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Dedication

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Dedication

By Richard Harnsberger*

I first met Don Ross in 1946 when we were students at the Law College and I have kept track of his career during the ensuing years. More than 15 years ago I asked him to spend an afternoon with the students in my Constitutional Law seminar. He agreed without hesitation and an annual tradition was born. Over the years the sessions have become more informal and we have settled into a comfortable routine. After driving down from Omaha he is introduced to the class, sips Pepsi from a can with the rest of us, and fields questions for two hours. The sessions seem to get better and better each time with the November meeting the best yet.

The students remark about how friendly he is and they are impressed by his command of so many subjects. It is a wonderful educational experience for students to interact with a federal appellate court judge and to realize that there are people with prestigious titles who are not pretentious. I've always appreciated Don taking the time from a busy schedule to visit with our students. He always accommodates our plans unless his panel is hearing cases or the court is sitting en banc. I admire his patience and enthusiasm for young people. Never in all the years have I heard him put anyone down and if some of our questions, including mine, lacked brilliance or clarity, nothing in the judge's demeanor or answers would give any indication that he thought so.

Judges and lawyers do not always agree. I disagreed with the opinion of Judges Ross and Stephenson in *United States v. McMains*, 540 F.2d 387 (8th Cir. 1976) and said so in a law review article in which I analyzed the matters involved at some length. See 7 Florida State L. Rev. 395 (1979). On the other hand, I believe his opinion in *Horowitz v. Board of Curators of Univ of Missouri*, 538 F.2d 1317 (8th Cir. 1976), was correct. But the Supreme Court disagreed and reversed. I am sure Don was much more upset by its evaluation of his *Horowitz* opinion than anything I had to say about *McMains*.

Among the interesting opinions Judge Ross has written are two decisions involving transfers of school teachers who had exercised their rights pursuant to the first amendment. In *Bowman v. Pulaski County Special School Dist.* 723 F.2d 640 (8th Cir. 1983), Judges Ross,

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Henley, and McMillian extended first amendment protection to statements by assistant high school coaches that were critical of corporal punishment imposed on students by the head coach. Thus, the panel refused to permit the school board to make involuntary transfers of the assistants and awarded them attorney fees. Judge Ross' opinion in *Raposa v. Meade School Dist. 46-1*, 790 F.2d 1349 (8th Cir. 1986) reached a different result.

In *Raposa* the teacher's troubles began when she reported, as required by state law, a suspected case of child abuse. Thereafter a turmoil developed with parents of nine of twelve families whose children attended the school. All on the circuit court panel thought the teacher's involuntary transfer was valid but disagreed regarding whether the teacher had a liberty interest in her reputation that required notice and an opportunity to be heard before complaints were placed in her personnel file. These are the types of different determinations federal judges face on an almost daily basis, and one appreciates the perplexing situations more after talking in a seminar about the alternatives and what influences decision-makers when selecting one course of action over another. In both *Bowman* and *Raposa* Judge Ross wrote in fine style about the interests on each side and why, after a delicate balancing process, he resolved the matters as he did. It is heady work and he does it well. My chief regret is that more students cannot engage in the dialogue when the judge comes to the school each year.

Those of us who know Judge Ross admire his intellect, his judgment, his integrity, and his humanity. When I think back over the years I frequently am reminded of the inscription above the gate of an ancient abbey:

Here enter you, pure, honest, faithful, true
Come, settle here a charitable faith
Which neighborly affection nourish.

As with the inscription, Don believes interpersonal relationships foster strong institutions, and on the basis of his friendship he has gained our gratitude. He has taught us elegance and a love of life. Certainly my life has been immeasurably enriched by the contacts we have had over the years, and I am delighted this issue of the Nebraska Law Review is being dedicated to him.

Dedication

By Roman L. Hruska*

It is a special privilege to join with others in *The Nebraska Law Review's* well merited recognition of Judge Donald R. Ross's contributions to the bar and bench as he takes senior status on the U.S. Eighth Circuit Court of Appeals.

As a senior member of the U.S. Senate's Committee on the Judiciary, it was my function to participate in the confirmation hearings of some 300 appointments to the federal bench over a period of several years. In that process I developed a deep sense of appreciation of the qualities and character necessary in a candidate for service in our federal courts.

When President Nixon nominated Judge Harry Blackmun of the Eighth Circuit to the U.S. Supreme Court and the question of a replacement on the Circuit Court presented itself, I immediately thought of Don Ross as a splendid nominee and I promptly presented his name to the Department of Justice and the White House for consideration.

Few things that I accomplished during my 23 years in the Senate have provided me more personal and professional satisfaction than has Judge Ross's complete justification of the trust and confidence reposed in him.

I have had the pleasure of a close association with Judge Ross in a number of contexts. I knew him first as a loyal and enthusiastic leader of the Young Republicans of Nebraska, as the youthful mayor of Lexington, as the vigorous and effective U.S. Attorney for Nebraska, as the leader of a highly successful law firm in Omaha, as vice president and general counsel of ConAgra, the agribusiness corporation, and as a national vice chairman of the Republican Party, as well as a valued member of two presidential commissions.

Because in each of those roles I saw in Don Ross the rare qualities of absolute integrity, an uncommon soundness of judgment and a strong set of personal values, I was gratified that I could play a modest role in his appointment to the bench.

Wherever he has served, Judge Ross has done so with admirable ability, with strength of character and with an abiding sense of duty.

Those were not traits that came late to him. At the age of 22 (the

* Former United States Senator.

age of many students in the College of Law) he had already attained the rank of major in the Army Air Corps during World War II and was twice awarded the Distinguished Flying Cross. He flew 46 combat missions, including two on D-Day.

Don Ross is a man of strong convictions, a self-described conservative. This facet of his character is apparent to a student of the opinions he has written as a member of the Eighth Circuit Court. He is, in the best sense of the term a judicial, as well as a political, conservative, as his opinions reflect, yet he has taken strong stands in defense of the rights of women and minorities.

He has exhibited great courage in a number of his opinions as he has taken positions not in accord with the trends of a particular time. He firmly believes the role of the jurist is not to make social policy, but to interpret the law with restraint and with compassion and understanding.

It is gratifying to know that the court will continue to have the benefits of Judge Ross's wisdom, intellect and experience for years to come. He has served well and faithfully and deserves the gratitude and appreciation of all of us.

Dedication

By Richard G. Kopf*

Donald R. Ross, United States Circuit Judge - A Consensus Builder

As a former law clerk to Donald R. Ross, Senior United States Circuit Judge, it is an honor to write a brief article regarding the Judge on the occasion of the dedication of this issue of the Nebraska Law Review to Judge Ross. It is appropriate to write of the Judge's contribution to the jurisprudence of the United States Court of Appeals for the Eighth Circuit, which contribution will, happily, continue as the Judge serves the court in his capacity as Senior Circuit Judge.

Strangely, the dissents that Judge Ross did *not* write are among the most important contributions he has made to the court's jurisprudence. It is no secret that, when strong-willed lawyers of extraordinary ability take the bench as circuit judges, the fashioning of opinions which find agreement among the panel members is a tough task. Consensus, such that the court can speak with one voice, is a virtue that gives the jurisprudence of the court coherence and stability. Judge Ross brought to the court, and used, a unique ability to bring people to an agreed, and agreeable, result.

When Judge Ross came to the court he had the customary skills of a circuit judge — he had been a lawyer of special ability. Practicing law in a small town law office, serving as United States Attorney, and engaging in national and international corporate practice, the Judge had distinguished himself in his profession. The Judge, however, also brought to the court something else — his ability to forge agreement when chaos seemed inevitable.

In 1965, *Newsweek* magazine recognized that an era had ended in the Republican party when Barry Goldwater surrendered the reins of authority to a new power bloc. *Republicans: End of an Era*, *Newsweek* 23, 23 (Jan. 25, 1965). As *Newsweek* observed, the negotiated transfer of power "started with an obscure Nebraska National committeeman named Donald R. Ross, 42, a tall, ruddy, Omaha lawyer." *Id.* Donald R. Ross would be obscure no more, and his skills at forging order out of disorder, through the use of reason coupled with diplomacy, became highly regarded nationally.

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No magazine has access to the delicate negotiations between circuit judges. No opinion of the court recognizes the private give-and-take of the judges as they struggle to reach the correct result. No law clerk should disclose the specifics of any such struggles. However, what can be properly said is that the skills of Donald R. Ross, the lawyer, recognized by *Newsweek* in 1965, were skills which Donald R. Ross, the judge, would judiciously and appropriately employ with his brethren on the court.

In approximately sixteen years on the bench, Judge Ross dissented on the average about four times per year. His published dissents total only sixty-two in number, out of more than one thousand published and unpublished decisions. When Judge Ross did dissent, one can see in his dissent the persuasive reasoning that made a Judge Ross dissent unnecessary most of the time.

An example will serve to illustrate this point. Consider the case of *Fields v. Wyrick*, 682 F.2d 154 (8th Cir.), *rev'd per curiam*, 459 U.S. 42 (1982). In short, the *Fields* court, with Judge Ross dissenting, held that there was a duty to readvise a defendant of the defendant's *Miranda* rights after a consensual polygraph examination, and before a post-polygraph interview, despite the fact that the defendant had been fully advised of the *Miranda* rights prior to the examination. In *Fields*, the defendant and his lawyer asked for the polygraph examination; Fields had stated that he did not want his lawyer present. Fields was informed that he could stop the questioning at any time and could request at any time that his lawyer join him. The Eighth Circuit majority seemed to require so-called "*meaningfully timed Miranda* warnings." *Id.* at 160 (quoting *Henry v. Dees*, 658 F.2d 406, 410 (5th Cir. 1981)).

Judge Ross dissented, stating that the proper test was whether, under the totality of the circumstances, Fields made a knowing and intelligent waiver of his constitutional rights. Judge Ross maintained his position in a "specially concurring" opinion in *United States v. Elk*, 682 F.2d 168, 170-73 (8th Cir. 1982) (Ross, J., concurring), *vacated*, 459 U.S. 1167 (1983) (remanding to the Eighth Circuit for reconsideration in light of *Fields v. Wyrick*, 459 U.S. 42 (1982) (*per curiam*)), suggesting that the court's opinion in *Fields* had incorrectly created a *per se* rule and that the court's inquiry was no longer directed at the totality of the circumstances. *Id.* at 170-71. By this time, the force of the Ross dissent in *Fields* had gained support with others of his brethren; Judge Gibson noted in a separate concurring opinion in *Elk*: "I agree with the reasoning in Judge Ross' specially concurring opinion. I am concerned that *Fields v. Wyrick* has created a *per se* rule that finds no waiver even when repeated *Miranda* warnings have been given." *Id.* at 173 (Gibson, J., concurring).

Seven months or so after Judge Ross dissented in *Fields*, the

Supreme Court granted certiorari and reversed. In the Court's per curiam opinion, the Court took the unusual step of acknowledging the dissent of Judge Ross in the first sentence of the opinion, stating: "In this case, the United States Court of Appeals for the Eighth Circuit, over a dissent by Judge Ross, [granted Fields' petition for a writ of habeas corpus.]" *Fields*, 459 U.S. at 43. And, as one commentator observed: "In the end, Judge Ross' position prevailed when the Supreme Court summarily reversed *Fields*. In a per curiam opinion, the Court was in complete agreement with Judge Ross." Note, *Fields v. Wyrick; United States v. Elk; United States v. Jackson: The Duty to Advise Defendants of their Miranda Rights after Consensual Polygraph Examinations*, 16 Creighton L. Rev. 1045, 1050 (1983) (footnote omitted).

Thus, one may conclude that Judge Ross seldom dissented, for he had the unusual ability to combine reason and diplomacy such that the court could speak with one voice. When the Judge did dissent, the force of his dissent made it apparent why it was unnecessary for him to frequently dissent. Judge Ross' contribution to the jurisprudence of the United States Court of Appeals has been truly significant. In a way, it is unfortunate that many of the Judge's triumphs on the court will not be known; when the Judge built consensus, the skill at building the agreement would not, out of necessity, be apparent to those outside the court. It is, therefore, especially fitting that the Nebraska Law Review recognizes Judge Ross, a consensus builder.