of time thinking about broadly. I want to follow-up on Michael's effort to think of some of the themes we've heard through out the day. And I think we would have to say that we've talked about language, about—see there are various things we can't do. Organizing, we can respond to requests from people on the Hill and we get them all the time, happily.

But we need to be heard is the main point. We need to use the media, our sense of language, the intensity of our client's stories in a multi-disciplinary, multi-pronged way, all of our tools. Litigation needs to be taken into consideration when we're talking to the press who contact our

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office and want to speak to one of our clients. So we need to have an effort to think broadly.

How can we solve this person's problem for those of us who actually are doing that in the field. I see Diane Paulson [misspelled?] and my staff, the myriad others who are resolving problems on a day to day basis. Of course, we need to solve that person's problem. But how can we think, what is the problem before them? Is it a pattern or does it have enough meat to it, enough energy and angst, frankly, that someone in the media might get what the rest of our clients or the rest of people in this general boat are dealing with because, we need to reframe the language, reframe the issues, take hold and own what the problems are that are facing people.

As an example, I would suggest that most—I think people don't get and don't like the world entitlement. So when we talk about what our dear clients, maybe our family members, certainly members of our community need, we need to think how to describe that. They need, is it health income security? It used to be Social Security, I'm not sure people know what social insurance means. And I'm not sure that that's the phrase either.

But I think one of our next steps should be to start to talk and think about language. You know, one of the smartest things some people did, in terms of capturing language was to

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put the word custodial versus skilled in the Medicare Act. I tell physical therapists all the time and nurses, even physicians, that what they're doing must be skilled, why would they be doing it or teaching someone else to do it if that teaching or performing wasn't skilled? And yet, they refer to their work sometimes as custodial only because the Medicare people who deny coverage have changed the language. So we need to capture the language back. Estate tax, changing that to the Death tax, that's brilliant. We have to be that brilliant.

So are we talking about how health care security, income security? I'm positing this but I'm pretty sure it's not entitlements, aliens, what a terrible word as opposed to my grandparents who were immigrants, I mean. So I think we've talked about language. We've talked about getting heard, media as an advocacy tool.

I have to tell you, about five years ago, maybe it's eight. The center hired a communications firm that specializes in non-profit organizations and helped us get heard somewhat better and think about how to talk to the press better and to use our stories. And I'm happy to say Sharon Lewis [misspelled?], from there, is here and I thank her for that. But you know, at first, I was a little bit tentative about admitting we were doing that. I wasn't sure it was a kosher thing to do. But I think we've learned today that it's a

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critical thing to do. That is hire or not, to get heard in the media.

And one of the things many of you have who serve people directly day after day, are real life stories so those of you, whether it's Molly Gavin [misspelled?] who's a care manager and her staff, the attorneys who serve and hear calls and speak to people who can't get their rights or their homecare or their pension or need to return a check that they already spent because they didn't understand they couldn't use it.

When, on occasion I get to speak to Robert Pear, he's interested in my theories, from The New York Times, but he inevitably will run the story if there's enough of you, David Lipshitz [misspelled?] and those in California, is there another state where this is happening and can I speak to a client, is there somebody who will talk to us? And would they possible let their picture be taken? I got a call on New Years day from Good Morning America, which was kind of thrilling, but also it was New Years Day after all, but they really were only calling me because they were hoping that I would be able to get them in touch with a person in a certain vicinity where they could get a camera who had this particular problem.

So we need to be better at categorizing, keeping current, our stories and knowing how to reach those people. So we, now on our intake forms, will this person speak to the

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press? And I think I'm seeing nodding that this is—people are in agreement about this. And this is part of our coalition building that we haven't done as well as we could have. And we do know what's happening to people. And we do have the stories, Mary Ashcar [misspelled?], of people who aren't getting the services they need from their Medicare Advantage plan, who did have a person come to the dialysis unit to market a Medicare Advantage plan. And those people will talk to the press. So we can frame the issue and then real people will talk later.

So language, media as an advocacy tool, all of the things we all do taken together and thought about together and thought about together. You here who have access to policy makers, remembering that some of us have, in Connecticut, California, Arizona, the geography mix is so important and the fact that we have the real stories and sometimes we're scratching our heads thinking, "God, we're all allies but what the heck are you doing? Why are you doing it that way?" How can we set up a better communication to have the in the loop and out of the loop, that's in credible power there. I think those are connections we need to make.

In the recent success for a moment in July, as Vicky [misspelled?] called it, over the CHAMP Act in the house, which had wonderful things in it. I know in Connecticut, we got

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Congressman Shays vote because of the coalition with the children's advocacy groups. And I think we've now forged a very major barrier to make it clear that health care access and security, income security too, but those cross generation and that we must start to bridge and continue to make coalitions with people we haven't been that astute at dating before. And we really were successful in part because of that very good coalition building.

So those are some of my thoughts. I think law reform was given another terrible name. I mean, they took that word back. We were proud of it. And so we need to think about the language.

We do have a problem now with funding our work. I've been told over the 21 years, every five years, we should drop advocacy from our name because funders don't like it were told or it's, I don't know, it's like saying the Center for Medicare Communism or something, I'm not sure. But we need to be pragmatic and yet principled. And I think if you work from values and principles and form strong coalitions that we will succeed.

I knew we were trying to help people with their low income elders and people with disabilities with their health care pension concerns and other income security concerns but now we also, I think, know we need to deal with election

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reform. We knew we needed to worry about judges. And there were sometimes it was, what did someone say, it's the budget stupid, pardon, it's the judges stupid. And the next election, it was the last election, the one before that, and climate change.

And yes, Gerry, attorney's fees, they have really got us there too. I mean I was told about in '91, that I roamed the judicial plains, that was because I did have a motion to dismiss and appeal on the class action. And all those other issues took ten years to get the case resolved and then the judge said, our fees, that was before these terrible new problems, were to be marked down absolutely incredibly because we roamed the judicial plains because it took too long to get to resolution of the suit.

Okay, so reform the language, new coalitions, strong coalitions, use our stories, those who are here and have access to policy makers, remember those of us who are not here but have real live people to help people to help frame the debate in jurisdictions where people are in power. In Iowa, we have a staff person who's family is from Iowa. That's important. Senator Grassley is from Iowa, et cetera, et cetera.

So that's my input. I'd like to have some more. We do have some time to discuss this. Are there others who have new, other ideas, ascent or dissent from what I just suggested? And

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we will write something up and get it out to all who are here, who are participating to try and get some sign on and thinking beyond this. Kim? Kim Glaun from the Medicare Rights Center and an NSCLC Alum, a strong ally of the center.

KIM GLAUN: [Inaudible].

JUDITH STEIN: Thank you, Kim. And it's been a pleasure to collaborate enormous numbers of times with you. Yes? Mark, yes?

MARK: [Inaudible].

JUDITH STEIN: That's very intuitive way to put it, thank you very much. Si, yes, please?

SIMON LAZARUS: I just, one thing that Mark's point, Mark's suggestion illustrates and that is that these ideas about framing and politicizing and reaching the media are critical and we really don't have the skill sets to do them right. We need, you know, we need to convince our funders or find other ways to employ the Selinda Lakes [misspelled?] of this world in a very strategic way to take advantage of your suggestions, Judith.

JUDITH STEIN: Thank you. Yes, Ted?

TED BLIMAN: [Inaudible] with respect to the language, I think not only are we advocating for low-income kind of issues, but we're also looking [inaudible] a stronger America that we're essentially striving for. Someone else earlier said

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today it comes all back to the people in the electorate. I think the electorate, that's a very positive message that the electorate would be advocating for the, you know, just like Al Gore can win a peace prize for climate change, or health care for all or health care for low income beneficiaries because also, it strengthens America and I mean, that's a very positive message.

JUDITH STEIN: Thank you. Tell the Nobel people. We keep getting those lottery tickets, but thank you very much. Yes, Chip.

CHIP: Sort of building on what we've been saying, I think the whole issue—finding the parents in your local community with other organizations and people who may not necessarily be traditionally the allies [inaudible] get to do things and to push the media issues, to learn about. And I guess to that kind of collaborative thing, find the people in your community who might have the different sets of skills and pair with them. The university committees are often a very good resource in that regard and can help with that.

JUDITH STEIN: Yes, thank you that's a good point. Yes, please.

TONY SARMIENTO: Hi, my name is Tony Sarmiento, I'm Executive Director of Senior Service America [inaudible] dues paying member of the Gerontological Society of America, I'm a

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staff person there [inaudible]. And I just want to thank the two organizations for such a wonderful conference. My organization has its roots in the National Counsel on Senior Citizens and we have been running [inaudible] program since we began the national program in 1968. I'd just like to raise a couple of issues. One is I was hoping that there would have been more discussion about the way that older people and work is being framed in public debate, that is as a way of essentially justifying [inaudible]. We used to think about the three pillars, retirement, pension, personal savings and Social Security. There are now other people who are reframing it say well, it's now four pillars. The fourth pillar is work. And people such as Trezigilar Duchi [misspelled?] at Notre Dame basically said, we have shifted from a lifetime of pensions to a lifetime of work.

And it seems that this thing gets played out pretty interestingly in this little narrow program of the Senior Community Service Employment program which is still the largest federal program targeted for older people and it also is targeted to low-income older people. It's a program that I would argue is [inaudible]. It serves about 100,000 people a year and these are people who are 55 and older still fall below 125 percent of the federal poverty guidelines. In many ways, these are people who didn’t work enough for Social Security.

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And the discussion going on on the Hill [inaudible] of the Older Americans Act, which took place in 2006, part of the debate was, what should be the purpose of Title V? And in the last two appropriations hearings, on Title V in the House, there's been very vigorous discussion and argument [inaudible] David Obey and Secretary Chao, they presented very different points of view. My opinion, thank goodness, David Obey prevailed and is the older people who are low-income need training, do they need jobs? And David Obey reminded the Secretary that, at least according to his understanding of the law, the requirement is that Title V, which is administered by the Labor Department, 75-percent of that has to be spent on participant wages and fringe benefits working minimum wage jobs in the community. And so, I think that then two points because we think about the safety net discussions which I think are so important, we also need to tackle, I think, or at least think about how they get connected to the debates about whether we expect older people to work [inaudible] and how do we preserve the vision of Title V, the Older Americans Act at least the way it was envisioned back in '68. Thank you.

JUDITH STEIN: Thank you. Anything further? Yes, Paul.

PAUL: Just another comment in terms of the framing and communication. It seems to me, I mean Ron Pollack has been

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immensely successful in the media realm. And one of the key things that he's done, we've talked about over the years, that I don't think we do, is that the communicators, the framers are in the room abenissue [misspelled?]. They're not there after the lawsuit or after the—they're part of the initial strategy which, as I say I think is really the way we have to do it if we're going to be doing effective social marketing and framing.

Second comment, I heard a politician the other day, actually it was John Edwards, talk about and I really brought truthfully the idea that we need to be framing health care income adequacy as patriotic. It seems to me the idea that the only thing that's patriotic is to fight a war, is somewhat amiss and the idea that we could be saying it's patriotic that people have health care that people have adequate income seems to me is a beginning of changing the framework, the framing. And the third point is that we really need, we've all said this, to build broader coalitions, but I don't see how we're thinking about building coalitions, especially with people of color, not in the room really, and the issue and talking to them about these issues being important on their agenda and them joining us.

JUDITH STEIN: Absolutely. Very good point, yes more diversity for sure. And you point, I think what Ted Bliman from my organization was also getting at which is that this is

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the American way, this is patriotic to care about all of us. I think that's a brilliant way to start to think about reframing this issue.

Okay. Well, I can't thank you enough for your time and attention. I know on behalf of Michael Kelly and the National Senior Citizen's Law Center, we thank you for all you've done and are doing and for giving us your time today. And again, I want to thank Linda Martin McCormick [misspelled?], Carolyn Boyle [misspelled?], my staff and ask you to please put your evaluations on the desks as you go to our reception, you'll see them on the exhibit table. Diane. We can't hear you.

DIANE: [Inaudible] thank Judy for pulling this day together and for doing this for and with all of us.

JUDITH STEIN: Thank you very much. Diane, thank you.

[Applause]

[END RECORDING]

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