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Judge Theodore McMillian: A Tribute

Honorable Richard S. Arnold

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JUDGE THEODORE MCMILLIAN: A TRIBUTE

THE HONORABLE RICHARD S. ARNOLD*

It is a real pleasure to write a few words in tribute to my colleague and friend, Judge Theodore McMillian. The Judge and I started out together, in a way, so far as the federal bench is concerned. President Carter nominated him to be a United States Circuit Judge for the Eighth Circuit at about the same time as I was nominated to the District Court in Arkansas. Judge McMillian and I appeared before the Senate Judiciary Committee for our hearing on the same day in 1978. I am happy to record that the hearing was brief, almost perfunctory, for both of us, something that cannot often be said in these more heatedly political times. That was a kinder and gentler age, in which most hearings on judicial nominations, except for the Supreme Court, were nothing more than formalities to ratify a decision already made. I will never forget Missouri Senator Thomas Eagleton's moving tribute given to Judge McMillian on the day that the Senator presented him to the Committee.

I soon learned that one of the chief joys of a judgeship in the Eighth Circuit was the opportunity to read the slip opinions that came out week by week from the Court of Appeals. Please notice the phrase "week by week." In those days, before the caseload had become so oppressively high, a bundle of slip opinions would arrive in the mail once a week. Now, they come every day in a torrent that is continuously increasing.[1] Anyhow, as a district judge, it was of course my duty to become familiar with Eighth Circuit opinions and apply them faithfully in cases that came before me. I soon learned that Judge McMillian's opinions were among the most enjoyable: invariably well researched, thoroughly reasoned, and (what is probably too much to expect) interesting to read.

One such opinion from those early days sticks out in my recollection. *Florey v. Sioux Falls School District 49-5* was argued while I was still on the

* United States Circuit Judge for the Eighth Circuit

1. During the first year of Judge McMillian's tenure on the Court of Appeals, 970 appeals were filed. MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS 1980 8 (1980) (charting statistics for the year ending June 30, 1979). My first year, the number rose to 1,147 appeals. *Id.* (charting statistics for the year ending June 30, 1980). The increase has been steep since then. In the year ending December 30, 1998, 3,255 appeals were filed. STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 6 (Dec. 31, 1998).

District Court, and was filed shortly after I became a circuit judge.[2] Judge Heaney, Judge Ross, and Judge McMillian comprised the panel.[3] Judge Heaney wrote for the Court, and Judge McMillian dissented.[4] The case was about Christmas. Specifically, the issue before the court was whether Christmas assemblies, including the singing of Christmas carols, conducted in the public schools of Sioux Falls, South Dakota, violated the Establishment Clause of the First Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[5] The Court held that the assemblies, including the carols, were not intended to advance religion.[6] The Court said that the principal or primary effect of the assemblies neither advanced nor inhibited religion, but rather promoted secular interests in cultural diversity and knowledge.[7] In the Court's view, the school board's administration of its rules and policy regarding Christmas assemblies did not excessively entangle the schools in religion.[8]

Florey is one of those cases which a judge instinctively knows has a popular side and an unpopular side. Most people in this country, I dare say, would identify themselves as Christians, even if only casually so, and most people, at least before they have thought much about it, would see no harm in a public school assembly marking such an important day of the year. It takes a brave judge to go against this popular public belief and express reservations about such governmental promotion of religion. Voting against Santa Claus, not to mention Jesus, makes the judge look like the "Grinch who Stole Christmas." But the Founders gave us life tenure[9] for a purpose. They knew that judges would be human beings, subject to all the frailties of that species. Consequently, they gave us a protected tenure and security against pay cuts, enabling us to make unpopular decisions, whenever, in the exercise of our consciences, we feel that the law demands it. Judge McMillian's dissent in *Florey* is an outstanding example of that judicial courage that the Framers sought to protect.

The dissent is worth re-reading from time to time. The point of my present comments is not how *Florey* would be decided today, or whether the Court or the dissent made the better argument. Rather, I offer the *Florey* dissent as an

2. 619 F.2d 1311 (8th Cir. 1980).

3. *Id.* at 1313.

4. *Id.* at 1313, 1320.

5. *Id*. at 1312.

6. *Id.* at 1313. The school board adopted "Rule 1," which allowed observation of holidays that had "both a religious and a secular basis," but prohibited observation of "solely religious" holidays. *Id.*

7. *Florey*, 619 F.2d at 1316-17 (noting that "carols have achieved a cultural significance that justifies their being sung in . . . [Sioux Falls] public schools").

8. *Id*. at 1318.

9. We hope that is what "during good behavior" means.

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outstanding example of judicial craftsmanship. Judge McMillian's opinion began by carefully disclaiming any hostility towards religion.[10] Indeed, Judge McMillian remained quite sensitive to the place of religion in our national life, not to mention our personal lives.[11] He recognized that the Establishment Clause was intended not only to protect government from being taken over by religion, but also to protect religion from being taken over by government. It has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams."[12]

Judge McMillian's dissent took on the Court point by point. He conceded that teaching *about* religion as part of a curriculum, say of music or art, is not unconstitutional.[13] Indeed, it would be bad educational policy to ignore it. In a particularly nice turn of phrase using a music metaphor, the Judge noted that "nothing in my analysis would limit a music curriculum to fugues and minuets, and exclude oratorios."[14]

Judge McMillian believed that the Court's position could not withstand the three part test for the Establishment Clause[15] set out in *Lemon v. Kurtzman*.[16] Initially, there could be no doubt that holding a Christmas assembly was partially motivated by religious purposes. Otherwise, why have the assembly at all? The school board could have allowed discussion of Christmas's cultural and musical history in the classroom as part of the regular curriculum without holding a special program at which Christmas carols were sung. It is difficult to derive much secular significance from "Silent Night" or "O Come All Ye Faithful," both of which were sung in these assemblies.[17]

The dissent especially criticized the Court's conclusion that Christmas had acquired a "secular basis."[18] The school board's rules allowed celebration of listed holidays that had "a religious and a secular basis" including Christmas, Easter, Passover, Chanukah, Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween.[19] It is hard not to share Judge McMillian's puzzlement:

10. *Florey*, 619 F.2d at 1320-21.

11. *Id.* at 1325 (acknowledging that Christmas "remains an event of immense and undiminished significance to Christians").

12. *Id.* at 1328.

13. *Id.*, 619 F.2d at 1321.

14. *Id*.

15. *Florey*, 619 F.2d at 1321-24.

16. *See* 403 U.S. 602 (1971) (requiring that a statute "must have a secular purpose, a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion").

17. *See Florey*, 619 F.2d at 1323.

18. *See generally id.* at 1314-16 ("Christmas[] has 'acquired a significance no longer confined to the religious sphere of life.' ") (citation omitted).

19. *Id.* at 1325.

> I find it very difficult to articulate what is meant by "secular basis" and to discern the secular basis of some of the holidays (i.e., Easter) . . . [and] what is meant by "religious basis[]" [of] . . . holidays like Valentine's Day . . . . Despite its many and diverse secular manifestations, Christmas . . . [u]nlike Thanksgiving . . . has no *inherent* secular basis as the anniversary of an American historical event.[20]

The Judge further noted that the school board's rules excluded Rosh Hashanah and Yom Kippur from the list, although the goal of cultural diversity would probably be better met by having a student body, which was presumably majority Christian, study these Jewish holy days.[21]

Judges taking such a position lay themselves open to the charge of being hostile towards religion. Judge McMillian recognized this danger, observing that his "analysis may be regarded by some as hypersensitive or even antireligious. It is not."[22] I think Judge McMillian was right in making this observation. In fact, if we start emphasizing the "secular basis" of Christmas or Easter, and justify governmental observance of these days for that reason, are we not watering down their religious significance? Jesus either got up out of the grave on Easter Sunday, or He did not. To reduce the observance to Easter eggs, baby chicks, and rabbits[23] actually trivializes religion by in effect telling the public that it is all right for government to observe these days because they really don't mean much, anyway, in this enlightened modern world. I congratulate Judge McMillian on having the courage and wisdom to reject this seemingly popular view. His opinion was probably unpopular at the time, and would still be so today. But I venture to say that his position may not only be more faithful to the First Amendment, but also more respectful of true religion.

Long live the Bill of Rights! Long live Ted McMillian!

20. *Id.* (emphasis added).
21. *Id.* at 1324.
22. *Florey*, 619 F.2d at 1329.
23. Presumably these symbols would be part of the "secular" basis of Easter.