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OBSERVATIONS OF TWENTY-FIVE YEARS AS A UNITED STATES CIRCUIT JUDGE

DONALD P. LAY†

INTRODUCTION

Following my announcement that I was stepping down as Chief Judge and taking senior status after having served as an active judge on the Eighth Circuit Court of Appeals for twenty-five years, I received many letters from lawyers, judges, and lay people from all parts of the country. One of my friends wrote that she felt it was the end of an era in the sense that, as of January 7, 1992, no active judge would be on the Eighth Circuit Court of Appeals who had presided when I was appointed by President Johnson in 1966. My announcement has caused me to reflect on the many changes that have taken place on the court of appeals over the past quarter century. For historical anecdote, I have tried to recall some of the great judges with whom I have worked, as well as some of the significant cases and memorable incidents.

MY RELATIONSHIP WITH THE EIGHTH CIRCUIT

My relationship with the United States Court of Appeals for the Eighth Circuit started several years before I was appointed to the court in July of 1966. As a trial lawyer, I had the privilege of bringing several cases before the Court of Appeals in the late 1950s and 1960s. I have fond memories of these cases. I always looked forward to arguing them at the federal courts building in St. Louis, Missouri. It was during this time that I became impressed with the caliber of the judges who sat on the circuit's bench. I found the court proceedings to be highly dignified, with the judges always alert, knowledgeable, and respectful to the bar.

I recall several trips where I would leave Omaha, my resi-

† Senior Judge, United States Court of Appeals for the Eighth Circuit. Judge Lay was appointed to the Eighth Circuit on July 6, 1966, by President Lyndon B. Johnson. He became Chief Judge on January 1, 1980, and he assumed senior status on January 7, 1992.
dence at the time, by boarding the Missouri Pacific sleeper at night, taking the train to Kansas City and then into St. Louis, getting into the Union Station at 7:30 a.m. I would argue my case during the day and then return to Omaha on the next night’s sleeper.

At the time, the Chief Judge of the court was the Honorable A.K. Gardner, a man in his nineties. With Minnesota’s John B. Sanborn and Nebraska’s Harvey M. Johnsen and Joseph W. Woodrough, who were all in their seventies and early eighties, the Gardner court was composed of some of the most elderly jurists in the country. Also sitting on the court in those days were Judges Martin D. Van Oosterhout of Orange City, Iowa, Charles J. Vogel of Fargo, North Dakota, Al Ridge of Kansas City, and Charles Matthes of St. Louis. Judge Harry Blackmun of Minnesota was appointed to the Eighth Circuit in 1959. He was followed by Judge Pat Mehaffy of Arkansas in 1963 and Judge Floyd R. Gibson of Missouri in 1965. I argued cases before all of these judges except Judge Floyd Gibson.

I once argued a bankruptcy case on a jurisdictional point where a creditor of my debtor-client had placed him into bankruptcy. The creditor was a franchisor from New York, and we filed a counterclaim against it for several thousand dollars asserting breach of contract. We could not get jurisdiction over the creditor on the counterclaim other than in New York. I successfully moved to dismiss the bankruptcy action on the ground that there existed more than twelve creditors.

In the 1950s, the district judge often wore two hats; one as a bankruptcy judge and one as a district judge. I tried to utilize the bankruptcy action as a basis to obtain jurisdiction in Nebraska, but the district court dismissed the case on the ground that the bankruptcy court could not entertain a common law action for breach of contract other than as an offset to any bankruptcy claim. Again, I successfully moved to dismiss the bankruptcy action on the ground that there existed more than

2. Id.
3. Id. "[U]nder Section 59, subdivision b of the Bankruptcy Act, a single creditor was not qualified to file an involuntary petition if the alleged bankrupt has twelve or more creditors." Id. at 684; see also 11 U.S.C. § 303(b)(1) (1988).
twelve creditors. I argued, however, that the district court should have continued jurisdiction to entertain the counterclaim. The case law was against us, but I urged the court to follow Professor James Moore, who maintained that the separation of the district judge from a bankruptcy judge was a mere fiction, and as such, it was not logical to recognize a distinction between bankruptcy and a federal court’s general jurisdiction. Judge Sanborn, who was an expert in bankruptcy law, asked me whether I wanted the court to follow the law or follow a law professor? I forget my exact response, but I do recall Judge Sanborn’s parting statement to me: “Anyway Mr. Lay, we will give you an E for effort.” Needless to say, I lost the case.

In other court of appeals cases, I received favorable decisions upholding at least three fairly substantial verdicts. As an appellant, I also obtained three reversals. As I recall, in each case, Judge Van Oosterhout or Judge Vogel wrote the opinion. Regardless of the outcomes, I always thought they were great judges.

In 1964, I filed an antitrust suit and breach of contract action in Nebraska for a client in Denver, Colorado, against McGraw-Edison Company, an Ohio corporation. McGraw moved for a change of venue to Denver. Judge Robert Van Pelt of the United States District Court of Nebraska, whom I consider to be the greatest trial judge I ever appeared before, denied the section 1404(a) motion to transfer. There could not be an interlocutory appeal on an order denying a change of venue. McGraw’s counsel, however, filed a petition for writ of mandamus in the court of appeals and asked that the case be heard by the court en banc. In another decision handed down a few years earlier, the court of appeals had ruled that it did not have jurisdiction to entertain a petition for writ of mandamus on a discretionary ruling of a trial court. Judge Harvey M. Johnsen of Nebraska, who I succeeded on the court four years later, had

5. See supra note 3.
7. See Associated Elec. Supply Co., 288 F.2d at 683.
8. See 28 U.S.C. § 1404(a) (1989). “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” Id.
dissented in that earlier case. 10 When McGraw-Edison was argued before the court en banc in 1964, 11 Judge Johnsen was the Chief Judge, and both Sanborn and Gardner, who had formed the earlier majority, were no longer on the court. We were successful in sustaining Judge Van Pelt’s ruling denying the motion to transfer. 12 Judge Johnsen had assigned the writing of the opinion to himself. Unfortunately, he was not known for producing his opinions in a very expeditious manner. As it was told to me years later, one reason for these delays was that, for over five years, the judge worked without a secretary or a law clerk because he felt he was saving the government money. Judge Johnsen had the McGraw-Edison case under advisement for over eighteen months before finally sustaining Judge Van Pelt’s denial of the motion to transfer. 13

In the meantime, while awaiting the decision, the case in the district court sat in limbo. My client was having a great deal of financial difficulty with McGraw-Edison. During the delay, he lost all monies he had available to pursue his case in the federal court. My client filed bankruptcy as a result, and when Judge Johnsen’s ruling finally came down, the client lacked any funds to pursue the original lawsuit in district court. Shades of Charles Dickens. That case personified for me the old saying that “justice delayed is justice denied.” 14

The effect of that case upon my client created a lasting impression upon me. During my tenure on the bench, I have been persistent in urging our court to dispose of opinions in as short a time as possible. The courts of appeals throughout this country should adopt mandatory procedures to follow the policy of the Judicial Conference of the United States, which resolves that every appellate decision should be written within

10. Id. at 538-42.
12. Id. at 364. The reason I mention this case is because it was the first case heard by the court of appeals en banc in ten years.
13. Id.
14. “Justice delayed is justice denied” is one of the three qualities of justice discussed by Sir Edward Coke in his exposition of the Magna Carta. According to Coke, justice must be “free, for nothing is more iniquitous than justice for sale; complete, for justice should not do things by halves; swift, for justice delayed is justice denied . . . .” David Schuman, Oregon’s Remedy Guarantee: Article I, Section 10 of the Oregon Constitution, 65 OR. L. REV. 35, 37 n.19 (1986) (quoting Edward Coke, 2 Institutes of the Laws of England 55-56 (4th ed. 1671), and translating from Latin into English).
three months. With the volume of work that a circuit judge has today, this is very difficult to do. Delays of six months to two years are common on most courts of appeal. However, with self-discipline and the application of proper management principles, adhering to the three-month timetable can, and should, be done. There are few reasons why cases cannot be processed in ninety days. The public should demand it. The court should strive, wherever possible, to meet these deadlines.

**My Appointment to the Eighth Circuit**

I had the privilege of being appointed to the Eighth Circuit Court of Appeals in 1966. At that time I was thirty-nine years old. I was recently reminded of my appointment when I received a nice note from the Honorable Barefoot Sanders, distinguished Chief Judge for the United States District Court for the Northern District of Texas. Barefoot was with the United States Justice Department in 1966. He was kind to recall that both he and Nicholas Katzenbach, then United States Attorney General, were actively involved in my appointment.

My first few years on the court were exciting to say the least. Because I had argued several cases before Judge Van Oosterhout and Judge Vogel, I was quite apprehensive when I was initially assigned to hear cases on a September panel with then-Chief Judge Vogel and Judge Van Oosterhout. The first calendar on which I sat scheduled three cases a day. For any case on appeal, regardless of merit or size, counsel received thirty minutes for oral argument.

The first night that I had dinner with Judge Van (as we all came to call him) and Judge Vogel was somewhat uncomfortable for me. It was at the Mayfair Hotel in St. Louis. I had always looked up to both of these judges with great respect and admiration. To realize that I was now their colleague and peer was indeed an awesome experience at the time. I proceeded to call them both “Judge” until finally Charlie Vogel, in a joking way, told me that if I did not start using first names he was going to start calling me “Judge.” He was such a great friend; he made me feel quite at ease. I recall how all of the judges made this transition easy for me; they were all congenial and helpful.

The first case I heard as a judge, in September 1966, was a
very difficult patent case.\footnote{15} I had read the briefs several times and still did not understand what function the patented device served. Skilled Washington and New York patent lawyers had presented their argument using various charts and diagrams. However, no one explained what purpose the invention served. I decided that, in order to make an intelligent vote on the case, I needed to ascertain the use of the invention. I thought perhaps I had missed some obvious explanation. At the end of the argument, after sheepishly apologizing to the lawyers for asking what probably sounded like a foolish question, I asked if they “would be kind enough to tell me for what use or function the patented device served.” I recall that one of the lawyers beamed and said he would be glad to explain. He turned to one of the complex diagrams in the courtroom and explained that the device was a “form” used to hold lead wires when constructing a suspension bridge. It was incredible to me that no one had ever informed us of this in either the briefs or during oral argument. After asking the question, I still felt foolish since I believed somehow I should have figured out the answer.

Shortly thereafter we took a recess, and as I walked into the robing room, Charlie Vogel put his arm around my shoulder and said, “Don, I am sure glad you asked that question because I didn’t know either.” I remember how much that comment made me feel at ease and at home with the court, and I have felt that way ever since.

For many years, members of the court stayed together at the Mayfair Hotel in St. Louis. We would generally meet for breakfast and lunch, and then in the evening, we would get together in someone’s room before going to eat either at the Mayfair or the Athletic Club. The rooms were small and I can still remember then-Judge Harry Blackmun sitting on the floor along with some of the rest of us. There was a lot of “togetherness,” which made for a great collegial court. There were never any open disagreements or bad feelings.

One of the early stories I recall about the court occurred in 1967. At that time, the court sat for two weeks in the spring

\footnote{15. Since the creation of the Federal Court of Appeals, courts of appeals no longer hear patent cases. I think this unfortunate. Specialized courts will never provide the objective analysis afforded by a generalist court. Patent cases were often difficult but fascinating to work on.}
and for two weeks in the fall with two panels sitting. This meant that all eight judges would be in St. Louis for two weeks. The weekends were deadly. By Tuesday of the second week, even though we were hearing only three cases a day, everyone was very tired. We came to the winter court meeting and Judge Blackmun stated that he did not know whether anybody had noticed, but the two week spring term fell over the Easter weekend. Chief Judge Vogel said that he had sat away from home on many Easter weekends and it did not bother him. Judge Van stated that he saw nothing wrong with it. Judge Blackmun immediately noted that it did not bother him either, he just “wanted to bring it to everyone’s attention.” Although I was one of the newest members on the court, I finally spoke up and said that it was of some concern to me because I had five children at home and I would like to be with them over Easter. At that point, Judge Vogel said that there was no motion on the floor and that there would have to be a motion if anything was to be changed. There was a thirty second silence. I then sheepishly moved that we not have the two week session in April. Judge Floyd Gibson seconded my motion and we voted. Judge Heaney, another new member of the court, Judge Gibson, and I voted for the motion; the other five judges, including Judge Blackmun, abstained.

The following year we were still planning to hold the two-week session in October. I suggested that instead of sitting for two consecutive weeks in the fall, we move one of the fall weeks to December. The court had never sat in December because it was considered to be a busy time at home. There was general discussion about the fact that we had never sat in December before. Judge Van Oosterhout, who was Chief Judge at that time, stated he did not want to sit in December. The motion barely passed. After that, I was one of the three judges who sat in St. Louis every December. Bob Tucker, who was the clerk of court, for many years called the December session “the Lay term of court.”

**Important Cases Decided During the 1960s**

We heard several significant cases during my first years on the bench. One significant case was *Jones v. Alfred H. Mayer*
the panel for which consisted of Judge Blackmun, Judge Mehaffy and me. This case presented a novel challenge under the Thirteenth and Fourteenth Amendments against racial discrimination in private housing. The Civil Rights Act of 1968, wherein Congress created a cause of action for discrimination in private housing, had not yet been passed. Our court reasoned that since private parties were involved, the existing law recognized a cause of action under the United States Constitution only where there was state action. We expressed a desire to find a cognizable claim under the Constitution, but felt that the law, as it existed at that time, did not provide us with that authority. Judge Blackmun cogently analyzed the case law that existed at that time. The Supreme Court ultimately granted certiorari on the case, and we were all pleased when, in a landmark decision, we were reversed.

In another interesting case, Standard Oil of New Jersey sued Standard Oil of Indiana in an attempt to dissolve the 1937 injunction which broke up the Standard Oil monopoly. This was a dispute over the use of trademarks by these competing oil companies. Our court determined that the 1937 injunction should remain in place and that the distinctive trademarks that had been developed by New Jersey and Indiana should not be infringed upon or used by either of them. The plaintiffs argued that the credit cards were interchangeable; thus the trademarks should be interchangeable as well. We reasoned that there had not been a sufficient change of circumstances to allow dissolution of the injunction.

Humble Oil stands out in my memory for two reasons. First, the district court had held two of the oil company attorneys in contempt of court because it felt that they had perjured themselves at trial. Second, there was a good deal of attention
given to the case by Standard Oil of New Jersey and Standard Oil of Indiana, as well as the national bar. Over thirty attorneys from both oil companies sat in the courtroom that day and listened to the arguments.

The case was argued by Richmond Coburn from St. Louis and Judge David Peck of Sullivan and Cromwell in New York. Each side had over an hour for oral argument and both counsel were thoroughly prepared. I later became acquainted with Judge Peck and he told me that he had spent over two weeks preparing his oral argument for that case. He also produced the most complete, thorough, and interesting printed record that I ever examined while on the court, filling over sixteen volumes with many color plates. In fact, I still have a copy of that record in my library today.

In the years since we heard Humble Oil, I have had the opportunity to tell both Judge Peck and Richard Coburn that they both made the finest appellate oral arguments ever presented before me during my twenty-five years on the court. An interesting aside to this litigation is that as a result of losing the case, Standard Oil Company of New Jersey went on to spend several million dollars in developing a new trademark which is now familiar throughout the United States: Exxon.

Judge Gerald W. Heaney of Minnesota came on the court six months after I did, in December of 1966. Upon his arrival on the court of appeals, Judge Heaney immediately established himself as a scholar and a proponent for equal rights. He took an early interest in the school integration cases. This interest continues to the present time. He has written on integration law in cases arising out of Little Rock, Omaha, Kansas City, and St. Louis. I generally voted with him on these issues; in the late 1960s and early 1970s, there were a few occasions when we were in the minority. He and I always felt that the district courts were reacting too slowly under the "deliberate speed" concept.27 The majority of the court disagreed with us, however, and continued to uphold the discretion of the district courts.

One of the interesting en banc cases that we heard at that

27. See Rogers v. Paul, 345 F.2d 117 (8th Cir. 1965); Dove v. Parham, 282 F.2d 256 (8th Cir. 1960); Aaron v. Cooper, 257 F.2d 33 (8th Cir.), aff'd, 358 U.S. 1 (1958).
time was the *Tinker* case out of Des Moines, Iowa. Judge Roy L. Stephenson of Iowa was the district judge. The Tinkers were a family of Quakers. The Tinker children wore black arm bands to school to protest the Vietnam War. Because of this, the principal at their school in Des Moines suspended them. The parents supported their children and refused to have them take the arm bands off. Judge Stephenson sustained the school board's action of upholding the suspension of the children.

Three of us on the panel believed that the suspension encroached upon the freedom of speech and religion granted in the First Amendment and that there was no basis for the suspension. Judge Blackmun and Judge Heaney agreed with me, but the vote in conference was five to three to sustain the district court. Judge Van Oosterhout then stated that he thought it would be better if we did not write any opinion. He thereafter changed his vote to make it four to four so that the decision would simply sustain the district court without precedential value. I mentioned during the conference that I thought I would still like to write something because I felt there were important First Amendment rights involved. Judge Van Oosterhout said that if I did that, he would then change his vote back to make the majority five to three. I then withdrew my request, and the en banc vote was issued four to four. Fortunately, the Supreme Court granted certiorari and reversed eight to one, holding, in a landmark decision, that the school board had violated the children's constitutional rights under the First Amendment.

Another important case in the late sixties was *Spinelli v. United States.* That case involved a gambler in the St. Louis area who had used interstate wires and travelled back and forth between Illinois and St. Louis in setting up a gambling ring. The FBI, after staking out Spinelli, obtained a search warrant to search his apartment where gambling paraphernalia was found and seized.

The key issue on appeal was whether, under the Fourth Amendment, there was probable cause to issue the search war-

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29. *Id.*
31. *Id.* at 878.
rant. Judge Heaney, in a panel opinion, joined by Judge Van Oosterhout, ruled the search unconstitutional as the search warrant lacked probable cause. The panel opinion was vacated and the case was placed en banc. The majority, which I joined, held that there was sufficient indicia to warrant a finding of probable cause for the search. Judge Heaney and Judge Van Oosterhout joined in writing a strong dissent.

The Supreme Court granted certiorari and, in a landmark decision, reversed our court. The Supreme Court adopted the dissenter’s view of the case that probable cause for the search was lacking. I remember that when the decision came down, the FBI agent who had been out working on the case for many months came into the clerk’s office in St. Louis and openly cried in front of Bob Tucker because all the hard work that he had done in staking out Spinelli had gone down the drain. The decision was significant since it established controlling case law for over twenty years as to the parameters of probable cause under the Fourth Amendment. Its importance has not diminished, despite the totality of circumstance rule later announced in *Illinois v. Gates*.

Judge Myron H. Bright of North Dakota joined the court in 1968. He, along with Judge Heaney, took strong stands in favor of civil rights. I have always felt that he, along with Judge Heaney, rank among the nation’s great circuit judges. On one occasion, Judge Heaney, Judge Bright, and I were sitting on an appeal in an Arkansas integration case in which the district court had held the counsel for the school board in contempt of court. We were forewarned by the FBI that there would be a group of irate citizens coming to hear the appeal and that some of them might be dangerous. The FBI recommended that we station marshals on the floor and in the courtroom. Two bus-loads of people drove up to Little Rock to hear the case. I was presiding. We addressed them respectfully and told them that there were some very important issues that would be ad-

32. Id. at 884.
33. Id. at 895 (Heaney, J., dissenting).
34. Id. at 894.
36. Id. at 419.
dressed, and as such, we would appreciate their utmost courtesy and quiet in the courtroom.

The main thrust of the school board's counsel's argument was that *Brown v. Board of Education* should be overruled. Obviously, we had no authority to do that and certainly did not feel that *Brown* had in any way been decided incorrectly. After we heard the case, we received a courteous letter from one of the citizens in attendance telling us that they appreciated the respect that the panel had extended to counsel by listening intently to the arguments. We held the case for about three months and then summarily affirmed. Within a few days, a letter was received by the court threatening our lives. We turned the letter over to the FBI, but fortunately nothing came of it.

I mention this story because a few months after we decided the Arkansas case, Judge Heaney, Judge Bright, and I together sat on another integration case. One of the lawyers for the Little Rock School Board, who was opposing the remedial orders of the district court, called our clerk of court, Bob Tucker, to determine who would comprise the panel hearing the case. Bob told him that the panel was Judges Lay, Heaney, and Bright. Immediately the lawyer said over the phone, "Oh S*!*!". After that, Tucker jokingly called the three of us the "Oh S*!*! Panel" whenever we sat together.

DECISIONS DURING THE BURGER COURT ERA

One of the more interesting cases I have heard on the Eighth Circuit was *In re Weitzman*. A twenty-seven-year-old woman, born in South Africa of Jewish parentage and married in Tel Aviv, Israel to a United States citizen, applied for citizenship but refused to take the oath requiring her to pledge to bear arms on behalf of the United States. She asserted that her objection was as a matter of conscience, but she did not believe in a Supreme Being or religion. In denying her citizenship, the district court found she could not claim to be a conscientious objector because she did not believe in a Supreme Being as

40. *Watson Chapel Sch. Dist.* , 446 F.2d at 933.
41. 426 F.2d 439 (8th Cir. 1970).
required in the citizenship oath.42 The citizenship oath included in the naturalization act was the same as the conscientious objector clause under the selective service laws.43

At conference, then-Judge Blackmun, Judge Heaney, and I were all somewhat undecided. Judge Blackmun voted to uphold the constitutionality of the Immigration and Nationality Act.44 Judge Heaney felt that the statute would be unconstitutional unless those who sincerely objected as a matter of conscience would be excused from bearing arms. He construed the statute in that fashion. Thus, he voted to reverse. I wrote that I would not pass on the constitutionality question notwithstanding Weitzman's claim that she had no religion. I found within her testimony, evidence that she did, in fact, possess a "religious belief" because her pacifism derived from a belief in instinctive natural law analogous to humanism, which the Supreme Court had held to be a recognized religion.45 I wrote that "citizenship [should not] be denied because the belief of the petitioner is not in conformity with an acceptable definition of religion."46

Judge Heaney's opinion was perhaps closer to the ultimate resolution by the Supreme Court a few years later in Welsh v. United States,47 where the court held that a statement of sincere conscience was sufficient, otherwise the statute would be unconstitutional.48 I have received several letters from professors around the country who felt that the opinion had great value for teaching freedom of worship under the First Amendment. I recall it to be one of the most fascinating cases on which I ever worked.

It may be surprising to know that Judge Heaney and I, in those early days, wrote several dissents to opinions by Judge

43. Weitzman, 426 F.2d at 439. At that time, there was a great deal of litigation over the conscientious objector clause under the selective service laws during the Vietnam War.
44. Id. at 462 (citing 8 U.S.C. § 1448(a) (1988)) (Blackmun, J., dissenting).
45. Id. at 459 (citing Girouard v. United States, 328 U.S. 61, 68 (1946)).
46. Id. at 458.
48. In Welsh, the petitioner was convicted for refusing to be inducted into the armed forces. The petitioner's statements that he believed the taking of life "to be morally wrong," together with the court of appeals' conclusion that the petitioner's beliefs were held "with the strength of moral traditional religious convictions," allowed the petitioner conscientious objector status. Id.
Blackmun. Because of our apparent philosophical differences, I knew he was concerned that we would not give him our full support when he was nominated to the Supreme Court. I felt badly about this because there was no question that Judge Heaney and I were pleased that a member of our court received an appointment to the Supreme Court. Despite our differences, we always considered him to be a good friend. We both knew that he was a scholarly judge and deserving of the appointment. After he was nominated, Judge Heaney and I went down to his office in St. Louis to greet him, and to shake his hand and wish him well. He said that he was relieved that we came to see him because he was afraid that we might oppose him.

There is no question that, because of our earlier disagreements, Judge Heaney and I had reservations as to just how far the new Burger Court would change the humanitarian approach taken by the Warren Court. However, Justice Blackmun, in a few years began to assert a judicial philosophy much different from that which we had perceived on the court of appeals. Today, he is recognized as one of the greatest constitutional scholars on the Court.

Another one of the more interesting cases that I sat on was *Morrissey v. Brewer.*49 *Morrissey* raised the question of whether the revocation of parole required due process notice and hearing before a parolee could be returned to prison. This case declared, for the first time, that the "hands-off" doctrine no longer applied to state prisoners, and that the due process clause was applicable to state prisoners.50

The hands-off doctrine was based on the idea that a parolee was in constructive custody of the state and, as such, he was not entitled to due process. The appeal came before an administrative panel of our court. Two judges determined that the appeal was frivolous. Both judges voted to sustain the trial court's dismissal. It seemed fundamental to me that a state prisoner was "a person" for due process purposes, and that the "state," in depriving him of his "liberty" by returning him to custody, denied him due process of law by failing to provide any kind of notice or informal hearing. With this basic concern, I requested that the court place the case en banc to re-

49. 443 F.2d 942 (8th Cir. 1971) (en banc), rev'd, 408 U.S. 471 (1972).
50. *Id.*
consider our earlier rulings. The court heard the case en banc and endorsed the old "hands-off" rule; Judge Heaney, Judge Bright and I dissented.\textsuperscript{51}

The Supreme Court, which by this time included Justice Blackmun, granted certiorari and unanimously reversed.\textsuperscript{52} The Court held that the state had to afford a parolee in the position of Morrissey a hearing before it could revoke his parole and return him to prison.\textsuperscript{53} This case was a landmark decision for prisoners' rights. Since that time, thousands of cases have applied the due process clause allowing state prisoners to have notice and hearing before the state can deprive them of their liberty interest.

One of the more unusual cases that we heard occurred back in the middle seventies. A non-profit corporation in Dubuque, Iowa, brought suit in federal court. The district court allowed the corporation to proceed in forma pauperis. The relevant statute\textsuperscript{54} speaks in terms of an "indigent person" being allowed to proceed without payment of fees. A paucity of case law at that time indicated that a non-profit corporation could not proceed as a "person" under that statute. Nevertheless, district court Judge Edward McManus in Cedar Rapids, Iowa, certified the corporation as a pauper and the trial proceeded.\textsuperscript{55}

The corporation lost the case and appealed. Thereafter, Judge McManus' court reporter requested payment for the transcript furnished to the non-profit corporation for use on appeal. The Administrative Office of the Courts refused payment under section 753(f) of the United States Code on the basis that the corporation did not qualify to proceed in forma pauperis.\textsuperscript{56} Judge McManus wrote to the Director of the Administrative Office, General Rowland F. Kirks, to seek reimbursement. General Kirks responded that he could not do so because the law did not allow a corporation to proceed in forma pauperis. Various letters were then exchanged between Judge McManus and the Administrative Office. The relationship between the judge and General Kirks deteriorated to the

\textsuperscript{51} Id. at 952-64 (Lay, Heaney and Bright, J.J., dissenting).
\textsuperscript{52} Morrissey v. Brewer, 408 U.S. 471 (1972).
\textsuperscript{53} Id.
\textsuperscript{55} See River Valley v. Dubuque County, 63 F.R.D. 123 (N.D. Iowa), appeal dismissed, 507 F.2d 582 (8th Cir. 1974).
point that Judge McManus' law clerk and Kirks' clerical assistant assumed most of the correspondence. Each letter became more terse. Finally, Judge McManus held that General Kirks was in contempt of court for failure to comply with his order.\(^57\)

I first learned of the case while reviewing for an upcoming court term. I noted that counsel from the Department of Justice was planning to travel from Washington, D.C., to argue the case on behalf of General Kirks. The corporation's counsel was to appear on behalf of Judge McManus. The amount involved was less than $500. I telephoned both counsel to see if the case could be settled. I felt that, since the government would spend thousands of dollars prosecuting the appeal, there should be some room for compromise. Any attempt to compromise, however, was proven futile. General Kirks was angry and wanted the case argued.

After argument, I assigned writing the opinion to myself. The panel was concerned with the precedential effect of holding the Director of the Administrative Office of the United States Courts in contempt. During my study, I realized that, even if the law did not allow a corporation to proceed in forma pauperis, the original order of Judge McManus had become final. The United States Attorney had not appealed the district court's original order. Of course, when Judge McManus issued the order, General Kirks was not a party to the case. Nevertheless, I discovered that, in the original action, the United States Attorney's Office had represented the federal agency who sued the non-profit corporation. Therefore, the government had received notice and had failed to appeal the order. On this basis, we determined that General Kirks, as an agent of the government, was bound by the district court's order. Our court ruled that the Director must pay the judgment since the original order was res judicata.\(^58\)

Under the circumstances, we were confident the Director would pay the judgment and the contempt would be dissolved. Shortly after the opinion came down, I received a call from Justice Blackmun, who was then our associate justice. He said that Chief Justice Burger was upset because our court had upheld the contempt order. When the decision came down, General Kirks, who was not a lawyer, had called the Chief Justice

\(^{57}\) River Valley, Inc. v. Dubuque County, 507 F.2d 582 (8th Cir. 1974).

\(^{58}\) See id. at 582.
and told him that our court had upheld the contempt order. I told Justice Blackmun to show our opinion to the Chief Justice. I explained that our court had decided the case under principles of res judicata and it had nothing to do with holding Kirks in contempt of court. In any event, after several months and additional correspondence, the Director finally authorized the Administrative Office to pay the amount. The contempt citation was dissolved.

RESERVE MINING LITIGATION

Some of the more dramatic incidents on the court occurred during the Reserve Mining Litigation.59 The United States, the states of Michigan, Minnesota, and Wisconsin, and several environmental groups sought an injunction ordering Reserve Mining Company to cease discharging wastes from its iron ore processing plant in Silver Bay, Minnesota, into the air of Silver Bay and the waters of Lake Superior, reasoning that the iron tailings contained asbestos fibers. There was speculation that digestion of the tailings that contained the fibers might cause cancer of the stomach or other internal organs. The district court granted the injunction, ordering that the discharges immediately cease, thus effectively closing the plant.60 Reserve Mining Company appealed the order, and we stayed the injunction pending resolution of the merits of the appeal, because we determined there was no credible evidence in the trial court record to sustain the injunction.61 Although the health issue was paramount, the evidence was entirely speculative. A balancing concern of the panel was the fact that if the plant were immediately shut down, approximately three thousand people would be thrown out of work. Also in balance at that time was a business which was vital, not only to the company, but to the State of Minnesota as well.

The case was appealed on the merits. The court determined that dumping tailings polluted Lake Superior and that Reserve Mining Company should cease the dumping and take affirmative steps to purify the water.62 The state favored a dump site

61. Reserve Mining Co., 514 F.2d at 537.
62. Id. at 538.
called "Mile Post Twenty," which was named such because it was twenty miles distant from the plant. Mile Post Twenty, however, was cost-prohibitive for the company. The company had an alternative site called "Mile Post Seven," which it argued would be both economically feasible and safe. However, our court held that the selection of sites was an issue for the state agencies.63

The district judge publicly challenged the court of appeals' decision. Many viewed his remarks as judicially improper and unethical. Thereafter, he held a hearing sua sponte to determine dumping sites for the tailings. He called his own experts and refused to allow the lawyers to do more than listen. He declared the lawyers for both sides incompetent and stated that he would do all direct and cross-examinations of the witnesses. He subpoenaed the various members of the state environmental protection agency to come to his courtroom. He allegedly locked the courtroom and would not allow anyone to leave during the hearing. Somehow, one of the lawyers was able to get word of the closed proceeding to his firm. A petition for writ of prohibition and mandamus was filed before our court in St. Louis.64

Three judges recused themselves for various reasons, and only five members of the court entertained the writ. We immediately issued a temporary injunction against the district judge and ordered that further hearings be held in abeyance until such time that we could entertain the motions for the writ.65 The court scheduled the hearing on the writ of prohibition in St. Louis a few days later. Chief Judge Gibson recused himself.

Before the arguments were scheduled, much to my chagrin and surprise, the district judge asked two lawyers who were close friends of mine to call and ask me whether he should orally argue his own case. I said that the district judge had to make up his own mind. I knew that some of our judges were very disturbed because he had defied our court order. I was worried that if he argued the case, a verbal altercation might occur in open court, which would be as unfortunate for the court as it might be for the judge. Alternatively, if the district judge were removed from the case and told not to appear, he

63. Id. at 539 n.87.
64. Reserve Mining Co. v. Lord, 529 F.2d 181, 182 (8th Cir. 1976).
65. Id.
would likely have claimed that I had somehow denied him due process.

When the scheduled hearing date arrived, we heard arguments from all parties for almost four hours. The district judge was present in the courtroom. At 5:00 p.m., I inquired whether, even though it was late, he wished to say something to the court. He did. He read a statement concerning his position on the case. It was written in a respectful way and was not argumentative. I was very relieved. Once again, I was concerned that some of our judges would get into a verbal exchange with the district judge which would not, at least in appearance, reflect well for the court or the district judge.

At the conclusion of his statement, as presiding judge, I thanked him. The district judge then stated, "This is my formal statement; now I would like the court to ask me some questions." I informed him that it had been a long day and the court did not have any questions. The five judges of our court all agreed that no one would ask the district judge any questions if he did speak. It was unfortunate that the proceeding did not stop at that point.

The district judge said, "Then I've got some more things that I want to say." He put down his prepared text and emotionally lectured the court on how wrong we were in questioning his judgment. He said that his position was taken in the interest of the people who were going to die in the future. I always recall his statement, "They say I'm an advocate. Of course, I'm an advocate; anyone would be an advocate in my position." As I recall, even the Minnesota Daily, the student newspaper at the University of Minnesota, which had supported the district judge's rulings in favor of the environmentalists, wrote an editorial recognizing the judicial impropriety of the district judge's statement. I wrote an opinion which all judges signed:

[The judge] seems to have shed the robe of the judge and to have assumed the mantle of the advocate. The court thus becomes lawyer, witness and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge—impartiality.

Disregard of this court's mandate by a lawyer would be contemptuous; it can hardly be excused when the reckless action emanates from a judicial officer. It is one thing for a district judge to disagree on a legal basis with a judgment of
this court. It is quite another to openly challenge the court's ruling and attempt to discredit the integrity of the judgment in the eyes of the public.66

A few years later, the same district judge had a dispute with A.H. Robins Co., the makers of the Dalkon Shield contraceptive. Robins filed a complaint under the Judicial Discipline and Conduct Act67 alleging that the district judge had abused his judicial power in comments and actions taken during the course of litigation.68 As a result, our Judicial Council conducted the only investigative hearing it has held in twelve years under the Judicial Discipline Act.

As Chief Judge, I appointed a five-judge committee to review the evidence. We convened the investigative committee with two other circuit judges and two district judges. I sat as Chief Judge. The district judge requested an open hearing. Representing the district judge was Ramsey Clark, the son of Justice Tom Clark. Representing Robins was Griffin Bell, a long-time friend of mine who had been a judge on the Fifth Circuit and Attorney General under President Carter. News correspondents came from all over the country. The courtroom was packed.

During the hearing, we discovered, through the oral presentations, that the district judge's conduct arose out of litigation which was on direct appeal. We determined that the district judge's conduct could be reviewed on appeal of the original case. We dismissed the judicial complaint on the theory that it arose out of ongoing litigation, which was not really under the scope and jurisdiction of the Judicial Discipline and Conduct Act.69 The district judge publicly stated that our dismissal of the case had vindicated him from all charges. Of course, this was not true. We simply took no action in the disciplinary proceeding. In the opinion written on the appeal, the court cited the district judge for abuse of judicial power.70

A short time later, the same district judge was charged under the same Discipline Act by the Washington Legal Foundation,
for judicial misconduct. The district judge was challenged for using the bench as a forum to express his social views. In a sentencing case, he praised two young war protesters for damaging a computer at Sperry Rand. 71 He said, “What is so sacred about a bomb, so romantic about a missile? Why do we condemn and hang individual killers, while extolling the virtues of warmongers.” 72 He had also been on 60 Minutes where he spoke disrespectfully concerning Chief Justice Burger, President Reagan, and the Eighth Circuit Court of Appeals. Although I found his comments disrespectful, as Chief Judge, I dismissed the complaint because I felt not to do so would serve to chill the independence of a federal judge to freely comment on cases pending before him. However, I wrote:

Although federal judges enjoy the independence accorded them under the Constitution, every judge should at the same time be keenly aware that the independence of the federal judicial branch depend[s] in large part on public confidence in the integrity and impartiality of the judiciary. In performing the duties of a judicial officer, it is incumbent upon a federal judge never to be swayed by outside partisan interests or private causes. These are principles of public accountability, which guide all federal judges, because they provide the basis for public trust in the judicial branch of government. When a judge fails to display objectivity and impartiality in a given case, the judge not only creates prejudice in the litigation before the court, but he or she also sacrifices the public trust in the neutrality of the judiciary. While the former can be corrected through the normal channels of appellate review, the latter damage may be irremovable. If the public loses its confidence in the fairness of the judicial system, public acceptance of the rule of law is weakened. 73

I received many letters that expressed both agreement and disagreement with that decision.

In the late 1970s, we heard an interesting case involving the Omaha Indian's claim to land on the Missouri River. Judge Roy Stephenson, Judge Smith Henley, and I sat on the case. A lawsuit was filed on behalf of the Omaha Indian Tribe alleging that their reservation had existed back in the early 1800s and

71. See In re Lauer, 788 F.2d 135 (8th Cir. 1985).
72. Id.
73. Id. at 138.
had been washed away by various avulsive movements of the Missouri River. After a lengthy trial, the district court determined that the Tribe had not shown that the land they once possessed as a reservation was washed away by avulsive movements of the river, rather than the gradual erosion of the land.  

Congress passed a statute in 1834 which declared that if a white person made a claim to lands that were once possessed or owned by Indians, then the burden of proof would be on the white person to demonstrate that the title had passed. The trial court refused to apply the statute. On appeal, we held the statute applicable. We reversed the district court, holding that the white persons had not carried their burden of proof, and established the title in the name of the Indians.

A disappointing thing happened after the original case was decided. One of the landowners' attorneys spoke at various community luncheons. In describing the historic case, he publicly declared that the court's decision was "a political one" which had nothing to do with the law. I have always been troubled by lawyers who place the blame for losing a court decision on "politics" of the court. I suppose this occurs when lawyers need an excuse for losing a case. They fail to realize that, by blaming the politics of the court, they create a general disrespect for the judicial system.

PERSONALITIES ON THE EIGHTH CIRCUIT

In 1967, when Ramsey Clark became Attorney General

74. United States v. Wilson, 433 F. Supp. 67 (N.D. Iowa 1977), vacated sub nom., Omaha Indian Tribe v. Wilson, 575 F.2d 620 (8th Cir. 1978), vacated, 442 U.S. 653 (1979). Under the avulsive theory, the title to the land would remain with the Indians, whereas under the accretion theory, the title to the newly formed land would be transferred to the owner where the land settled.


In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.


76. Omaha Indian Tribe v. Wilson, 575 F.2d 620 (8th Cir. 1978), vacated, 442 U.S. 653 (1979). Although the Supreme Court vacated our opinion, our interpretation of the statute was upheld. On remand, we reinstated our original finding. Omaha Indian Tribe v. Wilson, 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980).
under President Lyndon Johnson, Justice Tom C. Clark, his fa-
ther, resigned from the Supreme Court. Justice Clark was an
old friend who indirectly aided my appointment to the court of
appeals. As head of the National Conference of State Trial
Judges, Justice Clark assumed a mission to educate state trial
judges throughout the country. His primary goal was to up-
grade the knowledge and technique of trial judges so that state
courts could become more competent. He organized a series
of state judge seminars which led to the creation of the Na-
tional College for State Trial Judges in Boulder, Colorado. Ul-
timately, after receiving a grant from the Fleischman
Company, a permanent national college for state trial judges
was built in Reno, Nevada.

After Justice Clark left the Supreme Court, we invited him to
sit on our court. He sat on various courts of appeals through-
out the country but always told me he enjoyed sitting with the
Eighth Circuit the most. He visited our court many times.

One of the more humorous incidents which occurred on our
court involved Justice Clark. I tell this story at various bar
meetings when speaking on oral advocacy. The representative
of the estate for a deceased employee was suing the employer’s
insurance company for double indemnity by reason of the al-
leged accidental death of the employee. The tragic events that
led to the employee’s death centered around his constant
abuse of his wife. After one particularly intense domestic quar-
rel, the wife announced to the employee, “If I had a gun I
would shoot you.” He told her to wait a minute. He then
walked into the bedroom, took out a gun from a dresser
drawer, gave it to his wife and said, “Go ahead and shoot me.”
She did. He died as a result of the gunshot. The wife was con-
victed of manslaughter. Their five children were left without a
father and, for all practical purposes, without a mother. The
estate of the deceased brought suit for benefits on behalf of the
children on the ground that the death was accidental. The dis-
trict court ruled that the death was not accidental but was
caused by the employee’s willful conduct.

On appeal, the lawyer for the estate filed a very short brief.
It was no more than five pages and, as I recall, did not contain
any citation to law. The insurance company’s attorney was well
prepared and cited many cases purporting to support the dis-
trict court’s finding that the death was not accidental. At the
close of the argument, the estate’s lawyer asked if he could
have a moment to make a personal statement. I told him that the court had a full morning but that we would give him a few seconds to say what he wanted to say. He then stepped forward and stated, "I want the court to know that today is the proudest day of my life as a lawyer. I have never had the opportunity and privilege to argue a case before a Supreme Court Justice. Today I have the great personal privilege to argue a case before the Honorable Tom C. Clark, Associate Justice of the United States Supreme Court." He then added, "I am going home to tell my grandchildren that I was here and appeared before Justice Clark." When he concluded and stepped back, Tom leaned over the bench and said to counsel, "I appreciate very much your remarks. I want you to know something. I am going home to tell my grandchildren that you were here." With that we concluded the morning session and we adjourned court. As I walked down the steps into the robing room, Tom put his arm around me and said, "You know, Don, I think we ought to reverse that last case."

I assigned the case to myself. After considerable study, I became convinced the better reasoned cases required us to award the insurance money to the estate.\[77\] I have always held that case out to lawyers and law students as the most persuasive oral argument that I ever heard.

Justice Clark had a great retentive memory. On one occasion we heard an admiralty case. After oral argument, Justice Clark leaned over the bench and asked plaintiff's counsel, "Didn't you used to clerk for Bill Brennan?" The lawyer said, "Yes, sir." Tom said, "I thought so. I remember you." The lawyer was Richard Arnold, who has now succeeded me as Chief Judge to the United States Court of Appeals for the Eighth Circuit.

Justice Clark wrote his opinions in long hand as he flew from one city to another. He often called me from an airport and asked me to visit with him about a case. Sometimes he would visit with me for close to an hour. After a while he would say, "I think I've got it." In a few short days, I would receive his proposed opinion, always concise and to the point.

He told me that he always regretted his role as Attorney General concerning the Japanese internment camps in Califor-

nia. He said that Justice Black, who wrote the opinion, also expressed regret over the decision. Tom told me that Earl Warren, who was then the California Attorney General, also acknowledged sorrow in proceeding so precipitously. The nation was at war, and the national hysteria affected the wisdom of three great men.

The last time I saw Tom Clark was after we sat together in St. Louis in 1977, the year of his death. We rode out to the airport together in a taxi. When we arrived, I had approximately thirty minutes to catch my plane to Omaha. Tom had an hour left to get on his plane to Washington. When we reached the main terminal, we discovered our gates were at opposite ends of the airport. I began to say goodbye. He responded that he would walk me to the plane since he had plenty of time and liked to visit. He waited for me to board my flight before walking all the way back to the other end of the airport. I will always remember that. He was one of the most warm, gracious individuals I have ever known.

One of the best-liked judges who visited the Eighth Circuit during the 1970s was Talbot Smith, a senior federal district judge from the Eastern District of Michigan. Talbot had been a teacher at the University of Missouri in his younger days and, after serving in the Navy, he settled in the federal government in Michigan back in the early 1950s. When he was on the Supreme Court of Michigan, he wrote an opinion which recognized, for the first time, that under common law, a wrongful death of a child had substantial compensatory value. At that time, the general rule was that the measure of damage for the wrongful death of a child had to be calculated under the fiction of what the plaintiff could prove the infant child would have contributed to the family. Professor William Prosser gives Talbot great credit for his revolutionary decision.

78. See Korematsu v. United States, 323 U.S. 214 (1944).
79. Justice Clark was also one of the most thoughtful persons I ever knew. When I was a lawyer, he always wrote a long handwritten letter to me every time I appeared on one of the state trial judge programs. He always expressed his appreciation and added personal comments as well. He also wrote to all the state judges who participated in the program. When I was sworn in as a lawyer to the bar of the Supreme Court of the United States, Justice Clark wrote a little note from the bench, and gave it to the bailiff, asking me to please stop by his chambers to visit.
In 1960, Talbot had written a dissent in a case that involved the question of one man, one vote. He wrote that the Equal Protection Clause of the Constitution had been violated by the denial of one man, one vote in the state legislature. At that time, most courts rejected such claims as political questions. This was a few years before the landmark reapportionment case of Reynolds v. Sims.

Talbot told me that he received a note from Roscoe Pound, the great Harvard law dean, who wrote that he was delighted with Talbot’s dissent and wondered if Talbot and his wife would come to Boston and visit with him about the case. Invitations like that are few and far between, so Talbot and his wife packed their bags and took the train to Boston to visit Dean Pound. They went out to his home the first evening to have dinner.

Talbot told me he had done a good deal of reading about Pound’s life to be certain he had a topic for conversation. Talbot had read that the Queen of England had recently presented Dean Pound with an extraordinary distinguished cross for his contribution to Anglo-Saxon jurisprudence. After dinner, they were visiting, and Talbot told Dean Pound that he and Mrs. Smith would be so delighted to see the medal. At that point, Pound stiffened and said, “Absolutely not.” After regaining his composure, Talbot once again broached the subject. He observed again that both he and Mrs. Smith would be so pleased to see the medal and the great honor bestowed upon him. At this time, Pound turned toward him and said, “Under no circumstance.” Mrs. Pound then intervened and said, “Oh, Roscoe, show them the darn medal.” Pound stood up and said, “Follow me.” They went into the bedroom and Dean Pound opened the top drawer of the dresser. Talbot told me that there were over a hundred different medals and ribbons in the drawer that Dean Pound had received over his lifetime. Dean Pound picked up the medal, turned to Talbot, and said, “To have pride is to sin.” He then put the medal back in the dresser and shut the drawer. I have always treasured that story.

83. Id. at 98.
84. Id. at 95.
After his stint on the Michigan Supreme Court, Talbot served on the district court for the Eastern District of Michigan. When he took senior status, he had an ongoing personal feud with one of the judges on the Sixth Circuit and preferred to sit with our court, rather than the Sixth Circuit. Talbot was a congenial person. He adopted the Eighth Circuit as his home away from home, and we always enjoyed sitting with him. He provided great services to our court.

Judge Roy Stephenson came on our court in 1971. I believe that Judge Stephenson was one of the great district judges in the circuit. I always found that he treated lawyers fairly, and he was certainly respected in the Iowa bar. Several persons told me when Roy came on the court that the two of us would not get along because of our different philosophical views. I knew from some of the cases we heard in which he was the trial judge, such as *Tinker*[^86] and *Morrissey v. Brewer*[^87] that perhaps we did disagree on certain philosophical directions of the law. I was confident, however, that we would get along very well. We shortly became very close friends. Roy, Gerry Heaney, Bob Tucker, and I went on many fishing trips together up at Judge Heaney's cabin in Canada. We always had a great time. Roy knew that I had tried many jury cases, and he would always joke that "Don and I are the two jury lawyers" on the court. We always believed in the jury verdict and were very hesitant to reverse a verdict of a jury.

Perhaps the saddest event on the court over the last twenty-five years occurred when Judge Stephenson took his own life. Everyone knew that his wife, Betty, had been ill for a long time. Roy always traveled with her and took care of her. We would always say that there was going to be a place on high for Roy because of the tremendous care and love that he had shown his wife over the years. Many people speculated as to why Judge Stephenson took his life. I am not sure. I know that just before the installation of Judge Fagg, who was his successor, Roy called me and read to me a short message that he was going to give at Judge Fagg's installation. His voice quivered; it was so unlike him to express such a lack of confidence as to


what he was doing. I certainly was alarmed but had no idea how serious his situation was at that time.

While holding court in St. Paul, we received the telephone call that Judge Stephenson had taken his own life. It was the darkest day of our court. I arranged for all of the judges to fly to Des Moines for the funeral. On behalf of the court, I gave the eulogy. Some of my remarks I include here:

Roy Stephenson was our colleague on the Court of Appeals for 11 years; for 11 years before that he served on the United States District Court for the Southern District of Iowa.

No man performed more nobly; no man has ever given more to the cause of justice than Roy Stephenson.

He was the fairest of the fair, his integrity was respected by all, his dedication to his work and to his court was known throughout the nation. He was a judge's judge. His advice and wisdom was constantly sought by his colleagues. Although he firmly believed in swift punishment of those who violated the law—he never hesitated to set aside any conviction which was not fair within the bounds of due process. Above all else as a judge he knew the value of impartiality—he was the rare man who was always able to rise above the faults and prejudices of his inner self and to see and think and decide on higher ground. The great judge is the one who can set aside his personal belief as to the best result and use only the law as his helmsman. Roy Stephenson was such a judge. He was a people's judge. He long respected the jury system and seldom saw need to set aside a verdict of twelve men and women in a case tried fair and true.

Judge Charles Matthes of St. Louis was Chief Judge of the Eighth Circuit from 1970 to 1973. He was a very fair judge and was respected by everyone. The other members of the court gave great deference to his handling of administrative matters. This beneficial policy continued under Judge Vogel, Judge Van Oosterhout, Judge Floyd Gibson, and me. The court has had many internal disagreements over the years but they were always worked out and, for the most part, there were

88. In 1973, Judge Matthes stepped down to allow Judge Pat Mehaffy to serve as Chief Judge for a short period of time. He served for less than a year. At the time, Pat was experiencing illness and was not very active. Before his appointment, Pat was an able business man and lawyer. He was a fine judge and was loved by everyone who knew him. He also enjoyed a close friendship with Harry Blackmun.
never any hard feelings or lasting disagreements among the judges.

Judge Matthes was perhaps one of the most popular Chief Judges during my time on the court. He was a mild mannered person who always tried to be fair in his assessment of the cases before him. He told me that one of his first cases on the court was Aaron v. Cooper, which came in the aftermath of Brown v. Board of Education. An Arkansas trial judge had suspended the order mandating integration of the Little Rock High School on the ground that it would lead to violence.

The case was argued to our court en banc. Judge Matthes, the youngest judge on the court, was asked by Chief Judge Gardner to write the opinion as soon as possible because it was an expedited appeal and needed immediate attention. Judge Matthes told me that he had to cancel a family vacation in order to write the opinion. He reversed the district judge. The Supreme Court affirmed. It is the only case in the Supreme Court's history where all nine justices are shown as authoring the opinion. This was undoubtedly done to emphasize the court's unanimous agreement to enforce the integration decree.

One of the more humorous incidents I experienced on the court involved Judge Matthes' responsibilities as Chief Judge. At that time, we had only one staff law clerk. She wrote exclusively on state prisoner habeas corpus petitions. Judge Matthes felt that the staff law clerk was a "bleeding heart because she takes the prisoner's side in every case." Judge Matthes asked if I would work with her to see whether she could make her analysis more balanced.

A month later, Judge Matthes called me in and told me he had given up on the staff attorney and told me to discharge her. I told him that he was Chief Judge and if anyone was to be fired, he should do it. I offered to talk to the staff law clerk and tell her that we might be phasing out the job since the work

89. 257 F.2d 33 (8th Cir.), aff'd, 358 U.S. 1 (1958).
92. Aaron, 257 F.2d at 33.
93. Id. at 40.
was not that substantial at the time, and that she should perhaps look for different work.

A week later, Judge Matthes called me in again and asked if I had fired the staff law clerk. I smiled and said, "No, Charlie, that's your job, not mine. I did talk to her." I always remember his response: "Don, I can see you just haven't had the experience of dealing with people. You have to learn to take the bull by the horns. On Monday, I'm going to call Bob Tucker and tell him to fire her." Charlie was too kind-hearted to do the job himself. Bob Tucker, who was our clerk of court until 1980, was a dear, devoted friend to Judge Matthes. He and I still laugh about "the firing of the staff law clerk."

Judge Matthes wrote some historic words in *Aaron v. Cooper*,95 which I have always remembered. After he died, I thought it would be most fitting to dedicate the number one courtroom in St. Louis in his name. We have immortalized the words that Judge Matthes wrote in *Aaron* with a plaque outside the courtroom which reads: "We say the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto."96

Judge Floyd Gibson was appointed by President Johnson to the court in 1965. He had been a federal district judge and a former Missouri state legislator. He was my immediate predecessor as Chief Judge. As a lawyer, he had been in the commercial banking field. He brought to the court a wealth of experience in commercial transactions. He has been an outstanding judge and still sits as a senior circuit judge.

In 1970, when Justice Blackmun was appointed to the Supreme Court, Don Ross of Omaha was appointed by President Nixon to take his place. Ross was a close friend to Senator Roman Hruska and at one time, was the Republican National Committeeman from Nebraska. At one time early in our careers, Don and I lived across the street from one another in Omaha. His children often babysat for our little girls. Don and I have been good friends for almost forty years. He has been an excellent judge and still serves as a senior judge.

One other judge appointed to the Eighth Circuit during the

95. 257 F.2d at 33.
96. Id. at 40.
1970s was Judge Smith Henley of Harrison, Arkansas, who succeeded Judge Pat Mehaffy. Judge Henley had sat on many of the Little Rock school cases as a district judge. He also wrote the district court opinion in *Holt v. Sarver*,97 which held that Arkansas' prison system was unconstitutional because its combined practices constituted cruel and unusual punishment. Judge Van Oosterhout, Judge Vogel, and I affirmed that decision.98

Judge William Webster was appointed to the Eighth Circuit in 1973 from the United States district bench in the Eastern District of Missouri. He served with our court until 1978 when President Carter appointed him director of the FBI. President Bush later appointed him to become the director of the CIA. He was a highly respected and distinguished judge. The court of appeals lost a great judge, but the nation has benefited from his long service with the FBI and CIA. He is also a great friend. We both love to tell the story about the time we were playing golf in Washington with Bud Vieth, a former classmate of mine from Iowa, and the then-managing partner in the prestigious law firm of Arnold & Porter. Also with us was Ben Civiletti, who succeeded Griffin Bell as Attorney General in 1979. On the way home, Bud's car broke down. All of a sudden, the Attorney General of the United States, the Director of the FBI, the Chief Judge of the Eighth Circuit, and Bud found themselves hitchhiking to Bud's house.

**Colleagues on the United States Judicial Conference**

The Judicial Conference of the United States serves as a "board of directors" for the federal court system. It was created by statute.99 It is composed of the Chief Judges of each circuit, and one district judge member from each circuit. The latter are elected by all the district and circuit judges of each circuit. The twenty-six judges on the Conference represent the twelve circuits and the Court of Appeals for the Federal Circuit. The Chief Justice of the Supreme Court serves as the presiding officer. As Chief Judge, I was privileged to serve on the Judicial Conference for twelve years.

The Conference functions primarily through committees

and is greatly dependent upon reports and works of those committees. The Conference meets twice a year, normally at the Supreme Court in Washington, D.C. During my tenure on the Court of Appeals, I have served under three Chief Justices: Chief Justice Earl Warren, Chief Justice Warren Burger, and the current Chief Justice, William Rehnquist. During my time on the Judicial Conference, I served under the latter two.

In 1967, Chief Justice Warren, primarily through the influence of friends in the Justice Department, appointed me to the important Trial Practice Committee of the Judicial Conference. At one time, this was the most important committee of the Judicial Conference. However, the work of the committee became so diverse that it was splintered off into several committees. When Chief Justice Burger assumed his post, he abolished the Trial Practice Committee and assigned its responsibilities into various other committees.

Between 1960 and 1970, Al Murrah, the Chief Judge of the Tenth Circuit, was the chair of the Trial Practice Committee. During that time, I had the pleasure of working with several distinguished judges with whom I still enjoy friendships. On the Trial Practice Committee, at that time, were the distinguished district judges Frank Kaufman of Baltimore and Milton Pollack of New York. Milton, Frank and I became very close friends and associates through the years. Also on that committee was a district judge from Tennessee, Bob Taylor. He later presided over several important, nationally publicized criminal trials.

One of my most memorable experiences as a federal judge occurred during a committee meeting in Washington. Our committee was invited to a dinner with some of the new district judges at the Supreme Court. At that dinner, I was seated between Justice Hugo Black and Justice John Harlan. You can imagine the inspirational thrill I had as a young judge engaged in a dinner conversation with two of the greatest Supreme Court Justices who have ever served.

After Warren Burger became Chief Justice, I was appointed to the important Appellate Rules Committee of the Conference. This was in 1973. Our committee was composed of some of the great names in the law: Henry Friendly of the Second Circuit, John Minor Wisdom of the Fifth Circuit, John Hastings of the Seventh Circuit, Bailey Aldrich of the First Cir-
cuit, and Bill Hastie of the Third Circuit. I always felt that I was a babe who sat at their feet. These were some of the outstanding jurists of the century, and for me to share thoughts and exchanges with them was, and is still, an inspiring memory.

Former Justice Abe Fortas was also on the committee. At the time, he had left the Supreme Court and was back in private practice. One evening, when we met in Washington, Justice Fortas invited us to his home for dinner. After dinner, he took me into his "music room" to view two Stradivarius violins he kept under glass. There were no pictures of the Supreme Court decorating the wall, as one might expect. Instead, there were various photographs of Abe with such great musicians as Pablo Casals and Issac Stern, with whom he had played at various concerts at the White House. I recall that he had played for five Presidents. He was a talented viola player.

One political picture on the wall was a picture of the Truman Cabinet members and their deputy secretaries. As I recall, Abe was Undersecretary of the Interior. As I was looking at the photo, I said to him, "There is one very unusual thing about this picture." There were approximately twenty people in the picture. "Abe, you are the only one living at the present time." He acknowledged that he was well aware of that. Abe and I became good friends and exchanged correspondence for several years prior to his death. He was a great lawyer and a talented justice. I always deemed his resignation from the Supreme Court unfortunate.

Chief Justice Burger spent a great deal of time on administrative details. Many of us on the Judicial Conference were always amazed at his capacity to manage administrative details and serve on the Supreme Court at the same time. During the early days of the Gramm-Rudman Act, the Chief Justice announced at the Judicial Conference that, to cut down on expenses, only one law clerk or one secretary could travel with a district judge to sit away from his home base. This did not save a great deal of money; in fact, it caused a great many

problems for district judges who were willing to sit in other districts where there existed a case of need. A senior district judge from our circuit was asked to sit for three months in the Middle District of Florida. The judge came to me and said that the Judicial Conference Committee had turned down his request to take both his secretary and law clerk to Florida. He stated he wanted to be able to take them both because it was really necessary for both of them to be there. He suggested that he would drive his own car down to Florida, rather than fly, and his secretary and clerk would ride with him. In this way, there would be only one travel expense. The Conference Committee nevertheless turned him down. Under the awkward process, once the committee denied a request, permission had to be obtained from the Chief Justice himself. I called the Chief Justice and explained the situation and he gave me his approval. However, six weeks later, he called me on the telephone and told me that I had violated Judicial Conference orders in allowing the district judge to take both the secretary and law clerk. He had forgotten our earlier conversation.

In a more dramatic effort to comply with Gramm-Rudman, in July of 1986, the Administrative Office, with the approval of the Chief Justice, issued an order that there would be no more civil jury trials because there was no money left to pay jurors. As Chief Judge, I received a call from a district judge and lawyers in Arkansas who had scheduled a two-week product liability case involving a Japanese corporation.

The Japanese clients had flown to Arkansas for the trial, and they were ready for trial but did not want to proceed without the jury. The lawyers filed a petition of mandamus against the district judge (who was sympathetic with their plight). I appointed a three-judge panel of our court to review the petition. The panel issued an order directing the judge to hold a jury trial.

The Chief Justice was very disturbed. He later told me that I was requiring the Director of the Administrative Office to violate the anti-deficiency law and also subjecting him to a criminal penalty. My immediate response was that the anti-deficiency law provided that monies could not be spent unless otherwise authorized by law. It seemed to me the Seventh Amendment of the United States Constitution required a jury trial. I knew of no authority by which the Administrative Office or the Chief Justice could suspend the Seventh Amendment. The
jury trial went ahead. Fortunately, the order suspending the jury was lifted when new funds became available, and there was no appeal as to our order. Shortly afterward, I received a letter from a lawyer who had read about the case. He wrote that, in his opinion, this was my “finest hour” on the court. I do not think that the Chief Justice agreed.

On another occasion, a district judge allowed a convicted murderer to leave the state penitentiary (under guard) to serve as a lawyer for another prisoner in a section 1983 suit. The convicted felon was an excellent writ-writer and had written many briefs for the complainant. The case was tried at the other end of the state from where the penitentiary was located. Our court heard about the situation, and the state attorney general complained in the newspapers about the assignment. The problem was that the Attorney General presented no papers—no official pleadings to prevent this—and then waited until after the trial to complain about it. I am confident that had there been a petition filed under the All Writs Act,° 101 our court would have enjoined the district court from allowing the prisoner to participate in the trial.

The assignment caused many security problems. When I read about the assignment, I called the district judge and told him that our court felt that allowing the prisoner to be released from prison for that purpose involved too much risk and expense. I had no more talked to the district judge and been assured that the situation would never arise again when I received a phone call from the Chief Justice. He was calling me from an airport. He had just read of the incident in a newspaper and was very concerned. I assured him that I understood his concern and that the situation had been handled and would never happen again.

When Chief Justice Burger stepped down and William Rehnquist took over, I served as chairman of the Chief Judges Committee of the Judicial Conference. The Chief Judges of the various courts of appeals always had an adjunct meeting with the Judicial Conference. I wanted to make certain that the new Chief Justice was agreeable to our functioning as we had in the

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101. 28 U.S.C. § 1651 (1988). The All Writs Act provides, in part, “The Supreme Court and all courts established by act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” Id.
past and to pledge to him our full cooperation. He was kind enough to arrange a luncheon for the two of us in his chambers when I was in Washington. We had a good visit, and I was reassured that he supported the continued existence of the Chief Judges Committee.

Like Chief Justice Burger, Chief Justice Rehnquist displayed a talent for administration. One of his most notable administrative accomplishments was the reformation and streamlining of the Judicial Conference. The Chief Justice now circulates a consent-nondiscussion calendar prior to the Conference to allow the Conference to focus its discussion on those matters which would benefit from or require exchanges, and therefore avoid spending time on issues about which discussion is neither necessary nor appropriate. Any matter may be moved from the consent calendar to the discussion calendar at the request of any member of the Conference. This administrative innovation focuses the Conference so that instead of taking two or three days for meetings, which were mostly informational, the Conference now consists of a day or day and one-half of substantive discussions. Everyone has been enthusiastic about this change.

Serving on the Judicial Conference provided many rich experiences. During my tenure, I became well acquainted with the members of the Supreme Court. The signet honor of serving on the Conference, however, was in working with the many outstanding Chief Judges of the United States. During this time, I had the esteemed privilege of working with distinguished judges like Frank Coffin, Lee Campbell and Stephen Breyer of the First Circuit; the brilliant jurists Wilfred Feinberg and Jim Oakes of the Second Circuit; the likeable Collins Seitz, the scholarly John Gibbons, and the great humanitarian, Leon Higginbotham, of the Third Circuit; the renowned Clement Haynsworth, as well as my dear, departed friend, Harrison Winter, of the Fourth Circuit. They are both now succeeded by Sam Ervin, one of the ablest Chief Judges in the nation. I also had the unique opportunity to observe and work with Charles Clark of the Fifth Circuit, who possessed rare administrative genius; and the gifted judges of the Sixth Circuit, Pierce Lively and Gilbert Merritt. On the Seventh Circuit were my
long time friends Tom Fairchild, Walter Cummings, and Bill Bauer. I served with the talented Jim Browning, who served on the Judicial Conference as long as anyone, the dedicated Ted Goodwin, and the energetic Cliff Wallace on the Ninth Circuit; the marvelous Chief Judges Oliver Seth and Bill Holloway of the Tenth Circuit; and my great friends John Godbold and Gerald Tjoflat of the Eleventh Circuit. The remarkable Howard Markey of the Federal Circuit served along with the thoughtful Spottswood Robinson, and the brilliant Pat Wald represented the United States Court of Appeals for the District of Columbia Circuit. I was privileged to also serve with their successor, the able and talented Abner Mikva, a former United States Congressman. The scholarly Edward Re represented the Court of International Trade. These distinguished judges have each left their mark on the United States judicial system. History will regard them to be among the greatest circuit judges of our time. It is these associations that I treasure most.

There were other rewarding experiences as well. On two occasions, the Judicial Conference was invited to the White House. One of these occasions was the historic moment in the Rose Garden when President Reagan introduced Sandra Day O'Connor, the first woman justice in our history. My wife and I were in the front row and cherish the memory of this event. I have also been privileged to attend, as a member of the Judicial Conference, the swearing-in ceremonies of Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy.

John Paul Stevens and I knew one another back when we were circuit judges, and we have remained good friends over the years. My visits to Washington also provided me opportunity to play golf with John and my old friends, Bill Webster and Griffin Bell, the former Fifth Circuit judge who served as Attorney General. These are all memories to be cherished.

THE EIGHTH CIRCUIT TODAY

As Chief Judge, I took an active role in trying to expedite appointments to the judicial vacancies on our court. One con-

102. Fairchild, Cummings and I were appointed to the Courts of Appeals on the same day by President Lyndon Johnson, July 6, 1966.
103. John and I had our Senate hearing at the same time in July of 1966. When Judge Godbold took senior status, he served as the Director of the Federal Judicial Center in Washington, D.C.
stant, repetitive event in our "political world" is the delay which results when the executive branch of the government tries to make federal judicial appointments. This has been true of both Republican and Democratic administrations.

Once I recall that an appointment was being held up because the American Bar Association representative in our circuit told me that he had nine individuals to investigate and that he was going to arrange a dinner meeting sometime in the next four to six weeks to meet a new nominee to our court. I wrote Chief Justice Burger and members of the Conference that I felt the American Bar Association was not expeditious because they had too few people doing the investigations. One of the Conference members turned my letter over to the chair of the American Bar Association committee in New York. I received a blistering three page letter from him, with a copy to the Chief Justice, telling me how misinformed I was. The next week, however, I found out that the committee added another person to our circuit to aid in the investigations. Our nominee was interviewed the following week.

On two separate occasions, I went to Washington to visit the Attorney General of the United States to try to expedite the appointment process. The Justice Department is notorious in delaying these appointments. The Judicial Conference had complained every year about such delays, some lasting as long as five years. When the vacancy arose to which Judge James Loken, one of the newest members of the Eighth Circuit, was appointed, I visited with Attorney General Thornburgh and expressed the dire need we had in filling the vacancy. I do not know whether this helped or not, but the vacancy, which had been pending for over a year, was filled within a few months.

Judge Loken was nominated just prior to the hearings for Justice Souter's appointment to the Supreme Court. Congress was set to adjourn shortly after the Souter hearings, and if Loken could not get his Senate hearing prior to the fall recess, he would have been unable to take his place on the court until the following spring. I attended the Souter hearings, and during a recess, I spoke with Senator Biden and his administrative aide about expediting Loken's hearing. They told me that there were thirty-seven appointees ahead of Loken, and because Loken had just been nominated, a hearing before adjournment would be impossible.
I had known Senator Howell Heflin from Alabama back in the 1960s when we were both trial lawyers and had served on the Board of Directors of the American Trial Lawyers Association. I visited with Howell about our emergency. His aide called my office the next week and told me he was sorry, but to expedite Loken's hearing appeared to be impossible. The next day, he called again to see if Loken could be in Washington next Friday. Judge Loken went, and he began his service with us at the start of the year. Whatever works, works!

After Judge Floyd Gibson took senior status in 1980, we had a vacancy on our court for over three years. President Carter's nominee to the court, Howard Sachs, presently Chief Judge of the Western District of Missouri, lost out because of the 1982 election. Another year or more went by. I held a press interview and cited several candidates who had been interviewed by the Justice Department, reciting that they were all competent, and complained that the Justice Department was delaying the entire process. We were in dire need of having that appointment filled. I was called into Washington by the Attorney General, William French Smith. A deputy attorney general took out a red circled copy of the Minneapolis Tribune quoting my statement and said in a raised voice, "Whose job is it to fill this vacancy—yours or the President's?" I explained that, in all due respect, my only concern was not who would be appointed, but to have the appointment take place. At the end of the meeting, we parted friends. The assistant said, "In other words, you only want a warm body." The trouble was that warm body took a long time in coming.

Judy Whittaker, the daughter-in-law of Justice Charles Whittaker, was from Kansas City. I knew her through various trial lawyer meetings I had attended. She is an excellent lawyer and a good friend. One day in 1983, while I was sitting on the court in St. Louis, she called me. She told me that the Justice Department had just called her and told her that President Reagan would call her that week to tell her of her nomination to the Eighth Circuit Court of Appeals. I was almost as pleased as she was. My wife and I drove through Kansas City that Friday night and had a celebration dinner with Judy and her husband, Kent. She had called her family, and we even planned the date that she would be sworn in. Unfortunately, the phone call from President Reagan never came. At the last minute, a conservative political group in Missouri opposed her and ulti-
mately Lyn Nofziger, the President's political advisor, recommended that she not be nominated.

While this issue was pending, I made a nuisance of myself with Fred Fielding, the counsel to the President. He liked Judy very much and was favorably impressed with her. Unfortunately, Nofziger was the hatchet man, and Fielding lost control. When it was announced that Judy would not get the appointment, I sent a wire to Attorney General William French Smith and Fred Fielding that read: "What you have done to Judy Whittaker this day is both unconscionable and unpardonable." Later when I saw Fred Fielding, he told me that he agreed with my wire. This was in 1983. Unfortunately, the Eighth Circuit still is waiting for its first female judge.

Judge Ted McMillian was appointed in 1978. He is the only minority judge on the court. He and I first met in Aspen, Colorado, high in the middle of the Rocky Mountains, where we were attending a seminar. Judge McMillian has been a champion of civil rights for all individuals. Before being appointed to the Eighth Circuit, he sat on the Missouri Court of Appeals and served as a state circuit judge. He has been a great judge on our court and still sits as an active judge.

Judge Richard Arnold, who joined the court in 1980, has now succeeded me as Chief Judge of the court. Chief Judge Arnold has established a brilliant record on the court and has always manifested a concern for the constitutional rights of all citizens. It has been a privilege to work with him.

Starting in 1982, the court began to take on new faces. In fact, since 1982, as Chief Judge, I have presided over the investiture of nine new judges, including Judge Arnold. The most recent being Judge David Hansen of Cedar Rapids, Iowa, who was an outstanding district court judge for some five or six years before he came on the court. Ten months before that, Judge James Loken, a distinguished Minnesota lawyer, was appointed to the court by President Bush. Judge Loken and Judge Hansen are the two Bush appointments to the court. The other six "new" appointments were appointed by President Reagan. They are: Judges George Fagg, John Gibson, Pasco Bowman, Frank Magill, C. Arlen Beam, and Roger Wollman.

Judge Fagg was a highly respected state district court judge in Iowa. Judge John R. Gibson had a brief appointment as a
district judge before being appointed to the Eighth Circuit. Judge Roger Wollman came to the court after distinguished service as Chief Justice of the South Dakota Supreme Court. Judge Pasco Bowman is a former dean of the University of Missouri-Kansas City Law School. Judge Frank Magill was an excellent trial lawyer from Fargo, North Dakota, and Judge Beam was a federal district court judge from Nebraska. Their diverse backgrounds and skills have benefited the court.

Today, the Eighth Circuit is in the process of planning five new courthouses in five of the states of the Eighth Circuit. We have expansive automation programs and training programs. We have increased the number of personnel multifold. When I became Chief Judge, we had approximately twelve people in the clerk's office. Today we have close to forty. There are many more magistrate judges and bankruptcy judges now than ever before. These changes were impelled by the almost geometric increase in the overall dockets of this court and the district courts.

**My Term as Chief Judge**

When I became Chief Judge of the court in 1980, the administrative responsibilities were not nearly as numerous or complex as they are today. In the beginning of my tenure as Chief Judge, there was little administration to perform and most of it was fairly simple. Most of the administrative work left to the Chief Judge involved presiding over the judicial council, which conducted the "business" of all judicial officers within the circuit. As the court expanded, however, the workload expanded, and the administrative requirements and the duties of the Chief Judge greatly increased.

Suffice it to say, the work of being a Chief Judge, at least in my judgment, is no longer "fun." It requires doing a great deal of paper work, attending many meetings, and maintaining constant contact with administrative heads. The administrative responsibilities, in effect, totally preempt the regular performance of a chief judge's judicial duties.

One of the primary responsibilities has been chairing and directing our annual Judicial Conference. This has been an

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104. New federal court buildings are in the planning stages in St. Louis, Kansas City, Omaha, Minneapolis, and Fargo.
“open conference,” and lawyers of all races, ages, and genders are encouraged to come. We have strived to conduct outstanding educational conferences. The collegiality between the bar and the bench has greatly improved because of the success of these conferences.

The internal administrative operation of the Eighth Circuit is presently an efficient operation. Over the years we have constantly refined our procedures, and our internal operation facilitates an efficient operation of our docket and assists the attorneys and the public in every way possible. We have an outstanding circuit executive, June Boadwine, and a capable clerk of court, Michael Gans. Our twelve staff law clerks in St. Louis are headed by staff attorney Sheila Greenbaum, a very able person. The staff attorneys work with the judges on processing no-argument and pro se cases. These cases are getting more numerous, therefore, the court depends upon the assistance of this auxiliary staff to aid us in processing our heavy docket. When I became Chief Judge, our library staff involved only two people. Today we have approximately twenty individuals working in our library system. Ann Fessenden in St. Louis, our head librarian, manages and supervises the court’s eight branch libraries. John Martin, a former federal arbitrator, heads our pre-argument settlement program, where we attempt to settle cases which might be resolved accordingly, thus conserving judicial resources.

Although the court had sat in St. Paul at least once or twice a year before 1980, a major move to benefit the bar occurred in 1982, when we opened a divisional court in St. Paul. In 1980, several lawyers from Minnesota, North Dakota, and South Dakota complained to me about the long distances and time involved in going to St. Louis for short arguments. A lawyer from Bismarck, North Dakota, once wrote me that it took four days in the winter to travel in and out of St. Louis for a twenty minute argument. Since many cases argued before our court involve government counsel or counsel appointed by the court and paid by the government, we would save government monies by setting up a divisional court in St. Paul. The Eighth Circuit renovated the space on the fifth floor of the Federal Building in St. Paul and constructed two new courtrooms and a divisional clerk’s office. In order to facilitate the move, I decided to move my base from Omaha to St. Paul. We now try to assign cases, whenever possible, on a geographic basis.
The move was not altogether popular with some of the Missouri court employees and judges. They were afraid that my moving to St. Paul signaled the end of St. Louis as the seat of the court. Notwithstanding my assurances to the contrary, one judge once told me that the move was not immediate, but that I was attempting to do it "brick by brick." This was several years ago. I believe that everyone now is reassured that St. Louis will remain the seat of the court. I believe that the entire court and bar now see the divisional court in St. Paul as benefiting everyone concerned.

In the past several years, many important cases have passed through the Eighth Circuit. Significant abortion cases, such as Reproductive Health Service v. Webster and Hodgson v. Minnesota were heard in our court. We have heard several significant civil rights cases. We have also heard important cases concerning both the free exercise and establishment clauses. In addition, we have had numerous school integration cases arising out of Kansas City, St. Louis, and Little Rock. Some of the most important Indian jurisdiction cases have been reviewed by our court. Overall, the Eighth Cir-

108. See, e.g., Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982), aff'd, 463 U.S. 388 (1983) (Minnesota law permitting state taxpayers to claim a deduction for certain expenses incurred in educating their children does not violate the Establishment Clause by providing financial assistance to sectarian institutions); Board of Educ. of Westside Community Schs. v. Mergens, 867 F.2d 1076 (8th Cir. 1989), aff'd, 496 U.S. 226 (1990) (holding that equal access must be accorded a student Christian club where the school district permits access to other non-curriculum related student organizations); Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), rev'd, 463 U.S. 783 (1983) (holding that the practice of opening each session of the Nebraska legislature with a prayer by a chaplain, paid for with public funds, did not violate the Establishment Clause).
109. See, e.g., Jenkins by Agyei v. Missouri, 942 F.2d 487 (8th Cir. 1991); Board of Educ. v. Missouri, 936 F.2d 993 (8th Cir. 1991); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371 (8th Cir. 1990); Scoggins v. Board of Educ., 853 F.2d 1472 (8th Cir. 1988); Liddell v. Board of Educ., 851 F.2d 1104 (8th Cir. 1988); Clark v. Board of Educ., 705 F.2d 265 (8th Cir. 1983).
110. See, e.g., Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990) (holding that absent tribal consent, South Dakota had no jurisdiction over highways running through Indian lands in the state), cert. denied, 111 S. Ct. 2009 (1991); Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990) (holding that Major Crimes Act did not divest Indian tribes of sovereign power to punish their own members for violations of tribal law); Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988) (holding
cuit has had more than its share of significant litigation involving national issues.

With the advent of the sentencing guidelines authorized by Congress, our experience, along with other circuits, is that the guidelines are extremely punitive and unfair. Judicial discretion has been virtually abolished and prosecutorial sentencing is taking place. Hopefully, Congress will recognize the guidelines for the travesty that they are and will restore judicial discretion so that sentences can be justly individualized. However, I do not anticipate many changes in the near future.

CONCLUSION

When Oliver Wendell Holmes, Jr., was Chief Justice of the Massachusetts Supreme Court, he wrote that "all proceedings, like all rights, are really against persons." Great judges never lose sight of the human concerns and relationships all cases involve. Whether it is a defendant in a criminal case, a land dispute, or a corporate restructuring, people are involved.

The distinguished jurists who leave their mark on history are the ones who recognize that compassion for our fellow man is the root and end of all law. This has been the mark of the judges with whom I have been privileged to serve. It has been the honor of my life to serve with them.

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112. Tyler v. Judges of the Court of Registration, 55 N.E. 812, 817 (Mass. 1900).