

**The United States Court of Appeals  
for the Eighth Circuit**

# **Memorial Session**

**in Honor of**

**HONORABLE  
DONALD P. LAY**

**September 26, 2007  
St. Louis, Missouri**

# Proceedings

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THE HONORABLE JAMES B. LOKEN Please be seated. Good afternoon and welcome to the Special Memorial Session of the United States Court of Appeals for the Eighth Circuit. We gather today to pay tribute to our esteemed colleague and dear friend, Circuit Judge Donald P. Lay. He passed away April 29, 2007.

Judge Lay was appointed to our court by President Lyndon Johnson in July 1966, after distinguishing himself as a brilliant trial lawyer in Omaha. At age 39, Judge Lay was the second youngest person ever appointed to a Federal Court of Appeals. He served as an active judge of our court until January 1992, including twelve years as our chief judge.

After taking senior status, he continued to teach law, to write books and law review articles, while all the time continuing to hear nearly a full load of cases in this court and in other Courts of Appeal around the country until health issues forced him to retire in January of this year.

Many have recounted the achievements of this remarkable man as you hear from our guest speakers this afternoon. He had boundless energy and compassion that he devoted to his family, to the court and his judicial colleagues, to the University of Iowa where he received undergraduate and law degrees in 1949 and 1951, to the University of Minnesota, and William Mitchell College of Law where he taught law for nearly twenty years, and to the protection of civil rights and individual liberty and the defense of the jury system that he so admired and understood.

He was also a man of continual charm and good humor, an avid golfer, fisherman, card player, and storyteller, who was simply fun to be with. Even when I was a victim of his friendly but competitive spirit, I couldn't help but be amused by the impish grin on his face and the twinkle in his eye when he sunk a critical putt, as he usually did.

Judge Lay was the chief judge when I was appointed to this court in 1990. He arranged resident chambers for me down the hall from his chambers in the St. Paul courthouse, and we spent many hours discussing—or, I should say, he was teaching—court procedures, his judicial philosophy, particular cases, and the events of the day, both political, sports, and so forth.

His insights were invaluable, and Judge Lay and his wonderful wife, Miriam, went out of their way to make my wife, Caroline, and me feel at home with our new court family. All of his federal judges, all of his federal judicial colleagues, were privileged to have him as both a colleague and a friend. He

served the court, his country, and the people of the Eighth Circuit well indeed.

The audience today include Mrs. Lay and their five daughters—Susan, Betsy, Debbie, Cynthia, and Catherine—also eleven circuit judges, and a distinguished alumnus of this court, Judge William Webster, eighteen district judges, four magistrate and bankruptcy judges, twelve of Judge Lay’s former law clerks, and many other members of our court family. We are grateful that so many have come to join us in this important celebration of his life and judicial career.

I will now turn these proceedings over to Judge William Riley of Omaha, who has the unique distinction of being both a former law clerk and a judicial colleague of Judge Lay. Judge Riley.

THE HONORABLE WILLIAM JAY RILEY: Thank you, Chief Judge Loken. May it please the Court—that’s kind of fun to say—to Mrs. Lay and the Lay family, welcome. It’s wonderful to have you here.

I want to also recognize, as Chief Judge Loken did, but I’m going to do it a little differently. I would like to have all of the judges who are present here please stand so you can get some kind of concept of how many judges respect Judge Lay and have been here today. All our judges please stand. There are even some in the back. Thank you for coming. Please be seated. And if you haven’t noticed, they’re from all over our circuit, not just here from St. Louis. We appreciate your attendance.

I’d also like to recognize—again and have you stand—all of Judge Lay’s law clerks, again, who have come from across our circuit and across the country for that matter. Would all of Judge Lay’s former law clerks please stand? Thank you. Please be seated.

I want to welcome all of you, not only the Lay family and the court and law clerks, but all of you friends and guests here to this proceeding. We gather here to remember and honor with our deep appreciation and respect the Honorable Donald P. Lay. We recognize Judge Lay’s friendship, his distinguished service to the Eighth Circuit and to our nation, and his long career dedicated to protecting our Constitution, preserving freedom and civil rights, and pursuing justice for all.

Before his appointment to the bench in 1966 by President Lyndon Johnson, Don Lay excelled as a civil trial lawyer in Omaha, Nebraska. In 1966 Judge Lay brought his talent and skills to the judiciary where he excelled as a jurist and as our chief judge from 1980 to 1992.

Judge Lay profoundly influenced those fortunate enough to have shared his

company—his colleagues, his law clerks, and his staff. We will hear today from a small sample of those touched by this great man who so recently passed from our midst.

Our first speaker, as you will see in your program, is Judge Diana Murphy of our court in the Eighth Circuit. Unfortunately, she fell and broke her hip about ten days ago. She had surgery and I understand she's doing very well and, I believe, has had a hip replaced. And she sends her regrets.

However, in her place, I'm going to have Chief Judge Loken read a letter from Judge Gerald Heaney, who obviously was one of Judge Lay's very dearest friends and colleagues in the court. When I asked Judge Heaney to come here and speak, he was extremely disappointed that he could not come, but because of health reasons he was unable to fly and to come here. So I know he expressed his deepest regrets not being able to be here. So with that, I would like to turn it over to Chief Judge Loken.

**THE HONORABLE, JAMES B. LOKEN:** Thank you, Judge Riley. I'm very sorry Judge Murphy isn't here, because as the other present active judge from the state of Minnesota, she, too, would have some wonderful insights into the years we spent serving on the court with Judge Lay. And Judge Heaney spent the most years on the court with Judge Lay, as you will hear from his own words.

Chief Judge Donald Lay and I both joined the Court of Appeals for the Eighth Circuit in 1966—Judge Lay in July , and I in December. He and I were not only colleagues, we were close friends. I constantly looked to him for advice and counsel.

I did not know Judge Lay before I joined the court. He had practiced in Nebraska, Iowa and Illinois, while my practice had been confined to Minnesota. He had attended the U.S. Naval Academy, graduated from the University of Iowa Law School in 1951; and was awarded the Order of the Coif. At 39, Judge Lay was the youngest judge ever appointed to the Eighth Circuit Court and the second youngest ever appointed to any Court of Appeals.

Judge Lay became chief judge of the Eighth Circuit in January 1980. The next decade was one of great growth in the number of appeals filed. Judge Lay took the lead in modernizing the court to handle the increased load, both effectively and fairly. All the while, he continued to carry a heavy load of cases himself, writing more than his share of opinions, concurrences, and dissents. Although Judge Lay took senior status in 1992, he continued to be actively involved with the court writing precedent-setting opinions.

Judge Lay retired on January 4, 2007, and he died on April 29 of this year. He is survived by his wife, Miriam, five daughters and ten grandchildren. His wise counsel will be greatly missed by the Court, the Bar, and the litigants.—Gerald W. Heaney.

THE HONORABLE WILLIAM JAY RILEY: I next called Judge Myron Bright, and as you know, he would have been a very colorful speaker here today. However, he had previously planned a trip to Europe. And last I heard, he was in Israel and on his way to Dubai, and it just sounds like something he might do. So what I understand when I talked to him was that actually today he would be traveling and starting his trip home, and he also sends his regrets that he could not be here.

But in his place I've asked Judge Bye to read a letter and to say a few words. Judge Kermit Bye, covering our northern flank from Fargo, North Dakota, was in private practice after serving as the Assistant United States Attorney and earlier as a Special Assistant Attorney General for the State of North Dakota.

As a lawyer, Judge Bye served our profession in various roles with the American Bar Association. Judge Bye received his commission to the United States Court of Appeals in the year 2000, and Judge Bye was one of those judges coming from private practice that I turned to when I came on the court and said, "Does this ever get easier?" And he assured me if I could stick it out for two years, it would start getting easier. Judge Bye.

THE HONORABLE KERMIT E. BYE: Thank you very much. I'm going to read a letter that Judge Bright prepared. I might just fill in a little bit of background. Judge Bright, myself, and recently retired Judge Frank McGill all have our chambers on the same floor in the courthouse in Fargo, and in our earlier careers Judge Bright and I came from the same law firm. He never failed to say when he introduced me that I was but one of the three people who replaced him at the Vogel Law Firm, which was also true. And he took great delight that he had such a presence of force—which he did—that it took three people to replace him.

And I can assure you, Miriam, there's nothing that he would want more than to be here today, but he has asked me to read this letter. And when we are done with it, I will present it to you at the reception. And it goes as follows:

My admiration for Judge Donald P. Lay is unbounded. When I think about his life and career as a judge on this court, I most fondly remember his unfailing commitment to civil rights, and especially so during my early years as a judge beginning in the fall of 1968.

In those years, this court, like federal courts across the nation, was

called upon to consider and interpret provisions of the then recently enacted Civil Rights Act of 1964. Simultaneously, it was also called upon to adjudicate school desegregation disputes in the wake of *Brown v. Board of Education*. Not only were these cases politically charged, but they posed difficult legal issues of first impression. While change for the better was imminent, it was imperative that the court proceeded carefully. But even while proceeding with care, Donald Lay always reminded us that we should not lose sight of the bigger picture.

And so, in my view, we best honor the memory of Donald Lay and his contributions to the law by recognizing that he was a leader—one of many—who helped to ensure that society completed the transformation from one segregated in terms of race—blacks and other racial minorities on the one side, whites on the other, and also one in which women suffered discrimination, particularly in employment—to one in which all persons are truly equal in the eyes of the law.

Much has been written about Donald Lay's immense contribution to the law and his good works as a person, and in that regard I can offer nothing new. I can share with you, however, how important Donald Lay was to me personally. I loved him as a brother. He was one of the best judges I've ever known, and he was a great person.

Until his death on April 29, 2007, Donald Lay worked tirelessly on this court for 40 years. The day he died was a great loss not only for his family and friends but the entire judiciary. Among the judiciary's many bright lights, he was a shining star. He and I were true friends and always close colleagues in the law.

I shall never forget him. I send personal greetings to Don's ever-loving wife, Miriam, and to all of his family.

And on a personal note, I would share those remarks, because I didn't know Judge Lay quite as well, although I had met him, and actually argued several cases before he, Judge Heaney, and Judge Bright as well, and he was a true leader of the court, and a fine gentleman, and you couldn't have a better friend.

THE HONORABLE WILLIAM JAY RILEY: Now I would like to turn to another group, and that is Judge Lay's law clerks. Now, I'm in a unique position because I was one of Judge Lay's law clerks from 1972 to 1973. When I graduated from Nebraska law school, I knew there were two things that I did not want to do: I did not want to be a tax lawyer, and I did not want to be a trial lawyer.

And to those of you who know me, I then spent 28 years as a trial lawyer. That was because when you worked with Judge Lay, you were infected with his love of the practice in the courtroom. He loved the courtroom. He loved the practice of the law of the trial lawyer.

And with his inspiration and guidance, I then went to the Fitzgerald Brown Law Firm at his direction. He said, “You need to go there and learn how to be a trial lawyer,” and that’s what, I did. The rest is history. I would not be here today if it were not for Judge Lay. And I give my heartfelt and deepest gratitude to him for that. He made my career.

With that, I would like to turn to the first of our two former law clerks. As you know, Judge Lay had careers as a judge in Omaha and then in St. Paul, Minnesota. Because of that, we have kind of a bifurcated history of law clerks for Judge Lay.

We will begin with one of Judge Lay’s former law clerks from Omaha, Nebraska, David Houghton. Dave Houghton, by the way, is a former partner of mine. David Houghton graduated from the University of Iowa Law School in 1975 and served as a law clerk to the Honorable Donald P. Lay from 1975 to 1976.

Mr. Houghton is a member of the Lieben, Whitted, Houghton, Slowiaczek & Cavanagh Law Firm in Omaha, Nebraska. Dave is a former president of both the Nebraska State Bar Association and the Omaha Bar Association and is Nebraska’s delegate to the American Bar Association’s House of Delegates. David.

MR. DAVIS S. HOUGHTON, ESQ.: Thank you, Judge. May it please, the Court, Mrs. Lay, Catherine, Cindy, Betsy, Debbie, and Susan, family, colleagues and friends, It is a distinct privilege to represent the Nebraska clerks, also known as the “old folks.” I have the opportunity to speak today at this Special Session of Court called to reflect on the service of Judge Donald P. Lay, a dedicated servant to justice and to this court.

But, of course, it’s impossible to capture in a few words all that gave an extraordinary person such an influence on all with whom he came into contact—other jurists, the bar, his clerks, court staff, and the thousands of litigants who sought justice in this court over the last 40 years.

The judge would not want us to make him out to be larger in our memories than he was in life, and indeed, we need not do so, but he would approve of taking this time to recognize a life given in service to this court and to the values it embodies, for he was a guardian of those values, and he worked hard to prepare us to accept the responsibilities of guarding those values in his absence, a fact and a day he knew would come.

As we struggle to accept his passing, we acknowledge the place he will forever hold in our lives. As I have considered that place over the years, and especially over the last few months, what strikes me about my relationship with the judge, a relationship which he nurtured for over 30 years, is its very personal nature. Upon further reflection, of course, I realize that that was true for each of his law clerks. He made each of us feel special, and each of us was right.

I can almost hear the thoughts of my fellow clerks in the room today thinking, "But I was special." And that, of course, is the point: Each of us was special.

He was a life-tenured federal judge and allowed himself to be fully human in our presence. I never once saw him adopt an attitude which foreclosed the human vulnerabilities of openness and candor. He challenged our thinking, and he encouraged us to challenge his, for Judge Lay was a man of passion. His life's fire burned brightly and fueled his work and effort on a daily basis.

He had a passion for service. He saw the law as an extraordinary opportunity to serve his country, the principles he cherished, and the people with whom he shared this world as well as its future inhabitants. Whether he was the jurist working through a legal thicket of facts and precedents, or a dinner companion who relished a discussion of ideas and concepts he had yet to master, or a teacher of students, or a mentor to his clerks, or a golf companion schooling others on the finer points of some golf-related game, he served all with great passion.

He also had a passion for the roles of the judge and of this court. He understood the importance of an independent judiciary and saw this court as a bulwark against abuses and tyrannies of all kind. He understood the importance of efficiency and effectiveness in judicial administration and worked diligently to assure speedy resolution of the cases on the court's docket.

And Judge Lay had a passion for human kind. He saw the law in its fully human context. Each case, he often reminded us, involves real people with real issues, whose hopes and dreams were invested in the matter before the court.

Judge Lay has passed these ideals and his passion for them to us. We accept the responsibility for their safekeeping and indeed for their enhancement during our tenure at the bar or on the court.

Donald P. Lay was a rare gift, a person of extraordinary talents and caring who used his gifts for good in our world. He responded fully to the



admonition of St. Luke: “To whom much is given, much is expected.”

He will be missed, but he leaves a legacy which will echo through the lives of those who served with him and the lives of our children and our children’s children.

Today Judge Lay’s law clerks stand on his shoulders and with hearts full of gratitude, affection, and admiration declare: Well done, Donald P. Lay, Judge of the United States Court of Appeals for the Eighth Circuit.

THE HONORABLE WILLIAM JAY RILEY: Thank you, David. Next I want to travel north from Nebraska to Minnesota and introduce our representative of the Minnesota group of law clerks and introduce to you Thomas H. Boyd.

Tom Boyd received his jurist doctorate from the University of Iowa in 1987. Following law school, Tom clerked for the Honorable Ronald E. Longstaff in the Southern District of Iowa before clerking for The Honorable Donald P. Lay from 1988 to 1989.

Mr. Boyd is a shareholder in the Winthrop & Weinstine law firm in Minneapolis, Minnesota, practicing commercial litigation. He is a frequent speaker and author, following much in Judge Lay’s footsteps, I suspect. Tom Boyd is also the president-elect of the Eighth Circuit Bar Association. So with that, I turn to Tom.

MR. THOMAS H. BOYD, ESQ.: Thank you, Judge Riley. I’m very honored to make a few remarks today on behalf of Judge Lay’s law clerks from the Minnesota era—which began in 1983 when, as chief judge, he moved his chambers from Omaha to St. Paul.

This move can be fairly characterized as bold, innovative, and unconventional. I can only imagine that it ruffled a few feathers and raised quite a few eyebrows. But the move showed the decisiveness of a man who thought outside the box. The move reflected a judge who was absolutely committed to this court, committed to the lawyers who practiced before this court, and committed to the people over whom this court has jurisdiction

Although I am one of the Minnesota law clerks, I have to say I never thought of Judge Lay as being just a Minnesota judge His ties throughout the Eighth Circuit were deep and life long, and his devotion to the court was circuit wide

He had his early roots in Iowa, where as you’ve heard he received an excellent education from the University of Iowa. He developed his reputation as a superb trial lawyer in Nebraska, and then when he went on

the court he became well acquainted with Missouri, where here—in St. Louis—the court used to hear most of its cases.

Here in this—well, near this building, he gained a genuine fondness and appreciation for the collegiality of his colleagues on the court and greatly enjoyed his interaction with the lawyers from throughout the seven states within the Eighth Circuit.

Judge Lay's devotion to the Eighth Circuit was also evident in his hiring of law clerks. Over the years, Judge Lay came to hire nearly 90 percent of his law clerks from law schools that are located here in the Eighth Circuit. I suppose his willingness to occasionally hire a graduate from Yale or Harvard or Michigan was his form of affirmative action.

In any event, my point is that Judge Lay was clearly a man and a judge of the whole circuit, and when he moved his chambers to St. Paul, he was not moving away from anywhere but instead simply moving within his beloved Eighth Circuit.

Judge Lay's office in St. Paul was always a beehive of activity. I stopped by his chambers a few months before I began my clerkship. I expected to see a quiet, tranquil academic environment that one would conventionally associate with the research and writing of scholarly opinions. That is not what I found.

The phones were ringing off the hook, law clerks were rushing to and fro, and the secretaries were typing like mad. Judge Lay stood in the midst of all this, seemingly engaged with each member of his staff simultaneously. I was not sure what I had gotten myself into.

Once I started, my apprehension was transformed into exhilaration. Working with Judge Lay on opinions, speeches, and articles was thoroughly enjoyable. He was respectful of his law clerks' views, and he was appreciative of their hard work and their well-intentioned efforts.

The work was always fulfilling and satisfying, even when it involved administrative panel matters. Judge Lay took it all very seriously, and he strove to get to the right conclusion in each matter he undertook

Judge Lay once wrote that he approached each case as a great and new adventure—and it showed. He worked with extraordinary zeal and energy. He was always thinking—coming up with solutions and finding ways to get things done. He pressed to get everything done as quickly as possible, and then he immediately moved on to do more.

Fundamentally, his instinct was to take action. He instilled in his law clerks

the principle that “justice delayed is justice denied,” so he pressed to get cases decided and opinions filed as quickly as reasonably possible. And yet, while he was incredibly productive, Judge Lay never cut corners and he never sacrificed quality.

He was a true scholar. Notwithstanding his demanding administrative responsibilities and all of his other commitments, Judge Lay always gave priority to writing his opinions. He worked quickly and with great intensity. He had a brilliant grasp of the law in so many diverse areas. He was thorough, and he paid attention to detail.

Kay Oberly, one of the Omaha law clerks, recently wrote a tribute to the Judge in which she described how much her legal education was expanded by the opportunity to clerk for Judge Lay. We St. Paul law clerks had the same experience. He taught us in a way that allowed us to maintain our independent thinking and to develop self-sufficiency and confidence as fledgling young lawyers.

He was a workhorse, and we had to find ways to keep up, but he was always patient with the mistakes that we inevitably made as a result of our inexperience. He worked with us in a collaborative manner that made the process highly educational and fulfilling for his law clerks.

Yet, notwithstanding his whirlwind of energy and productivity, Judge Lay was always cordial, warm, thoughtful, and giving of his time to his law clerks. I think the fondest memories that many of us have of our clerking experience are those times we just spent talking with the Judge.

I do have to note that it was not all work and serious contemplation. Judge Lay also found time to have fun, and in doing so he found time to include his law clerks in the fun., There were many memorable occasions, many great outings—all very delightful memories. I won’t get into them now, but those are memories that we’ll cherish. Not only was working with Judge Lay a great honor, but spending time with him when we weren’t working was delightful.

Judge Lay made us all feel like we were part of his family, and he had a great family. Mrs. Lay was always a gracious and warm hostess who was so interested in what we were doing with our lives and what was new with our families. His lovely daughters, who were the delight of Judge Lay’s life, were so gracious in sharing their father with us.

Judge Lay also had a great staff. They were devoted to him, and he was devoted to them. Together they made a great team. In Omaha, he had Mary McQuin and Margaret Dutch. In St. Paul, his secretaries were Judy Anderson, Cindy Franck Hansen, and Cathy Cusack. Judge Lay and his staff were

true professionals, and they were very kind and tolerant of we amateurs.

After we finished clerking, Judge Lay continued to be a big part of all of our lives. He regularly organized law clerk reunions and otherwise kept in touch with each of us. He was interested in our careers and proud of our accomplishments. He made each of us feel that we had the talent and the capacity to do what no one else could do.

Judge Lay treasured his relationships with his law clerks, and when he took senior status in 1992, he referred to us as his “adopted sons and daughters” and said that our “enthusiasm and dedication had brought the bright spot to his judgeship.”

Needless to say, clerking for Judge Lay and receiving the gift of his friendship has enriched and brightened our lives beyond anything that could be put into words.

Judge Lay made the most out of his life. He worked with energy, enthusiasm, and conviction. He cared deeply about people. And, indeed, Judge Lay’s greatest contribution as a lawyer, as a judge, and as a man are manifest in the enormous number of people whose lives he affected and changed for the better, including his law clerks. Thank you very much.

**THE HONORABLE WILLIAM JAY RILEY:** Thank you, Tom. I want to also recognize Tom Boyd as one of the liaisons here for our next two speakers. He’s the one that got me connected to our next two speakers and had them, in their busy schedules, come here, so I want to thank you, Tom.

Our next speaker is Dean Robert Stein. Dean Stein served as the Dean of the University of Minnesota Law School from 1974 to 1994. From 1994 to 2006, Dean Stein was Executive Director, Chief Operating Officer of the American Bar Association.

In the fall of 2006, Dean Stein rejoined the faculty of the University of Minnesota Law School as the Everett Fraser Professor of Law. He, too, is a frequent speaker and author and is a long-time friend of Judge Lay. Dean Stein.

**DEAN ROBERT A. STEIN:** Thank you very much, Judge Riley. May it please the Court, Chief Judge Loken, ladies and gentlemen, members of the Court, honorable judges, Miriam Lay and family of Judge Lay, and friends of Judge Lay, all.

Judge Donald P. Lay’s life was a life of enormous accomplishment which earned the admiration and respect of everyone who knew him. And others today have spoken about these magnificent accomplishments and will speak

about them—distinguished jurist, record-setting longevity on the bench, committed protector of civil rights and individual liberties, national leader in improvement in the administration of justice.

And I would like to reflect on Judge Lay's remarkable legacy as a dedicated teacher and scholar. It's been said that all great judges are great teachers, and of course, Judge Lay was a teacher throughout his career on the bench. His opinions helped us all to understand the law more clearly. He was an inspirational teacher and mentor for all of his many law clerks through all of his years on the bench.

Beyond that, however, through virtually his entire career on the bench, including his years as chief judge, Judge Lay also taught a course or a seminar in a law school every year. He accomplished this remarkable feat first at the law school of Creighton University and, later, at William Mitchell College of Law, and the University of Minnesota Law School.

Indeed, I think it was noteworthy that when Judge Lay decided what he wanted to do next after he left the chief judgeship and took senior status, it was to a position as law school teacher that he decided to devote his future time efforts for a portion of each year.

My colleagues and I at the University of Minnesota Law School were pleased that Judge Lay accepted an appointment to our faculty for a portion of each year as the first James A. Levee Professor of Criminal Procedure Law.

At Minnesota and later at William Mitchell College of Law, Judge Lay taught courses in criminal procedure and first year civil procedure. But his favorite course, and the one he taught at Creighton, William Mitchell, as well as the University of Minnesota, was a seminar on the current term of the Supreme Court of the United States.

The seminar invariably attracted some of the brightest and most dedicated students in the school. The subjects of the seminar were selected cases scheduled for argument in the then-current term of the court. Individual students were given an assignment to represent the views of one of the Supreme Court justices. The students studied as many opinions as possible by their justice and attempted to become thoroughly familiar with the philosophy and the values of that justice.

In the seminar the students then discussed how the selected cases would be decided, and the students argued and voted as they believed their justice would vote. What a remarkably inventive and effective way for law students to gain an insight and understanding of the way in which law and legal theory develops.

The students were fortunate in other ways as well. Whenever the size of the course enrollment made it feasible, Judge Lay met individually with every student in his class to become acquainted with that student and offer valuable career-shaping advice. Clearly, Judge Lay had a lifelong impact on the future careers of the students.

It was a joy to have Judge Lay on our faculty. The students revered him, he engaged constantly with the entire faculty, and he threw himself wholeheartedly in the program of the school. In fact, in one year Judge and Miriam Lay traveled to Uppsala, Sweden where he taught in a law school summer program in Sweden.

But Judge Lay didn't limit his law school involvement to teaching a course or seminar each year. In addition, he authored and published a remarkable number of law review articles in many of the leading journals in the country. His pace of scholarship would do credit to many full-time tenured faculty members. Judge Lay authored well over 50 articles in legal periodicals on subjects ranging from trial and appellate advocacy to judicial administration.

One of his favorite pieces was an article exemplifying one of his loves, the great writ, the writ of habeas corpus, published in the Minnesota Law Review during the time he served on the faculty in the school.

Beyond these articles, he delivered dozens and dozens of speeches, lectures, commencement addresses, and presentations at law schools, bar associations, judicial conferences, and legislative hearings, and all of this was accomplished while carrying a heavy caseload and meeting the enormous administrative demands of the chief judgeship.

As the dean of the law school, I had numerous conversations with Judge Lay during those years in which he talked about his great love of teaching law. In a recent conversation I had with Judge Lay's long-time secretary Judy Anderson, who is here today, I learned that as a result of this love of law, teaching, and scholarship, at one time Judge Lay gave serious consideration to leaving the bench for a full-time career as a law teacher and scholar.

Now, I first met Judge Lay shortly after I became Dean of the University of Minnesota Law School, and I quickly learned that Judge Lay was extremely interested in bringing the work of the court closer to the law schools. Deans and professors, were invited—indeed, we were urged—to attend the Eighth Circuit Judicial Conference each year. Judge Lay had changed the conference from an invitation-only gathering of select invitees to an open registration conference for attorneys and law professors in the circuit.

The importance that Judge Lay attached to attendance by law school deans

is illustrated by my personal experience in missing the conference one year in 1985 when the American Bar Association annual meeting in London met at the same time as the Eighth Circuit conference. For years afterwards Judge Lay would remind me of my unfortunate choice to go to London instead of the Eighth Circuit meeting by continually referring to that conference as “the one you missed.”

Another important contribution to legal education by Judge Lay was his commitment to schedule oral arguments before an Eighth Circuit panel at each law school in the Eighth Circuit on a regular basis. These actual court sessions were major events at every law school. At our law school, several hundred students crowded into the large room in which the session was held. In addition, overflow students in other rooms observed the arguments by a closed-circuit television.

Following the arguments, Judge Lay and his colleagues on the panel always remained and answered questions from the students about oral argument and the decision-making process of the court. As nerve-racking as it was for the attorneys to argue their cases in front of a large body of law students, the learning experience for the students in observing law being made was remarkable.

And I might note parenthetically that a judge currently on this court has observed to me that the quality of oral argument in cases argued in law schools in front of a large body of law students frequently exceeds that of arguments in other cases.

This practice of scheduling oral arguments in actual cases in law schools begun during Judge Lay’s time as chief judge continues to be followed to this day by the Eighth Circuit Court of Appeals and other appellate and trial courts.

I wanted to note my wife, Sandy, and I had the wonderful experience of visiting with Judge Lay and Miriam just a few weeks before his death, and although suffering from numerous infirmities, he talked that evening with great enthusiasm about many subjects. He was so happy with correspondence he had recently received from many of his former clerks, and he recounted with great pride their most recent accomplishments.

And he still had another book he hoped to write. It was a book about judicial humor, a collection of amusing stories about judges that Judge Lay had heard through the years. And he proceeded to recount the story about an off-the-record exchange between two now-deceased justices on the Supreme Court of the United States while they were on the bench. When he got to the punch line, Judge Lay wasn’t exactly sure which of two ways it was said.

‘Well, Judge Lay,’ I responded, “since they are now both deceased, whichever way you say it was is the way it was said.”

He laughed and went on talking about his plans to write the book. What a wonderful, full life he enjoyed.

Judge Lay, your life epitomized the admonition of Justice Oliver Wendell Holmes, an admonition that you often quoted to your clerks and to your law students: “To live a life in the law in a grand manner.” That you did, Judge Lay. You lived your life in a grand manner. May you rest in piece.

**THE HONORABLE WILLIAM JAY RILEY:** We are honored today to have our next speaker, The Honorable William H. Webster. Judge Webster received his law degree from Washington University Law School in St. Louis. Judge Webster practiced with the law firm of Armstrong Teasdale until 1960, when he became the United States Attorney for the Eastern District of Missouri.

Judge Webster was appointed United States District Judge for the Eastern District of Missouri and served in that capacity from 1970 to 1973. In 1973 Judge Webster was elevated to the United States Court of Appeals for the Eighth Circuit and served as a Circuit Judge from 1973 to 1978.

In 1978 President Jimmy Carter appointed Judge Webster as Director of the Federal Bureau of Investigation where he served until President Ronald Reagan appointed Judge Webster as the Director of the Central Intelligence Agency in 1987.

In 1991, after leaving his position as the director of the CIA, Judge Webster joined the firm of Millbank, Queen, Hadley, and McCloy. Judge Webster is also a long-time friend of Judge Lay. Judge Webster.

**THE HONORABLE WILLIAM H. WEBSTER:** Chief Judge Loken, and may it please the Court, family and friends—and that includes us all—of Donald Lay. I feel very honored to be asked to participate as one who had the privilege of serving with Judge Lay on the court and of knowing him for many years.

My actual time on the courts with Don was five years, but I began to know him when I went on the District Court here in St. Louis, and that friendship continued for over 35 years, one of my warmest and best memories.

You have heard already of the length and breadth of service of this remarkable man. I’m not sure, but I suspect that as the last speaker I am supposed to fill in any cracks that may have been left without repetition. Pretty hard to do either of those. But I do want to express my admiration for the way he lived his life, the concern that he had for the least of these,



our brethren, and in consequence the passion with which he pursued issues of due process and the right of access and of free speech and association. He did so without ever raising his voice, but his opinions often carried a measure of thunder with them.

He was the youngest judge on this court, and I understand only William Howard Taft surpassed him in youth when he went on the Court of Appeals. I had the privilege of being the second youngest, but I was a good deal older by the time I got to serve with Donald Lay. But it was a 35-year friendship that I treasured.

He was young in heart despite a huge number of physical infirmities that he met in every case, and maybe that's what made him so popular with his law clerks, many of whom who are here today.

One of those clerks, who was just coming on board as I recall when I came on board, was Kathryn Oberly, who is here today. Kathryn went on, as many of you know, to be vice chairman and is general counsel of one of the great accounting firms in the world, Ernst & Young.

And years later, in 2002, when she was ready to marry Haynes Johnson, one of the country's most distinguished journalists, she turned to Donald Lay to perform the service. By that time, he was pretty bowed over from some of the physical infirmities, but he was happy to do it as long as it was for her. And I had the privilege of attending that ceremony.

Don managed to get to where he was supposed to be without any help, performed the service in a firm voice, and I suspect that that ceremony will be with us all for a long, long time.

His style on the bench and with his friends was unfailingly courteous, never raising his voice, but passionate in support of the rights that he believed to be enshrined from our Constitution.

Don made no secret of his liberal views, and it wouldn't surprise you to know that we did not always agree, but his way of presenting, the thoroughness of his presentation with the help of excellent law clerks who got the message, brought many of us to a point of view that I think was more consistent with the Constitution than we might have originally imagined when we began to serve with him. And that's a lot of judges.

As I look around this court and realize that I did not have the privilege of serving with any of those who are behind me here today and that only Senior Judge Bright, who was on the court at that time, when I think of all the judges whose lives were bettered for having served with Donald Lay, it's very impressive to me.

I recall just one case—I recall a lot of cases, but I'm only going to talk about one—in which I sat with Judge Lay that involved the rights of association and free speech. In *Gay Lib v. The University of Missouri*, a 1977 case, the Missouri Students Association and the Committee on Student Organizations, Government, and Activities had granted recognition to Gay Lib, including the right to hold meetings on campus and to discuss issues important to that organization.

The university administration reversed the student governing body, and legal action followed. In the District Court case, a respected judge, Judge Elmo Hunter, affirmed the administration's action, and on appeal we reversed, observing that the solution to the problem was not found in the repression of ideas. I've always felt good about that case, and I know that Don Lay's important and thorough analysis of the law made it possible and made it stick

Reference has been made to Don's love of the golf course. I'm a tennis player. I played this morning at 6:30, and I was thinking, Well, I wonder how Don would appreciate that, because golf was his game, he was passionate about it, he took a tyro like me along on any occasion when we might do it. And had a great time.

And I recall one time when he asked if we could play at Burney Creek Club in Washington, not too far from my house, and we left the course. And I can't remember who was driving, but we had a flat tire. And I still have the picture of two circuit judges, a director of the FBI, and a United States senator with their thumb out, to get as close as possible to my house. And he always brought it up whenever we were together.

Now, he paid a price for that. He developed a deteriorating spine, and one by one he had his discs fused until he had no more discs to fuse. And he kept on playing. He was close to the Mayo Clinic, and they designed a metal template to prevent his making a damaging bad swing which might hurt his spine, and he persevered. I questioned the fairness of that, thinking that he really was good enough not to need that kind of help. But he kept on until he could no longer do it.

My last memory of Don was at a dinner that he hosted with Miriam and Judge Heaney in their home there in St. Paul, not too long before his illness took him. And those were really rich moments as we thought about the old times and the good times and, because it was Don Lay, the times ahead of what was going to be there. And I think what a remarkable life he lived in the law.

You've heard about his teaching, his manner, his love of his law clerks, and his passion for the underdog to be sure they got due process.

Reference was made to Justice Holmes. I think of two ways of measuring a life in the law. One of them was given by Oliver Wendell Holmes, who said: "Whether a man will take from Aspiration her axe and cord and will scale the ice, or from Fortune her spade, and will look downward and dig, the one and only success that is his to command is to bring to his work a mighty heart."

And the other measurement comes from Judge Learned Hand, who says: "Descended to us, in some part molded by our hands, passed onto succeeding generations with reverence and with pride, we at once its servants and its masters, renew our feeling to the law."

By either measurement Judge Donald Lay was a huge success, provided a rich legacy and a rich career a wonderful family man, and a man to be admired for succeeding generations. Well done Donald Lay, good and faithful servant of the law

**THE HONORABLE WILLIAM JAY RILEY:** Thank you, Judge Webster. I know Judge Lay touched the lives of most of you out there, and we could have called on many of you to come up here and speak, and I just want you to know that all of these comments are made from representatives of you who had an opportunity to relate some of their wonderful experiences with Judge Lay.

With that, I want to thank all of you for coming. I want to thank Mrs. Lay and her daughters, and I want to thank the members of the court family, fellow law clerks, and all of our guests.

There will be a reception in the outside foyer area outside the courtroom afterwards, and we hope you all can join us. With that, I want to thank the Court and turn this matter back over to Chief Judge Loken. Thank you.

**THE HONORABLE JAMES B. LOKEN:** Thank you, Judge Riley. Our thanks to all the speakers who have shared their experiences with Judge Lay with us. Judge Lay will be dearly missed. We have lost an exceptional jurist and colleague, but we know that the court will benefit from his 40 years of service for many years to come.

This concludes the Special Memorial Session which will become part of the permanent record of the court. We invite you to join us in the reception. We are adjourned.



On Wednesday, May 7, 2008, the following memorial to Judge Lay was presented at a special session of the Hennepin County District Court by Thomas H. Boyd, a member of the county bar association:

**IN MEMORIAM**

**THE HONORABLE  
DONALD P. LAY**

**August 24, 1926 — April 29, 2007**

**The Honorable Donald P. Lay passed away in North Oaks on April 29, 2007. Judge Lay's career in the law spanned more than 55 years, and included more than 40 years of service as a federal judge. He is survived by his wonderful wife of 57 years, Miriam Gustafson Lay, their five beautiful daughters — Catherine, Cindy, Betsy, Debbie, and Susan — and their ten beloved grandchildren.**

**Judge Lay was born in Princeton, Illinois, on August 24, 1926. He attended the University of Iowa, where he received his bachelor's degree in 1949 and his law degree in 1951. He was a great debater and a brilliant law student, serving as articles editor of the *Iowa Law Review*.**

**He entered into private practice in Omaha, Nebraska, where he soon became one of the finest trial lawyers in the Midwest, trying hundreds of cases to verdict. He was dogged, tenacious, persistent and, above all else, extremely competitive.**

**President Lyndon B. Johnson nominated him to the U.S. Court of Appeals for the Eighth Circuit in 1966, making him the second youngest person to have received such an appointment up to that time. He quickly earned a national reputation as one of the nation's leading federal jurists.**

**Judge Lay's prolific contributions as a judge and a scholar are truly staggering. He wrote well over 2,000 majority opinions, plus more than 400 separate concurrences and dissents. Judge Lay also published scores of scholarly articles and essays on a variety of topics in leading law journals throughout the country.**

**He became chief judge of the Eighth Circuit in 1980, serving with distinction in that capacity until he took senior status in 1992. Signaling his bold and innovative leadership as chief judge, he moved his chambers from Omaha to St. Paul—a move that revitalized and strengthened the Eighth Circuit's presence in the northern states.**

**As chief judge, he relentlessly searched for ways to improve the judicial system and the quality of the federal courts. He was also a well respected voice in the U.S. Judicial Conference, as a passionate**

**champion of civil liberties and a staunch supporter of "The Great Writ" — the right of those in custody to the protections of the Writ of Habeas Corpus.**

**Judge Lay continued to work hard even after he took senior status. During this phase of his career, Judge Lay sat with all but one of the federal circuit courts. He also taught at the University of Minnesota Law School in Minneapolis and William Mitchell College of Law in St. Paul.**

**Judge Lay's life outside the law was just as vigorous, He had many friends here in Minnesota and throughout the country with whom he socialized, traveled, and, of course, played a lot of golf. Judge Lay's greatest passion outside of the law was golf. He loved the competition, as well as the fellowship.**

**Judge Lay was a wonderful man who was devoted to his family and friends. He was a tenacious trial lawyer, who became a prolific and thoughtful judge, always working with great energy and enthusiasm. He cared deeply about people, and he served the Eighth Circuit and the citizens of our nation with the utmost distinction.**

**THOMAS H. BOYD**

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**Posted MLHP: August 29, 2011;  
August 24, 2020: HCBA memorial added.**