

1992

# A Tribute to Judge Donald P. Lay

Rita Coyle DeMeules

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

DeMeules, Rita Coyle (1992) "A Tribute to Judge Donald P. Lay," *William Mitchell Law Review*: Vol. 18: Iss. 3, Article 11.  
Available at: <http://open.mitchellhamline.edu/wmlr/vol18/iss3/11>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## RITA COYLE DEMEULES†

Judge Donald P. Lay's decision to take senior status provides an opportunity to revisit briefly some of the highlights of his tenure as Chief Judge for the Eighth Circuit Court of Appeals. My review of Judge Lay's opinions is aided by the invaluable year I spent with him as one of his law clerks. Judge Lay's willingness to teach his law clerks about a federal judge's decision-making responsibilities revealed one of the important principles that guided his judicial career. The hallmark of Judge Lay's judicial career, including his tenure as Chief Judge, must be his consistent requirement to uphold the constitutional protections which have for over two hundred years been extended to protect the individual rights of the citizens of this country. His term as Chief Judge will surely be remembered for the direction and guidance he provided in numerous opinions regarding the sanctity of individual constitutional rights.<sup>1</sup>

My time with Chief Judge Lay demonstrated that an increasingly aggressive government threatened the protection of individual rights as never before. At the same time, the increasing threat of crime and the changing landscape of individual privacy concerns contributed to a gradual erosion of individual rights.<sup>2</sup> Judge Lay, in his role as Chief Judge and the guiding

---

† Associate, Robins, Kaplan, Miller & Ciresi, Minneapolis, Minnesota; Former Law Clerk to Chief Judge Lay, 1989-1990; Former Law Clerk to Justices Glenn Kelley and M. Jeanne Coyne, Minnesota Supreme Court, 1988-1989. B.A. 1981, University of Wisconsin-Eau Claire; J.D. 1988, William Mitchell College of Law.

1. See, e.g., *United States v. Kroh*, 915 F.2d 326, 342 (8th Cir. 1990) (en banc) (Lay, C.J., dissenting) (dissenting from majority opinion upholding criminal conviction for conspiracy and fraud on grounds that defendant did not receive a fair trial).

2. This point is illustrated most graphically in the areas of abortion rights and the use of habeas corpus for individuals convicted of crimes by state courts. For example, the scope of the constitutional right to abortion has varied widely since that right was recognized by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). The changing moral perception of abortion has led to a gradual change in the standard of review used to evaluate abortion restrictions so that greater control over the availability of abortion has been returned to the states. See, e.g., *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (rejecting the strict scrutiny standard of review and reviewing abortion regulations under an unclear, but most likely, undue burden standard), *rev'g*, 851 F.2d 1071 (8th Cir. 1988) (Lay, C.J.); see also *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (reviewing restrictions on minor's right to abortion under lower standard adopted in *Webster*), *aff'g*, 853 F.2d 1452 (8th

force for the court, did not allow these threats to deter him from enforcing the protections that are extended to individuals by the United States Constitution. Judge Lay would spend considerable amounts of time combing through trial transcripts and trial court records to ensure that all possible steps were taken to protect the constitutional rights of the litigant whose life or liberty interests were at stake. Often, that painstaking review convinced the Chief Judge that the litigant's rights had been protected sufficiently and that his role as a federal appeals court judge—upholding the Constitution—was fulfilled.

On those occasions where Judge Lay discovered trial court errors, or those instances where the government infringed on constitutional rights, he did not hesitate to rebuke the offending party. Recently, Judge Lay's views were vindicated by the United States Supreme Court in *Jacobson v. United States*.<sup>3</sup> *Jacobson* provides an excellent review of Judge Lay's approach to the continuing struggle between the federal government's aggressive enforcement of its laws, and the protection of the constitutional rights guaranteed all citizens, regardless of the nature of the crime with which they are charged.

The government's mission in *Jacobson* was prosecuting child pornography. Keith Jacobson became the target of a federal government sting operation after his name was found on a mailing list maintained by a dealer of both obscene and non-obscene materials. Jacobson's only prior purchase from this dealer had been material which at the time was considered legal.<sup>4</sup> Using five separate fictitious organizations, the government for more than two years worked to get Jacobson to purchase additional, and by then illegal, pornographic material. When Jacobson finally ordered one magazine over

---

Cir. 1988); *Planned Parenthood v. Minnesota*, 910 F.2d 479, 486 n.13 (8th Cir. 1990) (applying the *Webster* standard).

Similarly, the use of habeas corpus petitions to review the convictions of defendants tried in state courts has recently been restricted substantially. See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989); *Wabasha v. Solem*, 694 F.2d 155, 159, 161 (8th Cir. 1982) (Lay, C.J., dissenting) ("The law abhors forfeiture. . . . Conscientious state and federal trial judges should require much, much more before accepting a waiver of counsel in criminal cases.").

3. 112 S. Ct. 1535 (1992). The Court's majority opinion, written by Justice White, was joined by Justices Blackmun, Stevens, Souter and Thomas. Justices O'Connor, Kennedy, Scalia and Chief Justice Rehnquist dissented.

4. *Id.* at 1538.

twenty-six months after the government's crusade began, he was arrested.<sup>5</sup>

Jacobson raised an entrapment defense, which was rejected by the district court. On appeal to the Eighth Circuit, the initial panel agreed with Jacobson in an opinion written by Senior Judge Heaney and reversed his conviction.<sup>6</sup> On rehearing en banc, the full court reversed the panel opinion and reinstated Jacobson's conviction.<sup>7</sup> Chief Judge Lay dissented from the full court's opinion, pointing out that the government's actions constituted the height of entrapment of an otherwise lawfully acting individual:

I find the government's conduct in this case to be reprehensible. The government invested considerable time and money to prosecute a man who never would have committed a crime but for the government's encouragement. The government should not concentrate its efforts on incriminating innocent individuals; rather it should strive to suppress criminal behavior.<sup>8</sup>

The United States Supreme Court agreed with Chief Judge Lay, stating that

by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited [Jacobson's] interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and infringement of individual rights. . . . When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.<sup>9</sup>

Undoubtedly, defending the rights of convicted criminals does not win popularity contests. However, the nature of the crime or the criminal did not sway Chief Judge Lay from the

---

5. *Id.* at 1539.

6. *Jacobson*, 893 F.2d 999, *vacated*, 899 F.2d 1549 (8th Cir. 1990). The panel members were Chief Judge Lay, Judge Fagg, and Senior Judge Heaney.

7. *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990) (*en banc*), *rev'd*, 112 S. Ct. 1535 (1992).

8. *Id.*, at 471 (Lay, C.J., dissenting). Judge Heaney also dissented, arguing that the government's conduct was "outrageous," violating all accepted due process standards. *Id.* at 471, 476 (Heaney, J., dissenting).

9. *United States v. Jacobson*, 112 S. Ct. 1535, 1543 (1992).

oath which he took upon his appointment to the bench, to uphold the United States Constitution. Perhaps the oath is why Judge Lay dissented from the en banc decision in *United States v. Kroh*, voting instead to reverse the defendant's convictions for fraud and conspiracy.<sup>10</sup> Or, perhaps the oath is why Judge Lay dissented from the en banc decision in *Hodgson v. Minnesota*,<sup>11</sup> involving the sensitive issues of abortion, parental rights, and minors' rights to make an informed decision regarding abortion. Here, Judge Lay admonished the court to remember its duty to uphold the Constitution. "As long as the Constitution protects the right of a woman to have an abortion, we are under a judicial mandate to evaluate state regulations in terms of whether they impose undue burdens on the exercise of that right."<sup>12</sup>

For me, Judge Lay's tenure as Chief Judge of the Eighth Circuit Court of Appeals will serve as a reminder of the importance of respecting your beliefs, regardless of their unpopularity. For Judge Lay, the rights protected by the Constitution are paramount. His years as Chief Judge will be remembered for the fervor with which he respected the interests and rights of those individuals.

---

10. 915 F.2d 326 (8th Cir. 1990). Rejecting the assertion that jurors would not realize that the defendant's co-conspirator was his brother where the government brought out brother's plea bargain during trial, Judge Lay wrote, "If we believe in this, we believe in tooth fairies." *Id.* at 338-39 (Lay, C.J. dissenting).

In fact, Chief Judge Lay was very clear in explaining his concerns that the judiciary has an obligation to protect the rights of individuals: "This dissent is written vigorously with the hope that trial judges exercise great care and oversight when the government attempts to use guilty pleas of co-conspirators. . . . The need for a fair trial should always be paramount to the government's quest to obtain a conviction at any cost." *Id.* at 342.

11. 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 497 U.S. 417 (1990).

12. *Id.* at 1471 (Lay, C.J., dissenting).