Judge Edelen's Address to the Students of the College of Law of the University of Kentucky (concluded)

Judge Edelen

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In my judgment, a clear definition of the powers of government is the only safeguard at present needed to prevent encroachment by one branch of the government upon the others. In a people manifesting such widespread intelligence and universal patriotism, usurpation of power does not rise generally from a conscious purpose on the part of the usurper, so much as it does from a vague conception of his own rights and duties. I do not feel that any apology is due in a company of lawyers, for asking them to take up with me frankly for a few minutes, some fundamental principles of government, which, notwithstanding their elementary character, seem to have been ignored or forgotten. I am going to ask you in the few minutes allowed me for this address, to go over briefly some limitations imposed by the constitution upon the judiciary, with a view to providing some solution for the unfortunate differences of opinion, to which I have referred. I say unfortunate, but really all sharp discussions of questions of law or questions of statesmanship, result ultimately in the correct solution of the problems involved. Let me illustrate: You see two of our learned profession presenting a case in court. They contend apparently for conflicting views. Note how carefully they examine the witnesses and sift the accuracy of their testimony by cross-examination. Observe how profoundly they argue to the court the principles of law applicable to the case, and then listen to their arguments to the jury. You would think them intellectual gladiators thirsty for each other's blood. But note the outcome; out of the lust of battle emerges God's truth and the more thorough the strife and skillful the combatants, the surer is the issue to mark the eternal justice of the case.

Justice as rarely emerges from ex parte proceedings as truth blossoms in an affidavit.
In order to determine just how far judicial power was conferred and limited by the original constitutions of the colonies, it will be necessary very briefly to undertake to get the colonial viewpoint. It is very hard for us in this twentieth century to realize the conditions which confronted the thirteen struggling colonies at the time when they made their stand for liberty against the tyranny of George III. It is very much our habit, inculcated by Mr. Jefferson's masterly indictment against that sovereign, to think that the conditions which resulted in the severance of the colonies from the mother country, arose in some way from usurpations by the King and resulted in a personal protest against him. While it is true that much of the hardship under which the colonies labored was traceable directly to the exercise of power by that sovereign, which a wise monarch would have allowed to lie dormant, students of history will recognize the fact, that the so-called abuses of power, were not always abuses, but were in the main in the line of recognized powers of the British sovereign, and that many of the counts in the indictment drawn against him by Mr. Jefferson, were demurrable from the standpoint of the lawyer, however sound they were from the standpoint of the statesman.

The English Parliament has been characterized by an old lawyer of recognized standing, as "the highest and most honorable and absolute court of justice in England." The House of Lords not only sits as the highest Court of Appeals in Great Britain, presided over by the chief law lord of the government but it was within the recognized jurisdiction of that body to try as a court of original jurisdiction, issues of fact when its members were indicted for felony. The Parliament had further jurisdiction to hear and determine upon petition, any grievance presented to it, although such hearing might involve the ascertainment of facts and the creation of law applicable to those facts. When a subject presented to Parliament a grievance by petition, if the petitioner satisfied that honorable body that he was entitled to some relief, but that there was no antecedent law applicable to his case they granted him the relief, and the law enacted for that purpose was called a private act; and this, although the courts may have rendered judgment against the validity of his claim. Sovereignty could go no further. Summoning, proroguing and dissolving this omnipotent body was within the sovereign will of the King himself. When the body met, the King in person or through the mouth of his Lord Chancellor, the keeper of his conscience, opened the sitting with an address outlining to the body the legislation he deemed desirable. The
King was an integral member of the Parliament. A statute passed in the twelfth and thirteenth of Charles II., immediately after the restoration, made it highly penal for any one to affirm that the Parliament could enact a law without the concurrence of the King. He exercised a veto power upon the Commons' selection of a presiding officer. So apprehensive was this sovereign body, that its action might transcend legislative power, though how it could do so is well-nigh inconceivable, that a notice went to the Judges of the highest courts of justice, commanding their attendance as counselors at law. In this body thus constituted, was vested the sovereignty of the English people. Whatever of greatness makes the English name illustrious, must be credited in its ultimate analysis, to the efficiency of this organization, framed as a representative of the British sovereignty. Wisdom of a high character has been manifested times and ways without number in the crisis of English history by this body; and yet, with the power which the constitution of Great Britain vests in the existing sovereign, it must be admitted that there was a corresponding responsibility, which in the hands of a bad sovereign made a despotism of the most crying sort. Indeed the greatness of the English nation and its love of liberty are most manifested in their self-restraint, in refusing to permit the King to use the instrumentalities of tyranny which lay ready-made at his hands. I venture the suggestion in passing, that the high measure of liberty now enjoyed by the English people has arisen from the fact that for over sixty-three years the reins of government were in the hands of a woman with no inclination to tyranny and not in the hands of a sovereign whose impulse was to the exercise of arbitrary power.

All that is material, however, for my present purpose, is to invite your attention to the fact that at the time of the revolution the English Parliament embodied in itself supreme executive, legislative and judicial functions. There was absolutely no effective separation, and no court could decide a case between individuals without a knowledge that its judgment might be set aside by the House of Lords, by appeal or writ of error, or by the Parliament itself by a petition presented to that body by the losing litigant. If the House of Lords should prove recalcitrant, it was within the power of the sovereign, by the creation of new peers, whose opinions were known in advance, to control the concurrence of that body in any legislation pending before Parliament itself. And it is a well-known fact that more than once in the last hundred years, measures of reform coming from the House of Commons, were
forced through the House of Lords by a threat of the exercise of this very power. We are in the habit of saying that the English government secures for its citizens the very highest human liberty; but the liberty which is the birthright of the English people, finds its roots in the English character, and not in the possibilities deducible from the English constitution itself.

So much for the English Parliament as it existed in 1775.

With such an object lesson before them—a government which however limited in theory lent itself practically in the hands of an unscrupulous or tyrannical monarch to oppressions of the most serious kind—the colonists betook themselves to the task of framing governments for their own control, which would remove from any central power, the opportunity or possibility of tyranny. The formation of the individual governments of the colonies was a protest against the tyranny exercised by the English sovereign under the forms of law which were made possible by the constitution which I have just been sketching. In order to guard each individual government of the American states, the wise statesmen of that day created constitutions with declarations of rights, which served a double purpose: First, as a protest against the form of government which had made tyranny possible; and, second, to guard against the possibility of any such result in the future.

They say that to accomplish such a result, it was necessary to divorce absolutely the three functions of government, and to lodge each in a separate board of magistracy and to prevent each board from exercising the functions which properly belonged to the other. Of the thirteen original colonies, at least seven had in their constitutions a declaration that the powers of government, legislative, executive and judicial, should be maintained as separate and distinct powers exercised by separate bodies, and that neither should exercise the functions properly belonging to the other. Of the other six, including your own state, the same principle was clearly deducible from the instrument, though not so specifically declared.

The first state to lead off in this new constructive statesmanship was the Old Dominion. A convention of burgesses composed of forty-five members met at Williamsburgh on the 6th of May, 1776, and adopted a declaration of rights on the 12th of June, and the same body framed a constitution which was adopted on the 29th of June, 1776, six days before the Declaration of Independence. I shall not take up and define specifically the effect which this provision of the constitution had upon the several functions of government, the law-making, the law-enforcing and the law-construing;
but I want to ask you to consider what effect this provision of the constitution had upon the judiciary.

For over a hundred years the state and national governments have been operated as if the several functions of government were antagonistic; as if each was seeking to grasp for the possession of power at the expense of the other.

In short, the idea seems to have crystallized in the minds of the publicists, that in some way there is a conflict between the several powers of government, resulting in an equilibrium unstable in character, which changes from generation to generation as the one or other of these functions of government may be stronger or more aggressive.

No such conflict exists.

Before attempting to define judicial power in terms of the constitution, I am going to ask you to transport yourselves, without any change in your modern habits of thought, to a period one hundred and thirty-seven years ago. In doing so, you will forget Marbury v. Madison, and all the great judicial pamphlets, which came from the master mind of the great Chief-Justice, and deal with the constitutions exactly as you find them, without any preconception, except such as is necessarily bound up in the accumulated wisdom of more than one and a third centuries.

Let me in passing give you what impresses me as an interesting historical fact. We had in Kentucky in the latter years of the eighteenth century, a political club of some note, which held its sessions at Danville, Kentucky. Before the adoption of the constitution of the United States, and while Kentucky was still a part of Virginia, the paymaster of the Continental Army was passing through Danville on his way to Louisville. He was assigned a room at the tavern adjoining that in which this political club was holding its regular session. The subject for debate on the night in question was whether an act of the legislature in violation of the constitution, was, or was not law. The debate became so heated that the traveler found himself unable to sleep. The conclusion reached by this political club was that such an act was not law. Two of the members of this club subsequently became Judges of the Court of Appeals of Kentucky, and in the first volume of official reports may be found at least three cases in which an act of the legislature was declared unconstitutional and, therefore, void. This was before the elaborate dictum of Chief Justice Marshall in Marbury v. Madison.

No one, I imagine, can doubt the absolutely logical conclusion
reached by Chief-Justice Marshall, and it is equally true that no lawyer doubts that the conclusion reached in that particular case, was entirely outside of the decision, because having reached the conclusion that the court had no jurisdiction, under all legal principles, that was the end of that litigation. Following this master decision are innumerable judicial utterances to the same effect until the profession has been swamped with the overwhelming demonstration that the constitution is of paramount obligation which no one doubts, and that the courts are the ultimate arbiters of all the functions of government.

Let us weigh this latter contention.

An examination of the constitution of any state, will disclose the fact that the restraints imposed by it, may be classified generally under two heads: first, those provisions whose purpose is to conserve human rights, or individual liberty; and, second, those provisions which are administrative in character, and whose purpose is to secure the orderly administration of the government itself. Provisions of the second character are generally addressed to that board of magistracy whose conduct is to be affected thereby. Let me illustrate from your constitution of 1873 which contains a declaration of rights in twenty-six sections, all of which are declared to be "general, great and essential principles of liberty" and "excepted out of the general powers of government." I am using the constitution of 1873 instead of that of 1776, because the affirmative declarations are a little clearer, though the meaning is the same. In excepting these provisions out of the general powers of government, the people expressly reserve them from being dealt with by the General Assembly. It is too plain for serious discussion that any attempt to deprive one of your citizens of any of these rights by any legislative action, would be beyond any power conferred by the people upon that body. Any forcible attempt by a public official to interfere with any of these rights or to violate any of the restrictions therein contained, under the guise of a nominal statute would be an individual aggression of the person attempting it, and might be accordingly resisted by any means recognized by law. Neither the person affected nor any court, to which he might appeal, would be bound to recognize the validity of any such nominal statute, because having been "excepted out of the general powers of government," such an act would be unconstitutional and the violation of such reserved right would be justifiable.

On the other hand, take an illustration of an administrative
Your General Assembly is forbidden by Section 2 of Article 3, from considering a bill until the same has been committed and printed. Manifestly a bill passed without commitment and printing would be a violation of the instrument, but could its unconstitutionality be adjudged by the courts? I submit it could not, because its unconstitutionality depends upon the existence of conditions, the ascertainment of which in the ordinary, orderly course of business, is to be had by the board whose power it is to act when the condition exists. It is not, therefore, justiciable. The solemn farce of a Judge summoning as witnesses, the members of a co-ordinate branch of government and cross-examining them as to their dereliction of duty, would be a spectacle for gods and men. Again, we find that your constitution enjoins upon the Governor the duty of appointing a Secretary of State. Would a mandamus lie to compel executive action? The refusal to act would be a distinct violation of the instrument, but such refusal, I submit, would not be justiciable. Take an illustration from my own state: Section 118 of our constitution provides that "the court shall prescribe by rule that petitions for rehearing shall be considered by a Judge who did not deliver the opinion in the case." But how may this provision be enforced? A court cannot be impeached, nor addressed from office, although its Judges may be. The duty imposed upon the court is one whose enforcement depends for its sanction upon the oath of office of the separate Judges, and the refusal to enact such a rule, while a distinct violation of the constitution, would not be justiciable. Take one other illustration: By the provisions of our own constitution, the General Assembly is required to enact a law prohibiting state officials from riding on passes, and providing penalties therefor. Our constitution has been in force for over twenty-two years, but no such law has yet been enacted. A sin of omission, no matter how strong the violated command may be, is not justiciable. More mandates of the constitution find their exclusive sanction in the oath office than in the decrees of the courts. Where does the line lie between the justiciable and the non-justiciable violation of the constitution? Section 26 of our constitution, as Article 1 of yours, defines exactly where it lies. When the people in whom rests sovereign power declare certain fundamental rights and then say that all laws contrary thereto are void, or that the enumerated rights are "excepted out of the general powers of government," then under the familiar rule of exclusion, enactments infringing other provisions are not void, but the recalcitrant servant is left to be dealt with by his master and
by the scourge of his own conscience. One side lie infringements which are justiciable, on the other, those enforceable solely by a just responsibility to the people and by a conscientious regard for the oath of office. The danger of courts overlooking this distinction is one which arises from the high character of the members of the court itself. It is extremely difficult for a Judge who is conscious of his own integrity of purpose, to realize that the legislative power may be equally conscientious and equally intelligent, and when there comes before him an act, which to him seems unjust or a usurpation, he is very apt to declare it unconstitutional, although in so doing he may be guilty of unconscious usurpation himself. I have noticed along this line that those Judges who are most willing to declare in favor of their own jurisdiction, and are most willing to declare acts unconstitutional, are among that class of Judges who are most upright and conscientious.

Much has been said in these latter days about Judges setting aside acts of the legislature because such acts violate the constitution. The form in which the criticism is cast shows a lack of clearness of thought, which is not a credit to the critics. In no true and proper sense does a Judge ever set aside an act of the legislature. When a specific act of the legislature constitutes a link in the plaintiff's cause of action, or the defendant's defense against a cause of action, it is the duty of the court to determine whether the link is sound or a broken one.

Further, I think a slavish adherence to the doctrine of stare decisis with its correlative solecism of overruling decisions is an assumption of legislative power by the courts.

First let me analyze this as an elementary proposition and then illustrate it historically.

In reaching any legal judgment, two elements concur to produce the more or less logical sequitur. There are, one, the rule of law supposed by the court and counsel to underlie the particular lawsuit; and, second, the facts which seem to bring this particular case within the rule of law invoked. The facts relied on to bring the case within the principle of law, are made to appear to the court, either by the testimony of witnesses, by written memorials, or by the general matters of fact, so well known that the court will treat them as true, without the introduction of any evidence at all. So much of the issue of fact as depends upon the testimony of witnesses, is in the nature of things, more or less uncertain. The probative effect of the testimony of any witness depends in its final analysis upon two things, the accuracy of his observation, and his
truthfulness in making the result of that observation known to the tribunal trying the fact. Turning on the other hand, to the question of law, we see that questions of law are tried by the court. Now how does the court reach a conclusion upon a question of law? In a manner exactly analogous to that which obtains in ascertaining facts, viz., by the examination of witnesses.

As in ascertaining facts the probative weight of the witnesses depends first, upon the accuracy of observation, and second, upon the truthfulness in making the result of that observation manifest, so every Judge, or text-writer, or lecturer, or professor, who undertakes to declare a legal principle, does so, with such persuasive effect, as comes from these two things, accuracy of observation, and frankness in telling the result of the observation. They are expert witnesses, no more, no less. A Judge who has had long service on the bench, who has been studious, diligent and just, is a more valuable witness to the legal principles involved in a lawsuit, precisely to the same extent and in the same way as he would be, were he testifying to the facts instead of testifying to the law. The testimony of Chief-Justice Shaw upon a matter of law, is entitled to the same weight in the trial of a lawsuit, as the testimony of any other Judge of equal learning and of equal frankness, no more, no less. The weight of the opinion of any lawyer, whether he wear the doctor's gown, the Judge's toga, or the ordinary garb of the counselor, varies from day to day as the knowledge he acquires in his profession ripens into wisdom, and this without regard to the question, whether he is a mere practitioner, a professor, or a Judge of the highest court of the state. I submit there is no artificial weight to be given to a judicial utterance, merely because the lawyer who makes the utterance happens to occupy a judicial position. It is not wearing the judicial ermine, but the ability to recognize the nuances shading a legal principle which differentiates the great from the ordinary lawyers; somewhat as the soul of music lurks in the overtones.

What I wish to insist on is this, that the probative effect of any utterance declaring a legal principle, is to be tested by the two underlying elements, first, accuracy of observation; and, second, truthfulness in making known the result of that observation, and this whether the witness be a Judge, or a mere lawyer. Whenever the Judge of a court in delivering an opinion, goes beyond the conclusion required by the pending litigation in the attempt to demonstrate the accuracy of his own judgment, he creates protoplasm, from which the most lucrative lawsuits are evolved.
I think it may safely be asserted that the doctrine of stare decisis is a declaration that there exists in the courts at least a shred of lawmaking power, which should not be looked for in government, which builds its structures upon the absolute separation of the three functions of government. In England the doctrine of stare decisis presents no solecism, while in America the solecism is quite apparent. The reason so often given for imputing to judicial utterances a lawmaking effect that the community at large depends upon such utterances in making their contracts, is arguing in a circle. If the community at large would recognize the fact that a judicial utterance does not prescribe a rule of law, they would by that same token cease to impute such authority to judicial utterances and the supposed injustice would utterly vanish. Unless a judicial decision makes law, counselors would not hesitate to say so, and the public will cease to build their fortunes upon the sand and will build them upon the rock of legal principle. The traveler in the desert who sees the oasis through his fever-heated eyes, might just as readily claim that he had been cheated, as the investor who lays out his money upon what a judge supposes he sees rather than upon the eternal principles of justice, which underlie, or should underlie, the relation of man to his fellowman. Does the doctrine of stare decisis make for certainty of the law? It does not. The law does not derive its vitality from the utterance of the judge who determines a given litigation, but he determines that litigation according to antecedently existing legal principles. These legal principles represent either legislative rules, or those principles of common justice and morality which commend themselves to the enlightened conscience of the judiciary. The rule of stare decisis assumes that the finding of the court in any given case, either makes a rule of law, or conclusively finds the facts in such a way that a status is created which binds the world. In no other way can we understand the word "authority" so used.

I wish I could impress upon my brethren of the bar, the idea that the doctrine of stare decisis is not only unsound as a legal principle, but that it is an express violation of the underlying principles of the constitutions of this country, which demand a separation of legislative and judicial functions. The very reason given for the rule demonstrates its unsoundness. We say: the ruling has been acquiesced in so long that it constitutes a binding rule of property, viz., a statute.

The converse of the assumption that the courts may make law in declaring the rule which constitutes the ratio decidendi of any
given decree or judgment may be found in the idea that they repeal bad law in overruling decisions.

The principle upon which courts act in overruling cases, seems to imply a power to repeal a law which has been improvidently enacted. No one ever supposed that in overruling a case the court did so upon the idea that it had found the facts wrong. It is solely upon the idea that it had declared the law wrong, and that such declaration would mislead the public as to the law itself.

Whenever a decision becomes merely the court's testimony, as to its opinion of an existing principle of law applicable to an existing lawsuit, overruling a decision will become as much of a solecism as overruling the fact testified to by a witness.

An early protest against judicial decisions as a source of law may be found in the history of Virginia, which I hope may prove interesting to you. In 1776 the Virginia colonial legislature passed an act in this language:

"And be it further ordained: that the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony."

In a case coming before Chancellor Taylor and reported in 4th Hening and Munford, at page 463, the effect of these English decisions as authority upon the courts of Virginia came to be considered, and the learned Chancellor said:

"And while I have not less respect for English judges and English opinions than other gentlemen, yet I have too much regard for myself and the national character of my country, to rely upon the English books further than for information merely, but not as authority; it was the common law we adopted and not English decisions, and we should take the standard of that law (referring to the precepts of the civil law), namely, that we should live honestly, should hurt nobody, and should render to everyone his due, for our judicial guide."
In 1808 the Kentucky Legislature passed an act, that "all reports and books containing adjudged cases of the Kingdom of Great Britian, which decisions have taken place since the 4th day of July 1776, shall not be read, nor considered as authority in any of the courts of this Commonwealth, any usage or custom to the contrary notwithstanding." Notwithstanding this act, in an argument before the Court of Appeals of Kentucky, Mr. Clay, the "Great Commoner," undertook to read from a decision in 3rd East, which recited the decisions of the courts of Great Britain rendered prior to the 4th day of July 1776. Judge Trimble, afterwards Justice of the Supreme Court by the grace of President John Quincy Adams, stopped counsel with the statement that reading the book was a violation of the act of 1808. It was replied, first, that the legislature had no more right to say what should be read in court, than it had to prohibit the judge from using spectacles; and in the second place, that counsel was reading the decision not as authority, but as evidence of what the English law was prior to the Declaration of Independence. But the learned judge refused to permit him to proceed. The act of 1808 was enforced further by the court in the second decision reported in the same year. It then seems to have died a natural death, as we find no further reference to it by the courts, though Mr. Littell, one of our early reporters, in the preface to the first volume of his reports, in a humorous way comments upon the fact that the act could not be violated, unless a counsel should read all the books in one speech, or at least, in one case.

And now let me state what I have reached as the conclusion of the whole matter.

It occurs to me there should be on the part of the people, a declaration of rights, embracing these features:

(1) It should be declared specifically that the courts should be limited in declaring acts unconstitutional, to such acts as violate those provisions of the constitution which are written into that instrument for the purpose of conserving individual freedom or right.

(2) Negatively it should be declared that those provisions of the constitution which are administrative in character, and are addressed directly, or by necessary implication to any special body of magistracy, should find their sole sanction in the oath of office, and in the responsibility which such officials hold to the people who selected them.

(3) The courts should voluntarily abandon the doctrine of stare decisis, so far as the same carries with it an implication that they have power to prescribe authoritatively rules of law; together
with an abandonment of the twin solecism involved in repealing bad law by overruling bad decisions.

(4) The courts should restrict themselves in the preparation of written opinions to a succinct statement of the grounds upon which the ultimate judgment or decree is intended to be rested. By an adherence to this principle, not only would the courts be removed from the temptation to write too much, but they would also be enabled to decide cases more expeditiously, and therefore, with greater satisfaction to the litigant, if not to the lawyer, who represents him.

If the judges in administering justice between litigants would recognize these principles, which I sincerely believe to be written into the constitution, or necessarily implied therein, there would be little or no occasion for any discussion of the recall of judicial decisions and none for the recall of judges, except in case of actual corruption.

THE GRAND JURY AND SELF-INCRIMINATION

The functions of a grand jury have come down to us almost unimpaired. There is no branch of the court machinery which in its present day form antedates it. We are told by Wilkins in his history of the laws of the Anglo-Saxons that it existed at the time of Ethelred. As administered by the Saxons it consisted of twelve men, Seniores thani, as they were called, who were directed, under their oaths to accuse no innocent man nor to permit any criminal to escape. Brocton, an early English commentator, is authority for the statement that at the time of Henry III., it was the practice of the courts to have four Knights for every hundred, who elected twelve other Knights, “free and lawful men,” thus increasing the number to sixteen. Towards the close of the reign of Edward III., in addition to the inquest for the honored, the sheriff, by statute, was required to return a panel for the whole county, which was called le graunde inquest, from which is derived the term grand jury.”

Even at these remote beginnings the grand jurors were instructed that presentments, or indictments, were to be returned in every instance where the evidence presented gave reasonable grounds for suspecting a crime or an offense had been committed, it being the practice to let the accused present his side of the case at the trial as is done today. Under the English procedure some one was appointed by the court to swear all witnesses who testified at a grand jury hearing, the practice of permitting the foreman of the jury to administer this oath not having obtained.