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A Tribute to Judge Donald P. Lay

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We think of Don Lay as a great judge. Indeed he has been, and for more years than most.[1] But before he went on the bench he had already earned an enviable reputation as a great trial advocate. He represented people and cared about the people he represented. Protecting the interests of the litigant became an important theme in his life work, appearing and reappearing in various contexts.

First and foremost among Judge Lay's contributions has been his concern about excessive cost and delay. He understood—and it mattered to him—that the "direct effect" of such excesses was likely to be nothing less than "the denial of reasonable access to justice in our courts."[2] Lawyers' fees and expenses in excess of $130,000[3] in a case in which the monetary recovery was $1,500 represented something more than a problem for the parties to that single action. "The entire administration of justice is involved," he wrote.[4]

Judge Lay, typically for him, was not content simply to bemoan and to complain. There follows in the *Jaquette* opinion what the Chief Judge refers to as an "addendum," a discussion of remedies, particularly "early and stringent judicial management of the case,"[5] a remedy that has, in the ensuing years, become widely accepted.[6] Judge Lay's efforts have borne fruit. When, in 1988, the American Judicature Society bestowed its prestigious Herbert Harley Award on then-Chief Judge Lay, heading the list of his accomplishments was "his work in short-

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1. When Judge Lay, still in his thirties, was appointed to the United States Court of Appeals for the Eighth Circuit in 1966, the White House announced that he was the second-youngest judge to be appointed to the court of appeals.

2. Jaquette v. Black Hawk County, 710 F.2d 455, 462-463 (8th Cir. 1983).

3. *Id.* at 457, 461 n.13.

4. *Id.* at 463. He recognized, of course, that the vindication of the plaintiff's First Amendment rights was also significant, but noted that a reduction of the requested fee from $96,422.49 to a little less than $23,000 (including expenses) took that into account. *Id.* at 457, 461.

5. *Id.* at 462, 463.

6. *See, e.g.*, 28 U.S.C. § 473(a)(2) (1988).

ening the disposition time for trial and motions in the Eighth Circuit."[7]

As might be expected from one who possesses breadth of vision as well as depth of insight, Judge Lay has been concerned for what might be termed the architecture of the federal judicial system. He was an early and articulate opponent of the proposed National Court of Appeals, an idea intended to reduce the incidence of inter-circuit conflict.[8] Again, concern for the burdens a new court might impose on the litigant is clearly in evidence.

Having taken this position, Judge Lay felt obliged to remonstrate against government policies that spawned oppressive relitigation by trying to create inter-circuit conflict and thus avoid the full impact of an early loss in one court of appeals.[9] Res judicata and issue preclusion against the government was, for him, the proper judicial response, thus relieving both judges and litigants from the unwarranted burdens of delay, expense and effort.[10]

Uncompromising intellectual integrity marked Don Lay's approach to problems of judicial administration. He called for discretionary review of civil cases by the United States Courts of Appeals largely because the procedures adopted to keep up with the caseload did not provide the full measure of judicial process normally implied by appellate review as of right.[11] He

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7. Harley Awards, 72 JUDICATURE 198 (1988). He was also recognized for "helping to implement the Civil Appeals Mediation Program, which has resulted in many cases being settled out of court and helping to develop grievance procedures" for prisoners. *Id.*

8. *See* Donald P. Lay, *Why Rush to Judgment?*, 59 JUDICATURE 172 (1975); Donald P. Lay, *Query: Will the Proposed National Court of Appeals Create More Problems Than It Solves?* 66 JUDICATURE 437 (1983). Preceding the former article is the opposite point of view: A. Leo Levin & Arlene Fickler, *A New Proposal for a National Court of Appeals*, 59 JUDICATURE 165 (1975).

This is not a confession of error on my part. Interestingly enough, another opponent of the proposal recently wrote:

> As the apex of the judicial pyramid becomes ever smaller in relation to the base, it seems inevitable that the time will come when some form of appellate structural reform can no longer be avoided. For most participants in the legal system, the longer that day can be put off, the better.

ARTHUR HELLMAN, UNRESOLVED INTERCIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM 107 (Fed. Judicial Center 1991).

9. May Dep't Stores Co. v. Williamson, 549 F.2d 1147, 1150 (8th Cir. 1977) (Lay, J., concurring).

10. *Id.* at 1149.

11. Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151 (1981).

recognized that "courts of appeals are, in reality, invoking a form of discretionary dismissal without calling it such."[12] That was wrong. Truth in labelling was crucial. Moreover, it was Judge Lay's view that recognizing what was in fact going on might stimulate legislative and judicial adjustments that ultimately would prove beneficial.

There is far more to be said of the professional contributions of a man who came close to the record for longevity as a member of the Judicial Conference of the United States,[13] where his was an important voice, who wrote more than one thousand opinions, and who gave of himself to the professional advancement of others.[14] But there is more to a man than his profession, and certainly so in the case of Don Lay. Don has flair, a sense of the dramatic, a sense of humor, and together with his wife, Miriam, genuine style.

It was Don who put me on the front page of the *Daily Iowan* back in August, 1948, although it took me a quarter of a century to discover that. There was an Iowa City heat wave, the kind of weather that made it possible to "hear the corn grow." Air conditioning, at least in the law school, was unknown. And I, a neophyte law professor, quipped to the effect that a few cakes of ice might serve to reduce the temperature. That afternoon, I walked into class, and there on my desk were two cakes of ice in a very inadequate cardboard semi-container. The ice responded to the heat by melting; the resultant flow provided background for discussion of water rights and nuisances; we all had a good laugh; and the *Daily Iowan* had a front-page picture for its heat-wave story.

Some twenty-five years later, when the future Chief Judge of the Eighth Circuit introduced me at the circuit Judicial Conference, the truth came out: it was Don Lay who had been one of the architects of the episode.

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12. *Id.* at 1155.

13. As a result of Judge Lay's appointment to the court while still a very young man, *see supra* note 1, he became Chief Judge and a member of the Judicial Conference of the United States at an early age. Moreover, when a term limitation of seven years in the office of Chief Judge was enacted by Congress, the limitation did not apply to those already serving in that office.

The record for longevity should be read as applying only to the contemporary period and, of course, excludes the service of the Chief Justice.

14. I recall vividly Don's participation in the first session of the National Institute of Trial Advocacy in Boulder, Colorado in the summer of 1972. And I recall particularly the happy excitement of those who knew his reputation as a trial advocate.

You can't put melting ice into judicial opinions, at least not real, water-producing ice, but West *will* publish fables in the *Federal Reporter*, particularly if duly headed *Separate Appendix to the Opinion of Chief Judge Lay, An Exercise in Time and Music—A Fable*.[15] Again, the theme was excessive delay—this time by a late decision to certify a state law question to the state supreme court—but the point was made dramatically and the technique of fable-inclusion duly noted by others evidently appreciative of style and humor.[16]

Oliver Wendell Holmes, Jr., in a familiar passage, wrote, "I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at pain of being judged not to have lived."[17] Judges, too, are men and women to whom that prescription applies, although they are circumscribed in how and when and where they may do so.[18] But the passion for justice need not be limited. And that passion helps make a great judge.

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15. Hatfield v. Bishop Clarkson Memorial Hosp., 701 F. 2d 1266, 1272 (8th Cir. 1983) (Lay, C.J., concurring).

16. *See* Stuart M. Wise & David Berreby, *The Tale's the Thing*, NAT'L L.J., Apr. 11, 1983, at 39; Adalberto Jordan, Project, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 725-26 & n.154 (1987).

17. Memorial Day Speech at Keene, N.H. (May 30, 1884) (*quoted in* SHELDON M. NOVICK, HONORABLE JUSTICE 176 (1989)).

18. *See* Martha Middleton, *Judges Are People Too; Sometimes It Isn't Easy*, 68 A.B.A. J. 1200 (1982). Judge Lay commented to the effect that judges should feel free to express themselves on issues "with certain restraints." *Id.* Contrary views are also presented.