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Theodore McMillian: A Wise Judge

Honorable Myron H. Bright

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THE HONORABLE MYRON H. BRIGHT*

I have known the Honorable Theodore McMillian, my friend Ted, for more than twenty years. I first met him in September of 1978 when he joined me on the United States Court of Appeals for the Eighth Circuit and began his own service to the court. Over the intervening two decades, I have come to know him as a great man and a wise judge. I consider him to be wise for many reasons, but most importantly because he writes well-reasoned decisions which reflect both sound professional judgment and an uncommon insight into human nature. Whether he is in the majority or in the minority, the excellence and wisdom of his decision making shines through.

And from whence does such wisdom arise? Wisdom comes from experience. Judge McMillian's personal experience fits snugly with that of his entire generation, a generation that Tom Brokaw recently dubbed "the greatest generation."[1] As a member of that generation, Judge McMillian's life was not an easy one. It was fraught with difficulties and often-bitter experiences. As many others did, he lived through the poverty of the Great Depression of the 1930's; he struggled to obtain a decent education; he served our country in the great war between 1941 and 1945; and he returned to civilian life to build a new world and a very worthy career. Judge McMillian experienced all of these, but he also surmounted other difficult hurdles in his lifetime; those obstacles created by racism in our society. He became the first African-American appointed to the federal bench in the Eighth Circuit.[2] He became a leader on the court and paved the way for others of his race to serve as federal judges on the courts of the Eighth Circuit.

Judge McMillian possesses a fine judicial temperament, but more than that, he has the courage of his convictions and states his views vigorously, even when in dissent from the court's majority opinions. In this last regard, I commend the reader to a shining example of his wisdom and courage, from a

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1. *See* THOMAS BROKAW, THE GREATEST GENERATION (1999).

2. The United States Court of Appeals for the Eighth Circuit, on which Judge McMillian has so ably served, has jurisdiction over a large and diverse geographical region, a region which includes the states of Arkansas and Missouri to the south, but also stretches through Iowa and Nebraska, to reach Minnesota and the Dakotas to the north. *See* 28 U.S.C. § 41 (1998).

little-noticed dissent, in the case of *Paula Corbin Jones v. William Jefferson Clinton*.[3]

Although the ultimate incarnations of this case are well known, let me briefly recount the procedural and factual history of the suit in order to place Judge McMillian's views in their proper prospective. Paula Jones brought a sexual harassment suit against Bill Clinton, the sitting President of the United States.[4] To counter, the President sought immunity from suit during his term of office.[5] The United States District Court for the Eastern District of Arkansas, where the suit had been filed, granted the President temporary immunity from the lawsuit but permitted discovery to proceed.[6] On appeal by the President and cross-appeal by Jones, the Eighth Circuit reversed.[7] In a divided opinion, the court denied immunity and ordered the trial to proceed.[8] The Supreme Court, on review, subsequently affirmed the majority opinion rendered by the Eighth Circuit.[9]

As the country well knows, out of the discovery proceedings in this case, details of the President's personal life boiled to the surface. When the Office of Independent Counsel investigated and reported the salacious details to Congress, the resulting fallout almost toppled the President. The House of Representatives impeached Mr. Clinton, but the United States Senate ultimately acquitted him.[10] As this process unfolded, the news media engaged in an unrivaled frenzy and, for over a year, immersed itself in the details of the President's personal matters.

Let me be clear: It is not my purpose here to agree or to disagree with the opinion of the majority panel of the Eighth Circuit, nor with that of the unanimous Supreme Court which sustained it. Instead, I mean to highlight Ted McMillian's calm, prescient deliberation amidst the swirling storm created by a case of great public moment. In that context here is some of what he wrote in dissent:

> The majority opinion not only has put short pants on President William Jefferson Clinton, but also has succeeded in demeaning the Office of the President of the United States, recognized throughout the world as the most powerful office in the world, an office which, at this time, is grappling with world problems in Bosnia, Iran, China, Taiwan, Cuba, Russia, and most third-world nations, not to mention the myriad of domestic problems here at home.

3. *See* Jones v. Clinton, 81 F.3d 78 (8th Cir. 1996) (denial of rehearing en banc).
4. Jones v. Clinton, 72 F.3d 1354, 1357 (8th Cir. 1996).
5. *Id*.
6. *Id*.
7. *Id*. at 1362.
8. *Id*. at 1363.
9. Clinton v. Jones, 520 U.S. 681, 710 (1997).
10. *13 months of scandal ends in senate's acquittal of Clinton*, ST. LOUIS POST- DISPATCH, Feb. 13, 1999, at 16A.

> Never has there been a question of whether President Clinton is above the law and immune from suit, the question is only "when?" My colleagues, to my dismay, would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the appellant delayed filing for at least three years.
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> The second rationale applies to lawsuits, such as the present one, filed during the President's term but arising from conduct or events which are unrelated to the President's official duties. This rationale is not based upon the need for fearless and impartial decision making by the President but rather is based upon the need to allow the President to carry out his or her official duties free from unnecessary interference and distraction. As the Court stated in *Fitzgerald*, "[i]n view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages."[11]
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> In my opinion, Judge Ross[12] got it exactly right when he wrote in his dissent:
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> > The *Fitzgerald* decision was derived from both the functional necessities of the President's execution of Article II duties, and the principle that no branch should be subject to crippling incursions by another branch. The Court's reasoning is highly instructive in the present case because it demonstrates the importance of insulating the President from the disruptive effects of private suits against him, whether based on official or unofficial acts.[13]
>
> While delay may be unfortunate for the appellant, it is not necessarily prejudicial. She still retains her right to sue. What must be of greatest concern in this controversy is the welfare of this nation—and indeed of the entire world—over which the President of the United States exerts such strong influence . . . .[14]

What Judge McMillian understood in *Jones v. Clinton*, to his great credit, was the practical reality of modern litigation in this country, whether vexatious or meritorious. In words attributed to the late Judge Learned Hand, "After some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."[15] Or, to paraphrase Ambrose Bierce's graphic definition of a lawsuit in *The Devil's*

11. Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982).

12. The Honorable Donald R. Ross, United States Circuit Judge, sat as a member of the original Eighth Circuit panel which heard the appeal in the *Jones* case.

13. Jones v. Clinton, 72 F.3d 1354, 1367 (8th Cir. 1996).

14. Jones v. Clinton, 81 F.3d 78, 79-80 (8th Cir. 1996) (footnote omitted).

15. JEROME FRANK, COURTS ON TRIAL 40 (1950).

Dictionary, a machine into which you go as a pig and come out as a sausage![16] So it was with *Jones v. Clinton*.[17] Even so, Judge McMillian recognized the destructive power of litigation and sought to reign it in as it applied to the Chief Executive of this nation.

This is but one example, among many, of judicial courage exhibited by the Honorable Theodore McMillian – my friend Ted. Whether one agrees or disagrees with his views on any particular matter, those views nevertheless demand respect for their courage, honesty, and wisdom. He remains a tremendous jurist, and I am so very proud of my association with him.

16. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 194 (1944).

17. *See* Jones v. Clinton, 81 F.3d 78(8th Cir. 1996).