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LEGAL SYMPOSIUM ON JUDGE RONALD N. DAVIES: ROLE OF JUDICIARY IN ENFORCING CITIZENS' RIGHTS

CHIEF JUSTICE GERALD W. VANDEWALLE*

I am pleased to be part of this panel concerning Judge Ronald Davies. I have a couple of Judge Davies stories I could tell, but you have heard better stories from those who preceded me on this panel and who, indeed, knew him better than I did. My personal relationship with the judge came primarily through Tom Gaughan, my law school classmate and Judge Davies' long time law clerk. On occasion when they were in Bismarck, we had dinner together and always at the Patterson Restaurant in the Patterson Hotel where I believe the judge usually stayed. I finally figured out the reason he wanted to have dinner with me was because he wanted to know what was going on in the state capitol from the political standpoint.

For those of us who knew him and for me who appeared before him on a limited number of occasions, this is a time to remember, to reflect, and to realize the impact Judge Davies made not only in the singular action he took at Little Rock, but what that action represented, and continues to represent, to those whose rights are being denied and to the judiciary whose role it is to enforce citizens' rights. As most of you know, my career before I became a judge was in the office of the North Dakota Attorney General. Interestingly, while government is created in part to protect the rights of our citizens, it is often government that is accused of curtailing those rights. In my years in the Attorney General's office, I represented law enforcement on occasion and had little reason to think about how we might look to someone on the outside. It was brought home to me several years ago in an article in the magazine published by the American Judicature Society, an organization formed to promote the effective administration of justice. The article was about United States Supreme Court Justices Felix Frankfurter and Stanley Reed during the time they served together on the United States Supreme Court from 1939 to 1957. The focus of the article was on how the individual justices influence one another on issues before the Court. The article pointed out that Justices Frankfurter and Reed had few ideological differences except in one area, police behavior, particularly in search and seizure cases. Justice Reed is quoted in the article as explaining his differences with Justice Frankfurter as follows:

*Chief Justice, North Dakota Supreme Court.

Do you know why Felix and I decide these search and seizure cases differently? . . . Well, when Felix was a young Jewish boy growing up in Vienna, there could be a knock on the door in the night. It could be a policeman coming to take him away. When I was a young boy, I grew up in Maysville, Ky. I had a white pony and I used to ride him down main street . . . and as I passed the main intersection, there was a policeman there and he would stop traffic for me. And as I passed, he would pat me on my golden curls. And when Felix thinks of a policeman, he thinks of a knock on the door in the middle of the night, and when I think of a policeman, I think of the policeman stopping traffic for me and patting me on my curls.¹

That article remains with me today, not only with regard to how citizens view police officers but as to how they view the courts as the protectors or the destroyers of their rights as citizens.

One of the most moving, but chilling, programs I have seen is the one sponsored by the United States Holocaust Memorial Museum entitled “Law, Justice, and the Holocaust: How the Courts Failed Germany.” The program has been presented widely, including to the Conference of Chief Justices and to the Appellate Court Clerks Conference. It challenges us, as judges, to examine our roles and responsibilities by studying the decision-making, the opportunities, and, often, the failures of the judges in Germany that helped lead to mass murder. It does so by using legal decrees, judicial opinions, and the case law of the period to study the role of judges in destroying democracy and establishing Nazi Germany. It points out that judges, especially, were among the few inside Germany who could have challenged the laws restricting civil rights and guarantees of property, but the overwhelming majority of judges did not do so. Instead, most judges not only upheld the law, but they interpreted it broadly to help, rather than hinder, the Nazis’ agenda.

The program is the framework for a debate on the role of the judiciary in the United States today and poses several questions: What is the responsibility of judges to the legal system as a whole? What have been the challenges to a fair and impartial administration of justice in the United States? What can judges do to ensure that the kind of failures that led to the Holocaust do not happen in this country? The program does not directly answer the questions, but it encourages the participants to engage in a process of examining our roles as judges, what is happening in this country

1. Bradley C. Canon et al., *Justice Frankfurter and Justice Reed: Friendship and Lobbying on the Court*, 78 JUDICATURE 224, 226 (1995).

that might lead to something similar to Nazi Germany, and what can we, or more significantly, what should we do about it.

I will discuss some things that concern me about the effect of the judiciary. Before I do so, however, allow me one observation. We most often think of protection of civil rights in the context of government intrusion on those rights, and indeed, the Declaration of Independence and the Bill of Rights reflect that thinking. But, as we have heard before, the Constitution also protects the rights of the minority against the encroachment of those rights by the majority. There are, in fact, times when it is government that must protect the rights of its citizens from other, nongovernmental forces that would trample on those rights. When we think of Little Rock, we think of the federal government, Judge Ronald Davies, presiding and confronting the state government with Orville Faubus as Governor. But I submit it was the mobs and the masses that were the forces with which to be reckoned. The history of the South is full of stories of the Ku Klux Klan and its reign of terror. There are even stories of the Klan in North Dakota, and one of the interesting tidbits found in the recorded interviews and papers of Judge Davies is that in a college class, he had to defend the Ku Klux Klan. In the interview, he noted that while he won, he was opposed to the Klan as a Catholic and in a race for municipal judge, he defeated a Klansman for the position.

I am indebted to Ted Smith, the North Dakota Supreme Court librarian, who examined many of the Davies papers at the University of North Dakota and the interviews of the State Historical Society. I wish I had the time to thoroughly examine those papers. They are wonderfully interesting, including Judge Davies' comments on some of the luminaries and dignitaries of his time. Another interesting fact I discovered, and I should have known but did not, is that it was also North Dakota's own Charles Vogel who, as a judge on the Eighth Circuit, wrote the opinion that started the wheels in motion for the integration of Central High School in Little Rock when Judge Vogel and two other judges ruled in favor of the Little Rock School District to implement a gradual plan of integration that an Arkansas State Court had previously enjoined.²

But, back to some of the events in our country today that diminish or have the potential to diminish the judiciary's ability to protect citizens' rights. Without having the time to examine them in depth, let me comment on a few:

2. *See generally* Aaron v. Cooper, 243 F.2d 361 (8th Cir. 1957).

1. Lack of Resources. The North Dakota judicial system, while far from flush, is adequately funded, but that is not so for most of the state courts. They are cancelling jury trials, and access to justice is being denied.

2. Politicization of the Judiciary. I use this phrase in a broad sense. Judicial selection is not an issue to date in North Dakota, but it has become a scandal nationwide; money spent on elections, promises, etc.

3. Method of Selection. Another interesting tidbit found in the Davies papers was Judge Davies' view on judicial appointments. He did not believe that a single person should appoint, even though he was a product of that system; he rather favored a seven-person selection committee to make recommendations on the selection of federal judges.

How do we select judges? Lifetime appointment, partisan election, no party election, appointment with retention election, election by the legislature. I was dumbfounded to learn that in two states in this country, Virginia and South Carolina, the state judges are elected by the legislature.

Even in those states with nominating committees such as North Dakota, disputes arise as to the composition of those committees. The United States Supreme Court has said that, in the states that elect judges, judges can make promises and pledges when they are campaigning for office;³ they are allowed to spend substantial money on elections including retention elections.⁴

I fear the quality of persons seeking judicial posts is going to be affected by some of these nationwide conditions. Again, as I said, North Dakota to date has been left out of such influence, but I am concerned of what might happen in the future. There is no perfect method of selecting judges. I recognize the federal judges have lifetime appointments. Some say that is the best method; others say that is not the best method. Whether it is, or not, it is not going to happen in North Dakota.

4. Separation of Powers. Another issue that I really have concern with, and other panelists have touched on it a little bit, is the separation of powers. The blurring of lines among the various divisions of government is a threat to the judiciary. The United States Supreme Court seems to believe that judges are like legislators and sometimes we do act like legislators. Social justice issues that are better left to the legislative and executive branches are now being brought to the judicial branch and judges are succumbing to the temptation to decide those cases. Is it any wonder that

3. See *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding a state statute prohibiting judicial candidates from announcing views on legal and political issues violates the First Amendment).

4. See *Wersal v. Sexton*, 613 F.3d 821, 838-42 (8th Cir. 2010) (*rev'd en banc* 2012 WL 996921 (8th Cir. Mar. 27, 2012)).

the United States Supreme Court said that judges are like other elected officials, that the citizens consider courts as mini-legislatures? Just a little anecdote: Several years ago, a lawyer was arguing before the North Dakota Supreme Court in Bismarck and I asked him the question, “Isn’t this properly before the legislature?” He said, “Well, we tried that and they turned us down, so we thought we would come down the hall and come to you.” And he said it without trying to be funny about it. He was serious.

5. Respect for the Judiciary. Respect for the judiciary, at least for judicial decisions, is essential, and there are persons who disagree with the philosophy of a judge and attempt to reduce the judge’s credibility in order to destroy that respect not only for the judge, but for the judicial decisions, as well. Public Radio had a story on this subject recently, which quoted Professor Stephen Gillers, a New York University law professor and legal ethicist, who spoke to the North Dakota Bar Association’s annual meeting in 2010 and is a friend and colleague on the ABA Ethics 20/20 Commission. The story included Gillers’ comments that the United States Supreme Court is being buffeted by special interest groups over ethics questions because these groups “perceive, with some justification, that the [C]ourt’s overall credibility is in play”⁵ and that their purpose is “to undermine the credibility of the decision, whichever way it goes.”⁶ That view is supported by Harvard law professor and Supreme Court historian, Noah Feldman, who says both the left and the right have used ethics as a tool for delegitimizing the opposition. “[I]f you can say the justice is unethical, then you’ve switched the conversation in a way that can sometimes be politically powerful.”⁷ It does not bode well for judges generally as some of that type of advocacy is filtering down to the lower federal courts and even into the state courts.

In closing, I would like to share with you some of the interesting items that Mr. Smith found in the Davies papers and interviews that illustrate how well Judge Davies understood his role in protecting the rights of citizens. It is a letter Judge Davies personally received from a female juror:

Sir:-

Your decision on the case of the Alcatraz Indians has restored my faith in the governmental processes of our country. I wish you could restore my faith in myself.

5. Nina Totenberg, *Bill Puts Ethics Spotlight on Supreme Court Justices*, 88.7 KUHF FM NEWS (Aug. 17, 2011), <http://app1.kuhf.org/articles/npr1313439520-Bill-Puts-Ethics-Spotlight-On-Supreme-Court-Justices.html>.

6. *Id.*

7. *Id.*

I regret to say that I was a part of the jury hearing the case and was the only juror who believed the Indians not guilty (by reason of the governmental inaction which led them to believe their position was secure); but to my shame lacked the confidence to cause a hung jury.

I have been overcome with grief and remorse at the thought that I had become an accomplice to the immoral manipulation of these three unwary men.

Now—having just heard your judgment on the case—I bless you from the bottom of my heart for the infinite wisdom and justice with which you have viewed their case.⁸

Judge Davies wrote a response to her:

Dear Mrs. Offutt:

Your letter of March 1, 1972, was forwarded to me here in Fargo, since I concluded my work in San Francisco the same day.

Unfortunately, I did not receive it until recently for the reason that after leaving Northern California Mrs. Davies and I went to the Los Angeles area to visit one of our daughters, which accounts for the seeming delay in responding to you.

Mrs. Offutt, it is wholly unnecessary for you to feel that anyone need restore your faith in yourself. However painful it may have been, you did your duty in the best tradition of United States jurors.

You will note that I did not in any manner criticize the jury. It has never been my custom to criticize a jury after rendition of verdict, but in view of the fact that you seem very much upset, may I say that I think the jury verdict was technically correct.

My own observations thereafter, carried in the press, to which you referred, were my personal views based upon the entire trial, and of course, I adhere to them now.

You need not reproach yourself in any manner, Mrs. Offutt, and I just thank the good Lord that in this great country of ours we have people like you, who take their oaths seriously and strive, just as we do on the bench, to do basic justice to all of our citizens.⁹

8. Letter from Helen B. Offutt to the Honorable Ronald N. Davies, Visiting Justice, Fed. Dist. Court of S.F. (Mar. 1, 1972).

9. Letter from the Honorable Ronald N. Davies, U.S. Dist. Judge, to Mrs. C.Y. Offutt (Mar. 23, 1972).

A newspaper article discussed the case and had this to say about Judge Davies' comments:

In imposing sentence, Federal Judge Ronald N. Davies of Fargo, N.D., criticized the U.S. Government's handling of the Indian occupation and rejected a prosecution plea for a jail term for the three.

Judge Davies commented: "I think the officials of the U.S. Government, in many areas, handled the whole Alcatraz situation very badly. They vacillated. They couldn't make up their minds.

"With the course of conduct of certain officials, there is a very great possibility that these men may have thought they had a right to this property," said the judge who presided at the four-day trial.¹⁰

There are also a couple comments from stories in Newsweek and Time that have been referenced, and I could not help but try to pin them down to the Judge Davies I knew. I think they fit him pretty well. One of the comments from Newsweek says, "He does not suffer fools; he does not scare, and he has a quality, when you are talking to him, that makes his height a matter of no consequence at all."¹¹ And another comment in the article says "'[a]s a judge,' a friend of his reminisced last week, 'he was scrupulously fair, except if a close friend came up in front of him. Then he was murder. I'm damned glad I never was arrested; he would have thrown the book at me.'"¹² And one other comment from Time: "'There's no one I'd rather have with me on a camping trip,' says a friend, 'but I'd take any other judge in the state if I were in court and guilty.'"¹³ There is no doubt in my mind that Judge Davies knew how to handle this situation and what his role was in protecting the rights of the individuals, the rights of citizens of this country.

I'm delighted to be part of this tribute. Thank you for your attention.

10. *3 Indians Get Probation In Alcatraz Island Theft*, OAKLAND TRIB., Mar. 2, 1972, at 34E.

11. *The Judge from Dakota: He Wouldn't Crack*, NEWSWEEK, Sept. 23, 1957, at 34.

12. *Id.*

13. *Visiting Judge in Little Rock: "I'm Just One of a Couple of Hundred"*, TIME MAG., Sept. 30, 1957, at 13.