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The Significant Cases of the Honorable Theodore McMillian During His Tenure on the United States Court of Appeals for the Eighth Circuit 1978 - 1999

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THE SIGNIFICANT CASES OF THE HONORABLE THEODORE MCMILLIAN DURING HIS TENURE ON THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT 1978 - 1999

THE HONORABLE DONALD P. LAY*

I first met Judge Theodore McMillian in 1978 at a seminar held in Aspen, Colorado. He had just been appointed to the Court of Appeals for the Eighth Circuit. I did not have an opportunity to meet with him on the first day of the seminar because, as I later learned, he was taken to the hospital the previous evening owing to problems adjusting to the higher altitude. Thankfully, he adjusted. Since that first meeting and throughout the last twenty years, we have become close personal friends. His approach to judicial review focuses on compassion for humanity and the worth of the individual. Any person who appears before Judge McMillian can be assured of this simple fact: he will give their case a full and fair review. Because of his scholastic excellence, his dedication and compassion for the individual, I am confident that he would have been seriously considered for elevation to the United States Supreme Court if he had only been a younger man at the time of the vacancies.

Judge McMillian was born in 1919 in St. Louis, Missouri, the oldest of ten children raised by his mother, grandmother and stepfather.[1] He attended Vashon High School in St. Louis, where he was class president and a member of the National Honor Society.[2] He graduated Phi Beta Kappa from Lincoln University in Jefferson City, Missouri, in 1941, with degrees in mathematics and physics.[3]

He was drafted during World War II and attained the rank of Second Lieutenant in the Army Signal Corps.[4] After the war, he wanted to become a physicist or a physician.[5] But due to the limited number of spots open to African-Americans in medical school at that time, there was a five year wait before he could be admitted.[6] As a second choice, he applied to the St. Louis

* United States Court of Appeals for the Eighth Circuit.

1. Karen L. Tokarz, Comment, *Tribute to Judge Theodore McMillian*, 52 WASH. U. J. URB & CONTEMP. L. 5, 6 (1997).

2. *Id.*

3. *Id.* at 6-7.

4. *Id.* at 7.

5. *Id.*

6. Tokarz, *supra* note 1, at 7.

University School of Law.[7] He was accepted and began his brilliant career in legal studies. Again, he excelled in the classroom and graduated from law school first in his class.[8] He also became the first African-American inducted into Alpha Sigma Nu, the National Jesuit Honor Fraternity.[9]

Judge McMillian began his career in the law rather humbly. Because no large firm in St. Louis would hire him, he and another classmate set out on their own in the outskirts of the downtown St. Louis business area.[10] He left private practice in 1953 when he was hired as an Assistant Circuit Attorney.[11] In 1956, Governor Phil Donnelly appointed him to the St. Louis Circuit Court where he presided over various criminal and civil cases.[12] Later, because of his profound interest in juvenile justice, he served in the Juvenile Court for six and one-half years.[13] After being passed over twice, Governor Warren Hearnes appointed him to the Missouri Court of Appeals in St. Louis in 1972. He was the first African-American appointed to the appellate bench in Missouri.[14] In 1978, President Jimmy Carter selected Judge McMillian to become the first African-American on the United States Court of Appeals for the Eighth Circuit.[15] Since that time, Judge McMillian has written more than 1,000 opinions as a United States Circuit Judge.[16]

Every judicial officer, state or federal, has occasion during their career to attend many tributes and recognitions for distinguished colleagues. I have personally attended a plethora of banquets honoring various judicial officers, including Supreme Court Justices. Of all of these occasions, however, the St. Louis University School of Law's banquet in honor of Judge McMillian's 80th birthday was the most heartwarming. Over 1,200 lawyers, law professors from all of the Missouri law schools and many notable citizens of St. Louis and the State of Missouri attended the tribute that evening. The tribute was held in the large banquet hall at the new Civic Center in St. Louis. There was not an empty table. Many of Judge McMillian's childhood friends attended and made moving tributes. That evening will always mark a high point in my career. I was overwhelmed by the demonstration of love and respect for Ted McMillian,

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Tokarz, *supra* note 1, at 8.
12. *Id.*
13. *Id.* at 9. Even after his appointment to the Eighth Circuit Court of Appeals, Judge McMillian continued his interest in juvenile law, regularly attending national meetings of state judges focusing on improvements in juvenile justice.
14. *Id.* at 10.
15. *Id.* at 13.
16. Tokarz, *supra* note 1, at 13.

not only in tribute for his public service, but as a magnanimous recognition of his personality and greatness.

Judge McMillian's life exemplifies not only a profound love of the law but also a personal intimacy with his fellow citizens. Judge McMillian's modesty and authenticity have set him above the average jurist. My life and judicial tenure have been made far richer and more rewarding because of my relationship with the Honorable Theodore McMillian.

APPENDIX

CASES AUTHORED BY THE HONORABLE THEODORE MCMILLIAN

UNITED STATES CIRCUIT JUDGE, EIGHTH CIRCUIT 1978-1999

Others in this tribute discuss Judge McMillian's judicial and personal characteristics as well as the many honors that he has received throughout his lifetime. As a service to the bench and the bar, however, I thought it useful to set forth some of the significant decisions that he has written since being appointed to the United States Court of Appeals for the Eighth Circuit. I have therefore set out in this appendix a digest of some of his opinions.

CONSTITUTIONAL LAW & CIVIL RIGHTS

Judge McMillian has been a protector and advocate of the civil and constitutional rights of all people. The great number of cases exemplifying his dedication prevents a thorough review of each case, but these selections offer an insight to Judge McMillian's strong beliefs. It is perhaps Judge McMillian's many opinions involving questions of constitutional law and civil rights that best exemplify his search for fairness under the law.

For example, in *Krantz v. City of Fort Smith*,[17] church members brought an action under 42 U.S.C. § 1983 against various cities challenging their ordinances prohibiting church members from placing literature on unattended vehicles parked on public property.[18] After the district court granted summary judgment for the cities, Judge McMillian held that the members had standing to challenge the ordinance,[19] and the ordinances were not narrowly tailored to serve a significant governmental interest.[20] As a result, the Eighth Circuit reversed the district court's decision .[21]

In *Franklin v. Lockhart,*[22] a prison inmate brought a civil rights complaint against prison authorities for alleged violations of free exercise and Eighth Amendment rights.[23] The district court dismissed the complaint as frivolous,

17. Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir. 1998).
18. *Id.* at 1215.
19. *Id.* at 1215, 1218.
20. *Id.* at 1222.
21. *Id.*
22. Franklin v. Lockhart, 890 F.2d 96 (8th Cir. 1989).
23. *Id.*

and the inmate appealed.[24] Judge McMillian held that the allegations in the inmate's complaint pertaining to work he had to perform while assigned to the prison hoe squad were sufficient to state an Eighth Amendment claim.[25] He also held that the inmate's allegation that handling manure and dead animals is contrary to his Muslim faith was sufficient to state a free exercise claim and required further factual findings.[26]

In *Mergens v. Board of Education of Westside Community Schools*,[27] the students of a public secondary school appealed from a district court order finding that the formation of a Christian bible study club at the high school violated the Establishment Clause.[28] In reversing the district court, Judge McMillian held that the public high school was a limited open forum for purposes of the Equal Access Act ("Act"), and that the Act did not violate the Establishment Clause.[29]

In *Stiles v. Blunt*,[30] an underage office-seeker moved for a preliminary injunction to prevent state officials from refusing to certify him as a candidate for the Missouri House of Representatives.[31] Judge McMillian held that the rational basis standard, rather than the strict scrutiny standard, was appropriate for determining whether Missouri's constitutional minimum-age requirement for state representatives violated equal protection.[32] He found that the age requirement was "rationally related to the state's legitimate interest in a mature and experienced legislature,"[33] and that the district court properly refused to calculate the office-seeker's age from the date of conception in accordance with the preamble to the Missouri Abortion Act.[34]

In *Independent Charities of America, Inc. v. Minnesota*,[35] charitable fund-raisers brought an action for declaratory judgment and a permanent injunction against statutory amendments imposing local connection requirements for participating in the Minnesota state employees' annual charitable fund-raiser.[36] Judge McMillian held that the amendments did not violate free speech rights of charities and that the legislature had a rational basis for imposing local connection requirements in amendments without violating the Equal Protection

24. *Id.*
25. *Id.* at 97.
26. *Id.*
27. Mergens v. Board of Educ. Of Westside Community Schs., 867 F.2d 1076 (8th Cir. 1989).
28. *Id.* at 1077.
29. *Id.* at 1079-80.
30. Stiles v. Blunt, 912 F.2d 260 (8th Cir. 1990).
31. *Id.* at 261-62.
32. *Id.* at 265.
33. *Id.* at 268.
34. *Id.* at 269.
35. Independent Charities of Am., Inc. v. Minnesota, 82 F.3d 791 (8th Cir. 1996).
36. *Id.* at 794-95.

Clause.[37] In addition, he reasoned that the amendments in question reasonably promoted state objectives without violating the Due Process Clause and that the state was acting as an employer in restricting access to its workplace, which supported the application of the market participant exception to the Commerce Clause.[38]

DISCRIMINATION

In *Moylan v. Maries County*,[39] a female ambulance employee filed an employment discrimination action against the sheriff and the county.[40] The employee appealed after a jury found against her.[41] Judge McMillian remanded the case to determine whether the county could be held liable for creating a sexually hostile work environment in violation of Title VII.[42] The employee, however, failed to preserve her claim with respect to the allegedly prejudicial opening argument by defense counsel and that issue was not preserved for appellate review.[43]

In *Adams v. Nolan*,[44] a female police officer brought an employment discrimination action against the police department because she had been denied requests for light duty assignments during her pregnancy.[45] In a bench

37. *Id.* at 797-98.

38. *Id.* at 798. *See also* Ghane v. West, 148 F.3d 979 (8th Cir. 1998) (proffered reasons for discharge were pretext for discrimination); Coleman v. Rahija, 114 F.3d 778 (8th Cir. 1997) (inmate who gave birth subjected to cruel and unusual punishment); Hicks v. St. Mary's Honor Ctr., 90 F.3d 285 (8th Cir. 1996) (court had no authority to enter judgment in favor of defendants); Hayes v. Long, 72 F.3d 70 (8th Cir. 1995) (inmate established right not to handle pork based on religious objections); Schanou v. Lancaster County Sch. Dist. No. 160,, 62 F.3d 1040 (8th Cir. 1995) (distribution of bibles on school grounds upheld); Duckworth v. Ford, 995 F.2d 858 (8th Cir. 1993) (protected speech permitted action against fellow public employee); Shepherd v. Kansas City Call, 905 F.2d 1152 (8th Cir. 1990) (further proceedings necessary to determine work agreements); Gilbert v. City of Little Rock, 867 F.2d 1063 (8th Cir. 1989) (determination of damages from civil rights claim); Hamer v. Brown, 831 F.2d 1398 (8th Cir. 1987) (professor's public speech protected under First Amendment); Murphy v. Missouri Dep't of Corrections, 814 F.2d 1252 (8th Cir. 1987) (total withholding of mail from white supremacist organization too restrictive); Fields v. City of Omaha, 810 F.2d 830 (8th Cir. 1987) (arrest under unconstitutional ordinance permitted claim for damages); United States v. Norton, 780 F.2d 21 (8th Cir. 1985) (no Sixth Amendment violation for denial of fair cross-section in jury); Hazen v. Pasley, 768 F.2d 226 (8th Cir. 1985) (transfer of prisoner's property to sheriff violated public policy).

39. Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986).

40. *Id.* at 747.

41. *Id.*

42. *Id.* at 750.

43. *Id.* at 751.

44. Adams v. Nolan, 962 F.2d 791 (8th Cir. 1992).

45. *Id.* at 792.

trial, the district court denied relief and the officer appealed.[46] In reversing the district court, [47] Judge McMillian held the police department's proffered reason for denying the requested light duty assignments was pretextual, and the officer was entitled to relief on her Title VII sex discrimination claim.[48]

FEDERAL PROCEDURE & JURISDICTION

Judge McMillian wrote many opinions involving various jurisdictional issues.[49] Several of his opinions also dealt with procedural questions presented on appeal, which allowed for a wide variety of holdings.[50]

46. *Id.*

47. *Id.* at 796.

48. *Id.* Judge McMillian has written over 200 cases involving all aspects of employment discrimination. The following cases are illustrative of the issues he confronted. *See generally*, Widoe v. Dist. No. 111 Otoe County Sch., 147 F.3d 726 (8th Cir. 1998) (reversing grant of summary judgment on grounds that evidence of pretext existed which masked the Board's age discrimination); O'Bryan v. KTIV Television, 64 F.3d 1188 (8th Cir. 1995) (reversing in part grant of summary judgment on grounds that evidence of pretext existed within age discrimination claim); Taggart v. Trans World Airlines, Inc., 40 F.3d 269 (8th Cir. 1994) (reversing dismissal and remanding on grounds that state law handicap discrimination claim was not preempted by Railway Labor Act); Weissman v. Congregation Shaare Emeth, 38 F.3d 1038 (8th Cir. 1994) (reversing grant of summary judgment based on defendant-temple's lack of immunity from age discrimination claims); Throgmorton v. United States Forgecraft Corp., 965 F.2d 643 (8th Cir. 1992) (affirming a finding of sex discrimination in violation of Title VII based on the employer's failure to proffer a legitimate nondiscriminatory reason for terminating the plaintiff in response to the plaintiff's prima facie case); *Shepherd*, 905 F.2d at 1152 (reversing finding for defendant and remanding to determine key procedural issue); Propst v. Leapley, 886 F.2d 1068 (8th Cir. 1989) (reversing finding of no racial discrimination by prison officials against inmate as "clearly erroneous"); Edwards v. Jewish Hosp. Of St. Louis, 855 F.2d 1345 (8th Cir. 1988) (affirming finding of racial discrimination in violation of statute guaranteeing all persons the same rights as white citizens); Crutchfield v. Maverick Tube Corp., 854 F.2d 307 (8th Cir. 1988) (affirming finding of no sex discrimination by employer based on employee's inability to perform duties of the position); EEOC v. M.D. Pneumatics, Inc., 779 F.2d 21 (8th Cir. 1985) (reversing denial of retroactive seniority to victims of sex discrimination and finding district court to have abused its discretion in so denying); Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985) (reversing on grounds that district court's refusal to consider retaliatory discharge claim was improper based on plaintiff's success in establishing a prima facie case and remanding with directions for determination of defendant-university's entitlement to Eleventh Amendment immunity); Heath v. John Morrell & Co., 768 F.2d 245 (8th Cir. 1985) (reversing grant of summary judgment based on both evidence of pretext and the refusal to give finding of proper discharge in prior unemployment compensation proceeding preclusive effect).

49. *See generally* United States v. Yankton 163 F.3d 1096 (8th Cir. 1999) (accessory after the fact not subject to exception to federal jurisdiction); Carney v. BIC Corp, 83 F.3d 629 (8th Cir. 1996) (dismissed appeal for lack of jurisdiction); Meyers v. Trinity Med. Ctr., 983 F.2d 905 (8th Cir. 1993)(malpractice claim dismissed for lack of federal jurisdiction); Insurance Co. of Pennsylvania v. Syntex Corp., 964 F.2d 829 (8th Cir. 1992) (pending parallel state claim permitted dismissal); National City Bank v. Coopers and Lybrand, 802 F.2d 990 (8th Cir. 1986)(remand order not reviewable); Northwest S.D. Prod. Credit Ass'n v. Smith, 784 F.2d 323

The jurisdictional case with the most interesting implication was *Kaiser v. Memorial Blood Center of Minneapolis, Inc.*[51] In *Kaiser*, a patient brought a negligence action against the blood bank after allegedly contracting human immunodeficiency virus ("HIV") due to inadequate screening of donors and a failure to warn of the risk of HIV infection through blood transfusion.[52] Writing for the court, Judge McMillian held that the Red Cross charter established original federal jurisdiction and that the action accrued for limitations purposes when a patient received a blood transfusion during surgery.[53]

ADMINISTRATIVE LAW

One of the more significant cases dealing with agency review was *Wilkins v. Secretary of Interior,*[54] which involved a challenge to a decision by the Secretary of the Department of the Interior to remove wild horses from a national park.[55] The district court permanently enjoined removal of the horses, but Judge McMillian reversed, holding that the district court incorrectly applied an arbitrary and capricious standard of review.[56]

(8th Cir. 1986) (statute did not create federal casue of action on Indian trust lands); U.S. v. South Dakota, 665 F.2d 837 (8th Cir. 1981) (obligation to accept non-Indians in order to obtain HUD financing did not defeat federal jurisdiction); U.S. v. French, 628 F.2d 1069 (8th Cir. 1980) (Hobbs Act extortion did not affect interstate commerce).

50. *See, e.g.*, St. Croix Waterway Ass'n v. Meyer, 178 F.3d 515, 521 (8th Cir. 1999) (slow-no wake regulations not unconstitutionally vague and did not violate public trust doctrine); Marshall v. Warwick, 155 F.3d 1027, 1030 (8th Cir. 1998) (service of process to mother's place of employment not sufficient); Shempert v. Harwick Chem. Corp., 151 F.3d 793, 798 (8th Cir. 1998) *cert. denied*, 119 S. Ct. 1028 (1999) (Title VII filing requirement not tolled where circumstances causing late filing were never beyond party's control); Harris v. Folk Constr. Co., 138 F.3d 365, 371 (8th Cir. 1998) (delegation of duties that require final and independent determination of fact or law to magistrate judge not within authority of the district court); Hillary v. Trans World Airlines, Inc., 123 F.3d 1041, 1044-45 (8th Cir. 1997) (filing of complaint in wrong state not adequate exception to circumvent defense of res judicata); Renfro v. Swift Eckrich, Inc., 53 F.3d 1460, 1464 (8th Cir. 1995) (no waiver of right to claim breach of contract by accepting non-conforming performance); Scheerer v. Hardee's Food Sys., Inc., 16 F.3d 272, 275 (8th Cir. 1994) (material issue of fact existed regarding slippery condition in restaurant); Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994) (inmate lacked standing to assert denial of access without a total denial of such access or actual injury or prejudice); Johnson v. United States Dep't of Hous. and Urban Dev., 939 F.2d 586, 591 (8th Cir. 1991) (tenants not entitled to attorney fees under Equal Access to Justice Act); Photolab Corp. v. Simplex Specialty Co., 806 F.2d 807, 811 (8th Cir. 1986) (foreign defendants waived objection to sufficiency of service of process).

51. Kaiser v. Memorial Blood Ctr. of Minneapolis, Inc., 977 F.2d 1280 (8th Cir. 1992).

52. *Id.* at 1281.

53. *Id.* at 1283.

54. Wilkins v. Secretary of Interior, 995 F.2d 850 (8th Cir. 1993).

55. *Id*. at 851.

56. *Id.* at 853.

In *Northwest Airlines, Inc. v. Goldschmidt*,[57] the airline sought review of a Department of Transportation rule that allocated reservations of take-off and landing slots at Washington National Airport.[58] Judge McMillian determined that the order was reviewable[59] and the Department had the authority to issue the rule.[60] Further, he held the rule was not arbitrary and capricious,[61] the comment period limitation was for good cause,[62] and an environmental impact statement was not required.[63]

Throughout many of Judge McMillian's administrative law opinions, he often cited to the failure of one party to exhaust administrative remedies.[64] These cases offer examples of Judge McMillian's belief in fair administrative proceedings.

TORTS

Judge McMillian has had the opportunity to write many opinions which fall under the broad umbrella of tort law.[65] Illustrative of the complexity of these cases was *Wright v. Farmers Co-Op of Arkansas & Oklahoma.*[66] In that case, the owners of a motor home brought suit against the Farmers Co-op seeking recovery for injuries received after a propane tank in the motor home, which was over-filled by the co-op's employee, exploded.[67] Judge McMillian

57. Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981).

58. *Id*. at 1311.

59. *Id*. at 1314.

60. *Id*. at 1317.

61. *Id*. at 1318.

62. *Goldschmidt*, 645 F.2d at 1321.

63. *Id*. at 1322.

64. *See, e.g.*, Sharps v. United States Forest Serv., 28 F.3d 851, 854 (8th Cir. 1994) (failure to exhaust administrative remedies); Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 222, 223-24 (8th Cir. 1994) (affirming dismissal of complaint based on failure to file timely administrative appeal and establish official policy, custom, or practice elements of §§ 1981 and 1983 claims); Boge v. Ringland-Johnson-Crowley Co., 976 F.2d 448, 452 (8th Cir. 1992) (equitable considerations did not excuse failure to exhaust administrative remedies); Shatz v. United States Dep't of Justice, 873 F.2d 1089, 1092 (8th Cir. 1989).

65. *See, e.g.*, Brosnahan v. Western Air Lines, Inc., 892 F.2d 730, 734 (8th Cir. 1989) (question of adequate supervision of boarding process by airline and whether injury was foreseeable suitable for jury to decide); Rolfes v. International Harvester Co., 817 F.2d 471, 474 (8th Cir. 1987) (submitting products liability assumption of risk defense to jury improper); City of Omaha v. Hellmuth, Obata & Kassabaum, Inc., 767 F.2d 457, 459-60 (8th Cir. 1985) (statute of limitations appropriately based on professional negligence or breach of warranty); Anderson v. United States, 724 F.2d 608, 610 (8th Cir. 1983) (*Feres* doctrine barred Federal Torts Claims Act suit); Peterson v. Auto Wash Mfg. & Supply Co., 676 F.2d 949, 952-53 (8th Cir. 1982) (failure to warn action denied for contributory fault); Fletcher v. Union Pac. R.R. Co., 621 F.2d 902, 908 (8th Cir. 1980) (tortious conduct of employer not barred by statute of limitations).

66. Wright v. Farmers Co-op of Ark. & Okla., 620 F.2d 694 (8th Cir. 1980).

67. *Id*. at 696.

reversed the trial court, holding that it improperly instructed the jury to enter a verdict for the defendant if the jury found mechanical failure was the proximate cause of the fire.[68] He held that the instruction was unsupported by the evidence and could have misled the jury.[69]

LABOR & EMPLOYMENT

Judge McMillian has written numerous opinions involving issues dealing with labor relations.[70] Among the most notable is *Pony Express Courier, Corp. v. NLRB.*[71] Pony Express Courier Corporation petitioned for review of a final order of the National Labor Relations Board ("NLRB"), which found that the Company had refused to bargain in violation of the National Labor Relations Act ("NLRA").[72] Judge McMillian granted enforcement of the order and held there was substantial evidence to support the NLRB's determinations that the courier-guards were not "guards" within the meaning of the NLRA and that the dispatchers were not "supervisors" within the meaning of the NLRA.[73]

In *Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB,*[74] the Ranch, a religiously-affiliated residential treatment center for children that was recognized as a "church" by the Internal Revenue Service, sought review of an

68. *Id*.

69. *Id*. at 697.

70. NLRB v. American Linen Supply Co., 945 F.2d 1428, 1433 (8th Cir. 1991) (employer illegally discharged economic strikers); Hall v. NLRB, 941 F.2d 684, 689 (8th Cir. 1991) (anti-union motivation was underlying factor for layoff and discharge); Waverly-Cedar Falls Health Care Ctr., Inc. v. NLRB, 933 F.2d 626, 631 (8th Cir. 1991) (nurses not "supervisors" for purposes of certifying a bargaining unit); Bryan Mem'l Hosp. v. NLRB, 814 F.2d 1259, 1263 (8th Cir. 1987) (withdrawal of recognition from union violated Labor Relations Act); Wright Mem'l Hosp. v. NLRB, Region 17, 771 F.2d 400, 407 (8th Cir. 1985) (enforced NLRB order requiring hospital to bargain with a union); Teamsters Local Union No. 688 v. NLRB, 756 F.2d 659, 663 (8th Cir. 1985) (misapplication of the law by NLRB required a remand); NLRB v. Winco Petroleum Co., 668 F.2d 973, 978 (8th Cir. 1982) (successor employer was obligated to remedy predecessor's unfair labor practices); Beaird-Poulan Div., Emerson Elec. Co. v. NLRB, 649 F.2d 589, 595 (8th Cir. 1981) (union election was not required to be set aside); Kansas City Power & Light Co. v. NLRB, 641 F.2d 553, 560 (8th Cir. 1981) (renewal of probationary period after strike was unfair labor practice); NLRB v. American Postal Workers Union, St. Louis, Mo., 618 F.2d 1249, 1261 (8th Cir. 1980) (Postal Service not in violation of National Labor Relations Act); NLRB v. Vitronic Div. of Penn Corp., 630 F.2d 561, 565 (8th Cir. 1979) (requirement to sign request for reinstatement not an unfair labor practice); Procter & Gamble Mfg. Co. v. NLRB, 603 F.2d 1310, 1316 (8th Cir. 1979) (substantial evidence supported violation of labor act); NLRB v. Int'l Bhd. of Elec. Workers, Local 265, 604 F.2d 1091,1098 (8th Cir. 1979) (use of terms in picketing imported meaning in union's request); American Cast Iron Pipe Co. v. NLRB, 600 F.2d 132, 138 (8th Cir. 1979) (employer required to cease enforcing rules regulating writing, making and distributing of statements by employees).

71. 981 F.2d 358 (8th Cir. 1992).

72. *Id.* at 358 (361).

73. *Id.* at 365-65.

74. 752 F.2d 345 (8th Cir. 1985).

order of the NLRB requiring it to bargain with the union representing the center's employees.[75] Judge McMillian held the assertion of jurisdiction by the NLRB over the treatment center did not pose a significant risk of governmental entanglement with religion, nor did it violate the Free Exercise or Establishment Clauses of the First Amendment.[76] In so holding, Judge McMillian noted the center's primary purpose was the care of children, not the propagation of faith.[77] There were no ministers on the staff at the center, and the lay staff, chosen without regard to religious beliefs or affiliations, did not propagate tenets of church.[78] Furthermore, the center's staff did not conduct religious classes or services and did not attempt to persuade children to accept the church's sectarian doctrines.[79] Finally, Judge McMillian found that ministers of various denominations from throughout the community conducted services at the center, and the center and its employees performed essentially secular functions.[80]

In *NLRB v. Van Gorp Corp.*,[81] the NLRB petitioned for enforcement of its order requiring the employer to bargain with the union as the exclusive bargaining representative for some of its employees.[82] Judge McMillian held the cumulative effect of serious last-minute misrepresentations by the union and the threatening course of conduct of the union supporters showed that the union election took place in an atmosphere, so hostile to an employee's free choice so as to preclude the certification of the union.[83] Thus, the court held the Board's certification of the union should be set aside.[84]

75. *Id.* at 346.
76. *Id.* at 349.
77. *Id.* at 348.
78. *Id.*
79. *Volunteers of America-Minnesota-Bar None Boys Ranch*, 752 F.2d at 348.
80. *Id.*
81. 615 F.2d 759 (8th Cir. 1980).
82. *Id.* at 759-60.
83. *Id.* at 765-66.
84. *Id.* at 766.

PROPERTY, TRUSTS & ESTATES

In *North Dakota ex rel. Board of University & School Lands v. United States*,[85] North Dakota brought an action against the United States seeking to quiet title for portions of the riverbed of the Little Missouri River in which the United States claimed a fee ownership interest.[86] Judge McMillian affirmed the district court's decision in favor of the United States, holding that evidence supported a finding the river was not navigable at the time of North Dakota's statehood[87] and that, therefore, the United States had fee title to the property.[88]

In *Kane v. United States*[89] a home purchaser brought an action against the United States to recover for the presence of asbestos within the house.[90] In affirming the district court, Judge McMillian held that the "discretionary function" exception to the waiver of sovereign immunity protected the United States from liability for the failure of the Veterans Administration and its management broker to inspect the house for asbestos prior to the sale of the house.[91] The court also held that because the house contained asbestos, it was a "consumer product in consumer use" and, therefore, was not a "facility" within the meaning of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA").[92]

In *Knox v. Lichtenstein*,[93] a bank attempted to permanently enjoin the trustees of two profit-sharing trusts from proceeding with a civil action for breach of fiduciary duties against the bank.[94] The district court denied the

85. 972 F.2d 235 (8th Cir. 1992).

86. *Id*. at 236.

87. *Id.* at 240.

88. *Id.*

89. 15 F.3d 87 (8th Cir. 1994).

90. *Id*. at 88.

91. *Id.* at 88-89.

92. *Id.* at 89. For additional property decisions see Universal Title Ins. Co. v. United States, 942 F.2d 1311, 1313 (8th Cir. 1991) (release of federal tax lien sought in net proceeds of sale); In re Holiday Intervals, Inc., 931 F.2d 500, 502-03 (8th Cir. 1991) (land sale contracts not instruments within meaning of Missouri Uniform Commercial Code); Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316, 318 (8th Cir. 1989) (challenge to use of railroad line as recreational trails); Paulucci v. City of Duluth, 826 F.2d 780, 783 (8th Cir. 1987) (denied claim of taking for non-public use); Herring v. United States, 781 F.2d 119, 121 (8th Cir. 1986) (owner was prevailing party after recognition of right to just compensation); United States v. 341.45 Acres of Land, 751 F.2d 924, 926 (8th Cir. 1984) (denial of costs and fees after condemnation permitted); Hockett v. Larson, 742 F.2d 1123, 1125-26 (8thCir. 1984) (quit claim deed partially valid with one valid signature); Caffrey Farms, Inc. v. Williams Pipe Line Co., 739 F.2d 1366, 1368 (8th Cir. 1984) (pipeline easements not subject to reformation); Collier v. City of Springdale, 733 F.2d 1311, 1317 (8th Cir. 1984) (adequate state remedies preempted federal takings claim); United States v. 38.60 Acres of Land, 625 F.2d 196, 200 (8th Cir. 1980) (impaired drainage in condemnation not compensable as severance damages).

93. 654 F.2d 19 (8th Cir. 1981).

94. *Id.* at 19-20.

bank's motion.[95] On appeal, Judge McMillian held the district court had properly exercised its discretionary authority in dismissing the trustees' action.[96] Additionally, that dismissal did not operate as an adjudication on the merits, which would have permitted an injunction of the related state court action under the doctrine of res judicata.[97]

In *Drye Family 1995 Trust v. United States*,[98] a trust created by the taxpayer's daughter filed a wrongful levy action against the United States.[99] In turn, the United States filed a counterclaim to reduce the tax assessments to the judgment.[100] Judge McMillian held the taxpayer's disclaimer of his mother's estate under Arkansas law did not void state law interests already established under Arkansas law.[101] Therefore, the court decided the federal liens were enforceable against the trust.[102]

PATENTS, TRADEMARKS & ANTITRUST

In *Insty*Bit, Inc. v. Poly-Tech Industries, Inc.*,[103] the designer and seller of quick-change drill chucks, brought an infringement claim under § 43(a) of the Lanham Act, 15 U.S.C. § 1125, against the manufacturer of component parts for the designer after the manufacturer began developing its own competing products.[104] The district court entered summary judgment for the manufacturer.[105] Judge McMillian reversed and remanded, holding the district court was required to apply judicially established factors in evaluating the likelihood of confusion.[106] He further held the district court erred in placing primary weight on its visual examination of the products[107] and material issues of fact existed as to the likelihood of confusion, distinctiveness, and functionality.[108]

95. *Id*. at 19.

96. *Id*. at 22.

97. *Id. See also* Robbins v. Iowa Rd. Builders Co., 828 F.2d 1348, 1355 (8th Cir. 1987) (allowed action by trustees to recover delinquent contributions).

98. 152 F.3d 892 (8th Cir. 1998).

99. *Id*. at 893.

100. *Id*. at 897.

101. *Id*. at 899.

102. *Id*.

103. 95 F.3d 663 (8th Cir. 1996).

104. *Id*. at 665-66.

105. *Id*. at 665.

106. *Id*. at 669.

107. *Id*. at 670.

108. *Insty*Bit, Inc., 95 F.3d at 672, 674. See also* Morrill v. Becton, Dickinson & Co., 747 F.2d 1217, 1219 (8th Cir. 1984) (inventor brought claim of fraud and breach of contract against manufacturer).

In *John Deere & Co. v. Payless Cashways, Inc.*,[109] the plaintiff again brought suit under the Lanham Act to enjoin the defendant from using the word "furrow" as the name and service mark of its retail stores and on its advertisements.[110] After review, the district court denied the relief.[111] In affirming the district court, Judge McMillian stated the plaintiff was not entitled to injunctive relief because of its failure to associate the "furrow" trademark with any of its products.[112] The court also held the district court's determination that there was no likelihood of confusion because of the vast difference in the styles and types of advertisements was not clearly erroneous.[113]

In *United States v. Misle Bus & Equipment Co.*,[114] the defendants were convicted of conspiracy to suppress competition surrounding the "sale of school bus bodies to public school districts in Nebraska and western Iowa," in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7.[115] In holding the convictions were supported by sufficient evidence, Judge McMillian opined there was evidence of a similar bid-rigging/market allocation scheme admissible to show intent.[116] He also held lay testimony describing the agreements to fix prices and allocate the market was admissible[117] and that the jury instructions did not over-emphasize the government's multiple theories of liability.[118]

109. 681 F.2d 520 (8th Cir. 1982).

110. *Id.* at 522.

111. *Id.*

112. *Id.* at 523.

113. *Id* at 524. *See also* Applied Innovations, Inc. v. Regents of the Univ. of Minn., 876 F.2d 626, 627 (8th Cir. 1989) (university brought action against developer for infringement of psychological test); Vitek Sys., Inc. v. Abbott Lab., 675 F.2d 190 (8th Cir. 1982) (denied injunctive relief for trademark infringement); SquirtCo. v. Seven-Up Co., 628 F.2d 1086, 1088 (8th Cir. 1980) (trademark infringement required issuance of an injunction).

114. 967 F.2d 1227 (8th Cir. 1992).

115. *Id.* at 1227, 1229.

116. *Id.* at 1233-34.

117. *Id*. at 1234.

118. *Id.* at 1235. *See also* North Star Steel Co. v. MidAmerican Energy Holdings Co., 184 F.3d 732, 739-40 (8th Cir. 1999) (company immune from federal antitrust liability under state action immunity doctrine); Local Union 257, Int'l Bhd. of Elec. Workers v. Sebastion Elec., 121 F.3d 1180, 1186 (8th Cir 1997) (fund to reimburse wages to union members not antitrust violation); Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1460 (8th Cir. 1995) (Sherman Act four-year limitation period applied to Packers and Stockyards Act); Morgenstern v. Wilson, 29 F.3d 1291, 1294 (8th Cir. 1994) (surgeon brought suit against group medical practice alleging violations of the Sherman Antitrust Act); In re Wirebound Boxes Antitrust Litig., 993 F.2d 152, 154 (8th Cir. 1993) (claims to certain antitrust settlement funds properly denied as untimely); Minnesota Transp. Regulation Bd. v. United States, 966 F.2d 335, 341 (8th Cir. 1992) (Interstate Commerce Commission applied to property purchases); South Dakota Collectibles, Inc. v. Plough, Inc., 952 F.2d 211, 214 (8th Cir. 1991) (representative lacked standing to sue for antitrust damages); Health Care Equalization Comm. v. Iowa Med. Soc'y, 851 F.2d 1020, 1032 (8th Cir.

TAXATION

Although most of Judge McMillian's tax opinions involve the federal government and a private taxpayer,[119] some involve tax disputes among governmental bodies. Such was the case in *Minnesota Department of Revenue v. United States*,[120] a dispute over the priority of certain tax liens. The district court held the state's tax liens were perfected (choate) at the time the tax returns were filed, not when processed, thereby granting priority over federal tax liens.[121] Judge McMillian reversed the district court, determining that the state tax liens were not entitled to priority and that they were not established at the time the state tax returns were filed because, under federal law, the state must take administrative action to acknowledge taxpayer liability before its liens could be choate.[122]

1988) (dismissed claims against non-profit health care service corporation); In re Hops Antitrust Litig., 832 F.2d 470, 473-74 (8th Cir. 1987) (antitrust action deemed to be an equitable, not a legal, action); L & H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517, 519-20 (8th Cir. 1985) (awarding of franchise by city shielded from antitrust liability by state action immunity doctrine); Ryko Mfg. Co. v. Eden Servs., 759 F.2d 671, 673 (8th Cir. 1985) (enjoining party from terminating defendant's exclusive contract not abuse of discretion by district court); Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 62 (8th Cir. 1984) (state fraud claims subject to arbitration); Paschall v. Kansas City Star Co., 727 F.2d 692, 704 (8th Cir. 1984) (burden of generation of monopoly pricing minimized by anti-competitive effect); Russell Stover Candies, Inc. v. FTC, 718 F.2d 256, 260 (8th Cir. 1983) (refusal to sell to dealers not selling at suggested prices not coercion); Battle v. Lubrizol Corp., 673 F.2d 984, 990 (8th Cir. 1982) (termination of dealer for pricing protection violated Sherman Act); Yellow Forwarding Co. v. Atlantic Container Line, 668 F.2d 350, 354 (8th Cir. 1981) (conference agreements exempt from federal antitrust laws); Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130, 1146 (8th Cir. 1981) (exclusive foundation preparation policy constituted illegal tying arrangement).

119. *In re Brown*, 82 F.3d 801 (8th Cir. 1996) (failed to rebut prima facie validity of IRS proof of claim); Black Hills Corp. v. Commissioner, 73 F.3d 799 (8th Cir. 1996) (insurance premiums were not deductible as ordinary and necessary business expense); Norwest Corp. v. Commissioner., 69 F.3d 1404 (8th Cir. 1995) (taxpayer not entitled to foreign tax credit); Baptiste v. Commissioner, 29 F.3d 433 (8th Cir. 1994) (transferee's obligation to pay tax was res judicata); Hefti v. Commissioner, 983 F.2d 868 (8th Cir. 1993) (third party summons tolled limitations period for action by IRS); Billion v. U.S., 921 F.2d 182 (8th Cir. 1990) (taxpayer not entitled to interest after IRS errors); U.S. v. Claes, 747 F.2d 491 (8th Cir. 1984) (enforcement of IRS summons deemed valid); Snell v. U.S., 680 F.2d 545 (8th Cir. 1982) (taxpayers not entitled to deductions or reductions because of new partners); Universal Title Ins. Co. v. U.S., 942 F.2d 1311 (8th Cir. 1991) (insurer was not entitled to be subrogated to lienholders who were senior to federal tax lien); Noske v. U.S., 911 F.2d 133 (8th Cir. 1990) (penalty could not be applied retroactively); United States v. Williams, 815 F.2d 46 (8th Cir. 1987) (executive director not personally responsible for payment of employment taxes); Estate of Peterson v. Commissioner, 667 F.2d 675 (8th Cir. 1981) (income delivered after seller's death not income in respect to decedent).

120. 184 F.3d 725, (8th Cir. 1999).

121. *Id.* at 726.

122. *Id.* at 730-31.

In *Shangreau v. Babbitt,*[123] the mother and heir of a deceased illegitimate child whose father predeceased him challenged the constitutionality of the definition of "heir" in the White Earth Land Settlement Act of 1985 ("WELSA"). WELSA barred an illegitimate child from inheriting compensation for an allotment by right of representation through the father.[124] Judge McMillian held, in affirming the grant of summary judgment, that the differences between proving paternity and maternity justified the different treatment of paternal inheritance by illegitimate children, and that the definition of heir did not invidiously discriminate against illegitimate children.[125]

CRIMINAL LAW, PROCEDURE & SENTENCING

In *United States v. Johnson,*[126] following the denial of a motion to suppress evidence found as the result of a search and seizure of an express mail package, the defendant was convicted of conspiracy to distribute and possession with intent to distribute methamphetamine. On appeal, Judge McMillian reversed the district court, holding that the particularized facts of the case did not support a finding of reasonable suspicion of criminal activity to warrant the interception and detention of the express mail package.[127]

In *United States v. Leisure,*[128] defendants were convicted by a jury of various racketeering, obstruction of justice, and unauthorized creation of destructive devices offenses. On appeal, Judge McMillian affirmed in part and reversed in part.[129] He affirmed the district court's determination that the affidavits used in support of the applications for electronic surveillance were sufficient.[130] He also affirmed the district court's finding that there was no prosecutorial misconduct warranting reversal.[131] But he reversed the conviction of one of the defendants because the indictment failed to sufficiently allege a violation of the statute as amended.[132]

In *United States v. Dixon,*[133] the defendants appealed from a district court order denying their motions to dismiss the indictment pending against them

123. 68 F.3d 208 (8th Cir. 1995).

124. *Id.* at 212.

125. *See Id*. at 212-13; *See also* Lannan v. Maul, 979 F.2d 627 (8th Cir. 1992) (personal administrator sued for breach of contact).

126. 171 F.3d 601 (8th Cir. 1999).

127. *Id.* at 605.

128. 844 F.2d 1347 (8th Cir. 1988).

129. *Id.* at 1368.

130. *Id.* at 1354-59 (discussing the reasoning for sufficiency of affidavits used in support of the applications for surveillance).

131. *Id.* at 1360.

132. *Id.* at 1367.

133. 913 F.2d 1305, 1306 (8th Cir. 1990).

after the district court had declared a mistrial. Judge McMillian reversed the district court, holding that the denial of a motion to dismiss on double jeopardy grounds was appealable under the collateral order doctrine.[134] In reviewing the double jeopardy claims, Judge McMillian held the district court's *sua sponte* declaration of a mistrial because of prejudicial television news reports was not justified by manifest necessity, and, thus, the Double Jeopardy Clause barred re-prosecution of the defendants.[135]

In *United States v. Childress*,[136] a defendant was convicted of three counts of firearms violations from which he later appealed. A panel of the United States Court of Appeals for the Eighth Circuit affirmed the convictions.[137] Following an en banc rehearing on the issue of the government's use of peremptory challenges to remove almost all African-American prospective jurors from the jury panel, Judge McMillian, writing for the en banc court, held that the government's use of its peremptory challenges to remove four of five African-American prospective jurors did not establish a systematic exclusion of African-Americans from the jury process.[138]

In *United States v. Iron Cloud*,[139] a criminal defendant was sentenced for his escape from a halfway house where he was serving the final portion of his sentence. In vacating the sentence and remanding the case, Judge McMillian held that the district court clearly erred by imposing a three-level upward adjustment for assaultive behavior and creating the risk of serious bodily injury to an officer in the course of an offense or immediate flight.[140]

HABEAS CORPUS, PRISONER'S RIGHTS

Judge McMillian has written many cases involving the issues of habeas corpus and prisoner's rights throughout his time on the Eighth Circuit Court of Appeals. He has denied habeas relief far more than he has granted it,[141] but all

134. *Id.* at 1308-09.

135. *Id.* at 1315.

136. 715 F.2d 1313 (8th Cir. 1983).

137. *Id.* at 1313.

138. *Id.* at 1320-21.

139. 75 F.3d 386 (8th Cir. 1996).

140. *Id.* at 391.

141. Judge McMillian denied habeas corpus petitions over sixty times while on the court. Predka v. Iowa, 186F.3d 1082(8th Cir. Aug. 4, 1999) (use of state drug tax stamp law did not violate the Commerce Clause); Al-Din v. Bowersox, 176 F.3d 1043 (8th Cir. 1999) (en banc denial of motion to dismiss); Stallings v. Delo, 117 F.3d 378 (8th Cir. 1997) (jury verdict not coerced nor due process violation); Vogt v. U.S., 88 F.3d 587 (8th Cir. 1996) (failure to request competency hearing not ineffective assistance of counsel); Frizzell v. Hopkins, 87 F.3d 1019 (8th Cir. 1996) (claim not novel and failed to allege factual innocence); Krimmel v. Hopkins, 56 F.3d 873 (8th Cir. 1995) (ineffective counsel claims procedurally defaulted); Allen v. Nix, 55 F.3d 414 (8th Cir. 1995) (failed to establish constitutional violation); United States v. Duke, 50 F.3d 571 (8th Cir. 1995) (perjured testimony did not affect jury's judgment); Krimmel v. Hopkins, 44 F.3d

704 (8th Cir. 1995) (Fourth Amendment violations procedurally barred); Griffini v. Mitchell, 31 F.3d 690 (8th Cir. 1994) (reliance upon timely access to release date no cause to excuse procedural default); Lowe-Bey v. Groose, 28 F.3d 816 (8th Cir. 1994) (failure of postconviction relief counsel to file separate notice of appeal not cause to excuse procedural default); Hughes v. Lee County Dist. Court, 9 F.3d 1366 (8th Cir. 1993) (twenty-four hour notice of disciplinary proceeding sufficient for due process); Narcisse v. Dahm, 9 F.3d 38 (8th Cir. 1993) (claim of legal innocence, not actual innocence, did not present extraordinary case permitting relief); Pickens v. Lockhart, 4 F.3d 1446 (8th Cir. 1993) (claim of coerced confession procedurally barred); Freeman v. Erickson, 4 F.3d 675 (8th Cir. 1993) (confrontation rights not violated); Glaze v. Redman, 986 F.2d 1192 (8th Cir. 1993) (exclusion of evidence not deprivation of fundamentally fair trial); Parkus v. Delo, 985 F.2d 425 (8th Cir. 1993) (notice of appeal premature); Garcia v. Powers, 973 F.2d 684 (8th Cir. 1992) (state law corroboration requirement not cognizable under habeas review); McCann v. Armontrout, 973 F.2d 655 (8th Cir. 1992) (evidentiary hearing not required for effectiveness question at state trial); Bruns v. Thalacker, 973 F.2d 625 (8th Cir. 1992) (failure to establish actual prejudice to overcome procedural bar); Perez v. Groose, 973 F.2d 630 (8th Cir. 1992) (evidence supported conviction); Starchild v. Federal Bureau of Prisons, 973 F.2d 610 (8th Cir. 1992) (house arrest time not credited to sentence); Stewart v. Nix, 972 F.2d 967 (8th Cir. 1992) (ninety-five day delay in trial was not Fifth Amendment violation); Harris v. Lockhart, 948 F.2d 450 (8th Cir. 1991) (failure to prove actual innocence); Whatley v. Morrison, 947 F.2d 869 (8th Cir. 1991) (prisoner failed to exhaust all state remedies); Simpson v. Lockhart, 942 F.2d 493 (8th Cir. 1991) (state murder statutes not unconstitutionally vague); Rapheld v. Delo, 940 F.2d 324 (8th Cir. 1991) (failure to establish actual innocence); Williamson v. Jones, 936 F.2d 1000 (8th Cir. 1991) (no error in trial court refusal to give specific jury instruction); Mills v. Armontrout, 926 F.2d 773 (8th Cir. 1991) (decision not to impeach witness not cognizable in habeas review); Wright v. Lockhart, 914 F.2d 1093 (8th Cir. 1990) (no denial of Sixth Amendment right to fair and impartial jury); Epps v. Iowa, 901 F.2d 1481 (8th Cir. 1990) (change of venue not a constitutional violation); Adams v. Armontrout, 897 F.2d 332 (8th Cir. 1990) (failure to state specific, particularized fact for relief); Williams-Bey v. Trickey, 894 F.2d 314 (8th Cir. 1990) (no denial of effective assistance of counsel); Sumpter v. Nix, 863 F.2d 563 (8th Cir. 1988) (no violation of double jeopardy because of sentences imposed); Aschan v. Auger, 861 F.2d 520 (8th Cir. 1988) (no violation of pretrial agreement); Amos v. Minnesota, 849 F.2d 1070 (8th Cir. 1988) (refusal to give instruction on lesser-included offense proper); U.S. v. Hutchings, 835 F.2d 185 (8th Cir. 1987) (motions filed in incorrect judicial district); Perry v. U.S. Parole Comm'n, 831 F.2d 811 (8th Cir. 1987) (untimely revocation hearing not prejudicial); Wiggins v. Lockhart, 825 F.2d 1237 (8th Cir. 1987) (allegations insufficient to establish equal protection violation); High Elk v. Solem, 804 F.2d 496 (8th Cir. 1986) (failure to show that inclusion of evidence would have changed the verdict); Johanson v. Pung, 795 F.2d 48 (8th Cir. 1986) (self defense instruction not due process violation); Thrasher v. Armontrout, 784 F.2d 327 (8th Cir. 1986) (victim identification reliable); Beard v. Lockhart, 779 F.2d 23 (8th Cir. 1985) (possession of firearm sufficient to violate terms of parole); Warden v. Wyrick, 770 F.2d 112 (8th Cir. 1985) (denial of mistrial not violation of constitutional right to a fair trial); Johnson v. Mabry, 752 F.2d 313 (8th Cir. 1985) (failure to interview witness not sufficient to affect decision to accept plea bargain); Graham v. Solem, 728 F.2d 1533 (8th Cir. 1984) (victim identification testimony not constitutional violation); Cole v. Hunter, 726 F.2d 434 (8th Cir. 1984) (psychiatrist's testimony not Fifth Amendment violation); Thompson v. Missouri, 724 F.2d 1314 (8th Cir. 1984) (non-disclosure of information not denial of fair trial or due process); Hartung v. Omodt, 687 F.2d 1230 (8th Cir. 1982) (placement in juvenile facility did not constitute adjudication or permitting claim of double jeopardy); In re Assarsson, 687 F.2d 1157 (8th Cir. 1982) (extraditable offenses not within scope of habeas

of his opinions exemplify his thorough examination of the prisoner's diverse claims.[142]

In *Walton v. Caspari*, after a criminal defendant's convictions were affirmed, the defendant brought a petition for writ of habeas corpus.[143] The district court conditionally granted the petition and an appeal was taken.[144] In affirming the decision, Judge McMillian wrote that the defendant had fairly presented his equal protection claim to the state court.[145] He held that the district court did not err in retroactively applying the rule set forth in *Garrett v. Morris*.[146] *Garrett* held that once prosecutors volunteer their reasons for the

review); Fowler v. Parratt, 682 F.2d 746 (8th Cir. 1982) (failure to establish cumulative errors); Rhodes v. Foster, 682 F.2d 711 (8th Cir. 1982) (no constitutional violation as proceeding not detrimentally affected); Lenza v. Wyrick, 665 F.2d 804 (8th Cir. 1981) (state's refusal to examine claims of state procedural errors not cognizable for habeas review); Holiday v. Wyrick, 663 F.2d 789 (8th Cir. 1981) (ineffective assistance of appellate counsel not construed to be included); Morrow v. Wyrick, 646 F.2d 1229 (8th Cir. 1981) (failure to raise claims before state or district court precluded consideration of claims by court of appeals); Lindner v. Wyrick, 644 F.2d 724 (8th Cir. 1981) (lack of exhaustion of state claims prevented further review); Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980) (disclosure of grand jury materials to parole commission harmless error); Witham v. Mabry, 596 F.2d 293 (8th Cir. 1979) (failure to seek change of venue not ineffective assistance of council).

142. See also Nichols v. Bowersox, 172 F.3d 1068 (8th Cir. 1999) (one-year grace period permitted for filing habeas petition); Buckley v. Rogerson, 133 F.3d 1125 (8th Cir. 1998) (use of segregation and restraints violation of constitutional rights); Martin v. Gerlinski, 133 F.3d 1076 (8th Cir. 1998) (policy considering sentencing factors contrary to early release statute); Anderson v. Hopkins, 113 F.3d 825 (8th Cir. 1997) (consideration of invalid aggravating circumstance not harmless error); Hochstein v. Hopkins, 113 F.3d 143 (8th Cir. 1997) (failure to show defendant would have received death penalty even without consideration of exceptional depravity aggravator constitutional violation); Robinson v. Norris, 60 F.3d 457 (8th Cir. 1995) (act by trial court informing defendant of right to file appeal denied defendant right to counsel); Chambers v. Armontrout, 16 F.3d 257 (8th Cir. 1994) (order granting state additional period of time to retry defendant appealable); Wealot v. Armontrout, 948 F.2d 497 (8th Cir. 1991) (defendant's Confrontation Clause rights violated when not permitted to cross-examine complainant); Dickens v. Armontrout, 944 F.2d 461 (8th Cir. 1991) (waiver of exhaustion defense offered by state should have been accepted); Gilbert v. Lockhart, 930 F.2d 1356 (8th Cir. 1991) (right to counsel violated); Travis v. Lockhart, 925 F.2d 1095 (8th Cir. 1991) (interpretation of state crediting statute in violation of constitutional protection); Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1990) (equal protection claim fairly presented to state court); Brewer v. Swinson, 837 F.2d 802 (8th Cir. 1988) (concomitant issue permitted habeas review); DeVine v. Solem, 815 F.2d 1205 (8th Cir. 1987) (admissions by defendant required remand for determination of harmless error); Anderson v. Frey, 715 F.2d 1304 (8th Cir. 1983) (sheriff's involvement in jury selection violation of due process); Tinlin v. Parratt, 680 F.2d 48 (8th Cir. 1982) (ineffective assistance of counsel at previous hearings permitted reversal); Cox v. Hutto, 619 F.2d 731 (8th Cir. 1980) (stipulation to sentence by defense counsel without consent of defendant violated due process rights).

143. Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1987).

144. *Id.*

145. *Id.*

146. *Id*. at 1367.

exercise of their peremptory challenges, they are no longer entitled to a presumption that they exercised their peremptory challenges in lawful manner.[147] Judge McMillian further held that the district court properly decided the defendant's equal protection claim without holding an evidentiary hearing, and the record supported the court's finding that the prosecutor's use of peremptory challenges violated the Equal Protection Clause.[148]

In *Thomas v. Gunter*, a Native American inmate brought a 42 U.S.C. § 1983 civil rights suit alleging that his constitutional rights to free exercise of religion and to equal protection were violated because he was denied daily access to a prison sweat lodge for prayer.[149] The district court entered summary judgment in favor of the prison officials holding that the denial of extended daily access to a sweat house was rationally related to legitimate penological interests.[150] The inmate appealed.[151] In affirming the district court, Judge McMillian held that the denial of the inmate's request for daily and extended access to the sweat lodge, which was located near a truck delivery entrance during hours in which the entrance was in use, was rational.[152]

SOCIAL SECURITY

In his early years on the court, Judge McMillian wrote many opinions dealing with Social Security disability claims.[153] Many lawyers and judges

147. Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987).

148. 916 F.2d at 1362.

149. Thomas v. Gunter, 103 F.3d 700 (8th Cir. 1997).

150. *Id.*

151. *Id.*

152. *Id.*

153. For cases in which benefits were granted, *see* Geigle v. Sullivan, 961 F.2d 1395 (8th Cir. 1992) (submission of new evidence permitted reconsideration); Ross v. Social Sec. Admin., 949 F.2d 1021 (8th Cir. 1991) (claim of improper payment of benefits not frivolous); Jeffcoat v. Bowen, 840 F.2d 592 (8th Cir. 1988) (uncontradicted expert testimony demonstrated disability); Highfill v. Bowen, 832 F.2d 112 (8th Cir. 1987) (Secretary not estopped from reconsideration); Folks v. Secretary of Dep't of Health & Human Services, 825 F.2d 1259 (8th Cir. 1987) (ALJ failed to acknowledge shift in burden of proof); Anderson v. Heckler, 805 F.2d 801 (8th Cir. 1986) (ALJ's failure to consider impairments and complaints of pain allowed reversal); Dover v. Bowen, 784 F.2d 335 (8th Cir. 1986) (burden of proof not met by Secretary); Benson v. Heckler, 780 F.2d 16 (8th Cir. 1985) (record not fully developed and required remand); Sharrah v. Secretary of Health & Human Services,(747 F.2d 457 (8th Cir. 1984) (claimant determined to be disabled); Jolly v. Heckler, 747 F.2d 472 (8th Cir. 1984) (substantial evidence supported determination of disability after specific date); Tome v. Schweiker, 724 F.2d 711 (8th Cir. 1984) (claimant's disability within meaning of Social Security Act); Brenner v. Schweiker, 711 F.2d 96 (8th Cir. 1983) (evidence overwhelmingly supported determination of disability); McDonald v. Schweiker, 698 F.2d 361 (8th Cir. 1983) (error in application of grid for disability and full consideration of claims of pain required reversal); Gilliam v. Califano, 620 F.2d 691 (8th Cir. 1980) (expert testimony deficient to refute claim of disability); Hancock v. Secretary of Dep't of

have argued for a specialized court to hear Social Security cases. But Judge McMillian has always supported the view that Social Security claims are so important to the individual that it is far better that these cases be reviewed in a generalist court rather than in a specialized court. His exacting review is best illustrated in cases like *Rainey v. Department of Health & Human Services*.[154] In *Rainey*, a claimant sought review of the decision of the Secretary of Health and Human Services denying his application for disability benefits based on his heart condition.[155] After the district court affirmed the denial of benefits, Judge McMillian reversed and remanded the case, holding that the Administrative Law Judge ("ALJ") was required to give express reasons for rejecting the claimant's subjective complaints of pain.[156] The reasons previously given by the ALJ did not indicate that the claimant's participation in minor activities was inconsistent with his allegations of disabling pain.[157]

RAILROAD RETIREMENT BOARD

In *Bowman v. Railroad Retirement Board*,[158] the petitioner filed an application for disability annuity under the Railroad Retirement Act.[159] The Railroad Retirement Board determined that the petitioner was not disabled, and the petitioner sought review.[160] Upon review by the United States Court of Appeals, Judge McMillian affirmed the denial of benefits, holding that a hearing officer was justified in discounting the petitioner's subjective complaints of pain and that substantial evidence supported the determination that the petitioner retained residual functional capacity to perform sedentary work.[161] He further found substantial evidence supported the determination

Health, Educ. & Welfare, 603 F.2d 739 (8th Cir. 1979) (single report by physician not deemed substantial evidence sufficient to uphold denial of benefits).

For cases in which benefits were denied, *see* Weber v. Apfel, 164 F.3d 431 (8th Cir. 1999) (ALJ warranted in discrediting physician's opinions); Pertuis v. Apfel, 152 F.3d 1006 (8th Cir. 1998) (administrative record supported determination that no disability existed); Pyland v. Apfel, 149 F.3d 873 (8th Cir. 1998) (substantial evidence supported determination that no disability existed); Rowden v. Warden, 89 F.3d 536 (8th Cir. 1996) (failure to exhaust administrative remedies); Board of Regents of Univ. of Minn. v. Shalala, 53 F.3d 940 (8th Cir. 1995) (prohibition of redistribution of costs from medical school); Pickner v. Sullivan, 985 F.2d 401 (8th Cir. 1993) (substantial evidence supported denial of benefits); Eldridge v. Sullivan, 980 F.2d 499 (8th Cir. 1992) (failure to establish wage-earner paternity denied benefits); MacDonald v. Bowen, 850 F.2d 455 (8th Cir. 1988) (evidence supported denial of benefits).

154. 48 F.3d 292 (8th Cir. 1995).

155. *Id.* at 293.

156. *Id.*

157. *Id.*

158. 952 F.2d 207 (8th Cir. 1991).

159. *Id.* at 208.

160. *Id.*

161. *Id.* at 211.

that there were a significant number of jobs in the national economy that the petitioner was capable of performing.[162]

In *Arp v. Railroad Retirement Board*,[163] a former railroad employee appealed from the final decision of the Railroad Retirement Board affirming a decision denying the employee's application for employee disability annuity under the Railroad Retirement Act.[164] Judge McMillian denied the petition, holding that the Railroad Retirement Board's determination that the former employee had residual functional capacity to perform medium work and was not entitled to disability annuity, was supported by substantial evidence despite the employee's exposure to toxic chemicals.[165] Similarly, in *Carmack v. Railroad Retirement Board*,[166] a retired railroad employee petitioned for review of an order of the Railroad Retirement Board denying his application for disability annuity.[167] Judge McMillian affirmed the denial holding that substantial evidence supported the Board's order.[168]

BLACK LUNG BENEFITS

Judge McMillian reviewed many cases where parties claimed a disability from black lung disease. In *Yauk v. Department of Labor*,[169] the widow of a coal miner sought black lung survivor's benefits.[170] The Department of Labor Benefits Review Board denied the petition, and the widow appealed.[171] In permitting the benefits, Judge McMillian held that the ALJ improperly determined that the miner did not have ten years of mining employment in order to qualify for the presumption that the disability was caused by black lung disease.[172] The ALJ failed to apply the rule under which the miner was entitled to one year of credit for every year during which the evidence established that he had worked 125 days in mines.[173] After applying the formula, Judge McMillian found that the miner had the necessary ten years of employment.[174] Furthermore, he concluded that a remand for further consideration was not necessary because the claimant had satisfied the only

162. *Id.*
163. 850 F.2d 466 (8th Cir. 1988).
164. *Id.* at 466.
165. *Id.* at 468.
166. 928 F.2d 266 (8th Cir. 1991).
167. *Id.*
168. *Id.* at 270.
169. 912 F.2d 192 (8th Cir. 1989).
170. *Id.* at 193.
171. *Id.*
172. *Id.* at 196.
173. *Id.* at 195.
174. *Yauk*, 912 F.2d at 195.

other additional requirement, that he had sustained lung damage, and the government had failed to rebut the presumption of disability.[175]

In *Hudson v. Department of Labor*,[176] a claimant petitioned for review of a Department of Labor Benefits Review Board order denying his claim for black lung benefits.[177] Judge McMillian held, in granting the benefits, that the ALJ's finding that the claimant worked no more than seven years in coal mine employment and, thus, was not entitled to the statutory presumption was not supported by substantial evidence.[178] The record established at least ten years of coal mine employment and, therefore, supported a finding of total disability arising out of coal mine employment.[179]

INSURANCE, CONTRACTS

In *Mansker v. TMG Life Insurance Co.*,[180] the administrator of an insured's estate filed suit against an ERISA group health insurer, alleging that the insurer owed benefits for hospital bills relating to a fatal injury sustained by the insured employee when a gas stove exploded in his motor home.[181] The district court granted summary judgment in favor of the insured's estate administrator, and the insurer appealed.[182] In affirming the grant of summary judgment, Judge McMillian held that the insured's injuries were covered and did not fall within the exclusion for injuries "arising from employment."[183] He found that the district court had the authority to determine benefits even though an insurer had not made a determination as to reasonableness or necessity of expenses.[184] He also found that the award of attorney fees at $200 per hour was not excessive.[185]

Additionally, in *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co., Inc.*,[186] an insurer brought suit against a chemical producer and its former officers and directors seeking declaration that the insurer was under no duty to defend from or to indemnify the producer for liability arising out of environmental suits after the discovery of improper disposal of hazardous waste.[187] The district court granted summary judgment

175. *Id.* at 196.
176. 851 F.2d 215 (8th Cir. 1988).
177. *Id.*
178. *Id.* at 217.
179. *Id.* at 218.
180. 54 F.3d 1322 (8th Cir. 1995).
181. *Id.* at 1325.
182. *Id.*
183. *Id.* at 1327.
184. *Id.* at 1329.
185. *Mansker*, 54 F.3d at 1330.
186. 842 F.2d 977 (8th Cir. 1988).
187. *Id.* at 981.

in favor of the insurer on one count and dismissed another count with prejudice.[188] On rehearing en banc, Judge McMillian held that the environmental contamination was "property damage" and the exposure theory of coverage would provide for the insurer's liability for damages caused by the insured.[189] He found the term "damages," as used in the standard general liability insurance policy form, did not include cleanup costs under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") or the Resource Conservation and Recovery Act ("RCRA").[190]

In *LaSociete Generale Immobiliere v. Minneapolis Community Development Agency*,[191] a real estate developer brought an action against a city and the city's community development authority asserting breach of contract and due process claims arising from the city's last-minute rejection of the design for a proposed shopping area.[192] The district court entered judgment on the jury verdict for the corporation but reduced the jury award.[193] On appeal, Judge McMillian reversed the district court's decision.[194] He wrote that, as a matter of law, the contract unambiguously gave the city the right to approve the development's design and the trial court should not have sent to the jury the question of whether the city breached the contract by rejecting the design.[195] Judge McMillian also found that the developer was not hindered in his efforts to obtain a second anchor tenant for the development so as to excuse the developer's nonperformance of contract.[196] Finally, he found that the developer had not made a timely claim of delay by a lawsuit brought by owners of the property in the area in question.[197]

NATIVE AMERICANS

In *Cheyenne River Sioux Tribe v. South Dakota*,[198] an American Indian Tribe, which sought tribal-state compact under the Indian Gaming Regulatory Act ("Act"), brought an action against the state and state officials alleging violation of the Act and 42 U.S.C. § 1983.[199] The district court denied the Tribe's motion for a preliminary injunction, and both parties filed motions for

188. *Id.*
189. *Id.* at 983-84.
190. *Id.* at 987.
191. 44 F.3d 629 (8th Cir. 1994).
192. *Id.*
193. *Id.* at 635.
194. *Id.* at 641.
195. *Id.* at 637.
196. *LaSociete Generale Immobiliere*, 44 F.3d at 638.
197. *Id.*
198. 3 F.3d 273 (8th Cir. 1993).
199. *Id.*

summary judgment.[200] The district court denied the motions, and the parties appealed.[201] Judge McMillian affirmed the district court's denials and held that the state could, in good faith, refuse to negotiate with the Tribe.[202] He found that genuine issues of material fact existed to preclude summary judgment about whether the state's refusal to negotiate certain locations for gaming facilities was a failure to negotiate in good faith under the Act, and the action was not barred by the Eleventh Amendment.[203]

OTHER SIGNIFICANT CASES

In the case of *Starr v. Mandanici*,[204] an ethics grievance was filed against the Independent Counsel, Kenneth Starr, alleging various violations.[205] The complainant sought referral of the grievance for investigation and formal disciplinary proceeding.[206] The district court denied the motion for recusal and dismissed the complaints.[207] On appeal, Judge McMillian dismissed the complaint for lack of jurisdiction, holding that the complainant lacked standing to commence formal action on the grievance and, thus, lacked standing to appeal the grievance's dismissal.[208] In so holding, he rejected the complainant's argument that standing existed because the vital interest derived

200. *Id.* at 275.

201. *Id.*

202. *Id.* at 281.

203. *Cheyenne River Sioux Tribe*, 3 F.3d at 281. In addition, see United States v. Yankton, 168 F.3d 1096 (8th Cir. 1999) (offense of being an accessory after the fact to larceny not subject to Indian Country Crimes Act's exception to federal jurisdiction for Indian-on-Indian crimes); Thomas v. Gunter, 103 F.3d 700 (8th Cir. 1997) (Native American prison inmate's equal protection rights were not violated by prison officials' denial of request for extended access to a sweat lodge for prayer purposes); Shangreau v. Babbitt, 68 F.3d 208 (8th Cir. 1995) (the White Earth Land Settlement Act of 1985, which barred child from inheriting compensation for illegally taken allotment by right of representation through father, did not violate equal protection rights); United States v. Lester, 992 F.2d 174 (8th Cir. 1993) (Justice Department's internal policy, which would preclude federal prosecution of any person previously prosecuted by another sovereign for the same conduct, did not confer any substantive rights and, thus, did not preclude federal prosecution even though the defendant had already been convicted in tribal court); United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990) (sentence imposed under Indian Major Crimes Act only had to fall within range established by state law, but within that range, federal sentencing guidelines are used); United States v. Blue, 722 F.2d 383 (8th Cir. 1983) (statute denying exclusive United States jurisdiction over punishment of offenses committed by one Indian against the person or property of another Indian, did not place exclusive jurisdiction in tribal courts, even though offenses were not among the specified major crimes over which federal courts have exclusive jurisdiction).

204. 152 F.3d 741 (8th Cir. 1998).

205. *Id.* at 742-43.

206. *Id.* at 743.

207. *Id.* at 742.

208. *Id.* at 751.

from the uniqueness of the case and the proceedings forming its backdrop conferred standing on all citizens.[209]

In *United States v. McDougal*,[210] the President of the United States filed a motion for a protective order to prevent the distribution of his videotaped deposition testimony used at trial in the underlying criminal case.[211] The district court denied physical access to the videotape and several media organizations appealed.[212] Judge McMillian affirmed the district court's decision to deny access, holding that the videotape was not a judicial record for purposes of the common law right of public access to judicial records.[213] He concluded that even if the videotape was a judicial record, it was neither an abuse of discretion nor a violation of the First Amendment to deny access where the public and the press were given access to the information contained in the videotape.[214]

Finally, in *Little Rock Family Planning Services v. Dalton,*[215] Medicaid providers and recipients challenged an amendment to the Arkansas Constitution which prohibited the use of public funds for abortions except to save the life of the mother.[216] The district court enjoined the enforcement of the amendment.[217] An appeal was taken and consolidated with the decision of the United States District Court for the District of Nebraska enjoining enforcement of a Nebraska regulation which also prohibited the use of public funds for abortions except to save the life of the mother.[218] Judge McMillian affirmed the district court's decisions and held that the challenged provisions were invalid under the Supremacy Clause.[219] The Court of Appeal's decision was later overturned by the United States Supreme Court in *Dalton v. Little Rock Family Planning Services*.[220] The Court held that as long as the program was entirely state funded, the application of the program's provisions would not conflict with any federal statute, eliminating the bar on the validity of the provisions.[221]

209. *Starr*, 152 F.3d at 748.
210. 103 F.3d 651 (8th Cir. 1996).
211. *Id.*
212. *Id.* at 652.
213. *Id.* at 656.
214. *Id.* at 658.
215. 60 F.3d 497 (8th Cir. 1995).
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 503.
220. 516 U.S. 474 (1996).
221. *Id.* at 476-77.

DISSENTS

Judge McMillian has written some 245 dissents during his tenure on the Court of Appeals. Many of them are significant. Although space and time restrictions do not allow me to go into detail on the many dissents Judge McMillian has written, I mention one of the more recent cases in which he dissented to a per curiam denial of a certificate of appealability.[222] The majority of the court denied a certificate to the petitioner, Arnold Hohn, who sought a new trial under 28 U.S.C. § 2255 on the ground that he was convicted for an erroneous application of the "use" of a firearm under 18 U.S.C. § 924 (c)(2), arguing that it did not conform to the principles outlined in *Bailey v. United States*, 516 U.S. 137, 116S.Ct. 501 (1995).[223] The majority held that this was not a claim of a constitutional right under 28 U.S.C. § 2253 (c)(2).[224] Judge McMillian dissented because he felt the Due Process Clause did not permit a federal conviction for conduct that does not violate a federal statute.[225] In an emotional response, Judge McMillian concluded:

I conclude that depriving persons of the benefit of the delayed notice that conduct is innocent violates Due Process by tolerating convictions for conduct that was never criminal. Under that proposition, a post-*Bailey* § 2255 motion presents a constitutional question as required by amended § 2253 (c)(2). I also conclude Hohn's case presents a "substantial showing of the denial of a constitutional right." Accordingly, I would grant a certificate of appealability.[226]

The United States Supreme Court adopted Judge McMillian's dissent and reversed the case.[227]

Dissents serve diverse purposes which are instrumental in defining the law. Dissents often serve as a tool to sharpen the majority's opinion by narrowing it or perhaps by bringing about changes in some of the significant aspects of a majority opinion. They are also helpful to the bench and bar by reason of the fact that they narrow the issues involved in the case. Often, the dissent can serve as a basis to change the law as future cases are handed down by this court and other courts of appeals. The one outstanding aspect, particularly as they pertain to Judge McMillian's dissents, is that they demonstrate his searching analysis of the law and his willingness to speak out where he feels the majority is wrong.

222. *Hohn v. United States*, 99 F.3d 892 (8th Cir. 1996).
223. *Id*. at 892-93.
224. *Id*. at 893.
225. *Id*. at 894.
226. *Id*. at 895.
227. *See Hohn v. United States*, 524 U.S. 236 (1998).