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A LOOK AT CIVIL *GIDEON*: IS THERE A CONSTITUTIONAL RIGHT TO COUNSEL IN CERTAIN CIVIL CASES?

Justice Jess H. Dickinson[*]

When our Founders signed the Declaration of Independence in 1776, America was born, but it was not perfect. We immediately went to war with Great Britain—a war that was to last seven years.

In 1783, the war ended, and we had won our independence, but still, we were not perfect. We needed a constitution, which our Framers produced after six years of heated debate. On April 30, 1789, George Washington was inaugurated as our first president, and on February 2, 1790, the United States Supreme Court held its first session, marking the date the United States government first became fully operational.

Still, America was not perfect. Slavery was legal. Women could not vote. The accused had no right to counsel. There was no freedom of speech, no freedom of the press, and no freedom of religion. Our citizens had no protection from the government against unreasonable search and seizure. To say the least, we had many unaddressed problems.

Almost two years after our government began to operate with all three branches, the States ratified the Bill of Rights—the first ten amendments to the Constitution—and we moved a little closer to perfection. Those ten amendments provided substantial federal rights and protections to our citizens from the federal government; but what about the states? The individual states were left with the power to enact state laws and policies that discriminated, abused, and unfairly treated the citizens.

For the next three-quarters of a century, we engaged in a great struggle for freedom and civil rights that erupted into a great civil war that lasted four years, ending in 1865 with more than 750,000 deaths. Then, three years after that war ended—on July 9, 1868—a great event took place, one we all should remember and celebrate. Secretary of State William H. Seward certified the Fourteenth Amendment to our Constitution.

Finally, we had real equal protection under the law and the constitutional right to due process of law! Or did we? While it is true that only two years later we ratified the Fifteenth Amendment, prohibiting denial of the right to vote based on race, it would be fifty-two more years before we would ratify the Nineteenth Amendment, prohibiting laws that denied women the right to vote. And Secretary Seward would have to wait another eighty-six years for *Brown v. Board of Education* to end legalized school

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segregation,[1] and eighty-nine years before Congress passed the Civil Rights Act of 1957.

Of course, there have been many other struggles where brave women and men have stood on front lines of battle and fought for their beliefs. These struggles for civil rights and civil justice have been ongoing now almost a hundred and fifty years since we say we granted every citizen the constitutional right to equal protection and due process. And while it is true that we have seen many successes, few of them have been easy.

It is against that backdrop of history that I would like to tell you a story—a true story—about a criminal case.[2] I know we are here about access to justice in *civil* cases, but please bear with me. I think this story can teach us something of great importance.

Young Clarence was not a good student. He dropped out of school and ran away. For years he was a drifter doing odd jobs to survive. In June 1961, Clarence found himself in Panama City, Florida where he had managed to amass a few hundred dollars which, like most drifters, he kept in his pockets.

During the early morning hours of June 3, Clarence left his small hotel room and walked across the street to a pay phone to call a cab to take him to a local restaurant to get his breakfast. As he sat eating his breakfast, the police came in and arrested him, charging him with robbing the vending machines in the local pool hall. An eye-witness had identified Clarence as the robber, and much of the money the police found in Clarence's pockets was change. Police were not impressed with Clarence's claim that he had won the nickels, dimes, and quarters in a poker game the night before.

Now of course you could not hire much of an attorney in a criminal case for $300—even in 1961—so on the morning of his trial, Clarence asked Circuit Judge Robert McCrary, Jr. to appoint him a lawyer. Judge McCrary said he was sorry, but under the laws of the State of Florida, Clarence was not entitled to a lawyer unless he was charged with a capital offense.

Judge McCrary seemed sympathetic to Clarence's plight, but he was bound by the law which had been set decades before by the United States Supreme Court in *Betts v. Brady*, which held that the right to counsel was limited to capital cases and cases where the defendant demonstrated "special circumstances" such as illiteracy.[3] Clarence's case was not a capital case; he was not illiterate, and he did not qualify for any of the other "special circumstances." His only argument was that he was poor, so he proceeded to trial, acting as his own lawyer. And to no one's surprise, he was convicted.

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1. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
2. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
3. Betts v. Brady, 316 U.S. 455, 473 (1942).

Clarence never ceased claiming he was innocent. When he arrived at the Florida State Prison, he doggedly used the prison library to read everything he could find about the Fourteenth Amendment. It did not matter to him what Judge McCrary, the prosecutors, or anyone else said. It did not even matter to him what the Justices of the United States Supreme Court had said in the *Betts* case. Clarence knew what he believed, and in his own crude, succinct words, this is what he believed: "They can't give you a fair trial without they give you a lawyer."

And so he sat there at a little wooden desk in the prison library with a legal pad, a pencil, and prison books, and he worked out a crude legal argument—not born of precedent or scholarly articles penned by lawyers—but one of common sense and a stubborn, uncompromising view of what was right.

I sometimes think how discouraged Clarence must have become at times, with all the judges saying "it's not the law;" all the lawyers and legal scholars saying "it's not going to be the law;" and even those who wanted him to win saying "you don't have a chance." But still, he continued to read and scratch out his argument that "they can't give you a fair trial without they give you a lawyer." And when he was finished, he tore the pages from the legal pad and mailed them to the United States Supreme Court, asking the justices to recognize and announce to the world that the United States Constitution guaranteed him and other indigent criminal defendants the right—the *constitutional* right—to be represented by an attorney.

A law clerk in the Chief Justice's chambers read Clarence's petition and recommended to the Chief Justice that the Court review the case. And, at its next en banc conference, the Court voted to do just that, and it appointed Abe Fortas to represent him for the appeal.

Abraham "Abe" Fortas was a brilliant lawyer and an excellent choice. He had taught law at Yale University where, as a student, he had served as Editor-in-Chief of the Yale Law Journal and had graduated second in his class. In private practice, he and Thurmond Arnold founded Arnold and Fortas, which later (after Fortas's appointment to the United States Supreme Court) became Arnold and Porter, one of the world's largest and most prestigious law firms.

My friend, Jim Sandman—the current president of the Legal Services Corporation ("LSC")—was an attorney at Arnold and Porter. Jim recently gave me a copy of Clarence's handwritten petition to the Court. I had it framed, and it now hangs in the moot courtroom at the Mississippi College School of Law, where I am an adjunct professor of evidence and trial practice.

During the oral argument of Clarence's case, Mr. Fortas told the Court: "there has been a tendency from time to time . . . to forget the realities . . . of

what happens to these poor, miserable, indigent people . . . in these strange and awesome circumstances."[4] He said:

> I was reminded the other night as I was pondering this case about Clarence Darrow's trial . . . [when he was] accused and subsequently acquitted of attempting to bribe jurors. . . . [T]he first thing Clarence Darrow realized was that he had to have a lawyer. Here was a man who . . . I think perhaps really was our greatest criminal lawyer, he needed a lawyer.[5]

In a unanimous decision, the Supreme Court overruled *Betts*, overturned Clarence's conviction, and sent the case back to the Florida court for a new trial.[6] Clarence, of course, was Clarence Earl Gideon, the defendant in the landmark case, *Gideon v. Wainright*, in which the Supreme Court recognized that Clarence's right to counsel was a fundamental, constitutional right.[7] In the majority opinion, Justice Hugo Black pointed out that lawyers are necessities, not luxuries.[8] He went on to say:

> reason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided.[9]

My reason for using Clarence's story is illustrated by a quote that was placed on his headstone in 1984 by the American Civil Liberties Union. The quote was taken from the last paragraph of a letter Clarence wrote to Mr. Fortas in November 1962. It says: "I believe that each era finds an improvement in law for the benefit of mankind."

All of us should be seeking an improvement in the law that will benefit mankind. We passionately believe in what we do. But what do we really believe *about* what we do? Do we believe that legal aid lawyers are just a good idea? Many think what we do equates to charity work, like soup kitchens, animal shelters, and the Red Cross, all of which, of course, are important, but none of which raise constitutional questions. So the question is, do we believe fair and equal justice in our courts is simply a good, important idea, or does that concept have constitutional implications, making it a priority in the great scheme of government?

It is the government's job to make sure constitutional rights are protected. I know there are serious problems with the federal budget. Many of

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4. Oral Argument at 20:18, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155), *available at* https://www.oyez.org/cases/1962/155.

5. *Id.*

6. *See Gideon*, 372 U.S. at 345.

7. *See id.* at 344–45.

8. *Id.* at 344.

9. *Id.*

my friends say "don't push it too fast, we can't risk losing everything." They feel the right way to go is to continue trying to persuade Congress and our state legislatures to appropriate a little more each year—never mind that we are going backwards—rather than challenging them to live up to their constitutional responsibilities.

Those views, I know, are expressed in good faith by good people who legitimately want to advance the cause of equal justice for the poor. But when I think of our cause and the effectiveness of delay, I think of the one hundred men and women at the Seneca Convention in 1848, who signed the Declaration of Sentiments, demanding women be given the right to vote. That was seventy-two years before we ratified the Nineteenth Amendment.

I think of Susan B. Anthony, who was arrested for voting in 1872. She said to the judge: "You have trampled under foot every vital principle of our government. My natural rights, my civil rights, my political rights, my judicial rights, are all alike ignored."[10]

I think of the March on Selma. I think of Oliver Brown's third-grade daughter, Linda, who was forced to walk past a white elementary school to attend a segregated school in Topeka, Kansas. I think of the "Little Rock Nine"—those nine brave high school students who walked into Central High School right here in Little Rock in 1957. I think of all of these, and so many more. I thank God they believed, they stood up, and they cried out for justice, even in the face of all of those who told them they could not win.

My friends, we are on the front lines of this battle. If we do not believe, no one will. If we do not stand up, no one will. If we do not cry out, no one will. I know what I believe. I believe that when one person uses the law, the government, its facilities, and its power in an attempt to take away an indigent person's life, liberty, or property—which includes children, shelter, livelihood, and the basic right to dignity—that indigent person is constitutionally entitled to have a lawyer appointed, just as they are in a criminal case. My beliefs may not be in the majority, but I do not think I stand alone.

Last year, during the LSC's 50th anniversary celebration in Washington, D.C., I had the privilege of serving on a symposium panel with other state Supreme Court justices from around the country. And by the way, my bluegrass band—The Bluegrass Appeal—played for one of the receptions, and I still have some CDs for sale. The fiddler in the band likes to say that our CD—"From Dublin to the Delta"—is a million seller because we still have a million of them boxed up, down in the cellar.

But during that symposium, almost every one of the justices made statements that indicated they think maybe the time has come for this coun-

10. Susan B. Anthony, THE SELECTED PAPERS OF ELIZABETH CADY STANTON & SUSAN B. ANTHONY: AGAINST AN ARISTOCRACY OF SEX, 1866 TO 1873, 613 (Ann D. Gordon et al. eds., 2000).

try to seriously consider whether there is a basic, constitutional right to be represented by counsel in certain civil cases. Some call it Civil *Gideon*, and as I stated at that symposium, I do believe its time has come.

During the LSC's birthday celebration, one of the keynote speakers was Justice Antonin Scalia. During his speech, he complemented the LSC and its work, and I remember thinking what a gracious gesture from a member of the Supreme Court. But then he said something that I thought was so profound and important that I wrote it down on a napkin. He told us that the right to counsel is one of our most fundamental rights as Americans.

I had the pleasure of sitting next to Justice Scalia during lunch that day. During our conversation, I referred to his statement and asked him: "if the right to counsel is a fundamental right, wouldn't that make it a constitutional right?" He did not say yes, but he did not say no either. He said, "That's an interesting question." It certainly is.

And so, that brings it back to us. I would like to read you what Attorney General Robert Kennedy said about Clarence Earl Gideon:

> If an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, and if the court had not taken the trouble to look for merit 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 a 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 American legal history has been changed.[11]

Are we going to wait for another Clarence Earl Gideon to come along to make the argument we should be making? As I already have said, I know that many disagree with me—even some of my good friends who have been working for this cause much longer than I have. And to them, I say that I know this is not an easy issue. I know it is an uphill climb. I know the odds are against us. But the great tragedy is not to fail; it is to fail because we did not even try.

I close by reminding you of something I said the last time I stood before you in this very room. We revere our Constitution as our country's heart. It is the supreme law, and its words and phrases tell us who we are. The preamble's purpose is to announce to the world why we fought a war to

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11. Robert F. Kennedy, Attorney General of the United States, Address at the New England Conference on the Defense of Indigent Persons Accused of Crime (Nov. 1, 1963) (emphasis added), http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/11-01-1963Pro.pdf.

win independence and to set out in plain view our Constitution's five purposes. And the second of those five purposes is to "establish Justice."[12]

My friends, when justice is for sale, when the poor do not stand equal to the rich in our courts, when poor people by the millions go unrepresented in court—losing their children, their homes, their property, and sometimes their very freedom—we have not established justice. And we will not establish justice so long as we as a country grossly underfund legal services for the poor—leaving millions and millions of Americans with no reasonable chance at fairness and justice in our courts.

So in case you have not gotten the message, I believe that equal access to justice—and to our courts—is a constitutional right; and I believe its time has come. And like all constitutional rights, I believe it is worth fighting for.

12. U.S. CONST. pmbl.