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## Panel Discussion - Stanley Kutler's Presentation

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## **Abstract**

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## Panel Discussion — Stanley Kutler's Presentation\*

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JUDGE DANIEL HURLEY: First, I want to thank you for the invitation to be here and for the opportunity to listen to Professor Kutler. It has been a pleasure.

I would like to discuss just two items. The first is Madison's view that the state courts could not provide adequate safeguards to protect the federal interest. As I thought about that and reflected on it, I think that history has validated Madison's belief. In saying this, I do not in any way wish to cast any type of aspersion upon my brothers and sisters who serve at the state level, and who take most seriously their oath to defend and protect both the state and federal constitutions. Even so, as we watch the way state judges are put in place—whether in Virginia where they are elected by the legislature, in New York where they are elected, or in Florida where we have a combination of appointment and election, we see an uneven patch-work quilt. And it is my belief that none of these state variations offers the type of protection found in the federal system which can insulate judges so that they are really able, when called upon in times of great stress, to protect the values and rights that are set forth in the Constitution. The one example that came to my mind as I sat and listened, occurred in the 1950s, '60s, and '70s. The judges of the old Fifth Circuit—such as Judge Tuttle, Judge Wisdom, and Judge Johnson, now serving on the Eleventh Circuit, people of that caliber—despite great public pressure and personal sacrifice, were willing, when called upon, to stand up and enforce the Constitution. It seems to me that Madison's concern was certainly proven to be true. Today, as ever before, we continue to need protection of our civil liberties by all levels of the Judiciary—especially by the federal bench which is appointed for life, and is thus removed from the stresses and strains of the day.

One other thought came to mind: Madison's concern that some-

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\* The panelists were Judge Daniel T.K. Hurley, Chief Judge, Fifteenth Judicial Circuit of Florida; Judge William Hoeveler, Judge, United States District Court for the Southern District; Melanie G. May, Partner, Bunnell and Wolfe, P.A., Fort Lauderdale, Fla; Stanley I. Kutler, E. Gordon Fox Professor of American Institutions, University of Wisconsin; Professor Lino A. Graglia, A. Dalton Cross Professor of Law, University of Texas; and Anthony Chase, Professor of law, Nova University Law Center.

thing be done to limit vexatious and superfluous appeals to the Supreme Court. A perfect example of this is the number of repetitive appeals in the death penalty cases. Irrespective of one's view as to whether there ought to be capital punishment, once the United States Supreme Court ruled that capital punishment is constitutional, there ought to be a reasonable and timely way to impose this punishment. All of us ought to be concerned as we watch a system literally turning upon itself. The Chief Justice's recent remarks to the American Bar Association underscore the problem. Thus, Madison's concern continues even today; indeed, we are still seeking a solution that does not sacrifice our responsibility to protect people's rights—that does not result in a rush to execution without a full review both at the state and federal level. On the other hand, we must go forward in a reasonable way so that the process does not feed upon itself with multiple courts dealing with the same issue at the same time in the last hour. The latter is not only vexatious and superfluous, but it also paints, for society, a picture of a system that is simply unable to respond to one of the most difficult problems that we asked our courts to resolve.

**JUDGE WILLIAM HOEVELER:** Perhaps I should open my brief comments by saying that if I were a state judge and were functioning in Broward County, I would either be recalled or voted down at the next election. I think some of you know what I am talking about. Perhaps that is the best current example I can think of for the independence of the federal judiciary.

I wonder whether the *Brown*<sup>1</sup> decision would have had been put to a vote in 1956. I have my doubts. The concern about prisoners in jail, for example, is a real concern today. We have had guidelines established for constitutional functioning of jails and prisons. There is a distinction between them. When a jail is operated in an admittedly unconstitutional fashion as they have been in Broward, Dade, and Monroe Counties—all of which I have the great luck to have in my division—we have to do something about it. Indeed, I am impressed with what Broward County has done. But when there is, as we have recently seen, a confrontation between the state and the federal authorities, something has to give. It is clear in which that direction that "give" must go. But you would be amazed at the reaction of the general public, mainly because they do not know the real situation. The venom that is expressed is a large basis. But fortunately, we are appointed for life,

<sup>1</sup> <https://nsuworks.nova.edu/nlr/vol14/iss1/14>

<sup>1</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

and I say that very seriously because there are movements, and there have been movements in the Congress, to change that. If any of you ever have anything to say about this in any capacity, I want to tell you that it is a most important part of the Judiciary Act.

We have to be in a position to determine whether or not the Constitution is being followed at any given time, rightly or wrongly—hopefully rightly in most cases. The Framers contemplated that we must be in a position to interpret as we see proper, based on the decisions that have gone before us. What are rarely spoken of by scholars and historians are the debates between the Federalists and Anti-Federalists, both before and after the Constitution was written, and before the first Congress, on whether the people then of America were sufficiently virtuous to be able to handle a federal republic. We do not have a democracy; we have a federal republic in the form of a democratic government. But that federal republic is essentially regulated by the people through its representatives. There was a lively debate at the time about whether or not the American people were really virtuous enough to do it. Franklin said, for example, when we become sufficiently unvirtuous to handle a republic, when we acquire the need for masters, then this form of government will end. Others at the time, including Washington, said the same thing.

There are times when the current interests of the public are not really consistent with the aims of the Constitution, though it is a marvelous document of genius in its perception of what would be needed in the future. But because of the Constitution's perception, we currently have only very minor examples, such as the jail cases which show the need for a federal court system. I would not wish a jail case on a state judge under the present circumstances; it is a no-win situation. He or she would be in for one term.

You might be interested in the history of Frank Johnson, previously mentioned by Judge Hurley, who suffered turmoil because of his judicial decisions. There was a time when, in his town, he could not get a golf game together with his friends. They would walk on the other side of the street as he would pass by. He was under marshal security for years. All of this resulted from his doing what he thought was right and what indeed was right. Most everyone today agrees it was right and was the proper thing to do under the Constitution of the United States. You do not have to point to too many examples to see the beauty of a judicial structure which does not invade the rights of the state. I think the system has worked very well over the years. Protecting the integrity of the Constitution, while it is in conflict with what the

public may think, is the right thing to do, even when it is in conflict with what the states may think is the right thing to do. For example, in the Orval Fabus and Arkansas/Little Rock school case<sup>2</sup>, there was a direct confrontation between the state interests and the United States government almost to a military standard. The same thing occurred in Mississippi during the college crisis. Fortunately, these problems have resolved themselves—hopefully, and I believe, all in the right direction. The beauty of this system is so clear to one who has been in the position of having to live within it and administer the Constitution. Even I worked on a popular case involving a Miami ordinance relating to cable television. It was not a particularly easy decision, but it was one that had to be made. You would have been surprised that at least one of the letters I got from a friend who suggested that if I could not do what was right, I ought to leave the judiciary. But that is the way it is, and that is the beauty of the life appointment in the federal system. I applaud it and hope you do to.

MELANIE MAY: I find myself, in following up the comments that have been made by this distinguished panel, to be somewhat like the moot court advocate who, after being berated with questions by the appellate judges on the panel, got the pen out of his pocket, and spoke into it, "Scotty beam me up." But I do have some comments that occurred to me during the presentation and I think the other panelists' comments may be coming from a little bit different perspective than mine, which is not from sitting as a judge but from being an advocate before these fine judges.

One comment that occurred to me was that both the Judiciary Act and the constitutional amendments are vague. Maybe the vague drafting was intentional; we have seen over the course of judicial history that these vague amendments have been allowed to be interpreted in ways that meet the needs of a particular society. Maybe that was the Framers' intent—to have it somewhat vague and open to interpretation so that the act or amendment does what it needs to do at the time it needs to be done.

I also found interesting so many of the comments regarding distance and having to have an appeal to a distant court. Today, it is no longer a problem for the Court to be in Washington, D.C., with Eastern Airline and Delta Airlines being available. It is no longer a problem, and so maybe that initial concern has really been alleviated by the

way society has evolved. I also note that these days one can rarely get to the Supreme Court, and the concerns about having a court always dictating to society seems superfluous in our present-day situation where one cannot get the Court to render a decision in one's case because there are so many cases and there are more limited restrictions on appealing to the Supreme Court. I think the state court systems and the federal court system have worked in conjunction with each other and have found ways to compliment each other. I know that in the state of Florida, if the federal courts and the Eleventh Circuit have a question that it believes involve state tort law, that court will ask the Supreme Court of Florida to decide the particular issue and that opinion can be used in deciding what needs to be done in that particular case.

I have seen in my own practice an issue that was previously decided by the United States Supreme Court many years ago in a case involving collateral estoppel. In that case, the court decided that mutuality of parties is no longer needed to be able to estop someone from asserting a particular position. For years, the federal courts have been able to determine, on an ad hoc basis, whether the parties have to be identical, and if not, whether someone can use a particular decision in a previous case against someone else. Florida, on the other hand, has continued to adhere to a minority position and has not allowed a party to exercise the doctrine of collateral estoppel. Therefore, the federal courts' position on this issue has not really affected Florida's position up to this point. And yet I have a case now in the Supreme Court of Florida in which I am asking the Florida courts to adopt the approach taken by the federal court system. So I think you can see that the two systems can work side by side even though they are not the same, yet often one court may provide a model for the other court which can then learn, from the experience of the former court, what is the best procedure. Hopefully, in the case now pending, we will see that the Florida Supreme Court follows the federal courts' approach to the use of that particular doctrine.

### Audience Questions and Comments

**AUDIENCE:** Do the different methods of becoming a judge—appointment or election—effect the judges' willingness to undertake an unpopular decision?

**STANLEY KUTLER:** By having the two systems that we have, we do have two independent models. Remember Justice Brandeis' comment

once about the courts and states being laboratories. The same thing is true in the judicial system. Judges, I think by nature, are conservative, and their institution, the judiciary, is conservative. Furthermore, by having separate systems there is an opportunity to see things develop in one system that might not have developed if we only had a unitary system across the country.

A classic example of that has been the idea of judicial qualifications commissions—disciplining bodies—because as in the state system, as we began to move more toward appointment, there was a recognition that one of the benefits of having elected judges is that their feet would not be firmly planted on the ground. The judges have to be answerable to somebody. We have seen times when clearly there can be abuses. They need to answer for their abuses; the ability to call someone to answer could really be a form of retribution. As we move toward appointed judges there was a belief that some process, short of the impeachment process which was regarded as a difficult process to get going, to discipline judges. So the discipline processes really developed at the state level across the country, and we have recently seen them enacted on the federal level. We are beginning to see that function, and that is a good thing.

Your question was whether the fact that judges are appointed or elected has something to do with their willingness to undertake an unpopular decision. I alluded to it earlier and I believe that state judges take very seriously their oath which is to enforce not only the state law, but the Constitution as well. Day in and day out, the most classic example is in the area of criminal law when courts are enforcing federal interpretations of the federal Constitution that may well result in the unpopular decision of suppressing evidence or of suppressing a prosecution, as judges sometimes do. They do it without hesitation. They do it because, in our society, there is a recognition that that is their job.

The example Judge Hoeveler mentioned is really an excellent one. It is when you get out there on the cutting edge, when you have a situation that is not understood or is simply held with disdain by the community at large. Judge Garrity up in Boston, who had the Boston school busing case, talked about riding the subway to work and having people literally move away from him, and having to have a marshall go with him because he was accosted on one occasion. I am not saying that there are no courageous state judges who would do it, I am convinced that there are but I agree with what Judge Hoeveler said, and they do serve one term. Everyone of our state trial judges today is subject to election at the end of a six year term. That is something can-



didly that I hope changes and changes fast. We have seen what was written about in Miami, and we have seen things that are happening in the election process, and it is not a good process. The transition is a slow one. But there has been a hesitancy to go with these appointments for life because of the feeling that we will loose "control over the judge." Now the question is, ought we to have that control? I think we ought not when we can have a disciplining body that can hold a judge accountable, if the judge is being intemperate in the courtroom or engages in other conduct that would subject him to discipline. It seems to me we ought to look at the federal model and realize how successful that has been, using that as an enriching model at the state level.

AUDIENCE: The previous administration and the present administration seem to move toward pulling the federal government out of the state issues. I am curious whether that would be the of battle Professor Kutler spoke—the battle concerning the necessary separation of federal and state judiciaries.

STANLEY KUTLER: I do not really expect there to be any fundamental change because while there is often ranting and raving about a particular focus opinion or decision, the fact is that within our scheme of things, we find the courts relatively useful for resolving problems that we cannot resolve politically. The judge mentioned *Brown v. Board of Education*,<sup>3</sup> and, basically, I think he is right. There would have been little change in the system of segregation through the normal political process. Could we have expected southern state legislators, prior to 1954, to have abrogated all the laws of segregation? There is no evidence that they had any intention of doing so. There was some movement by school boards who, by 1954, were facing the onslaught of the first of the baby boomers, suddenly realized the enormous costs of maintaining the dual system. The school board members being elected are not necessarily known for great acts of political courage, and they were skittish about this, and courts took them off the hook.

Could we have expected really malapportioned legislatures to have reformed themselves? In 1960-61, the Maryland legislature was debating the question of reapportionment. Some legislator, who came from an area where there were more cows than trees than people, said I will be God damned if I will reapportion myself out of a job. So you were not going to get any action.

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3. 347 U.S. 483 (1954).

AUDIENCE: The legislators do not decide whether the laws which they pass are constitutional, but they should consider the constitutionality of the law; we hope that the legislators are enlightened enough to pass only constitutional laws. But at the very least they should be passing a law because they think that is the will of the majority of the people that they represent. With that in mind, I do not know that it is the courts' place to continually strike down laws as unconstitutional.

KUTLER: You do not always have a situation where judges are disagreeing with legislators. We highlight decisions which strike down constitutionality. The fact is, the great flow involves agreement rather than disagreement. We tend politically and historically to highlight disagreement. So we go on day after day in concert with one another. There is more harmony than disharmony between the branches of government. There are obvious tensions built into the arrangement. As Brandeis once said, those tensions are good because they are another way of expressing James Madison's notion of imposing the second sense of the community on things. The Framers of the Constitution were simply not going to rely upon the impulse and tempering feelings of the moment. There were some values that were enduring that should be imposed.

LINO GRAGLIA: What do we have above and beyond the will of the people, and by whom should it be imposed? There is apparently some group—the judiciary—with a superior wisdom or knowledge that controls the people.

KUTLER: Judges make mistakes all the time. For example, when they were rendering decisions invalidating laws limiting bakers to 60 hours of work per week, I think they were wrong. There are some people, like Professor Graglia, who would still buy into *Lochner*.<sup>4</sup> Judges have decided wrongly.

GRAGLIA: Do you not know of the wonderful things Garrity has done in Boston? Did we not hear about that? Can you imagine that people did not want to play golf with him? Of course, they did not want to play golf with him. He was, as everyone recognizes now, destroying the school system. Another judge thinks that he knows how to run prisons. He finds that the Constitution *happens* to require that he order all things that he, in his insight, understands are the better things. It is a

4. *Lochner v. New York*, 198 U.S. 45 (1905).

good thing there are federal judges. How can we speak about Garrity or Frank Johnson, one of the inventors of affirmative action? Of course, Frank Johnson was running Alabama, not the elected people of Alabama. Was there reason to object to Frank Johnson? Of course there was.

HOVELER: Both views are current and expressed from time to time, and it is healthy that we have one; that is the real genius in the Constitution. Most questions that come to the federal court of the nature that you are discussing involve the Constitution. Whether they are well perceived or not does not depend on whether some groups bring the action. They come to the federal court because, whether it is 1983 or 1987, it is a pure constitutional question. Somebody thinks the Constitution is being violated. So this court that deals with people who think they know more than the legislature at times, and indeed they probably do at times, is faced with the problem of solving that question: look, for example, at *Roe v. Wade* and at civil rights cases. Are we going to let the people vote on the first amendment? I think not.

Federal judges interpret the law for the Constitution. We do not want the people over the law. That is the problem we have had in Broward County in the last several weeks: a sheriff who thinks himself higher than the law. Whether it is the law of Pompano Beach, the law of the federal court, or some other law, he is violating law—apparently because he thinks that is what the people want. And in this case the people really do not know the facts; are we going to let them control the situation? Absolutely not. Here is the answer to your question. Judges are often wrong. But there is a balance in our form of government that was designed 200 years ago, and it is a balance of genius. In most cases the legislation that is promulgated by states, and the federal congress is understood. In probably ninety-nine percent of the pieces of legislation that are promulgated, no one worries about it, no one bothers about it, and no one brings it before a federal court; but there has to be that balance. When the so-called popular will infringes on this Constitution of ours, there has to be somebody there to say so. That is what the federal court is there for: to say so.

Now, the courts are not always right. We had the *Brown* decision because the Supreme Court of 1954 reviewed the situation, and, in effect, said the Court was wrong and the public was right. There is nothing wrong with that; there is nothing wrong with progress. There is nothing wrong with the development of morality and whatever direction it is moving, hopefully in the better. But there has to be that balance, lest the executive and the legislative run away with this. Without

that balance, we would eventually not have a constitution, and this is a point that really disturbs me these days. We are seeing crisis legislation. Our crime problem is so bad in this country that the people are demanding what, in effect, is crisis legislation. And I want to tell you as citizens that if you do not watch it carefully, you are going to see your rights begin to diminish. You are going to see the fourth amendment begin to diminish, and you are going to see other rights diminish. Look at the new guidelines and see what they do; you are going to see cases of just terrible injustice because the Congress has said to the judges: you are not competent to exercise discretion—the people want this kind of sentence specified in the guidelines, and when you sentence, you have a discretionary range only as wide as the guidelines allow. I want to tell you that you had better watch it carefully because this Constitution of ours is in crisis—in danger of being diminished further and further; if we do not guard against it, that diminishment is going to happen. I that hope is a sufficient answer to what you say.

ANTHONY CHASE: I would like to make a quick observation. I think when judges defend a central role for judicial review, not claiming that it is never mistaken, but defending it as an institution, they sometimes seem to be engaged in self-pleading because that is how they see their role. They are bound up with that function in society. Sometimes, even when Americans defend judicial review, we could be seen as self-pleading, because obviously the United States has a more powerful tradition of an independent judiciary and judicial review than any other country we know of. In attending some of the international conferences that have been held recently at American universities however, I have seen that there is an inordinate interest among developing nations and among developed nations, in understanding judicial review—a more concrete bill of rights in England after the *Spy Catcher* case, bills introduced in the parliament to try and give an increasing function to individual rights and liberties in those countries. Without an independent judiciary, right or wrong, with all of its mistakes, including *Lochner*, *Dred Scott*, and the others, how are international human rights going to be put into effect in these countries? For those who are conservatives in this country and who often advocate original intent doctrines, one of the main targets of their criticism worldwide is the Soviet Union. Surely we all look at the Soviet Union today as a place where an independent judiciary and an increasing separation of the law from immediate domination by power is a step in the right direction. I think that to some extent we can look hopefully to the judgment that is being made of our institution, imperfect as it may be, by those abroad who

are seeking to create pluralistic, open, and libertarian societies. And that is something that goes beyond our own self-pleading.

### I. The Status—Subjectivity of impartiality

The history of the Court's impartiality is a long one. The first way in which the Court's impartiality was questioned was in the case of *Marbury v. Madison*. The Court's impartiality was questioned in the case of *Marbury v. Madison* because the Court's impartiality was questioned in the case of *Marbury v. Madison*. The Court's impartiality was questioned in the case of *Marbury v. Madison* because the Court's impartiality was questioned in the case of *Marbury v. Madison*.

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