

Saint Louis University Law Journal

Volume 43
Number 4 *A Tribute to the Honorable Theodore
McMillian (Fall 1999)*

Article 11

1999

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Recommended Citation

Marilyn Tanaka, *An Essay in Tribute to Judge McMillian*, 43 St. Louis U. L.J. (1999).
Available at: <https://scholarship.law.slu.edu/lj/vol43/iss4/11>

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AN ESSAY IN TRIBUTE TO JUDGE MCMILLIAN

MARILYN TANAKA

It has been my privilege to serve as one of Judge McMillian's law clerks for more than 20 years. It has been a most rewarding experience, but one which I suspect began by mistake. In the late 1970s, the Missouri Court of Appeals judges collectively interviewed prospective law clerks. Facing a conference table full of judges who were all older men was a daunting experience, particularly for someone like me. I had gone to law school primarily because graduate school in my field, European intellectual history plus some art history, would have virtually guaranteed underemployment, if not unemployment. Because Judge McMillian had something else to do that day, he did not participate in the interviews. Needless to say, I was surprised when he offered me the position as his law clerk for the next term. To this day, although Judge McMillian gallantly denies it, I am sure that he thought I was someone else!

That was in 1976, and my clerkship started in 1977. In the fall of 1978, President Carter nominated Judge McMillian to succeed Judge William H. Webster on the U.S. Court of Appeals for the Eighth Circuit, and Pam Bucy, his intern at the time, now the Bainbridge Professor of Law at the University of Alabama School of Law, and I followed Judge McMillian to the Eighth Circuit as his first law clerks at that court. As it turned out, we were just the first of many Missouri Court of Appeals employees to migrate from the Civil Courts Building to the federal courthouse across the street. Law clerks traditionally serve one-year terms. Most law clerks continue to do so, although there are now quite a few "career" law clerks, so many in fact that the Administrative Office of the United States Courts considers career law clerks to be something of a personnel problem. In the late 1970s it was almost unheard of to make a career out of a clerkship. I vaguely recall the Judge asked me if I would be interested in clerking another year. I was, and since then I have served as his law clerk through five (so far) chief judges, dozens of co-clerks, one office remodeling, and several Macintosh computers.

Any clerkship is an excellent experience, but clerking for Judge McMillian has been a wonderful job. I have enjoyed every day, although perhaps not every oral argument and certainly not every brief. And, although I have occasionally disagreed with Judge McMillian, I have never been disappointed, and I would be willing to bet that very few employees can say that about their

employers. The Judge really is just as he is described in these testimonials—intelligent, scholarly, courteous, and generous. He also works too hard—his employees think he should take some time off! He is extraordinarily patient with even the most confused memoranda and confusing arguments. He really does know almost everyone in St. Louis. I once saw him standing outside on the courthouse steps— he was going to go for a walk for the exercise— and I returned an hour later to find him in exactly the same place; so many people had stopped to talk to him that he never got to go for his walk. His ability to clarify issues and cite holdings with a near-photographic memory is unsurpassed and not a little unnerving, especially since he will typically outline the analysis, in meticulous detail, while talking on the phone.

Those fearful of an imperial, or imperious, federal judiciary will be reassured to know that, for someone in such a prestigious and powerful position, Judge McMillian is extraordinarily modest and unassuming. Even though he has spent most of his professional life making judgments, he is scrupulously fair and non-judgmental. He is impartial, but not indifferent. In fact, he is passionate about many things, from civil rights to crab cakes. The Judge is also curious; he is genuinely interested in people and their problems and is intrigued by new things. Federal appellate judges are by necessity generalists (at least on the circuit courts of appeals, arguably less so on the newer specialized courts of appeals), and his interest in and openness to new subjects, new ideas and new legal arguments is infectious. Of course, that willingness to consider new legal arguments does not mean that the Judge will agree with them, much less adopt them, despite the enthusiastic endorsement of his law clerks.

Judge McMillian is also a realist. He has never forgotten that the law and the cases that he decides affect real people and have real consequences. That realism counterbalances the theory and ideology of appellate arguments. I think that the Judge's realism is the source of his famous equanimity; despite personal and professional experiences that would embitter or enrage most people, he is neither bitter nor angry. He is, however, under no illusion about the law or lawyers, or judges for that matter. Judge McMillian has kept faith with the law because, like Sir Thomas More, a reproduction of whose portrait by Holbein hangs just inside the Judge's office door, he believes that the law is the best hope for justice. It is that clear-eyed assessment of the utility of the law and its ultimate objective that is Judge McMillian's true legacy, not only to his law clerks, who have had the honor and privilege of working for him, but to everyone involved in the administration of justice.