TRIBUTE TO JUDGE THEODORE MCMILLIAN

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I have known Judge Theodore McMillian for over forty years. In fact, the first case I tried was as a court-appointed defense attorney against the experienced and respected St. Louis prosecutor, Ted McMillian. In his time as an Assistant Circuit Attorney in St. Louis, he was recognized as the ablest—I mean the ablest—trial attorney on that staff. His talents and skills were manifest early in his legal career and those talents and skills became more widely known as he advanced through the Missouri judicial system and ultimately to the United States Court of Appeals for the Eighth Circuit, where he has served with great distinction since 1978.

I am proud to have recommended Judge McMillian to President Carter for his appointment to the Eighth Circuit. In my introductory remarks to the Senate Judiciary Committee on August 16, 1978, I noted the following:

> As a member of the appellate bench, Judge McMillian quickly built a reputation as a prolific but careful opinion writer. More importantly, he made his mark as an independent thinker whose frequent dissents often were credited with changing the opinions of his colleagues. Despite the great volume of work which flowed from his pen, Judge McMillian never allowed the quality of justice to take a back seat to quantity.

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I cited a case to the committee that I felt revealed Judge McMillian's judicial philosophy, a case in which McMillian sharply criticized trial judges for being "more interested in case movement than . . . in the quality of the trial."[1] McMillian said that he hoped "the time will never come when we, as jurists, because of the pressure from overloaded trial calendars and dockets will sacrifice, for speed, the quality of justice that we attempt to dispense."[2] In writing that opinion, McMillian could have been writing his own motto as a judge.

There were no objections of any kind to Judge McMillian's nomination. He sailed through the Senate confirmation hearing in under fifteen minutes.

Judge McMillian has distinguished himself in many areas of the law during his service as both a state and federal judge. In this tribute I would like to focus on Judge McMillian's devotion to the preservation of individual civil rights. Throughout his four decades on the bench, Judge McMillian has addressed many important civil rights issues, including First, Fourth, Fifth, Sixth, and Fourteenth Amendment claims and race, sex, and religion employment discrimination issues. As Congress has passed new civil rights laws, creating new issues for the federal courts, Judge McMillian has consistently responded with concern for the rights of individual citizens. His continuing commitment to preserving individual liberties is evident in his recent decisions.

For example, in 1989 Judge McMillian authored the Eighth Circuit's opinion in *Mergens v. Board of Education*,[3] a case applying the 1984 Equal Access Act (EAA)[4] to protect the religious rights of public high school students. The EAA provides that if a public high school receiving federal funds allows non-curriculum-related student groups to meet on school premises, the school must not deny access

1. State v. Holland, 534 S.W.2d 258, 266 (Mo. Ct. App. 1975) (McMillian, J., dissenting).

2. *Id.*

3. Mergens v. Board of Educ., 867 F.2d 1076 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990).

4. Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C. §§ 4071-4074 (1994)).

to or discriminate against any student group based on the content of the speech at group meetings.[5] In *Mergens*, the Court of Appeals held that a Nebraska public school district had violated this statute by discriminating against high school students who wanted to form a Bible study club.[6] School officials permitted the students to meet informally on school grounds after regular class hours, but would not allow the group, because of its religious focus, to become a part of the school's official student activity program.[7] As a result, the Bible study group did not receive certain privileges given to official student clubs.[8]

In his opinion for the Eighth Circuit panel, Judge McMillian rejected the school board's attempt to dilute the application of the EAA. The judge stressed that Congress's intent was to prevent discrimination against unfavored speech, and that if a public high school allows even one non-curriculum-related student group to use school facilities, the school must provide equal access to other student groups.[9]

The school board argued that all the high school clubs were curriculum-related, even the scuba diving club, which the board claimed promoted physical education.[10] Judge McMillian responded with common sense and respect for Congress' intent: "Allowing such a broad interpretation of 'curriculum-related' would make the EAA meaningless [because] the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA."[11] The court concluded the EAA prohibited the school district from denying equal treatment to the Bible study group.[12]

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5. *See* 20 U.S.C. § 4071(a).
6. *See Mergens*, 867 F.2d at 1077, 1079.
7. *See Mergens*, 496 U.S. at 247.
8. *See id.*
9. *See Mergens*, 867 F.2d at 1078.
10. *See id.*
11. *Id.*
12. *See id.* at 1079.

The court of appeals also upheld the constitutionality of the EAA against the school board's Establishment Clause challenge. Judge McMillian noted that the Supreme Court had previously decided that a state university does not violate the Establishment Clause by allowing all student groups, including religious groups, equal access to university facilities.[13] Among other reasons for its decision, the Supreme Court had found university students were mature enough to understand that an equal access policy is neutral toward religion.[14] Judge McMillian noted that Congress had considered the maturity level of high school students when Congress enacted the EAA, and the court of appeals accepted Congress's fact-finding.[15] The court of appeals concluded that the EAA was constitutional and the board was required to comply with it.[16]

More recently, Judge McMillian further demonstrated his commitment to civil rights in *In re Young*,[17] an unusual bankruptcy case requiring the court of appeals to interpret the Religious Freedom Restoration Act of 1993 (the RFRA).[18] The Youngs, a married couple, had filed for bankruptcy. They were active members of a church and regularly tithed, or contributed one-tenth of their income to the church, based on their religious convictions.[19] The trustee of the bankruptcy estate contended the church was required to turn over to the trustee the tithes paid during the year immediately before the Youngs filed for bankruptcy, because those contributions were avoidable "fraudulent transfers" under the Bankruptcy Code.[20]

The court of appeals, on the other hand, concluded that forcing the church to turn over the tithes would interfere with the Youngs'

13. *See id.*

14. *See id.* at 1079-80 (discussing Widmar v. Vincent, 454 U.S. 263, 271-77 (1981)).

15. *See id.* at 1080.

16. *See id.*

17. *In re* Young, 82 F.3d 1407 (8th Cir. 1996), *vacated and remanded*, Christians v. Crystal Evangelical Free Church, 117 S. Ct. 2502 (1997) (remanding for further consideration in light of City of Boerne v. Flores, 117 S. Ct. 2157 (1997)).

18. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (1994)).

19. *See In re Young*, 82 F.3d at 1410.

20. *Id.* (quoting 11 U.S.C. § 548(a)(2)(A)).

religious rights under the RFRA. Assuming the RFRA was constitutional (an issue not raised or decided in the case), the court of appeals applied the statute to protect the Youngs' practice of tithing.[21] Judge McMillian wrote the majority decision, and his sensitivity to religious freedom is evident throughout the opinion.

The RFRA prohibits governmental action that substantially burdens a person's religious practice unless the action is the least restrictive means of furthering a compelling governmental interest.[22] In interpreting the scope of the statute, Judge McMillian recognized that a person's religious practice can be significant even if it is not absolutely required by that person's religion. In this case, the Youngs' church did not require that they tithe in order to be members or participate in church activities, but the Youngs' tithing was a sincere expression of their religious beliefs. Judge McMillian concluded their tithing was a practice protected by RFRA because the tithing was religiously motivated.[23]

Judge McMillian also believed the debtors' practice of tithing would be substantially burdened if the church had to turn over the tithes to the bankruptcy trustee. Judge McMillian rejected the notion that the church could be forced to turn over the tithes because the debtors could continue to tithe in the future and could express their religious beliefs in other ways. He stated that allowing the government to recover the tithes for the year before the Youngs filed for bankruptcy would effectively prevent the Youngs from tithing for that year.[24] In the judge's view, that would be a substantial burden. He believed it was enough that the government action would meaningfully curtail a significant religious practice, even though the effect on that practice would be retroactive.[25]

Again demonstrating the high value he places on free religious expression, Judge McMillian explained that only the most weighty government interests will qualify as "compelling" interests and

21. *See id.* at 1417.
22. *See* 42 U.S.C. § 2000bb-1(b).
23. *See In re* Young, 82 F.3d at 1418.
24. *See id.*
25. *See id.* at 1418-19.

permit the government to place substantial burdens on religious practices.[26] The judge started from the premise that even important government interests may not be serious enough to be "compelling" when balanced against the free exercise of religion. He stated that the goals of the bankruptcy system—allowing debtors a fresh start and protecting the interests of creditors—were simply not serious enough to allow the government to interfere with the Youngs' tithing.[27] Based on this reasoning, the bankruptcy trustee was not permitted to recover the tithes from the Youngs' church.[28] Although the constitutionality of RFRA was later successfully challenged on separation of powers grounds,[29] Judge McMillian's construction of the law while it was in effect was consistent with his longstanding philosophy of respect for individual rights.

As these recent cases demonstrate, Judge McMillian continues to decide current legal issues with the same concern for civil rights that he has displayed throughout his career. Although no one can predict how the legal landscape may change in the future, I am certain Judge McMillian will continue to carry out his judicial responsibilities with a dedication to the law and the personal freedoms it guarantees.

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26. *See id.* at 1419.
27. *See id.* at 1420.
28. *See id.*
29. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).