

7-1-2012

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Recommended Citation

Padilla, José (2012) "Lawyering Against Power: The Risks of Representing Vulnerable and Unpopular Communities," *Seattle Journal for Social Justice*: Vol. 11: Iss. 1, Article 13.
Available at: <http://digitalcommons.law.seattleu.edu/sjsj/vol11/iss1/13>

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Lawyering Against Power: The Risks of Representing Vulnerable and Unpopular Communities¹

José R. Padilla²

Many years ago, during a time of fundraising for the Korematsu redress work, Attorney Don Tamaki inspired me by urging me and other advocates to become involved with social justice causes because they are about family and about family healing. The *coram nobis* advocacy was about his Sansei generation freeing the Nisei generation before them—freeing a generation from shame and silence. It has always inspired me in the justice work that I do. Social justice lawyering, exemplified by the *Korematsu* and *Hirabayashi* cases, is political lawyering, which must address the failures of democracy. To put equality before the law demands a commitment to participation in the movement toward systemic change and to representation of the most vulnerable members of society. It also demands courage from advocates to weather the obstacles placed in their paths by powerful

¹ This article originates in José R. Padilla's February 2012 presentation at The 25th Anniversary of the *United States v. Hirabayashi Coram Nobis* Case: Its Meaning Then and Its Relevance Now, a conference hosted by Seattle University School of Law's Fred T. Korematsu Center for Law and Equality. The speech in its original version began as follows:

I thank Professor Lorraine Bannai and the Fred Korematsu Center for this humbling invitation to comment about how California Rural Legal Assistance's brand of justice advocacy fits into the subject of political lawyering. The political lawyer addresses the failures of democracy when it fails to keep promises, such as putting equality before the law.

² José R. Padilla is the Executive Director of California Rural Legal Assistance, Inc., and has held that position since 1984. José was born and raised in California's Imperial Valley and his family worked as farmworkers for a period of time. José is a 1974 graduate of Stanford University and received his J.D. from Boalt Hall School of Law, University of California, Berkeley in 1978.

economic, governmental, or political interests, all intended to discourage, then eliminate, justice advocacy, leaving targeted communities defenseless.

CRLA ORIGINS AND JUSTICE MOVEMENT

I was uncertain where to start on the topic of the role of the public interest lawyer in justice movements, so I decided to focus on the role of the lawyer in one justice movement embraced by my organization, California Rural Legal Assistance, Inc. (CRLA).³ Many people do not know that CRLA—which will celebrate its 50th anniversary in 2016—was started by both lawyers and organizers as a part of a justice movement. The CRLA’s founding board included lawyers like Cruz Reynoso, who would eventually become the first Latino Supreme Court justice in California.⁴ Also on that founding board was farmworker labor leader Cesar Chavez. In his stead, Cesar would often send Dolores Huerta, a farmworker labor leader in her own right, to CRLA board meetings.⁵ The other organizer who was part of that first founding board was Filipino labor leader Larry Itliong.⁶

Early on in my lifelong career with CRLA, I realized that the social justice culture I discovered at CRLA was a culture born out of the notions of social change from those founding members. As a lawyer in pursuit of social change, your work should always encompass both lawyering and the community. So, when people talk about CRLA in the context of “political” or “lawyering for social change,” I ask: “What is the nature of CRLA’s advocacy, and what are the consequences for engaging in this advocacy as an organization?”

³ Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO-LATINO L. REV. 1 (1972) (recounting CRLA’s early political history).

⁴ CRLA Board Minutes (Aug. 6, 1966) (on file with author).

⁵ CRLA Board Minutes (May 14, 1966) (on with author); CRLA Board minutes (Feb. 18, 1967) (on file with author).

⁶ CRLA Board Minutes (May 14, 1966) (on file with author); SUSAN FERRIS ET AL., *FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS MOVEMENT* 131 (1997).

I will touch on three principles about social change lawyering. They relate to systemic change litigation, the representation of socially vulnerable communities, and the political repercussions of such advocacy. I will provide a recent CRLA example of political lawyering related to the agricultural industry.

LAWYERING SYSTEMIC CHANGE

When you become involved with a justice movement that uses law for social change—at least in the way we practice at CRLA—it is never just about individual client advocacy (i.e., individual representation with individual remedies). At some point, if one is serious about challenging the underlying causes of poverty and its impact on the communities you are committed to serve, then you must engage in systemic advocacy to change the system itself. It is about focusing your resources to do what is referred to politically as bringing “impact cases.”⁷ Ultimately, when you engage in systemic advocacy, your advocacy is viewed as “political,” as you confront political power. Consequently, CRLA started with the idea that although individual casework was important, it was most important that systemic advocacy developed out of it.⁸

⁷ Unfortunately, in the history of civil legal aid the success of impact litigation led Congress to impose the prohibition against bringing class actions. For a discussion of the history of civil legal aid and governmental restrictions, see Alan W. Hoseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, CENTER FOR L. & SOC. POL’Y (Jan. 2007), <http://www.clasp.org/admin/site/publications/files/0158.pdf>.

⁸ Some of CRLA’s impact litigation includes: *Diana v. State Bd. of Educ.*, No. C-70-37 RFP (N.D. Cal. 1973) (successfully challenging the use of English IQ testing on Spanish-speaking students, which led to their disproportionate placement in classrooms reserved for the mentally retarded); *Carmona v. Div. of Indus. Safety*, 13 Cal.3d 303 (1975) (successfully challenging the use of the short-handled hoe in California fields); *Morris v. Williams*, 67 Cal.2d 733 (1970) (restoring \$210 million of Reagan cuts to California’s Medi-Cal program); *EEOC v. Tanimura & Antle*, C99-20088 (N.D. Cal. 1999) (resulting in a \$1.8 million settlement by the EEOC for female farmworkers who suffered sexual harassment in California fields); *Emp’t Dev. v. Superior Court of Sacramento Cnty.*, 30 Cal.3d 256 (1981) (giving some 170 thousand unemployed women \$27 million in

REPRESENTING THE MOST VULNERABLE

The second notion about justice movement lawyering that I have learned from CRLA is the following: when you engage in this type of social change work, never fear defending the most vulnerable members of society. In other words, when you practice poverty law in the pursuit of social justice, you must challenge injustices against the most vulnerable within already impoverished communities. Among the poor in CRLA's client communities, there are those who are poorer, lower on the income scale, and there are those who are even more isolated because of immigrant status. As an example, among California's farmworker poor, there are those especially isolated because of language and culture, such as Mixtec laborers, indigenous laborers who often do not speak English or Spanish, and who increasingly are doing more of the manual farm labor in California and in other parts of the country.⁹ In addition, within the farmworker community, we have found that women farmworkers are subject to other abuses in the workplace, such as sexual harassment.¹⁰ Similarly, within the immigrant

benefits because of state "domestic quit" laws); *Lickness v. Kizer*, No. 67292 (San Luis Obispo Sup. Ct. 1989) (restoring \$20 million for rural health clinics); *Hernandez v. Riverside County*, Nos. 09-99-11-0007-300, 09-98-2574-8 (2009) (successfully challenging county efforts to close a number of mobile home parks, which resulted in a \$20 million settlement).

⁹ Richard Mines et al., *California's Indigenous Farmworkers*, INDIGENOUS FARMWORKER STUDY TO THE CAL. ENDOWMENT, 8-9 (Jan. 2010), http://www.indigenousfarmworkers.org/IFS%20Full%20Report%20_Jan2010.pdf. (indicating that the number of indigenous farmworkers has grown from 8 percent of farmworkers in the 1990s to an estimated 25 percent today, and that the three primary language groups are Mixteco, Zapotecos, and Triqui); see also *Indigenous Mexicans in California Agriculture*, INDIGENOUS FARMWORKER STUDY, <http://www.indigenousfarmworkers.org/> (last visited July 27, 2012) (this organization was created by the CRLA and employs indigenous community workers to do outreach into these communities).

¹⁰ See William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075 (2000); Ilana DeBare, *Record Settlement in Farmworkers' Suit: Lettuce grower will pay \$1.85 million in harassment case*, S.F. CHRON., Feb. 24, 1999, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1999/02/24/BU63881.DTL>.

labor community, there are those who are particularly invisible and subject to abuse—the undocumented workers, who we are not able to represent themselves because of restrictions imposed by Congress, and, as a result, are often the most defenseless group of farmworkers.¹¹

THE PRICE OF POLITICAL LAWYERING AND A DEFENSE:
CHALLENGING INDUSTRY POWER

The discussion above highlights the notions of advocacy that were engendered in us as we came to CRLA and that I inherited and embraced when I took over as director of the program. But, there was yet a third principle that was taught to us—when you engage in systemic advocacy and confront political power, there is a political price to be paid, and you must be prepared for the political consequences that follow. Related to these challenges of power, I also came to learn that the best political defense to the political repercussion is to practice an aggressive “political” offense through the advocacy itself. What does that mean? It means that a social justice advocate must never be afraid to lawyer to power and must always be able to defend the work. In response, the advocate must show that the political attack was due to successful challenges to the injustices created by those powerful interests. The advocate must further acknowledge that the institutional response to any challenges will be political attacks, with even greater fervor, and must nevertheless continue the advocacy that has been deemed controversial. In the case of the dairy industry example that follows, CRLA defended itself against an onslaught of political charges by citing the numerous cases brought and won against the industry, indicating that “but for” this successful state-wide advocacy against the industry’s pattern of labor violations, the federal investigations and political interference would never have materialized. Similarly, dairy litigation has not ceased, but rather has expanded.

¹¹ 45 C.F.R. §§ 1626.2–1626.12 (2012).

In this regard, in the last eleven years, CRLA has endured three successive, congressionally driven, investigations that reflect these principles of political lawyering. These arose from three complaints brought by rural, Central Valley congressmen who were politically tied to the dairy industry: Congressman William Thomas (2000), Congressman Calvin “Cal” Dooley (2001), and Congressman Devin Nunes (2005).¹²

In 2000, when John McKay, currently a professor at Seattle University School of Law, was the head of the Legal Services Corporation (LSC), he engaged in an investigation of CRLA made at the behest of the Western United Dairymen.¹³ At that time, CRLA had begun representing workers against California’s dairy industry.¹⁴ The investigation was initiated because a project CRLA had developed earlier—the Center on Race, Poverty, and the Environment (CRPE)—was attempting to stop the expansion of dairies in the Central Valley.¹⁵ The Western United Dairymen alleged that CRLA funded CRPE’s advocacy, and it went to Republican Congressman William Thomas to demand the inquiry.¹⁶ The investigation was benign to the extent

¹² The years reference when CRLA filed the complaints with the Legal Services Corporation. *See* CRLA Minutes, *supra* note 6.

¹³ Letter from Congressman William Thomas to John McKay, President, Legal Serv. Corp. (Sept. 11, 2000) (on file with author).

¹⁴ We considered these workers to be a very vulnerable population and subject to abuse because they are isolated, housed on site, and generally not unionized.

¹⁵ CRPE is an environmental organization that was initially formed as a CRLA project to implement an environmental justice agenda in the early 1990s. Since 1998, CRPE has represented rural communities “struggling against the powerful and well-financed California dairy industry. Acting on numerous requests from client communities facing dairies, and their associated flies, water pollution, air pollution and of course pleasant manure odors” through grassroots strategies and litigation. *See* Matthew Heller, *Got Manure? How Environmental Lawyer Luke Cole Brought Dairy Construction in the San Joaquin Valley to a Standstill*, CAL. LAWYER (Feb. 2002), <http://www.callawyer.com/clstory.cfm?pubdt=NaN&eid=424932&evd=1>.

¹⁶ *See* Letter, *supra* note 13. *See also* Melinda Fulmer, *Got Milk? Got Problems Too*, L.A. TIMES, Aug. 20, 2000, <http://articles.latimes.com/2000/aug/20/business/fi-7468> (indicating that “one trade group, the Western United Dairymen, has even filed a federal Freedom of Information Act request to determine whether the environmental campaign by [the] Center on Race, Poverty and the Environment is misusing funds from California Rural Legal Assistance earmarked to assist the working poor”).

that the onsite audit lasted only four days—from the date of notice to the date of formal closure, it took four months—and CRLA was exonerated.¹⁷ However, we were surprised by how the dairy industry could marshal congressional scrutiny so quickly. Although LSC cleared CRLA’s activity, we were soon to learn the meaning of the word “perseverance.” You come to understand that when you engage in political lawyering, perseverance is a necessity. However, you also come to learn that perseverance happens on the other side at the same time. As much as we persevere in defending workers, the industry, too, will persevere in its defense.

Six months after LSC cleared CRLA, the Western United Dairymen requested the assistance of a second congressman. That is when we learned that the defense against political lawyering is bipartisan. The second congressman, Democrat Calvin Dooley, demanded that the Office of Inspector General (OIG) at the LSC again investigate CRLA’s relationship with CRPE.¹⁸ The second investigation was not as benign, lasting two and a half years—forty months.¹⁹ At its end, power reared its head in the form of an invitation from Congressman James Sensenbrenner, Chairman of the

¹⁷ Letter from John McKay, President, Legal Serv. Corp., to Congressman William Thomas (Dec. 11, 2000) (on file with author). “A review of the totality of the circumstances (the threshold of our review) has demonstrated that CRLA did not act in violation of the applicable restrictions and that CRLA maintained program integrity with the Foundation.” *Id.*

¹⁸ Letter from Congressman Cal Dooley to Leonard Koczur (May 25, 2001) (on file with author); Western United Dairymen, *Dairymen Seek Probe of Possible Misuse*, STANISLAUS FARM NEWS, May 18, 2001. The article reported that the WUD requested the intervention of the LSC Office of Inspector General as to whether CRLA advocacy violated federal restrictions, particularly, if CRLA complied with the 1610 regulation requiring CRLA to “maintain ‘objective integrity and independence’ from organizations with whom it works.” The article singled out CRLA’s relationship with the CRPE and stated that the true purpose of the request was to see if CRLA funded CRPE to stop dairy expansion. *Id.*

¹⁹ Letter from Leonard Koczur to author (June 11, 2001) (on file with author). The Notice to CRLA was dated June 11, 2001, and extended through December 2003, when the Inspector General Report was issued. *Id.*; see also *Review Of Grantee’s Transfer Of Funds And Compliance With Program Integrity Standards*, LEGAL SERVICES CORP. OFF. OF INSPECTOR GEN. (Dec. 2003), <http://www.oig.lsc.gov/reports/0402/805260.pdf>.

House Committee on the Judiciary, who invited CRLA to testify before the Subcommittee on Commercial and Administrative Law in order to respond to the audit findings.²⁰

Concurrently, the press began to report that CRLA had violated something called a corporate integrity law.²¹ In an effort at further intimidation, the Western United Dairymen went to the US Department of Justice (DOJ) and asked Attorney General John Ashcroft for a criminal investigation of the same activities for which CRLA had already been exonerated.²² The Attorney General did not bite and referred the matter back to LSC, which concluded that there was no evidence of criminal conduct.²³ Such multi-pronged attempts to obstruct “social justice” lawyering can intimidate a program and chill future aggressive advocacy. However, CRLA was not intimidated.

²⁰ Letter from Congressman James Sensenbrenner to author (Mar. 24, 2004) (on file with author). The letter also indicated that CRLA would be allowed five minutes of testimony to “highlight the most significant points” made in writing, and time for questions would be allowed and a verbatim record would be made. *Id.*; see also *Legal Services Corporation: Inquiry into the Activities of the California Rural Legal Assistance Program and Testimony Relating to the Merits of Client Co-Pay: Hearing Before Subcommittee on the Judiciary House of Representatives*, 108th Congress (2004) (on file with author) (in the thirty-eight-year history of legal aid, no recipient program had ever been asked to testify before Congress regarding alleged violations of LSC regulations).

²¹ Although media coverage was not immediate after the Final Report was issued, local reporting did follow. See Michael Doyle, *Legal-aid Lawyers Violated Fed’s Rules Audit Finds the Attorneys Supported Foundation’s Work Through Subsidies*, FRESNO BEE, Jan. 21, 2004, available at 2004 WLNR 17553955; *Legal Aid Agency Broke Federal Rules, Audit Says*, MODESTO BEE, Jan. 21, 2004.

²² Letter from Michael L. H. Marsh, CEO, Western United Dairymen, to John Ashcroft, Attorney General, US Department of Justice (Jan. 21, 2004) (on file with author). The WUD January 21, 2004, letter to John Ashcroft stated, “we respectfully request that the Department of Justice initiate an investigation into the relationship between CRLA, CRLAF, and CRPE to ascertain whether these violations reflect a pattern of criminal conduct on behalf of the various principals demanding criminal prosecution by the United States of America.” *Id.*

²³ Letter from Leonard J. Kozcur, Acting Inspector General, Legal Services Corporation, to Michael L. H. Marsh, CEO, Western United Dairymen (Mar. 26, 2004) (on file with author).

In December 2005, some fourteen months after CRLA was cleared, the same LSC inspector general, Kirt West, sought to investigate yet again. This third and final political investigation was in response to an inquiry by Congressman Devin Nunes. Unbeknownst to CRLA, because of controversy related to civil rights litigation in the Central Valley with the Lawyers Committee for Civil Rights, a disgruntled CRLA attorney had become a “confidential source” to the government and turned over a year’s worth of internal e-mails that prompted a third investigation at the request of Nunes.²⁴

As it turns out, this final investigation did not last three, four, or five years. In fact, it continues. After the nine-month initial investigation, an interim report was issued that charged CRLA with such things as representing too many Latinos and doing too much impact advocacy.²⁵ In defense, CRLA sought its own congressional support, only to hear a congressional friend (unnamed) indicate: “We cannot stand up against the Inspector General when we, too, use its authority to investigate others.”

As part of this investigation, the inspector general decided to ask for identifying information for individual clients, which CRLA determined to be protected under California privacy and attorney-client privilege laws. CRLA was concerned that the names and identifying information of its clients could potentially be made public and put these clients at risk of retribution because of their requests for legal assistance. Eventually, the inspector general issued a subpoena and DOJ intervened to enforce the subpoena. The case of *United States of America et al. v. California Rural*

²⁴ Ironically, at the time, CRLA perceived the problem as “bipartisan” because the Congressional Dairy Caucus was co-chaired by complaining Republican Congressman Nunes and Democrat Senator Diane Feinstein. It is difficult to launch a political defense when economic power has secured political influence from both parties.

²⁵ *Report to the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary Regarding Activities of California Rural Legal Assistance, Inc.*, LEGAL SERVICES CORP. OFF. OF INSPECTOR GEN. (Sept. 14, 2006), <http://www.oig.lsc.gov/reports/0603/crla0603.pdf>.

Legal Assistance was filed in the United States District Court for the District of Columbia in March 2007.²⁶ Although CRLA lost at the trial level, it is proceeding with its appeal. It is refusing to cave in to the federal government's demands and turn over confidential client data.

Notwithstanding the prolonged and relentless attack by the dairy industry and its powerful political allies, advocacy by CRLA on behalf of California's dairy workers has gone forward in the spirit of *Korematsu* and *Hirabayashi*. From 2000 to the present, CRLA's dairy worker advocacy has yielded between \$2 million and \$3 million in worker recovery for unpaid wages and other labor benefits unlawfully denied. These recoveries have identified a pattern of violations that include the failure to pay minimum wage and overtime; allow workers to take appropriate rest and meal periods; maintain adequate time and pay records; and provide required work equipment. At the same time, dairy work continues to be very dangerous, and sometimes fatal.²⁷

²⁶ United States v. California Rural Legal Assistance, Inc., 824 F. Supp. 2d 31, 34 (D.D.C. 2011).

²⁷ Arias v. Superior Court, 46 Cal. 4th 969, 975 (2009) (holding that workers can obtain relief under the Private Attorney General Act without having to bring those cases as formal class actions); for examples of dairy settlements, see Bethany Clough, *Dairy Workers Will Get Payout: Laton Company Settles Lawsuit Over Allegations of Labor Law Violations*, FRESNO BEE, Apr. 12, 2007, available at 2007 WLNR 7022016 (Jesse Silva Dairy, Fresno County, settled for \$275,034.00); Dennis Pollock, *Tulare Dairy Settles Lawsuit: \$230,000 Payment Resolves Allegations on Breaks, Pay, Safety*, FRESNO BEE, Oct. 19, 2006, available at 2006 WLNR 18196411 (Joaquin Toledo Dairy, Tulare County, agreed to pay \$230,000 to seventy-five workers); Roger Phelps, *Dozens File in Wake of Settlement by Pixley Dairy*, PORTVILLE RECORDER, Mar. 15, 2005, <http://www.recorderonline.com/news/dairy-25176-county-workers.html> (Vander Eyk Dairy of Pixley, Tulare County, paid \$360,000 to 125 current and former dairy employees); *Area Dairies Agree to \$185,000 Settlement*, REC., Feb. 25, 2006, <http://www.recordnet.com/apps/pbcs.dll/article?AID=/20060225/MONEY/602250309/1003> (Luis Bento Dairy, Stanislaus County, settled for \$100,000 and Jesse Silval Dairy, Fresno County, settled for \$85,000).

CONCLUSION

I remember a federal employee suggesting matters would be far easier were we to release the requested information as other programs do, avoiding unnecessary controversy. I responded: “Until the federal government assures me that it will protect the privacy of those women clients who come asking about sexual harassment in the work place; when it assures me that it will protect the privacy of those victims of domestic violence; when government assures me it will protect those farmworkers who come in, knowing that if their identity is revealed, they will be retaliated against by their employer; when the federal government promises to protect them, then I will release the information.” However, no such assurances or promises have been forthcoming, even from the new administration which inherited the case.

So I was humbled when asked to participate and speak at this conference celebrating the twenty-fifth anniversary of the *United States v. Hirabayashi* coram nobis case. I wanted to participate because many of us who do this work (and I have been doing this work for thirty-three years) need the inspiration. We need to be reminded. We all need to remember that there were others before us who took on these same powerful governmental forces because of racism and anti-immigrant sentiment. Like ours, those were also political cases.

I end with this thought: I was informed that Gordon Hirabayashi always felt that his case was not just about the Japanese community, but that it was an *American* case.²⁸ It *is* an American case. When we do this kind of political work, when these kinds of cases are defended, it *is* about patriotism. It *is* about recovering democracy and the principles it stands for. My father, who is aging and ailing at the age of eighty-six, is a World War II veteran—

²⁸ During court proceedings, Gordon Hirabayashi stated, “This is an American case.” Transcript of Record at 75: 14-15, *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986) (No. C83-122V); *see also* Kathryn Bannai, *Gordon Hirabayashi v. United States: “This is an American Case,”* 11 SEATTLE J. FOR SOC. JUST. 41, 50 (2012).

an Army patriot who went to fight that war as an immigrant. He left the picking fields to do his part and, upon his return, he was offered American citizenship. He took it. Because of his sacrifice, our family no longer had to rely on the fields for economic survival and was able to find opportunities elsewhere. I think my father, the patriot that he is, would want me to talk about that “high patriotism” that resonated throughout the conference.

He would want me to quote from another patriot, President Abraham Lincoln, who once said, “To remain silent when your neighbor is unjustly persecuted is cowardice. To speak out boldly against injustice when you are one against many is the highest patriotism.”²⁹

For me, this is what the *Korematsu* and *Hirabayashi* lawyering was *then* and what it *is* at heart. It was the redress demanded by the voices from those internment places; those voices that will always be, if unheard, a scar when democracy fails. I thank you for inviting me to the *Hirabayashi* Conference and thank you for the inspiration.

²⁹ JOHN WEXLEY, THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG 327 (1955).