

Remarks to Legal Services Corporation Board of Directors
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Welcome to Colorado! On a night like tonight, in a venue like this, I think you can understand why all of us here in Colorado have to be dragged away kicking and screaming, even for vacation. If the ocean touched any part of Colorado, in fact, we'd never set foot out of the state.

It is a great honor to appear before this distinguished group of people, dedicated as you all are to ensuring that the rule of law applies to all people in our society, no matter what their station. I particularly want to thank and express my appreciation to Jon Asher, the outstanding director of Colorado Legal Services, whom I am honored to call a friend.

798 years ago last month, the Magna Carta established that no man, even a king -- or in our constitutional system, a President -- is or should be above the law.

In a sense, the enterprise that all of you are engaged in is achieving the equal but converse principle -- that just as no person should be above the law, no person should be below it. In other words, no person should be so humble in their circumstances that the protection of law, in all its grandeur, passes over them without notice, effect or protection. That task, that enterprise, is every bit as large and as important a task as ensuring that the powerful are subject to law. And every bit as difficult. And that is why it is a particular honor for me to appear before people who are devoted to accomplishing it.

So you might well ask, what can a prosecutor meaningfully bring to the discussion of civil legal services for the poor and economically challenged? Well, I'd like to address that in two ways. First, with your indulgence, on a personal note; second, in my capacity as a prosecutor and a practitioner in the criminal law, where the poor and underprivileged are legion.

I'd also like to leave a few minutes for questions, as my experience is that every audience, no matter what the subject of my comments, wants to ask me about the state of federal marijuana enforcement in a state that has legalized marijuana.

First, let me speak on that personal level. My very first legal job was with Legal Services. While I was still in law school, just a few years after the Magna Carta was signed, I worked a summer for Alaska Legal Services in Barrow, a small Eskimo town on the very remote North Slope of Alaska.

It was an extraordinary experience, particularly as a first legal job. And it meant that my first legal case – not as a lawyer, but as a representative of a client in a legal dispute – was a case for a person with little or no economic resources. Let me describe that case, because I think it illustrates something relevant.

Down the coast of the Arctic Ocean to the east from Barrow is an Eskimo village, Kaktovik. There is no road into Kaktovik. But you can get supplies and heavy equipment there by barge or ship in the summer months when the ice is off the ocean.

During the winter of 1984, an Eskimo there had his Umiq – a walrus-skin, wooden framed boat -- run over and crushed in a snow bank by a tracked vehicle – a bulldozer. This was big deal – these Umiqs are hand-made family heirlooms used for subsistence hunting of whales. And you have to hunt and kill walruses to get the construction materials. In case you didn't know, walruses are really dangerous, particularly when you annoy them.

Now, as it turned out, there were only two tracked bulldozers in Kaktovik that winter; both Caterpillars – if I am recalling correctly, one was a D-9 model bulldozer, and the other a D-7. One was owned by an oil company, and one was owned by the state government. My first case assignment was to see if we could prove convincingly which machine had been the perpetrator. Without that, neither the oil company nor the state of Alaska was going to pay.

Fortunately, the two bulldozers are different sizes, and I hoped that meant they had different sized tracks. So, when I called the Alaska state trooper and asked for his accident report, I casually asked, sort of in passing, “Hey, could you tell from the track marks on the boat what model bulldozer it was?” He laughed and immediately said: “Oh, yeah, it was a D-9.” I, of course, thought I was the reincarnation of Sherlock Holmes – or at least, Columbo.

Armed with that State Patrol evidence, and a letter on Alaska Legal Services letterhead, we got the oil company to pay up to a person for whom that payment was a very big deal, both because of the vindication it represented, and also economically, because of his impoverished situation.

I am confident that after watching me have that experience, the Alaska Legal Services folks thought they had me for life. And you know, they did have me, but in a different way than they realized. I've never again worked as an employee of Legal Services. But I've been honored over the years to work with Legal Services lawyers and many different organizations providing legal services to the poor – Denver and Colorado have many strong programs doing that. And there is for me still a powerful emotional tie to the hard working and truly unsung heroes who make Legal Services work their career – their calling.

Now, I tell this story not just to show my personal connection to the task that you all have taken on – though I hope it does. The key point for our purposes today is broader: There was no private bar in Barrow, and no lawyers at all in Kaktovik. No private bar pro bono program

was going to provide legal help to this man for the destruction of his Umiag, or for any other legal problem.

Only the presence of a tiny Alaska Legal Services office in that far-off part of our country made a just resolution possible for this man. And while the geographical uniqueness of that setting may make the conclusion seem unique as well, in fact, it is not. In rural areas, small towns, and even in our largest cities all over this country, stories of this kind play out every day. Most poor people have no meaningful way to obtain legal help except by reaching out to a legal services office. Private bar pro bono projects, while enormously helpful, are not now, nor will they ever be, adequate by themselves to ensure that the poor and less privileged in our society have meaningful access to the machinery of the rule of law. Just as church soup kitchens – important though they are – will never by themselves solve the problem of hunger in our country, the private bar by its pro bono efforts alone cannot entirely solve the problem of access to justice in our law-driven society. We need the Legal Services Corporation and its lawyers, and we need the conduit to civil justice that Legal Services provides. Thank you for the work you do.

Let me turn now, with your permission, to some observations from the criminal justice world.

As I am sure everyone in this distinguished legal audience is very aware, 50 years ago, the United States Supreme Court decided in Gideon v. Wainwright that the Sixth Amendment requires that every defendant charged with a felony criminal offense must be provided with a lawyer if he or she is too poor to pay for one. As Justice Hugo Black, writing for a unanimous Supreme Court, succinctly and directly observed: “in our adversary system, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided to him.”

Justice Black was speaking of criminal trials -- the Sixth Amendment protects the rights of the criminally accused, and does not speak to the rights of parties in civil disputes. But as a practical matter – not a question of legal rights or the requirements of law – the words of Justice Black ring true, do they not, in the civil context as well? Who would argue against the reality that in a substantial civil matter, a person “haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial”? In civil cases, the imbalance of legal resources is often far greater than in our post-*Gideon* criminal system. I am not speaking here of what the Constitution requires, but the stubborn, practical facts on the ground.

But let me return to the criminal context. The promise of *Gideon* has been fulfilled in a patchwork and uneven way, which is to say, truly fulfilled in some states and courts, and not fulfilled meaningfully in some other locations. For example, the federal criminal justice system boasts an extraordinarily strong and effective public defender and CJA panel system. Without exaggeration in the slightest, I can tell you that we count many of our federal public defenders and CJA lawyers among our office’s most effective opponents in the courtroom. In fact, at times we cringe to see a criminal defendant scrape together money from relatives and friends

to hire an expensive private defense attorney who, in reality, is far less effective than the expert public defender that defendant was originally assigned. And that scenario plays out all the time, which speaks volumes about the very high quality of the federal public defenders here and around the country.

My focus is on the system I know best – the federal system – but I should add that some of the best criminal defense attorneys in Colorado, and elsewhere, are state public defenders. In the state systems, the caseload and burdens are higher and even more daunting.

But even the federal “gold star” public defender system is under thoughtless attack today. Indeed, although so-called federal budget sequestration has a strong adverse affect on my office – we have today a 10% prosecutor vacancy rate, and that is vacancy rate is likely to double to 20% or more over the next year unless something changes in the budget discussions – sequestration has disproportionately impacted the public defenders. Here in Colorado, although the Department of Justice has avoided furloughs in 2013, the Federal Defenders have not – they are essentially on furlough every Friday from April to September. And that has meant that the U.S. District Court has decreed that there will be no criminal hearings in that court on Friday. In other words, 20% of our available dates for the administration of federal criminal justice are now off the table as a direct result of those cuts to the public defenders.

I would note that I picked up the New York Times this morning to discover that the Times ran an editorial today on this very topic – so I commend that editorial to you.

I describe this federal criminal context, even though it is of course not what the Legal Services Corporation does, because it is such a simple and easily explained example of a system of government supported attorneys for the impoverished that is effective and efficient, and an essential component to a fair court and justice system. Far from “gumming up the works,” the public defender system in the federal courts makes possible the fair, efficient administration of criminal justice. If we starve that defender system, out of a penny-wise, pound-foolish conception that law enforcement needs full funding, but criminal defense does not, we will hamstring the full and fair enforcement of our criminal laws. And over time, public faith in the fairness of our criminal justice system will erode. In practice, I would submit that means the erosion of public faith in our system of government.

So, as a federal prosecutor, let me be on record advocating for and insisting upon the full and adequate funding of federal public defenders and federal CJA criminal defense panels. Effective enforcement of federal criminal law requires an effective system of criminal defense. But more importantly, justice and the rule of law require it. Just as no person is above the law, no person should be below the reach of its protection.

Now, of course, in the civil justice system Legal Services faces a far more complex set of issues, with far more nooks and specialty crannies. For that reason, among others, the efforts of the Colorado courts to provide “self-help” centers and on-line services for pro se litigants are clearly a forward-thinking step in the right direction. Colorado Legal Services itself has an

extensive website to assist litigants with forms and legal resources, something that I am sure is repeated in state Legal Services websites around the nation. Using technology to leverage the availability of legal assistance to all presents a huge opportunity.

But in the end, as Justice Black's simple words underscore, these advances in information technology cannot entirely replace having a real advocate, a real lawyer to provide real legal assistance in a difficult civil dispute. And just as in the criminal justice system, a breakdown in the availability of effective legal assistance in civil cases to the poor – and even the middle class -- over time can only have a corrosive effect on public faith in our system of justice. Already, all too many Americans see the courts as being a place where justice is bought by those who can afford the best lawyers.

But I am a great optimist on this subject, in part because of people like all of you here tonight. Every time a Legal Services lawyer successfully assists a client to win a legal dispute, he or she is fighting that jaded, cynical perception, and building up our system of government. To come back to where I started this evening, when my Eskimo client won his walrus-skin boat compensation from a huge multi-national oil company, I would like to think -- to paraphrase Bobby Kennedy -- that that small victory sent out a ripple of hope that, combining with countless other such small ripples sent out by Legal Services lawyers, helped sustain and build up the strength and justice of our system of courts and the very rule of law.

And that is why it is such a privilege for me to speak to you all today. Thank you for making the Legal Services Corporation a living, breathing reality. What you are doing not only helps define who we are today, but who we will be in the future. Thank you.