UNIVERSITY OF KANSAS SCHOOL OF LAW "ACCESS TO JUSTICE" SYMPOSIUM:

KEYNOTE SPEECH

*Hon. Edward C. Prado**

It is indeed a pleasure to be here today and share with you some of my thoughts on the fiftieth anniversary of the Criminal Justice Act ("CJA"). This is not my first time to Lawrence, Kansas. Former Chief Judge of the 10th Circuit and law professor at the University of Kansas, now Dean of Pepperdine University Law School, Deanell Tacha, invited me to Lawrence some years back. She was the Chair of the Judicial Branch Committee of the Judicial Conference, of which I was a member, and hosted the Committee at the Robert Dole Institute of Politics. The judges on the Committee were impressed with the Center and with the University of Kansas campus. We even had a chance to meet Coach Self and get a tour of Allen Fieldhouse. It is good to have the opportunity to be back here at the University of Kansas

As you know, the Criminal Justice Act turned fifty just this past year. I would guess that most law students and a good number of law professors were not practicing lawyers when the Act was passed. Perhaps that is why they picked on an old judge like me who was around near the beginning of the Act and might have some real life experiences with representing indigent defendants and can speak about some of its history firsthand.

England, from which we drew many of our legal ideas, did not have the right to counsel and in fact explicitly banished lawyers from felony trials. It was thought that the judge would see that the accused received a fair trial without the need for representation by an attorney. However, in America, our Founding Fathers recognized the importance of affording legal representation to everyone accused of a crime who had no means to pay for it. In 1770, the

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Boston Massacre demonstrated that some of America's legal principles were better than those practiced in England. British soldiers were put on trial for shooting into a crowd of demonstrators and killing several persons. John Adams—a founding father of our country, a signer of the Declaration of Independence, and the second president of the United States, volunteered to take on the representation of these soldiers, even though it was not a very popular thing to do. These British soldiers had very little means and yet John Adams took on their representation for very little compensation. His efforts resulted in seven of the soldiers being acquitted and the remaining two convicted only of lesser charges.

In contrast to England, several colonial charters declared a right to hire attorneys. Twelve of the thirteen colonies specified such a right before the U.S. Constitution was drafted and the Sixth Amendment guaranteeing such a right was adopted. The right to counsel was expressed in the Federal Judiciary Act of 1789. After ratification of the Bill of Rights, the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." However, while it looked good on paper, as a practical matter it was not implemented with force. No funds were made available to pay for attorneys to represent those without sufficient means to hire an attorney. As a result most people accused of a crime who could not afford a lawyer went without representation. It would be almost 150 years before the right to counsel became a reality.

In 1932 the Supreme Court ruled in *Powell v. Alabama*[1] that failure of a state to provide for legal representation of an indigent defendant in a capital case violated due process. The case concerned nine black teenagers, who would become known as the Scottsboro Boys, accused of raping two white girls in Alabama. Within twelve days they were arrested, indicted, convicted and sentenced. They were not given attorneys until just before the trial began. In a 7-2 decision, the Supreme Court overturned their convictions. Justice George Sutherland wrote, "Even the intelligent and educated layman requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

"In *Nabb v. United States*, . . . the U.S. Court of Claims held that the Sixth Amendment is a 'declaration of a right in the accused, but not of any liability on the part of the United States.'"[2] In 1938 the Supreme Court decided *Johnson v. Zerbst*.[3] The case dealt with two defendants who were charged in federal court with counterfeiting. They were arraigned, tried and convicted all in one day without the benefit of representation. The Court held that having a defense attorney was a "jurisdictional prerequisite to a federal court's authority

1. 287 U.S. 45 (1932).

2. Geoffrey Cheshire, *A History of the Criminal Justice Act of 1964*, 60-MAR FED. LAW. 46, 49 (2013).

3. 304 U.S. 458 (1938).

to deprive an accused of life or liberty." This established the right to counsel in federal cases twenty-five years before *Gideon*. However, no mention was made of funding for such representation. There was no process in place to compensate attorneys to represent indigent defendants in criminal matters. It was expected that attorneys, as officers of the court, had an obligation to represent indigent defendants out of their own pocket. This resulted in Judges, the Attorney General, law professors and others calling for the establishment of a system funded by the Government to furnish legal representation in criminal matters. In 1937 the Judicial Conference of the United States, at the recommendation of Attorney General Homer Cummings, adopted a resolution supporting the creation of a public defender system in districts where the volume of cases would justify the position. In other locations, the Conference recommended that counsel be appointed and compensated when services involved substantial time or effort. This resolution went on deaf ears and Congress passed no legislation adopting the recommendations of the resolution. Several versions of the Criminal Justice Act languished in Congress through the 1940's and 1950's but nothing was passed. In the meantime Nazi war criminals were afforded compensated representation at the Nuremberg Trials.

The constitutional right to the appointment of counsel did not apply to state courts until the 1963 decision in *Gideon v. Wainwright*.[4] Clarence Earl Gideon, who had only an eighth grade education, was charged with breaking and entering with the intent to commit a misdemeanor. While that is a felony under Florida law, Gideon went to trial without an attorney. In open court, he asked the judge to appoint counsel for him because he could not afford an attorney. The trial judge denied Gideon's request because Florida law only permitted appointment of counsel for poor defendants charged with capital offenses. Gideon represented himself at trial and was convicted. He sought relief from his conviction by filing a petition for writ of habeas corpus in the Florida Supreme Court. In his petition, Gideon challenged his conviction and sentence on the ground that the trial judge's refusal to appoint counsel violated his constitutional rights. The Florida Supreme Court denied Gideon's petition.

Gideon next filed a handwritten petition in the Supreme Court of the United States. The Court agreed to hear the case to resolve the question of whether the right to counsel, guaranteed under the Sixth Amendment of the Constitution, applies to defendants in state court. To represent Gideon, the Court appointed Abe Fortas, who later served on the Court as an associate justice. While Gideon won his case before the Supreme Court, neither that decision, nor others on the subject, required that lawyers be paid. Attorneys were expected as part of their responsibility as officers of the court to represent defendant pro bono. Not only were funds not available to compensate attorneys for their work, but also there were also no funds to hire investigators, experts or interpreters. Any case related expenses the attorneys might incur

4. 372 U.S. 335 (1963).

were out of pocket. Needless to say, without funding much of the representation that was afforded was lacking in zeal. Most cases involved interviewing the client and working out a plea agreement with the prosecutor.

While the Supreme Court was addressing the constitutional issue, a new push for reform built momentum for better representation of defendants in the criminal justice system.

In 1962 the *Harvard Law Review* conducted a study and found that in most federal courts an appointed "counsel's role is generally limited to appearances at arraignments and sentencings, discussions with his client and the prosecutor, and occasionally a brief investigation of the case in order to uncover mitigating circumstances." It was in effect a token kind of representation where not much time or effort was invested by the court-appointed attorney. Many lawyers avoided criminal practice for fear of getting burdened with criminal appointments. Judges had few lawyers to choose from in making their appointments. Of those that were available most were inexperienced and mediocre or worse. In some districts, civil lawyers with no criminal experience were appointed to represent defendants in criminal cases as part of the condition of being licensed in federal court. They were, for the most part, there to work out pleas of guilty. Despite these findings ninety-three percent of respondents to the survey considered the thoroughness of assigned counsel's preparation "adequate" or "very adequate."

Around the same time, a committee established by Attorney General Robert F. Kennedy and headed by Professor Francis A. Allen of the University Of Michigan School of Law, investigated the state of indigent defense in federal court. The committee concluded that the system was flawed in many respects. Many of the findings followed those of the Harvard study. Lawyers were inexperienced and unprepared and for the most part spent little time on their cases. To spend a significant amount of time on a case was a very expensive proposition. Statistics for 1963 showed that less than one-third of defendants in federal criminal cases had counsel assigned.

The report prepared by Professor Allen's committee proposed legislation that would improve the criminal appointment process in federal courts. The report was a significant reason for the passage of the Criminal Justice Act and for the creation of a funded federal defense system. In his 1963 State of the Union address, President John F. Kennedy proclaimed that the "right to competent counsel must be assured to every man accused of crime in federal court, regardless of his means." President Lyndon B. Johnson signed the Criminal Justice Act into law on August 20, 1964. While it provided for compensation for private appointed counsel, interestingly, it omitted the creation of a Public Defender system. Ironically, the Act was passed the day after Gideon, with counsel, was acquitted on his state retrial after the Supreme Court remand.

Six years later in 1970, after further study, the Federal Defender System was created by amendments to the Criminal Justice Act. I am proud to say that

I was one of the first attorneys hired by the Federal Public Defender for the Western District of Texas upon its creation in 1975.

This Act in effect created the court appointed system that exists today in the Federal Courts of our country. Public Defenders represent most defendants and a panel of compensated private attorneys represents the rest. Originally that Act provided for up to $15 per hour for in court services and $10 an hour for out of court work. Felony cases were capped at $500. Today limits have increased; attorneys are compensated up to $127 per hour for in-court services. Capital cases pay $181 and judges may compensate above the maximum. Although these increases seem significant compared to the dawn of the program, they are modest when compared to the rates charged by private attorneys. Public Defenders are paid at rates comparable to United States Attorney's Offices. Since the first offices were created in 1971 the Defender program has grown in size and caseload. In 1973 fifteen of the nation's ninety-four federal districts were served by full-time defender offices. My office was the twenty-second to be created in 1975. By 2013 the program had grown to ninety-one districts. The system handled 54,000 representations in 1973; last year there were nearly 230,000 representations. There are now about 1,300 full-time defender attorneys and about 12,000 panel attorneys. The clients are diverse as are the criminal charges they face. The fact is that most persons accused of crimes in our federal courts cannot afford an attorney and thus nearly ninety percent of federal criminal defendants are aided by lawyers, investigators and experts paid for under the Criminal Justice Act.

The Criminal Justice Act and the right to counsel have made great strides toward a system that is fair and provides equal justice for all. An advocate invested in the defense function and the individual defendant is in the best position to explore and advance claims of innocence and affirmative defenses. And, the Act has led to a much more efficient system of Justice. Experienced lawyers who are familiar with the law and how to evaluate the evidence are in a much better position to reach the best plea bargain possible and feel confident that they have done the best they can for their client. Judges have found that the docket moves in a much more efficient manner because you have experienced attorneys who know the worth of their cases and can settled matters much more quickly. It has proven to be a big success. We have come a long way from the days of no representation or token representation and no compensation and the program has brought fairness and integrity to the criminal justice system, nevertheless, some issues persist leaving room for improvement. I will go into some of those issues in a moment.

The Criminal Justice Act placed the public and panel attorneys within the judicial branch, under the auspices of the courts. In 1991 the Judicial Improvements Act directed the Judicial Conference of the United States to conduct a study that would revisit that decision and examine other issues related to the defender system. In response to that congressional directive, the Judicial Conference formed a committee to do the study. The Chief Justice appointed me as Chair of that committee. The committee was diverse and

included judges, lawyers, and law professors, including Professor Michael Davis of the University Of Kansas School Of Law. This diversity brought richly varied experiences to the task. Had the committee been a traditional Judicial Conference Committee composed only of judges, its perspective would have been different.

The Committee faced a plethora of challenging issues. Congress listed a dozen specific areas for scrutiny, many of which were predictably controversial, including the independence of Federal Defender Organizations and the role of the judiciary in the administration of the Criminal Justice Act. Additional issues for study were suggested by the Defender Services Committee of the Judicial Conference, and the Committee itself found some issues that needed to be addressed. At the time of the study by the Committee, in 1992, the CJA program involved more than 80,000 appointments of counsel and expenditures of $200 million. Today the program budget has reached the billion-dollar mark, a level that puts it on the Washington D.C. skyline. One of our report's recommendations was that the program be reexamined periodically to ensure appropriate oversight. We recommended that such a review be undertaken every seven years. Well, 20 years have now elapsed since our report and no new reexamination of the Criminal Justice Act has been initiated, however, it is my understanding that the Judicial Conference of the United States is in the process of organizing a new Committee to review the CJA program.

My Committee worked diligently to hold hearings, review prior reports, and collect data. But some issues were never fully resolved as the Committee lacked adequate information to make full recommendations. A reoccurring theme from private attorneys who testified before the committee was the power of the court to reduce vouchers for attorney payment and to withhold approval of vouchers for significant lengths of time, chilling panel attorneys' willingness to accept appointments. The Committee was unable to determine how pervasive, if at all, this issue was around the country. The Committee was unable to gather data that would help evaluate the quality of representation that was being furnished by private court appointed lawyers and Public Defenders. Further study would be necessary to determine the quality of representation being furnished. A further problem was the defendant who could pay some funds but not all of the cost of representation. We found very little effort was being made to collect funds from these people so as to reimburse the program and avoid giving completely free representation to those who were only partly eligible. Further study was needed to develop a system of partial representation or partial payment of counsel.

The CJA Review Committee made twenty-eight specific recommendations to improve the CJA program in its final report to the Judicial Conference of the United States. Key areas of attention included: selection, training, evaluation, and compensation of panel attorneys; establishment of new federal defender organizations and personnel practices involving defender organizations; CJA funding; and, administrative structure. The Committee's formal

recommendations pertaining to establishing eligibility standards for membership on the CJA panel and the development of an equal employment opportunity program were adopted by the Judicial Conference.

Other recommendations were:

- Additional training programs.
- Support services for panel attorneys in every district.
- Performance standards and reviews for panel attorneys.
- Increased compensation for panel attorneys to a level covering reasonable office overhead and fair fees.
- Compensation for a panel attorney's time spent on necessary and reasonable travel.
- Authorization for panel attorneys to use paralegals and law students, at reduced hourly rates, to assist in CJA representations.
- Prompt payment of panel attorneys, experts, and other providers of defense services.
- Absent fair compensation levels, indemnification of panel attorneys for civil malpractice and related actions arising from their CJA services.

With respect to federal defender organization and post-conviction defender organizations, the Review Committee recommended:

- Requiring the establishment of a federal defender organization in any district, or combination of districts, where it would be cost effective, where more than a specified number of CJA appointments are made annually, or where it is in the interests of effective representation.
- Monitoring equal employment opportunity in federal defender offices.
- Developing evaluation procedures to review attorney and staff performance in these organizations.
- Developing standards for managing a federal defender office.
- Examining the need for specific standards and procedures regarding the reappointment and removal of federal public defenders.
- Equalizing salaries in federal defender offices with comparable positions in the U.S. Attorneys' offices.
- Providing full funding for a program of freestanding, post-conviction defender organizations.

The Judicial Conference's final report, in most instances, concurred with the report of the CJA Review Committee, with one major exception. The Judicial Conference followed the suggestion of the Defender Services Committee (composed exclusively of judges) regarding the administrative structure of the program. The Review Committee recommended that an independent agency in the judiciary (to be known as The Center for Federal Criminal Defense Services) be established to administer the program nationally. It would be run by a board of directors with no judges and consist of only persons experienced in the defense of federal criminal cases. The

Committee felt that the judiciary should not exercise any significant control over the defense function. This recommendation was not accepted. Many Public Defenders opposed this recommendation as well. They had concerns that they would not have the political coverage they have while working within the Judicial Branch. While the Review Committee preferred a system with less judicial involvement the old process has continued and the program is overseen by a committee composed exclusively of judges that is part of the Judicial Conference of the United States.

Overall the report of the Review Committee proved to be a success in getting almost all of its recommendations implemented. Court appointed lawyers are for the most part adequately reimbursed for their expenses including expenses for investigative resources. There is training available to all attorneys accepting criminal appointments in federal courts. In short, we have made long strides toward making the system the best it can be.

Recently funding has been an issue for the program. Sequestration caused renewed discussions of the recommendation of the Review Committee that the CJA program have its own independent board. Sequestration and the responsive policies implemented by the Judicial Resources Committee caused defenders to furlough and lay off employees and panel attorneys faced both delayed payments and rate cuts. The Defender organizations lost four hundred positions, more than ten percent of the total staffing, including 145 lawyers. The furloughs cost defenders staff about 20,000 workdays. Also the hourly rates paid court appointed attorneys was reduced by $15 an hour for a period of six months.

Recent changes within the court administration system have also led to calls for reform. In the fall of 2012 the Executive Committee of the Judicial Conference voted to remove authority for determining the defender's staffing and budget from the Defender Services Committee and transfer that authority to the Judicial Resources Committee. This has the effect of treating the defense function the same as any other court unit, including pretrial services, probation, and the clerk's office.

It is the thinking of some that independence within the judiciary does not exist and the U.S. Court's primary goals diverge from the best interest of the program. Some argued that the function of Defender Services fundamentally is different from that of the probation or clerk's office or other court units. Those agencies were established to serve the Courts and the judges. Defender Services, on the other hand, is established to support the Sixth Amendment requirements to provide persons accused of crimes and who lack funds to hire an attorney. The Judicial Conference's primary purpose is to service judges and the Courts and, some argue, not the defense lawyers who represent a party in what is supposed to be a neutral setting. Emblematic of the third branch's response to the budget crunch and sequestration, the Office of Defender Services was demoted within the administrative structure of the Administrative Office of the United States Courts. Despite the financial impetus, many

defenders saw it as the Courts interfering in what should be an independent program with its own budget. They question whether the Courts can sincerely be their voice before Congress or whether there is conflict in their role to gain funding for the overall functioning of the Courts. In the struggle over, and sometimes competition for, federal dollars, some believe only defenders have an unmitigated interest in advocating for funds needed to provide zealous representation, just as only defenders have an unmitigated interest in representing those defendants in court. Others argue that the program cannot function totally outside of the Judiciary and that it is better for defender services to continue under the umbrella of the Courts who advocate for the program before Congress. The debate continues with no clear answer.

The Review Committee called for a review of the CJA every seven years. Nothing has been done since the report was handed up over twenty years ago. In that time much has changed. There are ever-increasing habeas corpus cases that are expensive to handle if done properly. There are increased immigration cases involving prior deportations that went without representation. In some jurisdictions persons convicted of illegal reentry plead guilty and are sentenced in hearings with as many as fifty defendants at a time. Mandatory sentences and sentencing guidelines have created a chilling effect on a defendant taking advantage of his Constitutional right to a trial. The prosecutor, through the guidelines, has been given a bigger role in the punishment phase of a trial. How an accused is charged can determine the punishment that will be imposed. This has caused the number of trials to decrease for fear of higher sentences dictated by the sentencing guidelines. Supreme Court decisions making guidelines advisory rather than mandatory as well as recent Department of Justice reforms have made this less of an issue. Nonetheless, judges are generally still following the guidelines. The Federal Criminal Code has expanded to include many crimes that were once primarily matters of state concern. And, Congress continues to parse criminal conduct by adding sentencing enhancements for variations of certain offenses, such as drug and weapons crimes. In 1963 over 50% of all federal defendants were charged with some type of property or fraud offense. Today, while only 15% are charged with property or fraud offenses, 73% of federal crimes charged involve drugs, immigration, or firearms offenses and in 1963 nearly 15% of federal cases went to trial. Today the number is 2.7% and the rate of pre-trial detention has doubled since 1963. In contrast to 1963 when around 70% of federal defendants were white, today the racial ratio has flipped and over 70% of all federal defendants are racial or ethnic minorities. The sentencing guidelines have required attorneys to become experts, not only in the guilt or innocence determination, but also in the punishment phase of the representation. Sentencing has become very technical. An attorney today must not only be skilled in trial advocacy in the rare event that his case goes to trial, but must also be a skilled counselor, negotiator, and mitigation investigator if he is to do his client service. Reports show that court appointed

attorneys are not taking advantage of resources made available to them and are not hiring experts and investigators to assist them in their cases.

In the 50 years since the *Gideon* opinion and the Allen Report were published, defendants in the federal courts have become poorer, disproportionately more Black and Hispanic, and subject to a system that affords them fewer trials and imposes more frequent, lengthier pretrial detention. The United States now imprisons one of every hundred of its adults, a rate surpassing every other country in the world.

While the Constitution guarantees representation in only criminal matters some have argued permanent deportation from the United States can in essence be a severe punishment. Many pro se habeas cases go without representation because, while involving criminal issues, they are considered civil matters and appointment of counsel is discretionary with the judges. The caseload has increased and funding is limited. For all these reasons, it is time for another review committee to take another hard look at where the CJA stands today and what, if any changes need to be made. The program has come a long way and is a model for other countries to follow. But, twenty years have elapse since the program was last reviewed and, in many areas, it fails to address the increasingly complex and consequential issues presented by the current criminal justice system. In short, it needs to evolve and respond to the pressing needs of today's justice system. It is therefore time to revisit the Act and explore how it can be improved.