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A Tribute to Judge Donald P. Lay

Gerald W. Heaney

GERALD W. HEANEY†

It is difficult for me to write objectively about the judicial career of my close personal friend and colleague, Judge Donald P. Lay. Not only do we share many of the same values and philosophical approaches to the law, but we came to the Eighth Circuit only a few months apart and have shared much together. I have turned to him for advice and counsel since my first days on the court and will continue to do so in the future.

Judge Lay and I joined a distinguished court in 1966. Charlie Vogel of North Dakota was the Chief Judge. Martin Van Oosterhout was next in line, followed by Harry Blackmun, Charles Matthes, Pat Mehaffy, and Floyd Gibson. All were men of character and intellect. Perhaps they were more conservative on many issues than Judge Lay and I, but they accepted us, helped us, and listened to what we had to say.

In that era, we had the luxury of spending a good deal of time together. Our annual caseload was in the low four-hundreds. By comparison, our court considered nearly 2,900 cases in 1991. We heard only three cases a day, which meant fifteen a week. We ate together, usually a two- to three-hour affair, swam together at the Missouri Athletic Club, went to ball games together, and frequently went on fishing trips together. These trips to my cabin in Ontario were a high point of the year. Good fishing, good food, good conversation, and cribbage were the order of the day. Martin Van Oosterhout, Charlie Vogel, and later Roy Stephenson, Smith Henley, and Mike Bright frequently joined the trips.

Don was an avid golfer, the only one on the court at that time. He quickly learned, however, that Jack Regan of the United States District Court for the Eastern District of Missouri was equally devoted to golf. He and Jack became close friends, and spring and fall afternoons of court week would frequently find Don and Jack on the golf course. Their friendship became a lifelong affair that gave Don an important insight into the problems of the district courts, an insight which served him well when he became Chief Judge on January 7, 1980.

† Senior Judge, United States Court of Appeals for the Eighth Circuit.

Don furthered this insight by sitting as a district court judge in Nebraska, Iowa, Minnesota, Missouri, and elsewhere. He remains anxious to learn how other circuits handle their workloads and frequently sits on other courts of appeal.

Where he gets the energy I do not know, but in addition to carrying out his duties on our court and as a visiting judge in other courts, he has always found time to teach law students, first at Creighton University Law School in Omaha and then at the University of Minnesota Law School in Minneapolis and William Mitchell College of Law in St. Paul. He rarely turns down an invitation to speak to law students or bar groups. Don leads a busy life, teaching, speaking, administering, and reading, but hearing and writing cases has always been his first priority.

While I suspect that scholars and lawyers would categorize Judge Lay as a liberal, he always bristles when others attempt to pigeonhole him. His opinions are there for all of us to read, and each of us can draw our own conclusion. One thing is certain: Judge Lay played a major role in fighting gender discrimination in employment and other aspects of our society, and he led the way on our court, and in the nation, in securing for women the right to choose. Perhaps his dedication to ensuring equality of opportunity for women has been influenced in part by Miriam, his wife, and his five daughters: Catherine Sue, Cynthia Lynn, Elizabeth Ann, Deborah Jean, and Susan Elaine. They have always been at the center of his very busy life.

Judge Lay participated fully in the important decisions of our court. He played a key role in ensuring equality of opportunity in education in Little Rock, St. Louis, Kansas City, and Omaha. His dissenting opinion in *Morrissey v. Brewer*[1] laid the foundation for the Supreme Court's decision in the same case, a decision that gave prisoners the right to due process in parole revocation proceedings.[2] He has shown consistent dedication to the First Amendment and has written several decisions defining the rights of Native Americans. Driven by a concern for the sanctity of life, he has insisted that persons sentenced to death receive the full protection of the Constitu-

1. 443 F.2d 942, 952-53 (8th Cir. 1971) (en banc) (Lay, J., dissenting), *rev'd*, 408 U.S. 471 (1972).

2. Morrissey v. Brewer, 408 U.S. 471 (1972).

tion. His compassion is eloquently expressed in *Mercer v. Armontrout*:

> Human life is our most precious possession. Our natural instincts guide us from birth to sustain life by protecting ourselves and protecting others. All notions of morality focus on the right to live and all of man's laws seek to preserve this most important right. . . . What separates the unlawful killing by man and the lawful killing by the state are the legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence. If the law is not given to strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon. It should thus be readily apparent that the legal process in a civilized society must not rush to judgment and thereafter rush to execute a person found guilty of taking the life of another.[3]

A judge's dissenting opinions often define him more clearly than those written for the court. In a dissent, a judge is often able to express personal opinions and beliefs that cannot always be included when one is writing for the court, and the excerpts that follow provide an insight into some of Judge Lay's deeply held views.

On the fundamental liberties of the individual:

> Today we are constantly concerned the powers of government do not encroach upon the fundamental liberties of the individual. It is almost axiomatic as government grows there exists a lesser concern for these rights. The application of the Bill of Rights to the Fourteenth Amendment is reassuring to say the least. The courts above all must remain the guardians and watchdog of these individual rights. We are properly concerned with the early stages of arrest and arraignment, freedom from unreasonable searches and seizures, the right to remain silent and not become a witness against one's self, the right to be represented by counsel, the right to have a jury fairly selected, to have an impartial forum for the trial, and even with fair pre-trial comment by the press. The concept of "*fair trial*" is always paramount.
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> It seems to me all of this is naught if the trial judge becomes the prosecutor by unfair comment in the trial itself. This is cognate to a doctor carefully taking precautions to inoculate a person to prevent a disease and once this being

3. 864 F.2d 1429, 1431 (8th Cir. 1988).

> assured shooting the patient in the back. The courts above all must practice what we command others to do.[4]

On due process, three cases express Judge Lay's view. The first is *United States v. Spotted War Bonnet*:

> Innocent citizens must not be deprived of their liberty without a fair trial, competent evidence, and due process of law simply because they have been accused of child abuse. Our zeal to protect young children from sexual abuse should not allow courts to ignore or to diminish the constitutional rights of any person, even those who stand accused of heinous crimes.[5]

In the second case, *United States v. Conley*, Judge Lay wrote:

> Our forebears recognized the dangers involved when the awesome forces of government are pitted against the meager resources of the individual whose life or liberty is at stake. The best bulwark against those dangers in a criminal trial is procedural fairness.[6]

In *McClard v. United States*, Judge Lay wrote:

> The law asks very little in requiring the government to *properly* prove a case when the ultimate consequence may be to deprive a man of his life or liberty. Courts should not be willing to allow convictions where inferences are derived from facts only suspected and not proved. Regardless how zealous we are to have good communities and proper criminal law enforcement, we have contracted with the rule of law that all men are presumed to be innocent until *proven* by competent evidence to be otherwise. The basic rights of all free men depend upon this principle.[7]

On judicial responsibilities, two cases stand out. The first is *Bryant v. Rankin*:

> Although judges properly serve as an ultimate safeguard to prevent a miscarriage of justice and as such possess the legal authority to take away a jury's finding of fact, nevertheless, the exercise of that power should be used only in exceptional circumstances. Unfortunately, this power is

4. Rogers v. United States, 367 F.2d 998, 1003 (8th Cir. 1966) (Lay, J., dissenting) (emphasis in original; footnotes omitted), *cert. denied*, 386 U.S. 943 (1967).

5. United States v. Spotted War Bonnet, 882 F.2d 1360, 1364 (8th Cir. 1989) (Lay, C.J., dissenting), *vacated*, 100 S. Ct. 3267 (1990).

6. United States v. Conley, 523 F.2d 650, 659 (8th Cir. 1975) (Lay, J., dissenting), *cert. denied*, 424 U.S. 920 (1976).

7. McClard v. United States, 386 F.2d 495, 502 (8th Cir. 1967) (Lay, J., dissenting) (emphasis in original), *cert. denied sub nom.*, Ussery v. United States, 393 U.S. 866 (1968).

> often exercised merely because judges sometimes feel that other results under the evidence are more reasonable than what the jury found. When this occurs we act without judicial authority.[8]

In *United States v. Pipefitters Local Union No. 562*, Judge Lay again spoke out on judicial responsibilities:

> I cannot judicially accept the reasoning that manifest injustice may take place in a criminal trial and yet lay beyond the reach of appellate review because a lawyer inadvertently failed to protect the defendant's rights in an appellate brief .... For an appeals judge to take effective action in these circumstances, even where counsel fails to properly preserve the error, is not advocacy, but rather an urgent and necessary exercise of judicial responsibility. If this be proscribed as advocacy, the breadth and meaning of judicial review would have been rendered meaningless long ago.[9]

On the right to privacy, Judge Lay has written many vigorous dissents, three of which stand out in my mind. The first is *United States v. Agrusa,* where Judge Lay wrote:

> The government's interest in law enforcement does not outweigh the citizen's justifiable expectation that government officials will not, under the cloak of authority, surreptitiously break into his home or office. I would hope there still exists "a private enclave where [a person] may lead a private life" without fear of stealthy encroachment by government officials.[10]

In another Fourth Amendment case, Judge Lay addressed these same concerns, stating, "The fundamental principles surrounding the fourth amendment still serve us well. Only with the greatest caution should we whittle away basic constitutional rights, for we often come to regret the unfortunate rulings we have made in times of hysteria in the past."[11] And finally, in *Thomas v. Parett*, he wrote:

> It is regrettable and yet understandable that law enforce-

8. Bryant v. Rankin, 468 F.2d 510, 515 (8th Cir. 1972) (Lay, J., dissenting).

9. United States v. Pipefitters Local Union No. 562, 434 F.2d 1127, 1139 (8th Cir. 1970) (en banc) (Lay, J., dissenting), *rev'd in part and vacated in part*, 407 U.S. 385 (1972).

10. United States v. Agrusa, 541 F.2d 690, 703 (8th Cir. 1976) (Lay, J., dissenting) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)), *cert. denied*, 429 U.S. 1045 (1977).

11. McDonell v. Hunter, 809 F.2d 1302, 1310 (8th Cir. 1987) (Lay, C.J., dissenting).

> ment officials resent judicial interference with otherwise lawful convictions of wrongdoers. It is difficult to write an opinion which allows the guilty to go free. Nonetheless, Fourth Amendment rights of our citizens should not be secondary or collateral to other rights.[12]

On the right to counsel, Judge Lay expressed his view in *Miller v. Maryland*:

> I sense that judicial acceptance of an alleged waiver of the right to counsel by an immature youth is often blinded by the heinous crime with which the youth is charged. Violation of the basic constitutional right to counsel cannot be obviated by hindsight rationalization. Whether the confession may be corroborated by extrinsic facts, whether the incriminating remarks have an inherent ring of truth is beside the point. More important is the right of each accused youth to effective assistance of counsel at a meaningful time in a criminal proceeding.[13]

Judge Lay has often spoken out on equality for women. In *United States Jaycees*, he wrote, "The attempt of the Jaycees to exclude women from their full membership seeks protection under what I consider to be an outdated rationale of our jurisprudence, one which relegated women to a status inferior to that of men."[14] In *Chambers v. Omaha Girls Club, Inc.*, he again addressed the issue of equality, referring to the dismissal of a teacher because of her pregnancy, as "the most blatant form of sex discrimination that can exist."[15]

Judge Lay has always been greatly concerned with the humane treatment of prisoners. He dissented from the majority opinion in *Morrissey v. Brewer*, writing,

> The denial of due process in parole revocation simply mirrors society's overall attitude of degradation and defilement of a convicted felon. It is sad 20th Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of

12. Thomas v. Parett, 524 F.2d 779, 787 (8th Cir. 1975) (Lay, J., dissenting).

13. Miller v. Maryland, 577 F.2d 1158, 1162 (4th Cir. 1978) (Lay, J., dissenting) (citation omitted).

14. United States Jaycees v. McClure, 709 F.2d 1560, 1579 (8th Cir. 1983) (Lay, C.J., dissenting) (footnote omitted), *rev'd sub nom.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984).

15. Chambers v. Omaha Girls Club, Inc., 840 F.2d 583, 583 (8th Cir. 1988) (Lay, C.J., dissenting).

> the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison; it cares even less for his future when he is released from prison. He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted and we react with sickened wonder and disgust when he returns to a life of crime.[16]

In another case addressing these same rights, he wrote:

> If these men, who have obviously found it difficult to live within society's mores, are ever to enjoy life within the law they must learn self control and discipline in an atmosphere where self respect is maintained and the human personality allowed to flourish. This cannot be achieved while the state pursues a policy which requires conformity beyond need.[17]

And in *Cody v. Hillard*, he stated,

> It is an old axiom that it is human nature to abuse power—nowhere is this more true than in the prison setting. It is not judicial activism to recognize constitutional intervention when the state refuses to provide humane treatment to those incarcerated. Federal judges who blindly interpret the hands-off doctrine to mean that the Constitution stops at the prison wall are grossly mistaken. A person who violates the law is separated from society as punishment for the crime committed. He serves time in a custodial setting. However, he is not sent to prison to have further punishment inflicted upon him by inhumane treatment. To close the eyes of judges by reference to the hands-off doctrine is a throwback to the Dark Ages.[18]

In the late 1980s and early 1990s, the great writ of habeas corpus came under attack. Judge Lay successfully led the fight in the Judicial Conference, and in Congress, to preserve many of the essential elements of the writ. In his comprehensive statement to the House Judiciary Committee on May 24, 1990, he stated:

> [I]t is imperative that all of us consider the background,

16. Morrissey v. Brewer, 443 F.2d 942, 952-53 (8th Cir.) (en banc) (Lay, J., dissenting) (footnotes omitted), *rev'd*, 408 U.S. 471 (1972).

17. Rinehart v. Brewer, 491 F.2d 705, 707 (8th Cir. 1974) (Lay, J., dissenting) (footnote omitted).

18. Cody v. Hillard, 830 F.2d 912, 919 n.3 (8th Cir. 1987) (en banc) (Lay, C.J., dissenting), *cert. denied*, 485 U.S. 906 (1988).

> purpose, and necessity of the great writ of habeas corpus. I find a general misunderstanding of habeas corpus even by many who are knowledgeable in the field of criminal law. Critics have often asserted that there should be no federal review of state prisoner cases whatsoever—that federal habeas corpus is simply another procedural vehicle by which we coddle the guilty and allow criminals to go free. The critics emphasize the need to protect the efficiency and finality of the state court decision-making process.
>
> I think these critics misconceive the very purpose of the Great Writ when they look upon it as a procedural vehicle to allow the guilty to go free. The best response to that attack is that the rights of the best of people are only secure as long as the rights of the worst of people are preserved.[19]

If Judge Lay's record were confined to the one area of preserving habeas, it would still be a distinguished one.

I end this essay by commenting on Judge Lay's twelve-year role as Chief Judge. Only Judge Walter H. Sanborn of Minnesota, who served for 14 years, and Judge Kimbrough Stone of Missouri, who served for 19 years, served for a longer period of time in the capacity of Chief Judge.

Among his accomplishments, Judge Lay expanded the Circuit Judicial Council to include district judges, formed federal practice committees in each district to give lawyers a greater voice in formulating new district court rules and operating procedures, and opened the Eighth Circuit Judicial Conference to all lawyers, making it the most democratic and possibly the largest of all conferences. Judge Lay also organized circuit and district court historical societies.

Not all of these changes came easily, and Judge Lay presided over the court in an era of change. Our caseload grew from 1,111 in 1981 to 2,886 in 1991. Our court grew from seven judges to eleven judges. The staff of the court grew twofold to 184, and we became fully automated. Some of us resisted Don's efforts to modernize and open the court as rapidly as he desired. But he kept pushing and shoving and cajoling and, most of all, writing memos. Memo after memo would arrive weekly, and sometimes daily, urging progress. To make mat-

19. *Hearings on H.R. 4737 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 139-40 (1990) (statement of Donald P. Lay, Chief Judge, United States Court of Appeals for the Eighth Circuit).

ters more difficult, a new generation of judges came on the court creating the additional problem of melding the views of the old and the new. In the end, Judge Lay's hard work paid off, and we can say today that our court is fully prepared to meet the challenges of the 1990s under the leadership of a new Chief Judge, Richard Arnold.

My friend and colleague will continue to serve the judiciary and the law. He now is teaching at the University of Minnesota, and will shortly sit in seven circuits, as well as our own. I am confident that Judge Lay will continue to have a profound influence on our court for many years to come.