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## TRIBUTE TO JUDGE THEODORE MCMILLIAN

*HON. RICHARD S. ARNOLD\**

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My assignment—to write about Judge Theodore McMillian—is both easy and pleasant. I am delighted to share a few thoughts on what Judge McMillian has meant to the United States Court of Appeals for the Eighth Circuit, and to me personally.

I first had the pleasure of meeting Judge McMillian in August of 1978. As fate would have it, we had our nomination hearings before the Committee on the Judiciary of the United States Senate on the same day. President Carter had nominated me to the District Court in Arkansas, and Judge McMillian to the Court of Appeals. (As you can see, he is senior to me. You may be wondering why I'm Chief Judge, and he isn't. A word of explanation about this later on.) Fortunately for both of us, the hearings were short. (There is a saying around the Senate that if your hearing lasts longer than five or ten minutes, and more than one or two Senators show up, you could be in trouble.) I remember particularly the splendid introduction to the Committee that Senator Thomas F. Eagleton of Missouri gave Judge McMillian. They had obviously known each other for a long time, and Senator Eagleton's words were both warmly personal and highly complimentary in professional terms. There is a certain justice in the fact that within a couple of years Judge McMillian will occupy chambers in the soon-to-be-opened Thomas F. Eagleton United States Courthouse at St. Louis, the main seat of the Circuit.

I next ran into Judge McMillian at my first Circuit Conference,

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held in Rapid City, South Dakota, in the summer of 1979. He was most cordial, and recalled at once how we had had our beginnings, so to speak, on the same day in 1978. (This was, in fact, my own beginning as a judge, but the same could hardly be said of Judge McMillian. I suppose he has been every kind of judge there is in Missouri—a great credit to the State.) Readers may know that one of the duties of all the judges in the Circuit, a duty which I hope is sometimes even a pleasure, is to read the slip opinions of the Court of Appeals. By the time of this second meeting with Judge McMillian, I had formed the distinct view that his opinions were among the ablest put out by this Court. They were uniformly scholarly, meticulously researched, and carefully reasoned. The intervening years have strengthened me in this view.

Anyhow, back to Rapid City: one of the things I recall about this, our second meeting, was the Judge's distinctive headgear. He had on some sort of a belted cap, or at least that is how I would describe it. This marked him, in my mind, as an individualist, though in a quiet, wholly inoffensive sort of way. The Judge has continued his use of such articles. Some of the readers of this piece may recall that, from time to time, Judge McMillian appears on the bench with a yarmulke on his head. This is not, he explains, because of religion, but simply because his head is cold! Years later I learned that part of the regular outdoor gear of the Chief Justice of the United States is a black skullcap. (When, you are thinking, does the Chief Justice appear out of doors? At inaugurations, of course.) So Judge McMillian's yarmulke combines judicial, religious, and practical aspects.

Being on a multijudge court is a little like being a polygamist—or maybe a polyandrist. We are together with our colleagues for life, or at least during our good behavior, which we hope will be the same thing. So one gets to know one's fellow judges extremely well. I can say with complete certainty that one of the finest and most wonderful aspects of my service has been the acquaintance, ripening into close friendship, that I have enjoyed with Judge McMillian. His good humor is proverbial in our Court. He is always polite to counsel, even those with whom he strongly disagrees (perhaps believing they can be redeemed). He is a good companion to the other judges,

enlivening our meetings with humor and sayings of great pith. He is zealous for justice, but not at the expense of evenhanded application of the law. And he continues his output of first-rate scholarship.

Earlier, I promised to explain why Judge McMillian, who outranks me in seniority among the active judges, is not Chief Judge of the Court. The answer lies in an activist Congress. Some years ago, a statute was passed providing that no judge may become chief judge of a district court or a court of appeals if the judge is, at the time the chief judgeship becomes open, 65 years old or older. That was the position Judge McMillian was in in 1992, when Chief Judge Lay, my predecessor, took senior status. So I got the place that, in a way, rightfully belongs to Judge McMillian. (Some days I devoutly wish that Congress had not made this decision.) The good news is that Judge McMillian remains a judge in regular active service and has, to my knowledge, no plans to change his status. Years ago, before he became eligible for senior status, he was heard to remark that on the day of his eligibility he would leave the bench, become a beachcomber in California, and never be heard of again. Happily for all of us and for the law, the day came and went without any move towards the beach.

I salute Judge Theodore McMillian, a wonderful judge and a prized colleague. I speak for all of the judges of the Court of Appeals when I say simply that we love him. Long live Theodore McMillian!

