MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 18 | Issue 3 Article 8

1992

A Tribute to Judge Donald P. Lay

James L. Oakes

JAMES L. OAKES†

I have known Don Lay for years, going back to our trial lawyer days. As a judge, I have known and admired his work and his opinions, particularly those dealing with individual human rights and liberties. But it has been in his indefatigable work as Chief Judge of the Eighth Circuit that I have come to know him best, particularly in connection with his work on the Judicial Conference of the United States.[1]

It was my pleasure and privilege to spend three years working with Judge Lay on the Judicial Conference. Always well-prepared and informed, like the fine trial lawyer he was before becoming a judge, he was also finely attuned to the somewhat legislative-like workings of the Conference and willing to speak out on any issue, whether or not it was a pet project of the Chief Justice.

During Judge Lay's twelve-year tenure as Chief Judge—the longest of any Chief Judge in the nation—the duties of the Judicial Conference expanded, membership on its committees became more open, and the makeup of its committees became much more representative. That this is true is a tribute to Chief Justice Rehnquist, who shared these aims with other leading members of the judiciary, especially Judge Lay and Judge Wilfred Feinberg, former Chief Judge of the Second Circuit and a member of the executive committee appointed by the Chief Justice in a reorganization of the Conference during the 1986-1987 period.

It should be noted that Judge Lay was one of those who opposed some of the points made in the so-called Powell Committee Report. The Powell Committee was an ad hoc Judicial Conference Committee appointed in 1988 by the Chief Justice primarily to recommend methods of speeding up habeas corpus proceedings in state death penalty cases. The Committee received Congressional recognition in the final hours of the

† Chief Judge, United States Court of Appeals for the Second Circuit.

1. The Judicial Conference is a policy-making body consisting of the Chief Judge from each circuit, one usually extremely well-experienced district judge elected by the judges of each circuit, and the Chief Justice of the United States, who chairs the Conference. Primary staff work is performed by the Administrative Office of the United States Courts.

100th Congress when a reference to it was written into the Anti-Drug Abuse Act of 1988.[2] That reference put the Report's recommendations on a "legislative fast track," a recently devised Congressional device meant to ensure that a bill cannot be bottled up in committee and a device that was unknown to many of us. The chairman of the Senate Judiciary Committee was instructed to file a habeas corpus reform bill within fifteen legislative days following receipt of the Committee Report from the Chief Justice.

When the Report was presented to the Conference in September of 1989, the Conference voted to table it until the March 1990 meeting. Some of us had serious problems with it. In particular, it permitted the states to select their own standards for competence of counsel in capital proceedings; it failed to permit second or successive petitions, even where, by virtue of state action in violation of the Constitution or U.S. laws, the claim had not previously been presented; and it limited consideration on habeas to the underlying guilt or innocence, not to the appropriateness of the sentence of death.[3]

Nevertheless, the Powell Committee was discharged and the Chief Justice accordingly sent the Report to Senator Biden on October 5, 1989, without Judicial Conference approval. Fourteen of us, including Chief Judge Lay, wrote to the Secretary of the Judicial Conference to request that no action be taken by Congress until the Conference had met. At the March meeting, the Conference adopted amendments addressing several of the problems we perceived with the Report, although the amendments described in note 3 were narrowly turned down.[4]

Subsequently, Chief Judge Lay and I testified at the Senate hearings on S. 1757. The legislation is part of omnibus crime packages which have been stalled for two years. The Democratic majority cannot maneuver cloture in order to pass the

2. Pub. L. No. 100-690, § 7323, 102 Stat. 4181, 4467 (1988).

3. Some of us also favored a one-year statute of limitations for federal habeas relief. The limitations period would run from the conclusion of all direct state appeals, post-conviction relief, and denial of petitions for certiorari thereon. Some of us also favored limitations on the non-retroactivity rule of Teague v. Lane, 489 U.S. 288 (1989), and its progeny.

4. *See supra* text accompanying note 3. A proposed amendment setting a one-year limitations period was narrowly turned down. *Id.*; *see also* Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637 (1990-91).

House bill, which contains the habeas provisions recommended by the ABA Task Force and which we endorsed.

In taking on this rather thankless battle, Chief Judge Lay was simply running true to form, the same form which won him such honors as the Outstanding Federal Appellate Judge of the Year in 1982 from the American Trial Lawyers and the prestigious Herbert Harley Award in 1988 from the American Judicature Society. He stands up for what he believes, and he believes in equal justice for all.

A resolution recently adopted by the Judicial Conference of the United States quite deservedly concludes as to Judge Lay: "For his principled leadership, his unyielding dedication to the work of the court, and his compassionate commitment to those served by the courts, we thank him and extend our highest esteem and gratitude." I join in those sentiments.