EIGHTH CIRCUIT BAR ASSOCIATION

Bar Association of the United States Court of Appeals for the Eighth Circuit

NEWSLETTER

WINTER | 2018

OFFICERS & EDITORS

IN THIS ISSUE

Editor's Note
by Benjamin Wilson

Season's greetings from the Eighth Circuit Bar Association. We welcome our new members and welcome back those of you who are returning.

We lost a pathbreaking judge of this Circuit, Diana Murphy, earlier this year. Many who knew her have offered memories and described her many virtues. Judge James Loken described her contributions to the District of Minnesota and Eighth Circuit as "truly remarkable," and said she was "a judge among judges." Senior U.S. District Judge Ann D. Montgomery called her an "intellectual presence and giant." We are pleased to have fitting and entertaining tributes to her in the Newsletter by two of her former law clerks, Beth Forsythe and Jeffrey Justman.

Our Board Member and Treasurer, Heidi Doerhoff Vollet, attended the Judicial Conference in Des Moines this year and was in the audience at a fascinating panel discussion on constitutional interpretation. Ms. Vollet writes about the competing approaches expressed there by Professors Pamela Karlan and John McGinnis.

And for those of you who were not able to be at the Judicial Conference, the Bar Association announced the recipients of the Richard S. Arnold Awards for Distinguished Service. It was a lovely ceremony, and we congratulate the winners again for their remarkable accomplishments in the law.

In October, a portrait ceremony was held in St. Paul in honor of Judge Roger Wollman. Two of his former clerks, Neal Perryman and Michael Jente, were able to be there, and write about that memorable and well-attended event. The portrait artist, Jason Bouldin, has also kindly allowed us to reprint his portrait in the Newsletter.

A new feature of this Newsletter is a review of books relevant to the Circuit. And Lacy Rakestraw, the director of the St. Louis County Law Library, does us the honor of penning the first one—of a book by Roberta Walburn on the inimitable U.S. District Judge Miles Lord.

Timothy Droske again gives us an excellent overview of the past Supreme Court term, with a statistical snapshot of the rulings on appeal from the Eighth Circuit, how the past term compared with previous ones, and descriptions of the Court's opinions in *Minnesota Voters Alliance v. Mansky*, *Sveen v. Melin*, and *Koons v. United States*.

As always, I thank our authors for their thoughtful contributions. I also thank our outgoing President, John M. Baker. John led the Association's Board meetings each month, spearheaded the Arnold Awards, coordinated our sponsorships, and spoke at our "Supreme Court Term in Preview" panel last month. The Bar Association has had great leadership, which has made it such a valuable group for all of us. Our sincere thanks to John for continuing that tradition.

Warmest wishes,

A Clerk's Tribute to Eighth Circuit Judge Diana E. Murphy
by Beth Forsythe

The entire Minnesota Congressional delegation in June co-sponsored House and Senate bills "to designate the United States Courthouse … in Minneapolis, Minnesota, as the 'Diana E. Murphy United States Courthouse.'" Rep. Tom Emmer was the chief sponsor of H.R. 6244, while Sen. Amy Klobuchar was the chief sponsor of S. 3021. The Senate Bill passed and was signed by the President in October. The Minneapolis federal courthouse will now bear the name of a model jurist whose narrow, elegant opinions revealed her commitment to fair application of the law and her animus toward punctuation. The naming is a fitting honor for a woman who loved being a judge, loved her colleagues, clerks, and court family, and who supported and inspired so many in our legal community. Judge Murphy died on May 18, 2018, at age 84.

Judge Murphy is described frequently as a trailblazer, an apt moniker for the first female judge appointed to the District of Minnesota (1980) as well as to the Eighth Circuit Court of Appeals (1994), and the first woman to chair the United States Sentencing Commission (1999 – 2004). For nineteen of her years on the Eighth Circuit (1994 – 2013), she was the lone woman on the eleven-judge Court. Nevertheless, she persisted to give voice to the female experience as the Court analyzed the proper application of the law.

An example was her majority opinion in *Nelson v. Correctional Med. Services*, 583 F.3d 522 (8th Cir. 2009). Shawanna Nelson was a non-violent pregnant prisoner whose legs were shackled by a female correctional officer to a hospital bed in the final stages of labor, causing permanent damage to her hips and back. The Court's six-five decision to allow Nelson's suit against the officer owes much to Judge Murphy's non-sensationalized, common sense female perspective: "[it may be inferred from the evidence that the officer recognized] the shackles interfered with Nelson's medical care, could be an obstacle in the event of a medical emergency, and caused unnecessary suffering at a time when Nelson would have likely been physically unable to flee because of the pain she was undergoing and the powerful contractions she was experiencing as her body worked to give birth."

Her strong sense of empathy informed her jurisprudence. In *Gregory v. Dillard's, Inc.*, 565 F.3d 464 (8th Cir. 2009), the Eighth Circuit *en banc* ruled that Dillard's department store could not be sued for "discriminatory surveillance" of thirteen African-American shoppers, which included security guards closely following shoppers around the store then to the dressing room, where they would wait for them and stare at them as they exited. The majority affirmed dismissal of a § 1981 claim on the basis that "[r]acially biased watchfulness, however reprehensible, does not 'block' a shopper's attempt to contract." Judge Murphy criticized the majority's interpretation of § 1981 as inconsistent with the law's purpose of protecting each shopper's freedom of contract: "Section

1981 does not require as a matter of law that within the context of closing a contract a customer persist in her attempted purchase despite overt racial hostility right up until a merchant flatly denies her service and forcibly ejects her from the premises." (Note the lack of any punctuation until the period.)

Judge Murphy's favorite cases were those involving Indian Country. A passionate historian, she loved discerning the understanding of the treaties' original signatories, as she did in deciding that an 1837 treaty with the Mille Lacs Band of Chippewa granted the tribe the disputed hunting and fishing rights. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1989), *aff'd* 124 F.3d 904 (8th Cir. 1997), *aff'd* 526 U.S. 172 (1999).

Perhaps Judge Murphy's favorite single case was *United States Jaycees v. McClure*, 534 F. Supp. 766 (D. Minn. 1982). It came eight years after she graduated from the University of Minnesota Law School, and a few years after a law firm partner told her she should not be a trial lawyer because juries do not like women. Judge Murphy ruled that the Jaycees must accept women as members based on the Minnesota public accommodations law, rejecting the Jaycees claim that its "men-only" rule warranted First Amendment protection. Although the Eighth Circuit reversed, 709 F.2d 1560 (8th Cir. 1983), the Supreme Court ultimately agreed with Judge Murphy, 468 U.S. 609 (1984).

On December 15, 2016, the Eighth Circuit convened an all-female panel of judges for the first time in the history of the Circuit (l-r): Senior U.S. District Judge Ann D. Montgomery, Circuit Judge Diana Murphy, and Circuit Judge Jane L. Kelly.

I had the great privilege to clerk for Judge Murphy from 2007 – 2009. She was courageous, witty, incisive, determined, imaginative, cultured, spiritual, civic-minded, friends with RBG, and had great taste in jackets. The reminders that she was a singular figure were constant, like the handful of times I had the pleasure of driving her car from the courthouse to Bobby & Steve's to fill it with gas. Judge was quite particular about her car's seat position and music, and I had received some friendly advice not to adjust anything in the car. Judge was five feet tall. I am six feet tall. So I would fold myself into the driver's seat of her Cadillac and roll down Washington Avenue with her German opera music on blast, understanding

clearly that while many of us aspire to be like Judge Murphy, there is no substitute.

Beth Forsythe is co-chair of Dorsey & Whitney LLP's Government Enforcement and Corporate Investigations Group.

This article is reprinted with permission of the Federal Bar Association - Minnesota Chapter. The editors also wish to thank Joan Voelker, Eighth Circuit Archives Librarian, for graciously providing photographs of Judge Murphy.

A Limerick for Judge Diana Murphy

There once was a federal judge
Who most certainly maintained no grudge.
Her name was Diana
She's not from Montana
From core principles she would not budge.

Over decades she's held all positions
Hearing trial and 'ppellate petitions
She's always quite thorough
But her brow she would furrow
If a cat ever harbored ambitions.

When she'd edit she always would use
The same black felt tip pen to diffuse
A dissenting opinion
Or lackey, or minion
If they tried to obstruct or confuse.

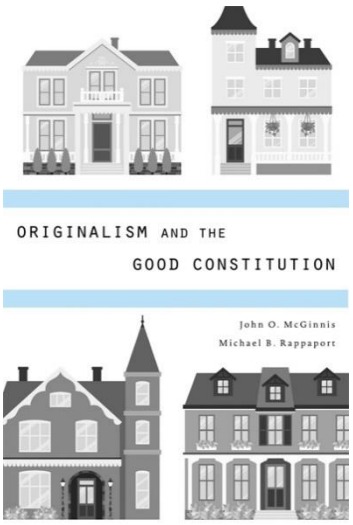
Dear Judge Murphy, oh what can we say?
Can we ever e'en hope to repay
The debt that we owe?
Well, we just hope that you know
In the law you helped show us the way.

Jeffrey Justman is a partner at Faegre Baker Daniels LLP in Minneapolis. He clerked for Judge Murphy from 2010 to 2011, and wrote this limerick at the end of clerkship.

Judicial Conference Notes: Competing Approaches to Constitutional Interpretation
By Heidi Doerhoff Vollet

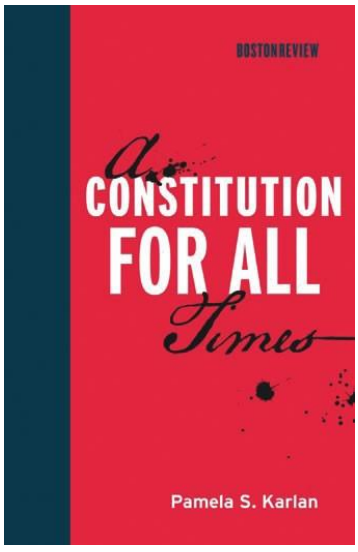
Attendees of the Eighth Circuit Judicial Conference in Des Moines had the opportunity to hear two leading scholars in constitutional interpretation discuss their views. Eighth Circuit Judge Jane Kelly moderated. John O. McGinnis, the George C. Dix Professor in Constitutional Law at Northwestern Pritzker School of Law, spoke about originalism. Pamela S. Karlan, the Kenneth and Harle Montgomery Professor of Public Interest Law and Co-Director of the Supreme Court Litigation Clinic at Stanford Law School, gave a critique of originalism and spoke of alternative methods. Professor McGinnis is the co-author of *Originalism and the Good Constitution* (Harvard University Press 2013) (with Michael Rappaport). Professor Karlan is the author of *A Constitution for All Times* (MIT Press 2013).

Professor McGinnis described originalism as a theory of meaning which posits that the meaning of a constitutional provision is fixed at the time of its enactment. He described the theory as being rediscovered in the 1970s. In originalism, he said, legal terms in the Constitution should be understood in a legal way based on the principles at play at the time of enactment. Terms that have an originalism meaning, McGinnis argued, include "reasonable" and "Due Process." Interpretative principles like *expressio unius* are used in originalism interpretation.



McGinnis argued that an orginalism framework allows much leeway for the ordinary political processes and resolutions of issues to take place. The Constitution should be seen as a broad framework about which there is great consensus among the people. He argued that the Framers were thinking long term in structuring our government and purposely made it difficult to amend the Constitution. This, he argued, was why there should not be much room for the judiciary to "update" the Constitution. Because the judiciary is not a super-majority, but rather an insular group, activism by the judiciary can interfere with the amendment process. He argued that originalism also avoids politicism of judicial selection.

Professor Karlan invoked the analogy of the hedgehog and the fox in the famous essay of philosopher Isaiah Berlin. She argued that originalism is like the hedgehog, which knows only one trick, while constitutional interpretation requires one to be like a fox that knows and applies many different methods to attack a problem. She said that her views were greatly influenced by her experience clerking for Justice Blackmun at the United States Supreme Court and the views he conveyed to her at that time.



Karlan agreed that one method for interpreting the Constitution is textualism. But while words are sometimes clear and have clear meaning, she said, sometimes they do not. As an example of the latter, she referenced the requirement

that the President must be a "natural born Citizen." Does "natural born" mean that Bill Clinton, who was born through cesarean section did not qualify? What about John McCain who was born on a naval station in Panama during military service of his parents? The purpose of the provision must be taken into account.

Karlan argued that proponents of originalism initially used a "WWJM" test—what would James Madison do? But she argued that this test continues to morph to justify the results, particularly with the 14th Amendment and segregation.

Professor Karlan mentioned another interpretive technique from Charles Black, which draws on the structure and relationship of the Constitution. One looks at issues of separation of powers both horizontally and vertically. This can also be described as a representation-reinforcing principle in which courts should be skeptical of any analysis that keeps the right to vote from the people.

Karlan spoke of the role of pragmatism, which she described as a rule of interpretation that the Constitution is not a suicide pact. She gave the example of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and Justice Scalia's opinion going out of its way to note that the Constitution does not protect tanks, nuclear weapons, or guns in courthouses, or give rights to the mentally ill.

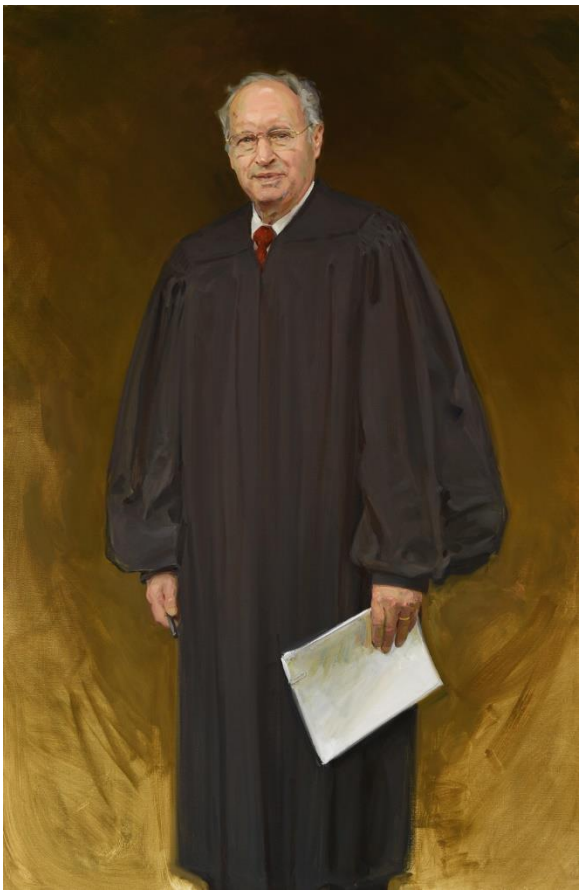
Karlan noted that, for her, the key takeaway is that constitutional interpretation is not a mechanical activity. Constitutional interpretation is not like putting rolled-out pie dough onto a counter and cutting away all that doesn't belong in the shape of the pie, or giving your child a haircut by putting a bowl over the child's head and just cutting away what doesn't fit under the bowl. She said some people use the analogy of judges being umpires who call balls and strikes. She pointed out that even in baseball, Rule 7 calls upon umpires to apply equity and judgment in determining whether to call a runner out.

Both McGinnis and Karlan spoke about the role of precedent. McGinnis noted that precedent was a concept well known to common law. He argued that the Supreme Court should follow neutral principles in deciding what precedent to follow but should yield to originalism in the event of a conflict. Karlan argued that precedent should play an important role. Precedent, she said, is an acknowledgment that smart people have grappled and decided issues before you, and the result of their decisions gives rise to settled expectations. *Griswold v. Connecticut*, 381 U.S. 479 (1965), she said, was decided based on a penumbra, but people have organized their personal lives around that precedent.

Heidi Doerhoff Vollet is a partner with Cook, Vetter, Doerhoff & Landwehr, PC in Jefferson City, Missouri. She served as a law clerk to the Honorable John R. Gibson, Eighth Circuit Judge, and to the Honorable William H. Rehnquist, Chief Justice of the United States.

Portrait Unveiling for Judge Roger L. Wollman
by Neal F. Perryman and Michael L. Jente

On October 17, 2018, the official portrait of the Honorable Roger L. Wollman was unveiled during a special en banc session of the U.S. Court of Appeals for the Eighth Circuit. Chief Judge Lavenski R. Smith presided over the ceremony, with distinguished guests including judges, former law clerks, court staff, family, and friends filling the rows of Courtroom 5A of the Warren E. Burger Federal Building in St. Paul.



Judge Wollman's portrait is reprinted here with kind permission of the artist, Mr. Jason Bouldin.

Judge Wollman, born on the family farm near Frankfort, South Dakota, served as a member of the South Dakota Supreme Court from January 5, 1971, through his appointment to the U.S. Court of Appeals in 1985. He was the second South Dakotan to serve in that position and the first since 1962. Before taking the bench, Judge Wollman served in the U.S. Army, after which he graduated magna cum laude from the University of South Dakota School of Law and received a Master of Laws Degree from Harvard Law. Judge Wollman also served as a law clerk to U.S. District Judge George T. Mickelson from 1962 to 1963 and went into private practice from July 1964 to January 1971.

Widely known for his keen intellect and professionalism, Judge Wollman has received a variety of awards and recognitions, including the Marshall M. McKusick Award from the University of South Dakota Student Bar Association, the Distinguished Service Award from the South Dakota Charter of the Federal Bar Association, the Fred J. Nichol Award for Outstanding Jurist from the South Dakota Trial Lawyers Association, and the Richard S. Arnold Award for Distinguished Service from the Eighth Circuit Bar Association. Perhaps most telling of all, in addition to colleagues, family, friends, and court staff, more than 75 of Judge Wollman's former law clerks came from across the globe to attend the event.

During the ceremony, Chief Judge Smith shared warm stories emblematic of Judge Wollman's kindness and professionalism and thanked Judge Wollman for his tireless efforts both in considering cases presented and in serving on committees, including the United States Judicial Conference Court Administration and Case Management Committee and the Federal-State Jurisdiction Committee. Justice Jerod E. Tufte of the North Dakota Supreme Court, law clerk from 2002 to 2003, shared insightful—and humorous—lessons he learned, as did John D. Inazu, Sally D. Danforth Distinguished Professor of Law at Washington University in St. Louis, law clerk from 2004 to 2005, and Judge Wollman's career law clerk, Amy N. Softich. Other speakers included Judge James B. Loken, speaking as a colleague, and the portrait's artist, Jason Bouldin.

Portrait Unveiling for Judge Roger L. Wollman
by Neal F. Perryman and Michael L. Jente

The portrait will be on display permanently in the Court of Appeals en banc courtroom in the Thomas F. Eagleton United States Courthouse in St. Louis.

Neal F. Perryman is a partner with Lewis Rice LLC in St. Louis, where he practices primarily in labor and employment law, complex commercial litigation, and appeals. He clerked for Judge Wollman from 1991 to 1992 before joining Lewis Rice, where he is also a member of the Management Committee.

Michael L. Jente is a partner with Lewis Rice LLC in St. Louis, where he practices primarily in complex commercial litigation and appeals. He clerked for Judge Wollman from 2012 to 2013 and Judge David D. Noce from 2010 to 2012 before joining Lewis Rice.

Miles Lord: The Maverick Judge Who Brought Corporate America to Justice
Reviewed by Lacy Rakestraw

In her biographical book and personal memoir *Miles Lord: The Maverick Judge Who Brought Corporate America to Justice*, author and former law clerk Roberta Walburn takes us back to the 1970s and 1980s, a time before corporations were officially deemed legal people by the U.S. Supreme Court's expansion of their First Amendment rights. Even back then, these business giants wielded extraordinary political power, often writing their own rules with no check on their power. No check, that is, until they came across a behemoth equally as strong willed, who was willing to stand up and play politics against these corporations. Judge Miles Lord was just such a behemoth (even if only in his own mind), and he shined the light on at least two otherwise dark companies in two landmark cases: *United States v. Reserve Mining Co.*, and the Dalkon Shield cases.

Before he was a judicial powerhouse, Lord was an Iron Ranger, born in the iron ore country of Minnesota. Walburn chronicles his legal and political maneuvering, serving first as an Assistant U.S. Attorney for Minnesota in the early 1950s, before becoming the Attorney General of Minnesota from 1955 to 1960. He entered the federal game in 1961 when he was appointed as the United States Attorney for the District of Minnesota in 1966. His role as a U.S. Attorney ended only when he was appointed in February 1966 by Lyndon B. Johnson to the federal bench for the U.S. District Court for the District of Minnesota.

Throughout all of these roles, Lord was quite politically active, making lifelong friends with Hubert Humphrey and Eugene McCarthy, who themselves became U.S. Senators and, in the case of Humphrey, even Vice President of the United States. Walburn notes curiously that even after being appointed to the federal bench, and being aware of the impropriety of judicial involvement in politics and elections, Judge Lord continued to promote his friends and lend his support where possible. If this book can be summed up in only a few words, it's essentially a story of Miles Lord bending rules like this just up to the breaking point, and walking away with only a few papercuts.

Walburn uses an interesting style of alternating chapters between Lord's history, and the history of the Dalkon Shield cases. The author was hired as a clerk right before the beginning of these cases, and so gives a very interesting inside perspective into litigation that ultimately ended with the bankruptcy of the A.H. Robins Company, a Fortune 500 titan and the company responsible for production of the Dalkon Shield.

Throughout the chapters detailing Lord's background, we get to know the man behind the robe as a no-nonsense man of the people who pushed himself and his friends to greatness. He worked himself tirelessly, and he expected nothing less from those in his courtroom and his chambers. It is this continuation to push to the limit that often landed him in hot water with the Eighth Circuit, often in its minds' eye taking too much control in the courtroom and often disregarding the Federal Rules of Evidence.

The chapters that lay out the Dalkon Shield litigation are equally as compelling. Walburn gives very interesting insight into Lord's choice to include her in case management and discovery proceedings, going so far as to send her to A.H. Robins's headquarters to assist two special masters in searching for documents that proved company executives were aware of the health issues associated with their product. At times, the book reads like a John Grisham legal thriller, with all the twists and turns throughout the litigation. One such point was when A.H. Robins filed a writ to the Eighth Circuit, complaining that Judge Lord had over-involved himself in the discovery process. The Court of

Appeals was no stranger to Lord overstepping, as it finally had enough of his rule breaking in the *Reserve Mining* case and completely removed the case from his docket. As it can be imagined, there was no love lost between the Court and Judge Lord.

This contentious relationship came to a head in the book when A.H. Robins filed an official complaint against Judge Lord with the Eighth Circuit, complaining of judicial misconduct. This came after the Dalkon Shield cases before him settled, and Judge Lord called a hearing where he read on the record a scathing speech directed to three A.H. Robins executives he called to his courtroom. Such judicial misconduct proceedings are unusual, to say the least, and it is made even more compelling when Judge Lord chose to attend the proceedings in person.

In the end, even with Judge Lord's cases settled, his speech lived on in other legal proceedings, forcing more and more settlements with the company. Stubbornly, A.H. Robins refused to recall the Dalkon Shield, the subject of much of Lord's speech, until October 1984, only after a former in-house attorney was deposed and gave very damning testimony of corporate misconduct concerning the Dalkon Shield. Finally, in August 1985 A.H. Robins filed for bankruptcy after 19 years of litigation, presumably to the delight of Judge Lord.

Miles Lord passed away in December 2016, at the age of 97. Walburn successfully paints a portrait of his life as colored by his passion for politics and what he felt was the fair treatment of people. And Walburn makes clear that, while most federal judges are known to shy away from controversy, Judge Lord loved stirring the pot and making headlines from his first day on the bench to his last.

Lacy Rakestraw is the Director of the St. Louis County Law Library, located in the County Courthouse in Clayton, Missouri. Lacy earned a B.A. in English-Creative Writing and History from the University of Missouri-Columbia, where she also received her Masters in Library Science. She attended Southern Illinois University for her J.D., and is licensed to practice in Missouri. Lacy has previously worked as a law clerk for the U.S. District Court for the Southern District of Illinois and as the evening librarian at the East St. Louis Community College Center.

The 2018 Richard S. Arnold Awards for Distinguished Service

The Richard S. Arnold Award Winners (l-r): Katherian D. Roe, Bridget G. Hoy, Hon. Roger L. Wollman, William A. Waddell, Jr., Richard Henderson, Randy Seiler, Cynthia C. Moser, Robert A. Van Vooren, and Kim Stoler (on behalf of her late husband, Alan G. Stoler). Not pictured: Charles R. Ledbetter.

At the Judicial Conference in Des Moines, the Eighth Circuit Bar Association announced this year's winners of the Richard S. Arnold Awards. Since 2012, the Bar Association has presented Arnold Awards at the Judicial Conference to ten deserving individuals based on nominations provided by the chief judges of each district in the Circuit.

The Association asks each judge to nominate an individual who demonstrates the following characteristics of Judge Richard S. Arnold:

1. The person has achieved professional excellence in his or her field.
2. The person has been a leader in the legal community as reflected in the leadership positions held in bar associations and other professional organizations.
3. The person has contributed significant work toward the delivery of volunteer legal services to underserved members of the community.
4. The person has been honored by his or her peers.
5. The person has served as a mentor or role model for less-experienced lawyers or students interested in law.

The 2018 recipients are Randy Seiler, Richard Henderson, Katherian D. Roe, Charles R. Ledbetter, Bridget G. Hoy, Cynthia C. Moser, Robert A. Van Vooren, Alan G. Stoler, the Hon. Roger L. Wollman, and William A. Waddell, Jr.

Judge Arnold led a distinguished career that included graduating first in his class at Yale University and Harvard Law School. He clerked for Justice William Brennan on the U.S. Supreme Court before entering private practice and serving on the Eighth Circuit. Judge Arnold's biographer said that he was "perhaps the best judge never to serve on the Supreme Court."

The Arnold Awards are fitting for each of this year's recipients, who likewise have achieved careers of distinguished service.

Review of the Eighth Circuit During the Supreme Court's 2017 Term

by Timothy J. Droske

The recent terms at the Supreme Court have been marked by its change in composition—Justice Scalia's death during the October 2015 Term and replacement by Justice Gorsuch, and Judge Kavanaugh's confirmation shortly after the October 2018 Term began following Justice Kennedy's retirement. In the midst of these changes, the October 2017 term was notable for its relative stability—the first term in the past four years in which a full nine-member Court served the entire term.

It was also a year of relative consistency as far as the Eighth Circuit's appearances before the Supreme Court. The Supreme Court heard three cases from the Eighth Circuit, 4% of the Supreme Court's docket—consistent with the average this decade. Moreover, there was also consistency as to the Eighth Circuit panelists in the cases that the Supreme Court heard. Judge Benton was a panelist on all three cases heard by the Supreme Court and the author of two of the reviewed decisions—two decisions in which Judge Shepherd also sat on the panel. Lastly, there was also relative consistency in the outcome before the Supreme Court, with the Court again reversing the Eighth Circuit more than it affirmed, and doing so in unanimous or near-unanimous decisions.

The subject matter of the three cases before the Supreme Court, however, was varied. The most high-profile case from the Eighth Circuit was *Minnesota Voters Alliance v. Mansky*, a case involving the State of Minnesota's "political apparel ban" inside polling places on Election Day. Much less high profile, and much more obscure, was the Court's decision in *Sveen v. Melin*, a case squarely addressing the Contracts Clause as applied to Minnesota's divorce decree statute. The third case was a relatively run-of-the-mill criminal case, *Koons v. United States*, where the Supreme Court addressed the circumstances in which defendants are eligible for sentence reductions if their Sentencing Guidelines range was later lowered by the Sentencing Commission.

Statistics from the 2017 Term and a summary of these cases follow.

Eighth Circuit Statistics

The number of cases from the Eighth Circuit before the Supreme Court last term, and the results at the high court, were consistent with what the Eighth Circuit has averaged this decade. While there have been recent terms where the Supreme Court has heard no cases from the Eighth Circuit, and others where it has heard as many as eight, the three cases the Supreme Court heard last term—composing 4% of the Supreme Court's docket—was in keeping with the 4.5% average over this decade.[1] It also appears that the greater attention the Supreme Court paid to the Eighth Circuit in the 2014 and 2015 Terms—where it heard eight cases and six cases respectfully—was an anomaly. That is further confirmed by the fact that the Court has already filled more than 75% of its

[1]

Term	Cases	Docket Percent	Aff'd/Rev'd/ Split	Affirmed
2017	3	4%	1-2	33%
2016	2	3%	0-2	0%
2015	6	7%	3-2-1	60%
2014	8	11%	1-7	13%
2013	2	3%	0-2	0%
2012	2	3%	0-2	0%
2011	0	-	-	-
2010	4	5%	1-3	25%
Avg.	3.4	4.5%		18.7%

The table reflects statistics for the Eighth Circuit cases heard by the Supreme Court since the October 2010 term. *See* SCOTUSblog, Stat Pack Archive, http://www.scotusblog.com/reference/stat-pack (Circuit Scorecard for 2010-2017 Terms). Note that the 4-4 split in 2015, although resulting in a nonprecedential affirmance, is not included in the Affirmed Percent. Also, the Average for the Affirmed Percent does not include the 2011 Term in which no cases from the Eighth Circuit were decided by the Court.

docket for the current term, and of the 59 cases the Court will hear, there are again three from the Eighth Circuit.[2] In terms of the results at the Supreme Court, despite being reversed more than it was affirmed, the 33% affirmance rate was better than the 26% overall affirmance rate from the Supreme Court last term, and among the twelve U.S. Court of Appeals, only the Second, Seventh, and Tenth Circuits had a higher affirmance rate.[3]

Minnesota Voters Alliance v. Mansky— What You Can Wear to the Polls

In *Minnesota Voters Alliance v. Mansky*, the Supreme Court addressed Minnesota's "political apparel ban," which provided that "a political badge, political button, or other political insignia may not be worn at or about the polling place."[4] Although the law had existed for over a century,[5] its enforcement came to a head in the 2010 election, when Minnesota Voters Alliance and other groups planned to have supporters wear "Please I.D. Me" buttons to the polls. That prompted county officials and the State to create and distribute an "Election Day Policy" for election judges and officials, which specified examples of apparel falling within the ban, including names of political parties; candidates; items supporting or opposing a ballot question; issue-oriented material including the "Please I.D. Me" buttons; and material promoting a group with recognizable political views, such as the Tea Party and MoveOn.org. On election day, certain individuals wearing the "Please I.D. Me" or Tea Party apparel were asked to cover the apparel and refused; they were allowed to vote, but election judges recorded their information.[6]

After the election, the plaintiff groups and certain individuals brought facial and as-applied First Amendment challenges to the apparel ban.[7] The district court granted the defendants' motion to dismiss,[8] and the case went to the

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[2] *See* SCOTUSblog, October Term 2018, http://www.scotusblog.com/case-files/terms/ot2018/ (last visited Dec. 10, 2018). The three cases, and the questions they present, are as follows: *United States v. Sims*, Sup. Ct. No. 17-766 (QP: Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). On December 10, 2018, the Court answered this question in the affirmative and vacated the Eighth Circuit's judgment); *BNSF Railway Co. v. Loos*, Sup. Ct. No. 17-1042 (QP: Whether a railroad's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.); *Bucklew v. Precythe*, Sup. Ct. No, 17-8151 (QP: (1) Should a court evaluating an as-applied challenge to a state's method of execution based on an inmate's rare and severe medical condition assume that medical personnel are competent to manage his condition and that the procedure will go as intended? (2) Must evidence comparing a state's proposed method of execution with an alternative proposed by an inmate be offered via a single witness, or should a court at summary judgment look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate? (3) Does the Eighth Amendment require an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition? (4) Whether Petitioner met his burden under *Glossip v. Gross*, 576 U.S. __ (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's own method of execution.).

[3] SCOTUSblog, Final Stat Pack for October Term 2017 at 3, http://www.scotusblog.com/wp-content/uploads/2018/06/SB_Stat_Pack_2018.06.29.pdf.

[4] *Minnesota Voters Alliance v. Mansky*, No. 16-1435, 138 S. Ct. 1876, 1883 (2018) (quoting Minn. Stat. § 211B.11(1) (Supp. 2017).

[5] *Id.*

[6] *Id.* at 1884.

[7] *Id.* at 1884-85.

[8] *Minn. Majority v. Mansky*, 789 F. Supp. 2d 1112 (D. Minn. 2011).

Eighth Circuit.[9] On the facial challenge, Judge Benton, writing for the court, rejected the plaintiffs' arguments that the polling place was a public forum subject to strict scrutiny. Instead, the court found that as a nonpublic forum, the law was permissible so long as it was viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." That less-stringent standard of review was dispositive, with the court rejecting the facial challenge.[10] Judge Shepherd dissented as to that holding, agreeing as to the standard of scrutiny, but disagreeing that on this record it was shown that "these restrictions are reasonable limits on free speech which rationally relate to the state's interest in maintaining order and preserving integrity at the polling place."[11] As for the as-applied challenge, the full panel agreed that claim should be remanded for further record development.[12]

The voter groups petitioned the Supreme Court regarding their facial challenge, but review was denied.[13] Litigation continued for years at the district court and Eighth Circuit, with both courts rejecting the groups' as-applied challenge.[14] The groups then petitioned the Supreme Court, again raising only the facial challenge to the law.[15] This time the Court granted review, reflecting that the Supreme Court's denial of certiorari on an interlocutory basis may not be indicative of the overall certworthiness of the issue. Amicus support for both sides was strong, and made for interesting bedfellows, with the American Civil Liberties Union, for example, which has a policy position against voter ID laws,[16] filing an amicus brief in support of the "Please I.D. Me" group's First Amendment challenge.[17]

In a 7-2 decision, Chief Justice Roberts wrote the majority opinion, reversing the Eighth Circuit and holding the political apparel ban unconstitutional.[18] While the majority agreed that a polling place qualified as a nonpublic forum and was thus subject to the most deferential standard of scrutiny, the Supreme Court nonetheless held that the ban was not "reasonable in light of the purpose served by the forum." The Court recognized that, "in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys," but said "the State must draw a reasonable line" and "basis for distinguishing what may come in from what may stay out." According to the Court, Minnesota's ban "fail[ed] even this forgiving test." The "Please I.D. Me" buttons themselves highlighted the problem, since voter ID requirements were not on the ballot, but were still covered because the Republican candidates had staked out positions on that issue. Further disconcerting to the Court was how the restriction would apply to groups and organizations—varying from labor unions to the Boy Scouts—which have taken positions on political issues. And mixed responses from the State as to the ban's applicability to shirts with a rainbow flag, or displaying the text of certain constitutional amendments, further troubled the Court. The Court did leave the

[9] *Minn. Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013).
[10] *Id.* at 1057-58 (joined by Judge Gruender).
[11] *Id.* at 1061-62 (Shepherd, J., *dissenting*).
[12] *Id.* at 1059; *id.* at 1062.
[13] *See Minnesota Majority v. Mansky*, Sup. Ct. No. 13-185.
[14] *Minn. Majority v. Mansky*, 849 F.3d 749 (8th Cir. 2017)
[15] *Minnesota Voters Alliance v. Mansky*, No. 16-1435.
[16] *See* ACLU, Fighting Voter Suppression, https://www.aclu.org/issues/voting-rights/fighting-voter-suppression
[17] *See* Docket, *Minnesota Voters Alliance v. Mansky*, No. 16-1435.
[18] Justice Sotomayor dissented, joined by Justice Breyer, taking the position that the Court should first "certify this case to the Minnesota Supreme Court for a definitive interpretation of the political apparel ban." 138 S. Ct. at 1892.

door open to Minnesota fashioning a permissible ban in the future, but held "it must employ a more discernible approach than the one Minnesota has offered here."[19]

***Sveen v. Melin*—The Contracts Clause Shows Its Face**

Last term was a reminder that the Contracts Clause in the Constitution is not merely a relic of the *Lochner* Era Court at the turn of the twentieth century.[20] That clause prohibits any state "[l]aw impairing the Obligation of Contracts,"[21] and the Supreme Court has held that certain "laws affecting pre-existing contracts violate the Clause."[22] At issue in this case was whether Minnesota's new revocation-on-divorce statute crossed the constitutional line. Under Minnesota's prior law, a divorce would not change a beneficiary designation in an insurance policy, but it could be changed by a particular divorce decree. Minnesota's new law, Minn. Stat. § 524.2-804, subd. 1, was enacted in 2002 and automatically revoked the former spouse's designation upon divorce, again subject to alteration by divorce decree, or by the policyholder himself overriding the revocation.[23]

Here, Mark Sveen purchased a life insurance policy in 1998, when the predecessor law was in effect, designating his wife, Kaye Melin, as his primary beneficiary, and his two children from a prior marriage as contingent beneficiaries. The two divorced in 2007 after the new law was passed. No mention of the insurance policy was made in the divorce decree, and Sveen made no effort to revise his beneficiary designation. After he died in 2011, Sveen's children and his former wife both made claims to the insurance proceeds, with the children relying on the new revocation-on-divorce statute, and Melin arguing retroactive application of that law violated the Contracts Clause.[24]

The Eighth Circuit, with Judge Benton again authoring the opinion, reversed the district court and found the Contract Clause prohibited the revocation-on-divorce statute's retroactive application here.[25] The Eighth Circuit's slip opinion was only six pages long, and found that its prior decision some 25 years earlier, interpreting a similar clause in an Oklahoma statute, was binding precedent.[26] Both statutes, the Court held, violated the Contracts Clause because they "disrupt[ed] the policyholder's expectations and right to 'rely on the law governing contracts as it existed when the contracts were made.'"[27]

While the Eighth Circuit's decision was short and succinct, it did identify other courts, including the Tenth Circuit, that had come to a contrary result.[28] That conflict was the foundation for the Sveen childrens' successful certiorari petition.

Justice Kagan, writing for eight members of the Supreme Court, reversed, and found the Contracts Clause was not violated. The Court

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[19] *Id.* at 1885-92.
[20] *See* George Leef, "The Supreme Court Will Soon Decide: Uphold The Contract Clause Or Let It Die?" Forbes (Mar. 13, 2018), available at https://www.forbes.com/sites/georgeleef/2018/03/13/the-supreme-court-will-soon-decide-uphold-the-contract-clause-or-let-it-die/#6f005a9635a1
[21] *See* Constitution, Art. I, §10, cl. 1.
[22] *Sveen v. Melin*, No. 16-1432, 138 S. Ct. 1815, 1821 (2018).
[23] *Id.* at 1819-21.
[24] *Id.* at 1821.
[25] *Metro. Life Ins. Co. v. Melin*, 853 F.3d 410 (8th Cir. 2017) (Judge Shepherd and Judge Ebinger also on panel).
[26] *Id.* at 412-14 (following *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1324 (8th Cir. 1991)).
[27] *Id.* at 413 (quoting *Whirlpool*, 929 F.2d at 1323).
[28] *Id.* (citing *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003)).

found that its analysis started and stopped at the first step of its two-part test: that the law did not "operate[] as a substantial impairment of a contractual relationship."[29] According to the Supreme Court, the law did not "severely impair" the ex-husband's contract, for three reasons: (1) "the statute is designed to reflect a policyholder's intent"; (2) the law "does no more than a divorce court could always have done"; and (3) "the statute supplies a mere default rule, which the policyholder can undo in a moment."[30]

While the Eighth Circuit's view did not prevail, it did get explicit endorsement from Justice Gorsuch's sole dissent. There, he highlighted that "[t]he Court of Appeals held that this [the retroactive application of Minnesota's statute] violated the Contracts Clause, which guarantees people the 'right to rely on the law … as it existed when the[ir] contracts were made,'" and found that in his estimation, "[t]hat judgment seems to me exactly right."[31]

***Koons v. United States*—Sentencing Reductions When the Guidelines Range Is Lowered**

Lastly, in *Koons v. United States*, five petitioners moved for sentence reductions under 18 U.S.C. § 3582(c)(2), which permits a district court to reduce the sentence of "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission … ."[32] For all five defendants, the Sentencing Commission had reduced the Guidelines' base offense levels for the drug offenses for which they had been convicted. But for each defendant, while the district court had calculated the Guidelines range before sentencing, in each case the top of that range fell below the applicable mandatory minimum sentence. As a result the district court in each had found the mandatory minimum sentence to control, and then departed downward from that mandatory minimum because of the defendant's substantial assistance to the Government.[33]

The Eighth Circuit, in an opinion by Judge Loken, found that the sentences in these circumstances did not qualify for a sentencing reduction because, under the plain language of § 3582(c)(2), the sentence was not "'*based on* a sentencing range that has subsequently been lowered by the Sentencing Commission.'"[34] That decision conflicted with the Fourth Circuit,[35] and the Supreme Court granted review.

The Supreme Court unanimously affirmed. In an opinion by Justice Alito, the Court likewise found the statute's plain language controlling, and "h[e]ld that petitioners' sentences were 'based on' their mandatory minimums and on their substantial assistance to the Government, not on sentencing ranges that the Commission later lowered."[36]

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[29] 138 S. Ct at 1821-22 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). The second step, which the Court did not reach, examines "whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Id.* (quotations omitted).

[30] *Id.* at 1822.

[31] *Id.* at 1826 (Gorsuch, J., *dissenting*).

[32] 18 U.S.C. § 3582(c)(2)

[33] *Koons v. United States*, No. 17-5716, 138 S. Ct. 1783, 1787-88 (2018).

[34] *United States v. Koons*, 850 F.3d 973, 976-79(8th Cir. 2017) (quoting § 3582(c)(2)) (joined by Judge Wollman and Judge Benton).

[35] *Id.* at 978 (citing *United States v. Hood*, 556 F.3d 226 (4th Cir. 2009)).

[36] *Koons*, 138 S. Ct. at 1787.