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Program Introduction

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II. Program Introduction

Archibald R. Murray
Burt Neuborne
Alexander D. Forger

A. *Program Organizers*[62]

Good morning and welcome to this twenty-fifth year celebration of *Gideon v. Wainwright*.[63] I am Archibald R. Murray, the Attorney-in-Chief and Executive Director of The Legal Aid Society, and on behalf of the entire Society, I welcome you.

The Society, which began in 1876, was, before *Gideon*, an agency of modest size concerned with the delivery of legal service to poor persons in both civil and criminal cases. *Gideon* triggered state legislation that produced our Criminal Defense Division, and our Criminal Appeals Bureau, as we know them today. The Society is now a law office of approximately 1,000 lawyers. Most of that growth is directly attributable to *Gideon*. It seemed right and fitting, therefore, that we should gather to celebrate *Gideon* and to ask ourselves a few hard questions about the future of *Gideon*.

Last spring, I appointed a committee comprised of both board members and staff members to plan for this occasion. The committee was chaired by Phillip Weinstein, who is the Chief of our Criminal Appeals Bureau and the Vice Chair was Susan Lindenauer, my counsel. That committee also had on it Haliburton Fales and Paul Saunders, two members of our Board. In addition, many others have made a significant contribution including: Robert Baum, who is now the head of our Criminal Defense Division; Ruth Chamberlain, of our Federal Defender Services Unit; David Clarke, a supervisor in the Manhattan office of the Criminal Defense Division; Paula Deutsch, a senior trial lawyer in Brooklyn who will be on the panel today; Ivar Goldart, who is a member of the Criminal Defense Division and is responsible for a number of legal matters including the

62. This section of the conference was presented by Archibald R. Murray — Executive Director and Attorney-in-Chief of the Legal Aid Society; J.D., Fordham University Law School, 1960; Commissioner of the New York State Division of Criminal Justice Services, 1972-75.

63. 372 U.S. 335 (1963).

training of our lawyers; Gregory Harmon, from the Bronx Criminal Defense Division Office; Henriette Hoffman who heads our Federal Appeals Unit; Sarah Jones, who is a supervisor in our Criminal Defense Division, Manhattan Office and a former law professor; Susan Salomon, who is in our Criminal Appeals Bureau and will be on this morning's panel; Rosali Vazquez, who is a lawyer in our Criminal Appeals Bureau; and Hillard Wiese, a supervisor in our Criminal Appeals Bureau.

We owe a special thank you to that committee for an especially well done job. They have assembled a particularly knowledgeable and interesting group of participants. I know that you will enjoy the presentations and on behalf of The Society I would like to thank the panel publicly at this time.

Well the family is gathered. I thank all of you for coming.

B. *Program Participants*[64]

I am Burt Neuborne — your moderator for this discussion. My thanks to The Legal Aid Society for asking me to participate in the twenty-fifth birthday celebration of *Gideon*. I must say I was slightly troubled when I was originally asked to participate. I considered it a commentary on the passage of time that I was no longer an *enfant terrible* but a moderator. I guess it eventually happens to all of us.

Let me share with you one very brief personal observation on the *Gideon* case which emerged from a dinner table conversation, debate actually, that my wife, Helen, and I had years ago when she was a lawyer with The Legal Aid Society in the Brooklyn Family Court. Helen and I were talking about what the right to counsel would mean in the family court. Our two daughters, who in those years were subjected to these nightly assaults on their consciousness at dinner, asked where all of this comes from. I gave my eleven-year-old a copy of the Bill of Rights and said: "Here, read it. This is where it all comes from." So she read it. The next night at dinner she said she had two questions about the Bill of Rights. She said she understood the right to counsel. She could see why you had to have a lawyer to make

64. This section of the conference was presented by Burt Neuborne — Professor of Law, New York University School of Law; LL.B., Harvard Law School, 1964; Legal Director, American Civil Liberties Union, 1983-1986.

the proceedings meaningful. But she said there were two rights in there she could not understand, and she wanted an explanation. The first question was what is the right to bear arms? Why did people care about whether they had to wear sweaters or not; and the second one was this business about quartering soldiers? Why would they want to tear them up that way? I realized then that there was a good deal about constitutional interpretation that I still had to learn.

I thought, however, that there was a consensus judgment in this society that the underlying principle of *Gideon* is that the amount of money one has ought not to determine the degree of justice that one can expect from a system, especially when the system is threatening your personal liberty. I thought that in a civilized society this concept would unite diverse political forces. Any civilized legal system should be able to agree on this basic aspect of decency. The longer you spend inside the system, however, the more you realize how fragile are the shared conceptions that hold us together as a system. We like to think that these shared conceptions are written in the Bill of Rights and explained there for everybody. We all realize, however, that they are abstract conceptions of a shared political community that can come unraveled in a very short period of time. In fact, the fight to preserve those shared conceptions is one that is never over.

Witness the very disturbing events in Great Britain where the right to remain silent (which we think of as one of the core concepts of Anglo-American law that underlines our joint conception of limited government) is about to be swept away, not only in the areas of Northern Ireland where there is arguably an emergency terrorism situation, but throughout England and Wales as well. In one fell swoop, centuries of evolution toward a conception of decency can be swept away. This tells us how important occasions like this are to the battle to keep *Gideon* won and to keep *Gideon* expanded; one simply cannot assume that because the battle was won a generation ago, it will continue to be won. It has to be refought in every single generation. The fact that all of you have come together on a Saturday to think about and to celebrate the *Gideon* anniversary is mute testimony to how deeply we all feel about *Gideon*.

We are lucky to have with us an extraordinary panel to talk

about some themes that were raised by *Gideon* and perhaps to raise some questions about the future. Let me briefly introduce the panelists. I'm not going to do justice to any of them because it is frankly more important that they speak than they be celebrated themselves. Paula Deutsch is an attorney with the Criminal Defense Division of The Legal Aid Society. She has been with the Society since 1979. She is a devoted and extraordinarily effective criminal defense trial lawyer. She is a winner of the Society's Orison Marden Award, an outstanding attorney, and a graduate of Brooklyn Law School who worked as a paralegal with the Society as she went through law school. She is going to give us a view from the trenches about the reality of *Gideon* today. The Honorable Michael Juviler is now a Judge in the Court of Claims of the State of New York. He is one of the leading commentators on the nation's criminal justice system. Nicholas Katzenbach, a partner now in Riker, Danzig, Sherer, Hyland & Perretti, was Attorney General of the United States and one of the great voices of decency in society during the period in which the *Gideon* principles came to fruition. Abe Krash is a member of the law firm of Arnold & Porter in Washington D.C., one of the deans of the Washington, D.C. Bar, colleague of Abe Fortas on the *Gideon* brief, and truly one of the forefathers of the *Gideon* case. Anthony Lewis is a columnist for the New York Times, author of *Gideon's Trumpet*, and one of the most perceptive voices commenting on the relationship between law and the political world. Charles Ogletree is a Professor of Law at Harvard. He was formerly the head of the Washington Public Defender's Office and a graduate of Stanford and Harvard Law School. He is one of the most perceptive critics of the existing system. Susan Hofkin Salomon, is an Assistant Attorney in charge of the Criminal Appeals Bureau of the Society and a professor at Columbia Law School where she teaches ethics. She is a graduate of Bryn Mawr and the University of Pennsylvania Law School. She is one of the most scholarly appeals lawyers now working for the Society, who can give us the perspective of the *Gideon* believer. Ronald Tabak of Skadden, Arps, Slate, Meagher, & Flom is in charge of the firm's extraordinarily broad and exciting pro bono litigation project and heavily involved in the defense of persons charged with capital crimes. He will speak to us about some of the concerns that he has with the failure of

society to deliver on the promise of *Gideon*. Barbara Underwood is a Professor at New York University School of Law. She was formerly the Chief of Appeals and Counsel to the Brooklyn District Attorney's Office, a professor at Yale Law School, and author of the leading article on the use of presumptions in the criminal process. The article taught me everything I know about presumptions. She is one of the most perceptive observers of the way *Gideon* operates inside the system itself. The Honorable Jack Weinstein is a Judge of the United States District Court, Eastern District of New York. He was formerly, of course, Chief Judge of the District, author of more books than I can count, including the books that we use at NYU to teach evidence. He was a member of the faculty at Columbia and one of the most pre-eminent intellectual forces ever to sit on the Federal District Court.

The panelists will address a number of themes. I had suggested to them that they might want to consider four themes. The four themes it seems to me that we might want to think about this morning are: (1) *Gideon* Celebrated — after all, *Gideon* was a great civilizing statement by the legal system and twenty-five years later one ought not to lose sight of the fact that we ought to be proud of it; (2) *Gideon* Betrayed — the promise of *Gideon* has been only partially carried out in society and in many areas of our society, it is as though *Gideon* has never been decided at all; (3) *Gideon* Questioned — is the quality of justice improved by the use of a core adversary system and are there limits to where the core adversary system ought to operate inside either a criminal justice system or a legal system and finally, (4) *Gideon* Achieved — what do we as people who care about the *Gideon* principle have to do to see to it in the years to come that the principle is carried to fruition? Is there a plan of action that we should be thinking about?

C. *Keynote Speaker Introductions*[65]

As a preliminary to the introduction of our distinguished speaker, I feel compelled to note that the twenty-fifth anniver-

65. This section of the conference was presented by Alexander D. Forger — Partner, Milbank, Tweed, Hadley & McCloy; Chairman of the Board and Director of The Legal Aid Society; LL.B., Yale Law School, 1950.

sary that we celebrate today falls, unfortunately, within our presidential election year — which all too often can be characterized as our nation's quadrennial moratorium on serious intellectual thought or discussion.

While we may take heart in the expectation that this will soon pass there is a sense that this time the justice system, which is a prime attractor of so-called political rhetoric, may sustain some permanent damage. As the hall that we are meeting in still reverberates with the sounds of the recent celebrations marking the anniversaries of the country's founding and more recently, the ratification of our Constitution, we observe that unfortunately, for some, national pride carries with it the spirit of jingoism, except this time we are not mobilizing against America's enemies abroad but rather those at home, many of whom can be found in this room today. Evidencing commitment to guaranteed individual rights evokes, for the misguided, the symbolism of the earlier life of foreign-directed jingoism, the card carriers, and sympathizers.

Fortunately, there still exist among us those who would continue to be card-carrying, sympathizing constitutionalists. Yale Kamisar stands out among them — a nationally recognized legal scholar and author of many publications on criminal law, constitutional law, the administration of justice and indeed, the politics of crime. He is the Henry K. Ransom Professor at the University of Michigan and among his very many and distinguished credentials and factors relating to his life is the key and most important, that he is a native New Yorker. We are pleased to claim him here today, Professor Kamisar.