

## Remarks for Access to Justice Panel—Thomas Jefferson School of Law

July 18, 2013

### I Introductory Remarks

I am delighted to have the opportunity to participate in this program on access to justice. I want to congratulate Dean Guernsey and wish him all the best as he begins his deanship. I also want to extend a warm welcome to Justice Toffoli. It is a pleasure to return the hospitality you showed me during my visit to the Supreme Court of Brazil in May.

### II 50<sup>th</sup> Anniversary of Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963)

The Supreme Court's decision in *Gideon* allows us to reflect upon where we are and where we need to go with regard to achieving equal justice under the law. Clarence Gideon was an unlikely hero. He had an eighth-grade education and had run away from home when in middle school. He spent much of his early adult life as a drifter, in and out of prisons for a series of nonviolent crimes. Gideon was arrested on June 3, 1961, when \$5 in change and a few bottles of beer and soda were stolen from a Florida pool room. Henry Cook, a 22-year old who lived nearby, told the police he had seen Gideon walk out of the pool hall with a bottle of wine and his pockets filled with coins, and then get into a cab and leave.

Gideon was charged with breaking and entering with intent to commit a misdemeanor, which is a felony under Florida law. Too poor to afford counsel, Gideon asked the trial judge to appoint a lawyer to represent him. The judge refused, since Florida then only provided attorneys to indigent defendants charged with capital offenses. Gideon represented himself and was convicted, receiving the maximum sentence of five years.

Gideon went to the prison law library and came to the conclusion that the trial judge

had violated his constitutional right to counsel under the Sixth Amendment, as made applicable to the states through the due process clause of the Fourteenth Amendment. He filed a petition for a writ of habeas corpus in the Florida Supreme Court, but that court denied the petition. In January 1962, he mailed a handwritten five-page petition to the United States Supreme Court. The case was argued in January 1963 and Abe Fortas (later to become a Supreme Court justice himself) was assigned to represent Gideon. Fortas argued that a common man with no training in law could not go up against a trained lawyer and win, and that “you cannot have a fair trial without counsel.” On March 18, 1963, the Supreme Court ruled unanimously in Gideon’s favor, overruling its prior decision in *Betts v. Brady*, 316 U.S. 455 (1942). Justice Black, who delivered the Court’s opinion, stated that “reason and reflection require us to recognize that in our adversary system of criminal justice any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is appointed for him.” He added that the “noble ideal” of “fair trials before impartial tribunals in which every defendant stands equal before the law. . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”

Gideon received a second trial and chose attorney W. Fred Turner to represent him. Turner picked apart Henry Cook’s testimony, establishing that Cook had been a lookout for a group of young men who had stolen the beer and coins. Turner also elicited from the cab driver that Gideon was not carrying any beer or soft drinks when he picked him up. In addition, while Gideon had not cross-examined the cab driver in the first trial about the driver’s statement that Gideon had told him to keep the taxi ride a secret, Turner’s cross-examination in the second trial revealed that Gideon had said that to the cab driver because “he had

trouble with his wife.” The jury acquitted Gideon after only one hour of deliberation.

### III The Impact and Importance of *Gideon*

Attorney General Robert F. Kennedy had this to say about the importance of *Gideon*: “If an obscure Florida convict named Clarence Earl Gideon had not sat down in prison with a pencil and paper to write a letter to the Supreme Court; and if the Supreme Court had not taken the trouble to look at the merits in that one crude petition among all the bundles of mail it must receive every day, the vast machinery of American law would have gone on functioning undisturbed. But Gideon did write that letter; the court did look into his case; he was retried with the help of competent defense counsel; found not guilty and released from prison after two years of punishment for a crime he did not commit. And the whole course of legal history has been changed.”

Gideon’s story was the subject of a book called “Gideon’s Trumpet” by a New York Times reporter named Anthony Lewis and was portrayed in a movie starring Henry Fonda. I recall reading the book when I was a teenager. The story inspired me to look upon the law as a noble and important profession, assuring equal access to justice for all.

The impact of *Gideon* was immediate and profound, leading to the establishment of state and federal public defender systems and panels of private attorneys to be appointed to represent indigent criminal defendants. The decision also served as a rallying cry for advocates of legal services for the poor in civil cases, leading to the establishment of legal aid societies and other pro bono legal services organizations, and encouraging bar associations nationwide to impress upon their members the importance of donating free legal services to those who would otherwise have no access to the legal system.

Here in San Diego, our bar and bench have a demonstrated commitment to equal access to justice, with state and public federal defenders' offices on the criminal side and the San Diego Volunteer Lawyer Program and the Legal Aid Society on the civil side. Pro bono service is a high priority for many private law firms and solo practitioners.

#### IV Shortcomings/Problems in Achieving the Ideal of Equal Access to Justice

Notwithstanding *Gideon* and its very positive impact, we have a very long way to go in assuring that all persons truly have equal access to justice. While the federal public defender and assigned counsel programs in federal courts provide excellent representation, 95% of criminal prosecutions take place in state courts. Although some jurisdictions have programs through which capable counsel provide high-quality representation from the initial appearance through the conclusion of the case, many more jurisdictions have not established or funded an adequate and comprehensive system for providing representation. In California, some counties have outstanding public defender offices, while others contract with lawyers or law firms to provide representation, often awarding the contract to the lowest bidder, thereby creating an incentive for the lawyers to handle a high volume of cases and spend as little time as possible on each to generate a profit. In many state courts, poor people plead guilty and are sentenced without lawyers, while many others have lawyers who are so overburdened with cases that they have only a few minutes to spend with them. In such instances, defendants may plead guilty with little or no understanding of the consequences of their pleas, such as deportation, denial of business or professional licenses, exclusion from public housing and other benefits, and the loss of the right to vote.

The crisis in the criminal justice system fifty years after *Gideon* is portrayed very well in

a film called “Gideon’s Army,” currently being shown on HBO throughout this month. This film premiered at the 2013 Sundance Film Festival and dramatically demonstrates how overworked and underpaid the public defenders who comprise “Gideon’s Army” are.

The same kind of “justice gap” between rich and poor unfortunately also exists in civil litigation. Studies have shown that for every eligible person seeking help from a legal aid program, another eligible person is turned away. Estimates suggest that 80% of the civil legal needs faced by low-income individuals go unmet. More than 61 million Americans are eligible for legal aid, but only a fraction of them can access it. As Attorney General Holder has said, “[t]his is both unacceptable and unsustainable. It is unworthy of a legal system that stands as a model for the world. And it is incumbent on everyone. . .to help address those problems and improve our ability to see that justice is done.”

A study conducted by the World Justice Project in 2010 called the “Rule of Law Index” highlighted the seriousness of these problems. As part of the study, the organization polled 1,000 people in New York, Chicago and Los Angeles, and found a significant gap between the rich and poor regarding their use and satisfaction with the civil court system: Only 40% of low-income respondents who used the court system in the preceding three years reported that the process was fair, compared to 71% of wealthy respondents. This 31% difference between rich and poor litigants was the widest among all developed countries sampled. By comparison, in France the gap was only 5%, in South Korea it was 4% and in Spain it was zero. As the study’s director stated, when it comes to access to justice, “the U.S. could do a better job, especially among marginalized communities.”

In March 2010, the Department of Justice established the Access to Justice Initiative to

“address the access-to-justice crisis in the criminal and civil justice system.” The Initiative is pursuing strategies to (1) advance new statutory, policy and practice changes that support the development of quality indigent defense and civil legal aid delivery systems at the state and federal level; (2) promote less lawyer-intensive and court-intensive solutions to legal problems; and (3) expand research on innovative strategies to close the gap between the need for, and the availability of, quality legal assistance.

Today we unfortunately face another threat to our legal system’s ability to deliver equal justice to all—the severe cutbacks in funding of our state and federal courts. At the same time demand for court services has increased, the availability of those services has been seriously undermined by consistent funding shortfalls. According to the Judicial Council of California, in the past five years, the state court system’s budget was cut by over \$1.2 billion. More than 170 courtrooms and over 20 courthouses were closed and over 30 courts have reduced their hours. In many state courts, including our Superior Court, there are no longer court reporters, meaning that only those who can afford to bring their own reporter can have the benefit of a written record of proceedings. The state courts have responded to the budget crisis by imposing higher filing fees, but this will add only about \$120 million a year and poses the very real danger of substantially impacting the public’s ability to use basic court services because they are no longer affordable. As the president of the Los Angeles County Bar Association has stated, “The courts are supposed to be an essential function of government, but they’re being funded by users to a large extent instead of all people in the state. The problem is an access to justice.”

Some of the adverse impacts in San Diego County, as set forth in the San Diego County

Bar Association's recent "Report on State of the Judiciary in San Diego County," include: (1) Routine law and motion matters are being scheduled out six to seven months or more when such motions used to be heard in as little as 16 days; (2) Civil Independent Calendar departments now average over 1000 cases each, when formerly they handled about 500 apiece; (3) Troubled families confronting difficult custody issues now have to wait up to ten weeks to schedule a first appointment with Family Law Services, when formerly it took two weeks; (4) Traffic court trials with time waivers are being set out at least seven months, when previously they were set within 90 days; and (5) The lack of court reporters in civil, probate and family law departments compromises the integrity of the proceedings and the ability of parties to preserve issues for appeal. As the report starkly demonstrates, justice delayed most surely is justice denied.

On the federal side, the situation is also very troubling. Sequestration has slashed \$350 million from the federal courts' budget, even though that budget constitutes only 0.2% of the entire federal budget. Funding for the Federal Defender System has been severely cut, resulting in layoffs and furloughs in offices across the country, and the situation will get much, much worse if sequestration is allowed to continue and Congress fails to reach agreement on a budget before the end of the fiscal year (9/30/13). In May, the United States Judicial Conference asked that emergency legislation be enacted to restore \$73 million in essential funding, but no action has been taken. The Administrative Office of the United States Courts has indicated it may be forced to delay or even eliminate civil jury trials during certain periods of the year if funding cuts continue. In many districts, it is not possible to schedule criminal

cases on particular days due to the unavailability of federal defenders. As Sixth Circuit Judge Julia Gibbons told lawmakers in March, “If sufficient funding is not provided to the courts, we cannot provide the people of the United States the type of justice system that has been a hallmark of our liberty throughout our nation’s history.” And as Judge Learned Hand stated last century in words that ring just as true today, “If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”

#### IV What We All Must Do to Ensure the Promise of *Gideon* is Realized

We must all redouble our efforts to assure equal access to justice is a reality and not a hollow promise. We must educate law students about the critical importance of access to justice. There should be an even greater emphasis on clinical programs designed to deliver legal services to the poor and we should encourage students to consider public interest careers. Law firms must make pro bono service an even higher priority than before and require their lawyers to donate a portion of their time to organizations such as the Volunteer Lawyer Program, the Legal Aid Society and other similar programs. And all of us must make known to our elected representatives how the failure to adequately fund the courts is eroding the rule of law and the Constitutional guarantee of equal access to justice.

As Attorney General Holder has stated on this 50<sup>th</sup> Anniversary of *Gideon*, “[i]t’s our solemn responsibility to . . .reclaim the promise that once drove a destitute man to ask the highest court in the land to hear his case—and drove that Court to respond, in the words of Robert Kennedy, ‘by [changing] the whole course of legal history. . .’”