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A Tribute to Judge Donald P. Lay

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To write some words of appreciation about the judicial career of Donald P. Lay, who stepped down after twelve years as Chief Judge of the United States Court of Appeals for the Eighth Circuit this January, is a task both pleasant and easy. I have had the privilege of being Judge Lay's colleague—his Brother, as we say—during all but a couple of months of his chief judgeship. I have observed his work, judicial and administrative, first hand. I have shared many experiences, professional and personal, with him. It is a joy to have this chance to express a few thoughts in tribute to my friend, Don Lay.

The first thing one notices about Judge Lay's judicial product is its sheer quantity. He had the advantage of beginning early. He entered on duty as a United States Circuit Judge for the Eighth Circuit on August 26, 1966. He was, at that time, the second youngest judge to be appointed to a United States Court of Appeals. When he took senior status on January 7, 1992, he had served as a circuit judge in regular active service for more than twenty-five years—a judicial lifetime by anyone's standards. In 1980, he became Chief Judge and served in that demanding position, as I have mentioned, for twelve years.

During his time on the bench he has written 886 published opinions for the court in this circuit and eleven for the court in other circuits, where he sat as a visiting judge. He has written thirteen opinions for a district court, where he sat by special designation. In addition, he has written eighty-eight concurring opinions and 130 dissenting opinions. This work is scattered throughout 589 volumes of the *Federal Reporter, Second Series*. To assess this work, to describe all of its contributions to American jurisprudence, to appreciate the tremendous industry it represents, deserves more space and attention than these few pages can give. It would, in fact, be an admirable project for a legal scholar to categorize and analyze the corpus of Judge Lay's opinions. It suffices to note here that the volume of his output far exceeds that of most judges who have sat on the federal bench since the beginning of our history. Two

† Chief Judge, United States Court of Appeals for the Eighth Circuit.
words sum this up: hard work. Judge Lay has never been a stranger to hard work, nor has he shirked it. His written opinions are a monument to his zest for the law.

The list of appointments, responsibilities, and honors that have been heaped upon Judge Lay through the years is also impressive for its quantity. In particular, he has served, in common with other chief circuit judges, as a member of the Judicial Conference of the United States, the governing body, in administrative terms, of the Judicial Branch. The work of the Conference is little known to the bar, to say nothing of the public, but its work is both important and essential. There are now over 1,000 federal judges in this country. Of necessity, a far-flung administrative structure must exist to help this system function properly. At the top of this structure is the Judicial Conference, and Judge Lay has been a leading member of the Conference. Its meetings are not open to the public—indeed, they are closed to all but the membership of the Conference and a few others—but some of its decisions are of great public interest. I will mention only one issue: federal habeas corpus. The Conference has, on several occasions, considered proposals to restrict the Great Writ. Judge Lay has been in the forefront of those who, with a large measure of success, have resisted these narrowing efforts, believing that the writ of habeas corpus is one of the chief defenses of human liberty in this country. Without Judge Lay’s tireless and persistent efforts, the outcome of this story would have been far different.

The main aspect of Judge Lay’s work that deserves attention, however, is not quantity, but quality. He is a quality judge and a quality person, and this shows through brightly in his opinions, in his judicial administration, and in his personal relationships.

The most obvious quality of Judge Lay’s opinions is intensity. I am reminded of a speech I heard him give called “Putting on Wet Greens.” This speech, which I heard early in my tenure as a circuit judge, impressed me greatly. As a golfer (a vice I share with Judge Lay), I understand perfectly what it means to putt on wet greens. It is hard, unpredictable, and takes more strokes than anyone would want. Yet, with persistence, one ultimately gets the ball into the hole. So it is, Judge Lay explained, with judging, especially appellate judging. There are many obstacles. There are briefs to read, records to study, precedents to understand. There are difficulties in ascertain-
ing and understanding facts, even when those facts have been found by a lower court. When one has reached a result in one's mind, not an easy thing in itself, there are difficulties in putting it on paper. Often opinions go through many drafts. Sometimes even the result changes from what we thought it would be when the first draft was written. This process requires, above all, dedication and persistence. It is no task for the short-winded, as Chief Justice Vanderbilt said of judicial reform. Judge Lay has the qualities of persistence and dedication that the task demands. He can deal with frustration and overcome it.

His opinions show, above all, a zeal for justice to the individual litigant. Institutional concerns are not absent, but it is the individual that is paramount. Judge Lay knows that cases are about people, and only secondarily about principles and concepts. Appellate opinions should be written with people in mind, and his opinions live up to this ideal. Moreover, he pulls no punches. One sees this especially in his dissenting opinions. A dissent, he has told me, has to have impact; otherwise there is no point in writing it. Judge Lay's dissents fit this description. I think in particular of his dissenting opinion in United States Jaycees v. McClure.¹ This dissent is a model of professional yet impassioned expression. I am well qualified to testify on this subject, since I wrote the opinion of the Court from which Judge Lay dissented, a dissent later vindicated by the Supreme Court of the United States.² Perhaps I should have listened more carefully to the dissent when I had a chance.

Judge Lay's quality also shines forth in judicial administration. As Chief Judge of the Eighth Circuit for twelve years, he made a special effort to solidify the bond between bench and bar. He has been and remains, above all, a lawyer, and his feeling of professional kinship for the men and women of the bar who appear before him is keen. In order better to serve the bar, he established a divisional office of the Court of Appeals in St. Paul. He created Federal Practice Committees in each district of the Circuit, vehicles for lawyers to use to express their views, even their criticisms (I should say especially their

criticisms) to the bench. During his tenure and with his encouragement, the Historical Society of the United States Courts in the Eighth Circuit was established. He took care to see that the Federal Advisory Committee, another means by which lawyers can express their views to the Court, got off to a good start. He also constituted a Judicial Conference Advisory Committee to make sure that the views of lawyers were taken into account in planning the annual Circuit Conferences attended by judges and lawyers from throughout our seven states. In all of these ways, Judge Lay has taken pains to emphasize that judges and lawyers are in partnership. “The law is not made by judge alone, but by judge and company,” as Lord Coke said.

During his tenure as Chief Judge, Judge Lay strove constantly to see that our growing caseload was processed promptly and fairly. He hates delay, because he realizes that it brings the entire administration of justice into disrepute. Unhappily, delays in deciding cases have grown somewhat over the years. This is a sad but inevitable consequence of volume. When Judge Lay became a circuit judge in 1966, about 250 appeals were filed each year in the Eighth Circuit. Every case was fully briefed and orally argued, and full opinions written. In 1991, over 2,800 appeals were filed. Yet, we have only three more judges. Coping with this cascade of litigation is the bane of every chief judge’s existence, and how to deal with it was constantly in Judge Lay’s mind. He never stopped looking for better ways to handle the caseload, and the fact that we are handling it with a fair degree of expedition is a tribute to his efforts.

This little piece is of course mainly about Judge Lay as a lawyer and a judge. A word should be said, though, about the personal aspects of his work and character. On a multi-judge court, all colleagues work together closely. Unlike the district judges, who have most of the real power in our system, an appellate judge can do virtually nothing without the assent of at least one colleague. Membership on a multi-judge court is a little bit like being married: you can get out of it, but as long as you are in it you cannot have your own way all the time. Judge Lay’s presence on the court has been one of the bright spots for me personally. We began as professional colleagues and became friends. This is one of the major blessings of being a circuit judge: one comes to know well other judges who would
otherwise have been strangers. My association with Judge Lay is a priceless possession, even though our relationship is greatly strained on the golf course, where he regularly defeats me. When I was nominated for the Court of Appeals in 1980, a certain newspaper attacked the nomination as “cronyism.” (I had been a member of the staff of a United States Senator.) The accusation was, of course, partly true. Lawyers who are unknown to Senators seldom become federal judges. It was not, however, the whole truth, and Judge Lay came immediately to my defense, making a strong public statement in support of my nomination. Understandably, I have not forgotten this. We got off on the right foot together and have stayed there.

The greatest thing about Judge Lay’s career is that it isn’t over. Senior status, an enviable state indeed, enables him to keep on working, but at a more livable pace. In addition, Judge Lay, always looking for more to do, is now finding wider scope for teaching, one of his lifelong loves. He has recently become the James A. Levee Professor of Criminal Procedure Law at the University of Minnesota, and he has also taught for a number of years here at William Mitchell. Judges, or good judges anyway, are, above all, law students, and law teachers are also law students. They have to be, or the law will rapidly pass them by. When I think of Judge Lay’s career as a lawyer, judge, continuing student of the law, and law teacher, I remember the lines in Chaucer’s Canterbury Tales about the Clerk of Oxenford: “Gladly wolde he teche, and gladly lerne.” Judge Lay is glad to teach and glad to learn, and law students who learn from him are fortunate indeed.

Long may he flourish.