

January 27, 2006

Devitt Distinguished Service to Justice Award
American Judicature Society
The Opperman Center
2700 University Avenue
Des Moines, IA 50311

RE: 2005 Devitt Distinguished Service to Justice Award

Dear Selection Committee:

With pride, pleasure, and enthusiasm, I nominate Gerald W. Heaney, Senior Circuit Judge of the Eighth Circuit Court of Appeals, for the Edward J. Devitt Distinguished Service to Justice Award for 2005. This year marks Judge Heaney's thirty-ninth on the bench, making him one of the longest serving judges in the history of the Eighth Circuit. His storied service as a judge, combined with his contributions to society beyond the bench, make him an excellent candidate for this Award.

Before describing the contributions to the law by Judge Heaney, I want to mention my late Eighth Circuit colleague and friend Judge Edward Devitt. Judge Devitt and Judge Heaney served their respective courts as administrators and ministers of justice, dispensing equal justice to all. Both admired each other's work. I sincerely believe were Judge Devitt alive, he would endorse the nomination of Gerald Heaney for this significant honor.

As a federal appellate judge with over thirty-seven years of service, it has been my privilege to know and to call as friends many of the recipients of the Devitt Award. Some have been my colleagues on the Eighth Circuit and some have been colleagues in my service as a visiting judge to other circuits.

In reflecting on these awards, one must observe that some of the judges have provided essential services in the administration of justice by their individual service in the federal courts. Other judges have received this high recognition by the Devitt Award committees for their administering of justice, which has bettered the lives of many. Into this latter category are judges such as Elbert Parr Tuttle, John Minor Wisdom, and Frank Johnson.

Judge Heaney's judicial work follows in the mold of those three great judges. He has served as the acknowledged leader in the Eighth Circuit in writing opinions for the court that changed the law and bettered the existence of thousands of African Americans and also literally thousands of disabled persons who seek total disability benefits under the social security laws.

I personally remember that in my first year on the bench back in 1968, Judge Heaney and I had dinner together in St. Louis before my first session as a member of the Eighth Circuit. At that time, Judge Heaney said to me, "Myron, I do not believe that this country can exist in domestic peace as a segregated society as we now are. All men and women regardless of race, color, or creed must, and should, be entitled to equal protection of the laws." And to that goal, Gerald W. Heaney has devoted his judicial life.

The attached addendum, cited to below, lists some of Judge Heaney's noteworthy and significant opinions in greater detail than I can mention with particularity in this letter.

In the **CIVIL RIGHTS** area of the law, Judge Heaney's leadership, wisdom, and clarity of thought in writing opinions requiring school desegregation, in various cities in this circuit deserve special mention. Liddell v. Board of Education, an important opinion relating to the schools in St. Louis, Missouri in particular, guaranteed a better and more equal educational opportunity for minority children in that great city. Judge Heaney's opinions relating to civil rights opened the door for many to obtain equal employment opportunities in the workplace. See addendum, pgs. 14-17.

In his **CRIMINAL LAW** decisions, Judge Heaney recognized that the criminal law processes must be administered fairly. For example, in one of Judge Heaney's earliest cases, Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967), Judge Heaney dissented from the court's holding that a confidential informant's tip was sufficient to support the issuance of a search warrant. He asserted that allowing warrants in such circumstances would undermine the Fourth Amendment, since there was no evidence of the confidential informant's reliability. The Supreme Court subsequently accepted Judge Heaney's analysis in reversing the Eighth Circuit's majority opinion. See addendum, pgs. 17-18.

His opinions relating to the **FIRST AMENDMENT** guaranteed more freedom of expression for all citizens. He has consistently defended the rights of those whose views are unpopular as protected by the Constitution, whether those rights are exercised by protests or by picketing. Judge Heaney has been particularly attentive to ensuring that students in high schools and universities are exposed to a wide range of information, as his opinions on school films, school papers, and school facilities as open forums demonstrate. See addendum, pgs. 19-21.

Finally, his leading and often cited opinion in Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984), was a very important contribution to the law relating to disability under the **SOCIAL SECURITY** laws and regulations. Judge Heaney ruled and recognized that pain and suffering demonstrated by a claimant must be factored into the decision-making by the Social Security Administration. In this noteworthy opinion, he observed and stated that pain, even though not testified to by a physician, can be established as an element of disability claims by the claimant's own credible testimony buttressed by other trustworthy evidence of those who observed the suffering of the claimant. This opinion affected thousands of claimants as that opinion has been cited nearly one thousand times by courts throughout the country, and is one of the leading opinions relating to social security disability claims. See addendum, pg. 22.

Let us examine the nature of this individual who has become a great judge.

Oliver Wendell Holmes' famous aphorism "the life of the law has not been logic: it has been experience" has special meaning as applied to Gerald Heaney. Judge Heaney grew up in Goodhue, a tiny town of 500 in Southeastern Minnesota, where he learned the value of hard work on his family farm. He saw the plight of those less fortunate during the great depression. He graduated high school with a class of five students, and he continued on to Saint Thomas College in the Twin Cities. From there, Judge Heaney continued on to the University of Minnesota Law School, to Europe during his service with the Army Rangers in World War II, to an active role in Minnesota's young Democratic Farmer-Labor (DFL) party, and, finally, to his position as distinguished judge of the Eighth Circuit Court of Appeals. I make brief mention of his life experiences here because it is clear to me that they have served to mold Gerald Heaney into a fine person and judge with great wisdom.

Interestingly enough, Judge Heaney, like his predecessors mentioned above, Judges Tuttle, Wisdom, and Johnson, has lived through some of the major crises of this country in the twentieth century. I particularly point to living through the Great Depression and serving gallantly and heroically in the battlefields of World War II. We have recently paused to remember "The Greatest Generation" in Tom Brokaw's well-known book of that name, and in the great movie, "Saving Private Ryan," and this country continues to pay tribute to that generation at the World War II Memorial in Washington, D.C. While the attachments to this nomination present in greater detail the accomplishments of the nominee, I think it appropriate to note that Gerald Heaney stands as a shining example of the contributions to our country by that "greatest" generation.

In 1941, Judge Heaney, like so many young Americans, was deeply affected by the bombing at Pearl Harbor. Together with his law school friend (and future Minnesota governor) Orville Freeman, he made application for the Marines, but was rejected because he was color blind. Unfettered, he tried again to enlist in the summer of 1942, and was accepted for the Army. He sought to be transferred to the Army Rangers, known for its highly skilled soldiers and dangerous missions. He was accepted, and, following his training, was sent to Europe for what would become a life-defining time.

I could dwell at great length on Judge Heaney's heroic service, but I would merely be repeating the words written by many others, and attached to this submission. I mention but one battle because of its powerful effect on so many of us. This battle takes us back to June 6, 1944 and the invasion of Europe at the Omaha Beach in Normandy, France. First Lieutenant Gerald Heaney of the Second Ranger Battalion was in the first wave to hit the beach. Many of our troops were killed or wounded but by the end of that longest day, Gerald and his fellow Rangers had moved across the beach, fought up the bluffs, and survived. He earned the Silver Star for combat heroism. The citation, awarded September 9, 1944, speaks for itself.¹

¹ FIRST LIEUTENANT WILLIAM G. HEANEY, 01309733, Infantry, United States Army, for gallantry in action in connection with military operations against the enemy on 6-7 June 1944 in France. Upon landing at Omaha Dog Green Beach, Vier Ville-sur-Mer, Lieutenant Heaney and his men were pinned down by heavy enemy machine gun,

In addition, Gerald Heaney fought with gallantry in France with General Patton's Third Army. He earned the Bronze Star and five battle stars. He returned to the United States in October 1945, one of the 150 remaining Rangers out of the initial 600 that embarked for war duty in 1943. His battalion received a Presidential Unit citation when the war ended.

In speaking of "The Greatest Generation," I will briefly mention the extraordinary contributions and experiences of Gerald Heaney as a lawyer, citizen, advisor to political leaders, education advocate, jurist, and author.

LAWYER

Like so many of our brave soldiers, Judge Heaney recognized America's responsibility to assist in the reconstruction of Europe, and his background as a labor lawyer proved just as valuable as his training as one of the Army's finest soldiers. Prior to leaving the service, he was appointed as Labor Relations Officer for the Military Government of Bavaria and served in the rewriting of Bavarian labor laws and organizing a free trade movement in Bavaria.

Upon his return to the United States, Gerald Heaney, as a lawyer, became a recognized leader in the area of labor law. From 1946 to 1966, he worked for the law firm of Lewis, Hammer, & Heaney. He represented many of Northeastern Minnesota's labor unions, including the International Brotherhood of Electrical Workers, Local 31, the Duluth Teachers Association, the Hotel and Restaurant Employees, Local 84, as well as local chapters of the Retail Clerks and American Federation of State and Municipal Employees. In this capacity, Gerald Heaney was instrumental in the creation of the first self-insured hospital and medical plans for a number of unions, many of which continue to operate today. He also

mortar, and artillery fire. With utter disregard for his personal safety, Lieutenant Heaney stood up, induced his men to continue the attack and led them across the beach to accomplish their mission in due operational time. The undaunted courage and leadership demonstrated by Lieutenant Heaney reflect great credit upon himself and are in keeping with the highest traditions of the Armed Forces.

Quoted in, Scott A. Johnson, *Point of Honor*, Experience (Spring 1999) (attached).

negotiated the first contract that equalized pay for male and female teachers in Minnesota.

CITIZEN

For his local community and area, Gerald Heaney served as an organizer of the Northeastern Minnesota Development Association, fostering industrial development in Northeastern Minnesota. He worked to bring the University of Minnesota-Duluth branch to his home community; served on a Citizens' Committee before the legislature to create the Seaway Port Authority of Duluth; served as a member of the organizing committee for a regional educational television station; led as Chairman on the Inter-racial Council of Duluth efforts to promote fair employment and fair housing legislation for Duluth. Of particular note, he aggressively assisted home rehabilitation in blighted areas of Duluth through the Town View Improvement Corporation, a non-profit organization, which he organized and advised. In 1973, Town View was recognized with the National Volunteer Award by the National Center for Voluntary Action, and its developments continue to provide good, affordable housing for Duluth's citizens to this day.

POLITICAL ADVISOR

Gerald Heaney has made outstanding contributions to the political processes of the state and nation. When asked about when his interest in politics was piqued, he recalls the presidential election of 1928, when he was only ten years old. In later years, his hand helped to shape Minnesota's political landscape. Together with his classmate Orville Freeman and his good friend Hubert H. Humphrey, Judge Heaney was one of the primary architects of the Minnesota Democratic Farmer-Labor (DFL) party, which still thrives today. He served as Democratic National Committeeman from Minnesota from 1955 to 1960.

After his return from military service, Minnesota state and national political leaders looked to him for advice and counsel. Some of these political leaders included Senators and later Vice Presidents Hubert H. Humphrey and Walter F. Mondale, United States Senator Eugene McCarthy, and Governor Orville Freeman (later United States Secretary of Agriculture). In his early political days, and at

Hubert Humphrey's request, Gerald Heaney helped Minnesota remove alleged communistic sympathizers from controlling positions in the Minnesota DFL party.

EDUCATION ADVOCATE

Gerald Heaney served the cause of better education as a member of the Board of Regents of the University of Minnesota. In recognition of his service to University education, that Board presented him the Outstanding Achievement Award for his service during 1964 and 1965. In 2000, he was recognized as the University of Saint Thomas's Alumnus of the Year. In 2001, he was awarded an honorary doctorate from the University of Minnesota. Finally, I refer the Committee to Judge Heaney's attainment on June 8, 2004 of the Hubert H. Humphrey Public Leadership Award. The Hubert H. Humphrey Institute of Public Affairs gave these awards to four distinguished American recipients: former Secretary of State Madeleine Albright; the first female leader of the Mille Lacs Band of Ojibwe, Marge Anderson; Target Corporation executive Nathan Garvis; and Judge Gerald W. Heaney.²

²The inscription on the program reads:

Judge Gerald W. Heaney of the United States Court of Appeals for the Eighth District is a noted jurist who has spent his legal career protecting the rights of children, the disadvantaged, minorities, and working people. A cherished friend of Hubert H. Humphrey, Judge Heaney is a founding father of the public affairs institute that bears his friend's name. In addition to counseling Humphrey, over the years Judge Heaney has provided advice to such political leaders as Senator Eugene McCarthy, Vice President Walter F. Mondale, and Governors Orville Freeman and Karl Rolvaag. A passionate champion of northeastern Minnesota, the judge served as a Regent for the University of Minnesota and was the driving force behind the establishment of the Duluth campus as part of the University system. Judge Heaney's intellectual and professional courage was evident early on. As a young man he served in the United States Army. As a result of his WWII service, he earned the Presidential Unit Citation, the Silver Star, the Bronze Star, and five battle stars.

This letter would be incomplete if I omitted noting Gerald Heaney's work for the betterment of education of young lawyers. He has mentored some seventy law clerks who have served him. He was the first judge in the circuit to hire a female law clerk and the first to hire an African American law clerk. See proposed History of Eighth Circuit, Chp. 4, p. 10 (attached). In his honor, Judge Heaney's clerks and friends have established scholarship funds to assist minority students studying law—one at the University of Minnesota Law School and one at William Mitchell College of Law. A scholarship fund in Gerald's name has also been established at the Hubert H. Humphrey Institute of Public Affairs.

JURIST

In his thirty-nine years on the United States Court of Appeals for the Eighth Circuit, Judge Heaney's contributions to the law have been prodigious. For the court, he has authored 1,691 opinions, plus 610 dissents or concurrences. He has written leading opinions in every area of the law, but those in constitutional law, criminal law, habeas corpus, post conviction remedies, civil rights, equal opportunity for minorities, women, handicapped, the aged, labor law, administrative law, social security benefits, and education are particularly noteworthy. He has written many of the most significant cases on desegregation of the public schools for the Eighth Circuit and his thoughtful and carefully crafted opinions have made for successful public school desegregation in St. Louis, Missouri; Kansas City, Missouri; Omaha, Nebraska; and Little Rock, Arkansas, and many other locations. In addition to the Eighth Circuit, Judge Heaney has served as a visiting judge to the Second, Third, and Fourth Circuits and as a visiting district court judge in the District of Minnesota and the Eastern District of Arkansas.

I can think of a no more fitting tribute to Judge Heaney's devotion to equal rights than a statement by then Dean E. Thomas Sullivan in a Minnesota Law Review tribute to Judge Heaney on his first thirty years of service. After reviewing and commenting on Judge Heaney's judicial opinions and service, Dean Sullivan wrote this:

Gerald W. Heaney has led a life of service. He has served his community, his country, and our future through his vision for education that creates opportunities for, and develops the potential of,

all American children. It is through that dedication that Judge Heaney's philosophy of life and law will serve for generations to come, generations which will read the Heaney jurisprudence for its clear message on promoting liberty, on protecting individual freedoms against the tyranny of the more powerful, on ensuring equal opportunity for all people in education, in the workplace, and in living accommodations, and on pursuing the public good through civic responsibility.

At the University of Minnesota Law School, we are proud to call Judge Heaney one of our own. He honors all of us by his life-long contributions to the State of Minnesota and to the University, and, importantly, by sharing with us his philosophy on the role of public service and civic-mindedness within the legal profession and society. He has left us with an uncommon legacy.

E. Thomas Sullivan, *The Heaney Jurisprudence: Judicial Valor and Civic Responsibility*, 61 Minn. L. Rev. 1087, 1092-93 (May 1997).

That law review, among other things, contained a statement from former University of Minnesota Law School Dean Carl A. Auerbach (1972-1979) who earlier had written:

Judge Heaney has been a brilliant jurist, whose talents were best demonstrated by his imaginative and yet careful and successful handling of school desegregation cases. On the whole, Judge Heaney has not espoused a judicial activism—except when fundamental human rights were at stake. The compassion which he demonstrated as a lawyer was not abandoned when he became a judge. He is a judge of extraordinary balance whose work is appreciated by the bench and bar throughout the Eighth Circuit and whose thoughtful opinions will shape the law in the years to come.

Id. at 1096.

A close observer of Judge Heaney's work and his friend Judge Donald P. Lay, who served as Chief Judge of the Eighth Circuit from 1980-1992 and is a

continuing colleague, gives particularly pertinent comments in the Minnesota Law Review previously mentioned. Judge Lay quoted his previous statement on the occasion of Judge Heaney taking senior status on December 31, 1988:

In my judgment, he is the most outstanding judge ever to serve, not only on the Eighth Circuit but throughout the United States in the last twenty-five years. He is the most well-prepared judge in the circuit. His industry and dedication to law are unparalleled. His compassion and understanding of human problems is unique. He is a scholar and true gentleman in all respects.

Id. at 1095.

Judge Lay also quoted from a letter he had received from three of Judge Heaney's law clerks on Gerald taking senior status. The law clerks wrote:

He approaches each case as if it was the most important case he will ever decide. . . . For us, Judge Heaney is the ideal role model. He is compassionate, diligent and selfless. He has inspired us to view law as more than a vocation, to see our legal careers as a form of community service.

Id. at 1100.

AUTHOR

In addition to always carrying a heavy caseload, Judge Heaney also has found time to make significant contributions to the law with his writings which are documented in the attached biography. I especially note his law reviews on important subjects as well as commentary on two great federal judges, Judge Martin van Oosterhout, 79 Iowa L. Rev. 1 (1993), and Judge Jacob Trieber of Arkansas, 8 Ark. L.J. 421 (1986). His article on Social Security disability cases, *Why the High Rate of Reversals in Social Security Disability Cases*, 7 Hamline L. Rev. 1 (1984), focuses on administrative errors and unfairness to claimants and has contributed to a change for better procedures by the Social Security Administration.

His law review articles on sentencing guidelines: *Revisiting Disparity: Debating Guidelines Sentencing*, 29 Am. Crim. L. Rev. 771 (1992); *Federal Sentencing Guidelines: No Cure for Disparity*, 4 The Aspen Institute Quarterly 142 (1992); and *The Reality of Guidelines Sentencing: No End to Disparity*, 4 Fed. Sentencing Rep. 142 (1991), contain important critical commentary which have been helpful to bench, bar, and members of Congress. In hearings held in 1986 and 1987, Judge Heaney appeared before the United States Sentencing Commission to discuss what was then the innovative concept of sentencing federal defendants under a uniform system. Judge Heaney's comments there are but one example of his ability to anticipate problems that have yet to emerge. Speaking to the Commission, Judge Heaney noted that under the proposed system (which was eventually accepted), "in many cases conduct proved beyond a reasonable doubt is less important than conduct which only needs to be proved by some evidence." This very sentiment—that mandatory sentencing guidelines systems may not be adequate to protect the constitutional right to trial by jury and the requirement of proof beyond a reasonable doubt—was echoed in the Supreme Court's seminal decisions of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), and United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005).

Additionally, Judge Heaney has co-authored, with Dr. Susan Uchitelle of St. Louis, a graphic work describing the failures and successes in the desegregation of St. Louis public schools. The book entitled *Unending Struggle: The Long Road to an Equal Education in St. Louis* has been published by University of Nebraska Press, fall 2004. Former Senator Thomas Eagleton said of the book "[f]rom analysis of court cases to in-depth interviews of teachers, administrators, and former students, *Unending Struggle* offers an unparalleled examination of issues surrounding public education in urban areas." Gary Orfield, a prominent scholar and expert on school desegregation, called Judge Heaney "one of the nation's most perceptive appellate judges on civil rights issues," and said of the book that "I know of nothing like this in the literature on school desegregation. I believe readers will be deeply grateful for their work." Judge Heaney also wrote law review articles relating to desegregation of previously segregated public schools, such as his 1984 work, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 Minn. L. Rev. 735 (1984).

Finally, Judge Heaney has made valuable contributions to the administration of justice in his service on committees of the Eighth Circuit and his important

work on Judicial Conference Committees—Committee on the Operation of the Jury System (1969-1975) and Judicial Improvements Committee (1987-1991).

It becomes exceedingly clear from a purview of his record of achievements as detailed in this nomination letter and attachments that Judge Heaney is an outstanding nominee for the Devitt Distinguished Service to Justice Award. He is an Article III judge of national stature. He has had a distinguished life-long career characterized by conduct and actions, both as a judge and citizen, that demonstrate high character, courage, and wisdom to do what is right, proper, and necessary under the law. The bench, bar, and citizenry who know Gerald Heaney would acknowledge his wisdom, humanity, compassion, and commitment to the rule of law to willingly entrust him with the most complex cases of the most far-reaching consequences.

Much more could be said and further information is attached. I conclude with this observation. There are not too many of us left from the “Greatest Generation” who still serve in the judiciary. The ranks of those of us who also served in the battlefields of World War II are thinning rapidly. The Devitt Distinguished Service to Justice Award to Judge Heaney would give recognition and honor to all of the federal judges, past and present, who served this country during World War II. The award this year would be particularly significant. Judge Heaney recently announced that this year, his fortieth on the bench, will be his last in service to his country as a judge.

Thank you for your careful consideration.

Sincerely yours,

Myron H. Bright

Nominee: Hon. Gerald W. Heaney, judge_gerald_heaney@ca8.uscourts.gov
218-529-3530 (Office telephone number) 218-525-7711 (Home telephone number)

Addendum: List of Important Cases of Gerald W. Heaney

List of Letters of Support (originals on file with AJS

as part of 2004 submission, except as otherwise noted)

Attachments:

1. Profile & Evaluation of Judge Gerald W. Heaney, ALMANAC OF THE FEDERAL JUDICIARY, Vol. 2, 8th Cir. at 26 (2004)
2. Biography of Judge Gerald W. Heaney (June 2004)
3. Jeffrey Morris, EIGHTH CIRCUIT HISTORY, Chp. 4, pp. 9-10, 42, Chp. 5, pp. 13-16, & Chp. 6, p. 10 (publication pending)
4. Statement of the Honorable James L. Oberstar of Minnesota in the U.S. House of Representatives in Recognition of Judge Gerald W. Heaney (May 11, 1989)
5. *A Tribute to Judge Gerald W. Heaney: Three Decades of Service on the U.S. Court of Appeals for the Eighth Circuit*, 81 Minn. L. Rev. 1087 (May 1997)
6. Scott A. Johnson, *Point of Honor*, EXPERIENCE (Spring 1999)
7. Resolution, Senior Status of the Honorable Gerald W. Heaney, United States Circuit Judge for the Eighth Circuit (July 1989)
8. Judge Gerald W. Heaney Baseball Card (Dec. 1, 1966 through Sept. 23, 2004)
9. *Public Leadership Award Recipients Inspire Audience*, HUMPHREY INSTITUTE NEWS, Univ. of Minn., 1 (July/Aug. 2004)
10. Hubert H. Humphrey Public Leadership Awards program inscription as noted in Judge Donald P. Lay's memo dated June 9, 2004
11. Mark Stodghill, *8th Circuit Gets Change of Venue*, DULUTH NEWS TRIBUNE, June 13, 2004
12. Judge Gerald W. Heaney & Dr. Susan Uchitelle, UNENDING STRUGGLE—THE LONG ROAD TO AN EQUAL EDUCATION IN ST. LOUIS (2004)

LIST OF IMPORTANT CASES OF GERALD W. HEANEY

CIVIL RIGHTS & DESEGREGATION

Kelley v. Altheimer, Arkansas Public School District No. 22,
378 F.2d 483 (8th Cir. 1967)

African American residents of the Altheimer School District brought suit alleging that the school district's policies and practices were racially discriminatory. The district court dismissed the complaint. The plaintiffs appealed, and, in one of his first decisions in what would become one of his touchstone subjects, Judge Heaney reversed the district court. In so doing, Judge Heaney spelled out in great detail the segregated history of the district and its current racially segregated status. He set out specifics which informed the school district, the district court, and others of the district's failings with regard to faculty, building construction, and transportation. This approach undoubtedly quickened the district's pace in attempting to fashion a plan toward integration.

United States v. City of Black Jack, Mo., 508 F.2d 1179 (8th Cir. 1974)

The City of Black Jack was a nearly all-white unincorporated municipality, located near the City of Saint Louis. Up until 1970, it was governed by Saint Louis County, who proposed a large-scale development plan to create housing for low and moderate income families. Residents quickly incorporated the city and then issued a zoning ordinance prohibiting the construction of any new multi-family dwellings, including those already approved by Saint Louis County.

The United States brought suit, alleging a violation of the Fair Housing Act. The district court denied relief, opining that there was no evidence of racially discriminatory motive on behalf of the city, or of racially discriminatory effect. The court of appeals reversed. Judge Heaney recognized that the historical context of the segregated Saint Louis metropolitan area must be part of the analysis when considering questions of racial discrimination in housing. Viewing the zoning ordinance under that filter, he found it clearly violated African Americans' right to fair housing, as it disproportionately affected that group's ability to live in decent, desegregated neighborhoods.

Junior Chamber of Commerce of Kansas City, Mo. v. United States Jaycees, 508 F.2d 1031 (8th Cir. 1975); United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983), *rev'd*, Roberts v. United States Jaycees, 468 U.S. 609 (1984)

In 1974, the United States Jaycees required that any of its contracting local clubs limit their membership to men. The Kansas City, Missouri Jaycees amended their bylaws to allow the admittance of women in the club. Upon realizing this, the United States Jaycees voted to move a national awards conference from Kansas City to another location. The Kansas City chapter sought and received a preliminary injunction to retain the awards conference, but the United States Jaycees appealed. The majority found that there was not a sufficient nexus between the Jaycees receipt of federal funds and its discriminatory action to invoke the constitution. In dissent, Judge Heaney disagreed. He found that the allocation of federal funds to the Jaycees' program was more than sufficient to make it a state actor for purposes of this lawsuit. Often the case, his final paragraph cut to the heart of the matter:

The development of community leaders is essential to our democracy and should be encouraged by all responsible persons. But when the federal government becomes involved to the degree present here, the leadership development opportunities it supports must be available to women as well as men.

Judge Heaney took the same position in his written vote to grant the petition for rehearing en banc in United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983). In that case, a panel of the court found that the Jaycees' First Amendment right to free association protected the organization's gender-based discriminatory practices from Minnesota's anti-discrimination laws. The Supreme Court reversed the Eighth Circuit, agreeing with Judge Heaney that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the [anti-discrimination] statute to the Jaycees may have on the male members' associational freedoms." Roberts, 468 U.S. at 623 (1984).

Firefighters Institute for Racial Equality v. City of St. Louis, Mo, 616 F.2d 350 (8th Cir. 1980)

On the third appeal of a case involving the City's racially disparate promotional practices, Judge Heaney was tasked with considering whether the City's promotional examination was consistent with EEOC guidelines. Turning to the results of the examination, Judge Heaney noted that blacks who passed the exam were far less likely to be promoted than whites who did. Moreover, the multiple choice portion of the written examination did not approximate firefighting, yet excluded a large number of otherwise qualified applicants. For relief, the court ordered the immediate promotion of eight African American firefighters to the rank of captain, with additional vacancies filled at a rate of at least one African American firefighter per two white firefighters until an acceptable test is advanced.

Creighton v. City of St. Paul, 766 F.2d 1269 (8th Cir. 1985), *vacated*, Anderson v. Creighton, 483 U.S. 635 (1987)

Judge Heaney, writing for the panel, reversed the district court's summary dismissal of a suit that sought damages for an unlawful warrantless search. The court held that summary judgment is not available where the lawfulness of a search is at issue, and further opined that summary judgment on immunity grounds was unavailable where the right violated is clearly established. The Supreme Court reversed, holding that summary judgment is available where a reasonable officer could have believed that a warrantless search was lawful.

Mems v. City of St. Paul, 224 F.3d 735 (8th Cir. 2000)

African American firefighters brought suit against their employer, the City of St. Paul, alleging that the City created and maintained a hostile work environment. The district court granted summary judgment in favor of the City, finding that the plaintiffs failed to allege a sufficiently pervasive or severe work atmosphere to qualify for relief. The court of appeals reversed. Judge Heaney, writing for the panel, summarized record evidence which supported the inference that a pervasively racist tone was the order of the day. Although the City put forth alternative explanations for the behavior, Judge Heaney rejected that claim, properly leaving it for a jury determination.

Liddell v. Board of Education of the City of St. Louis

Beginning in 1981, Judge Heaney was assigned to a case challenging the racially-segregated education system in St. Louis, Missouri. For the better part of the next eighteen years, Judge Heaney worked tirelessly on the matter to ensure that the students of St. Louis were afforded every opportunity for an equal education. By the time the case had reached an end by way of a settlement in the district court in 1999, Judge Heaney had authored twenty-seven panel opinions. Certiorari was granted seven times, and each time the circuit court opinion was affirmed. By challenging the parties to pursue innovative desegregation strategies such as intradistrict busing and city-based magnet schools, Judge Heaney was able to ensure that the goal of a quality education was realized by thousands of young citizens of St. Louis. Liddell will stand as a landmark desegregation case due not only to its jurisprudential value, but also because of its real-world impact on St. Louis students and their families. (This case is documented at length in *Unending Struggle: The Long Road to an Equal Education in St. Louis*, coauthored by Judge Heaney and Dr. Susan Uchitelle.)

Judge Heaney has also participated in school desegregation cases involving Little Rock, Arkansas; North Little Rock, Arkansas; Texarkana, Arkansas; Morrilton, Arkansas; Altheimer, Arkansas; Willisville, Arkansas; and Omaha, Nebraska.

CRIMINAL LAW

Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967) (en banc), *rev'd*, Spinelli v. United States, 393 U.S. 410 (1969), *overruled by* Illinois v. Gates, 462 U.S. 213 (1983)

Judge Heaney dissented from the court's holding that a confidential informant's tip provided a sufficient basis for the issuance of a search warrant. He argued that the warrant should not have issued because the affidavit in support of the warrant did not disclose the "underlying circumstances supporting the affiant's conclusions," nor did the affidavit set forth a basis upon which the magistrate judge could form an independent opinion of the informant's reliability. The Supreme Court reversed, agreeing with Judge Heaney's analysis.

United States v. Mendoza-Lopez, 781 F.2d 111 (8th Cir. 1985), *aff'd*, 481 U.S. 828 (1987)

The Eighth Circuit affirmed the district court's dismissal of indictments against aliens who reentered the country after being deported. The original deportation hearing did not insure that the aliens understood their rights to judicial review. The charge in the indictments required a prior valid deportation. Judge Heaney ruled that the aliens could collaterally challenge the original deportation as a material element of the subsequent criminal charge. The Supreme Court affirmed, noting that although Congress did not intend such collateral challenges, due process required that they be allowed.

United States v. Jacobson, 916 F.2d 467 (8th Cir. 1990)

Judge Heaney wrote the original opinion setting aside the child pornography conviction of Keith Jacobson, and dissented from the en banc decision reinstating the conviction. In dissent, Judge Heaney said that the Postal Service had no reasonable suspicion that Jacobson was predisposed to buy child pornography, yet instituted five separate undercover string operations over two and a half years; Jacobson purchased obscene material only after the 12th solicitation. According to Judge Heaney, the Postal Service's actions constituted outrageous government conduct that violated Jacobson's due process rights. The Supreme Court reversed, agreeing that the government did not prove Jacobson's predisposition to criminal activity absent the government's own conduct. 503 U.S. 540 (1992).

Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003) (en banc)

Judge Heaney dissented from the court's holding permitting the forced medication of an incompetent inmate where the result would be the inmate's execution. "I believe that to execute a man who is severely deranged without treatment, and arguably incompetent when treated," Judge Heaney stated, "is the pinnacle of what Justice Marshall called 'the barbarity of exacting mindless vengeance.'" This decision garnered national attention, including a front-page article in the *New York Times* and an interview with the BBC, and presumably increased awareness of the plight of mentally ill death row inmates.

FIRST AMENDMENT & CIVIL LIBERTIES

In re Weitzman, 426 F.2d 439 (8th Cir. 1970)

In a separate opinion, Judge Heaney explained his view that the Constitution did not permit Congress to treat differently those aliens who object to bearing arms on religious grounds from those who object for other reasons. Concluding that such distinctions could not bear scrutiny, Judge Heaney voted to reverse the district court's ruling that a person could be denied citizenship based on her refusal to take an oath that she would bear arms on behalf of the United States, where that refusal was based on a sincere opposition to all killing of human beings under any circumstances.

Pickings v. Bruce, 430 F.2d 595 (8th Cir. 1970)

Plaintiffs were members of a student group at Southern State College in Magnolia, Arkansas, that promoted the concept of racial equality. The group wrote a letter to an all-white church requesting an explanation for the church's policy and its basis for excluding a small group of African American students who sought to worship. In response, the college suspended the organization and forced some of its members to resign from the organization. Later, the organization invited speakers to the college that administrators believed were controversial. The college suspended the organization, and the organization brought suit challenging the suspension. The district court found no constitutional violation. Judge Heaney reversed, holding that the plaintiffs' First Amendment rights to free expression and association were violated by the college's sanctions.

Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971)

Two organizations, Action and the Black Liberation Front, staged a series of demonstrations outside and inside predominantly white churches. The churches brought suit, seeking to enjoin the organizations from further disruptive protests. The district court granted the injunction, and the organizations appealed. Judge Heaney upheld, with some revisions, the injunction, reasoning that the defendants' right to express their views must be balanced against the plaintiffs' right to engage in peaceful religious services:

The defendants have a right to voice their opinion that the plaintiffs have not fulfilled their obligation to the black community. The defendants also have a right to make requests upon the plaintiffs if

such requests are not joined with threats to disrupt church services and are not otherwise unlawful. The fact that the requests or opinions may be offensive to the parishioners does not render them outside the protection of the First Amendment.

....

The defendants also have a right to engage in peaceful pamphleteering and picketing on public property, so long as they do not “unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it,” provided, of course, that they do not interfere with those entering or leaving the church.

The defendants, however, do not have a right to enter the cathedral and disrupt the church services of the plaintiffs. Such disruption is an intolerable violation of the rights of those engaged in worship.

Pratt v. Independent School District No. 831, 670 F.2d 771 (8th Cir. 1982)

A school district removed “The Lottery,” a film adaptation of a story about a small town who would randomly select a resident to be stoned to death each year, from the high school curriculum. Judge Heaney concluded that the removal was based on the ideas expressed in the film, and thus could not survive First Amendment scrutiny absent a “substantial and reasonable governmental interest.” The evidence showed that the film was removed from the curriculum because some district members simply found it unpleasant. Judge Heaney recognized the competing interests in holding that the film could not be removed for this reason:

“The Lottery” is not a comforting film. But there is more at issue here than the sensibilities of those viewing the films. What is at stake is the right to receive information and to be exposed to controversial ideas—a fundamental First Amendment right. If these films can be banned by those opposed to their ideological theme, then a precedent is set for the removal of any such work.

In sum, while we are mindful that our role in reviewing the decisions of local school authorities is limited, we also have an

obligation to uphold the Constitution to protect the fundamental rights of all citizens.

Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *aff'd*, Widmar v. Vincent, 454 U.S. 263 (1981)

Judge Heaney wrote the panel opinion holding that the First Amendment did not allow the University of Missouri-Kansas City to prohibit the use of University facilities by religious groups for worship or teaching while allowing secular student groups to meet on campus. The court held that the University had created an open forum and could not deny a recognized student group access based on the content of their speech, nor would allowing the students to meet on campus violate the prohibition on the establishment of religion. The Supreme Court affirmed.

Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), *rev'd*, Marsh v. Chambers, 463 U.S. 783 (1983)

The Eighth Circuit partly affirmed and partly reversed the district court, holding that the Nebraska legislature's practice of selecting and, with taxpayer's money, paying a minister to open each legislative session with a prayer was violative of the establishment clause and therefore unconstitutional. The Supreme Court reversed on the ground that Congress, like Nebraska and many other states, had long opened sessions with prayers, and that such a historical pattern indicated that the drafters of the Constitution did not mean to foreclose such prayers.

Kuhlmeier v. Hazelwood School District, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

The Eighth Circuit reversed the district court, and held that a high school newspaper was a "public forum" for purposes of First Amendment protection against censorship. Judge Heaney stated that the paper "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution." The Supreme Court reversed, holding that the newspaper was not a forum for public expression but part of a journalism class. The school, being the publisher, had exercised permissible editorial functions. The Court furthermore observed that the rights of students are not always equal to those of adults.

SOCIAL SECURITY

Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984)

In a class action suit brought challenging the standards used by the Secretary of Health and Human Services to evaluate subjective complaints of disability claimants, the court was faced with the issue of how to confront a series of cases that appeared to deviate from Eighth Circuit precedent on the issue. At oral argument, the court informed both parties that it would defer any immediate action so that the parties could confer about what standard they believed was appropriate for evaluating a claimant's complaints of pain and other subjective matters. As a result, the parties reached agreement on a detailed methodology that the adjudicator should consider in deciding whether to credit those subjective complaints. That methodology required the adjudicator give specific attention to a number of enumerated matters in making its determination. That analysis, now commonly known as consideration of the Polaski factors, has remained the accepted basis for determining whether to credit subjective complaints for over twenty years.

LIST OF LETTERS OF SUPPORT

(Originals on file with American Judicature Society as part of 2004 submission, except where otherwise noted)

THE EIGHTH CIRCUIT

The Honorable James B. Loken, Chief Judge (Letter of Support attached)

The Honorable Roger L. Wollman

The Honorable Diana E. Murphy (Updated Letter of Support attached)

The Honorable Theodore McMillian

The Honorable Donald P. Lay

The Honorable John R. Gibson

The Honorable Pasco M. Bowman II

The Honorable C. Arlen Beam

Robin J. Weinberger, Chief Deputy Clerk

UNITED STATES DISTRICT COURT

The Honorable John R. Tunheim

The Honorable Donald E. O'Brien

The Honorable Howard F. Sachs

The Honorable Scott O. Wright

The Honorable Henry L. Jones, Jr.

OTHER DISTINGUISHED SUPPORTERS

The Honorable Walter F. Mondale
The Honorable James L. Obserstar
The Honorable Warren Spannaus
The Honorable John J. Sommerville
Dr. Susan Uchitelle
Mayor Herb W. Bergson
Councilman Donny Ness
Provost E. Thomas Sullivan
Vice Chancellor Gregory R. Fox
Chancellor Kathryn A. Martin
Professor John-Mark Stensvaag
Professor Laura S. Underkuffler
Professor Carl A. Auerbach
Professor Ann L. Iijima
Beth M. Andrus
Ben W. Blanton
Patrick C. Diamond
Joseph T. Dixon, Jr.
Christie B. Eller
Arvonne S. Fraser
Jane C. Freeman
Beverly Betten Goldfine
Cheryl Heilman
Robert J. Hennessey
E. Richard Larson
Kenneth L. Lund
Douglas A. Micko
James Duffy O'Connor
Jeno F. Paulucci
Robert J. Sheran
Robert A. Stein
Andrew Toftley