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The Honorable Theodore McMillian *Leading the Way*

Memorial Session, April 17, 2006

First African American:

Missouri Circuit Judge, St. Louis City, 22nd Judicial District, 1956 - 1972

Missouri Court of Appeals Judge, Eastern District, 1972 - 1978

U.S. Court of Appeals for the Eighth Circuit Judge, 1978 - 2006

Theodore McMillian was a remarkable man. He did not choose an easy path. In fact, no one had gone before him. Throughout his life, he was the first to break down long-standing racial barriers, rising to sit on the second highest court in the land. And as he led the way, he continually helped others to follow.

Early Years



McMillian as a child with sister

Theodore McMillian was born on January 28, 1919, in St. Louis, Missouri, at 901 South 14th Street. He was the great-grandson of a slave and grew up in an impoverished area of the City of St. Louis as the oldest of ten children. He was raised by his mother, stepfather, and grandmother, all of

whom worked to support the family. He was inspired by his hardworking grandmother who placed breakfast on the coal stove warmer for everyone before heading off to work before sunrise. She encouraged him to work hard and get an education, and this work ethic was his inheritance. He proved to be an excellent student at Vashon High School, where he served as class president and was a member of the National Honor Society. After only three and a half years, he graduated first in his class.

Following high school, he attended Stowe Teachers College and then Lincoln University in Jefferson City, the only accredited public four-year institution open to African Americans in Missouri at that time. At Lincoln University, he worked in the college kitchen to help pay his way during the first year. As a sophomore, the school gave him a job teaching classes in mathematics as well as a physics lab. He graduated in 1941 with degrees in mathematics and physics.

On December 8, 1941, he married Minnie Foster, and in 1942 was drafted to serve in World War II with the United States Army. He was first assigned to the U.S. Army Signal Corps 93rd/92nd Division, an African American division specializing in communications. He attended Officers' Training School and returned to the 93rd Division because there were few places for

African American Signal Corps officers. He was then transferred to the famous "Buffalo Soldiers" Division from the 9th Cavalry of Fort Riley, Kansas and then to the 696th Ordnance Ammunition Company which was being sent overseas. He landed in northern France, and among other duties, directed traffic at the Remagen Bridge across the Rhine River. He was then sent to the Arles staging area and was preparing to go to the Pacific when the war ended.

During his Army service, McMillian achieved the rank of First Lieutenant. As one of the few African American officers, he was barred from the white officers' club, mess, swimming area, and theater seats. Later, as a practicing attorney, he would win a case making segregated swimming pools illegal in Webster Groves.

After his discharge in 1946, he became one of the first African Americans to attend law school at Saint Louis University and was the second to graduate. He had dreamed of studying medicine, but racial quotas at medical schools would have forced him to wait five years to begin. Although law was not his first choice and he had to work as a janitor before and after classes to support his wife and son, he excelled as a law student. He served as the first associate editor, along with Charles Dougherty, of the School's first law



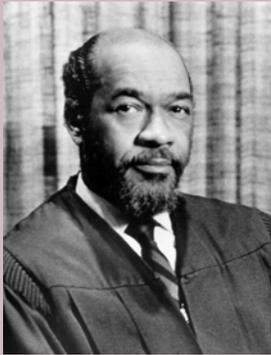
McMillian's 1949 yearbook photo

review, the *Intramural Law Review* (later *Saint Louis University Law Journal*), graduated first in his class in 1949, and was the first African American to be inducted into Saint Louis University's Chapter of Alpha Sigma Nu, a Jesuit national honor society.

Early Career and State Judiciary

Despite his success as a law student, racial discrimination made it difficult for McMillian to find a position with any of the law firms in St. Louis. Determined to practice law, he and Alphonse Lynch, the first African American to graduate from Saint Louis University's law school, established the firm of Lynch & McMillian. Their firm was located just outside downtown St. Louis, since African Americans were unable to rent office space downtown. Unable to support his family on the meager earnings of his legal practice, he taught adult education classes and managed the old Aubert Theatre at night.

In 1953, Edward L. Dowd hired McMillian as Assistant Circuit Attorney for the City of St. Louis. He made a name for himself as a diligent prosecutor with a high conviction



rate, but at the same time he maintained a healthy respect for the civil rights of defendants.

His hard work and ethical standards served him well, winning him an appointment to the St. Louis City Circuit Court, 22nd Judicial District, in

1956. He was the first African American judge to serve on a circuit court in Missouri. As a state circuit judge, he focused on violent crime and became an advocate for reform in the juvenile courts.

As a member of the Berkeley Associates—a group of judges, corrections officers, police and civilians—he actually infiltrated the penal system to see what it was like on the inside. He was given a false criminal record, photographed, and allowed to co-exist with prisoners. This experience and his years on the St. Louis Circuit Court's juvenile bench, an assignment most perceive as undesirable and which he sought out, left an indelible

impression on him. He wished that hard line jurists could actually see the penal institutions to which they were sending people before handing down sentences. And he realized that juvenile court is extremely important because if young offenders can be helped at that level, perhaps future crimes could be deterred. Never failing to take action, Judge McMillian fought for reform in the juvenile court system and initiated civic programs designed to help address these problems.

In 1972, under the Missouri Non-Partisan Court Plan, Judge McMillian was appointed to the Missouri Court of Appeals for the Eastern District by Governor Warren E. Hearnes. He was the first African American appointed to Missouri's appellate bench and served from 1972 to 1978. He continued to build a reputation for diligence and fairness, and he became an even stronger advocate of civil rights. He frequently criticized the U.S. Supreme Court's high standard for proving the exclusion of jurors based on race, most notably in *State v. Davis*, 529 S.W. 2d 10 (Mo. Ct. App. 1975). He also took a stand against mandatory minimum sentences, arguing that they were an unconstitutional usurpation of the court's power to grant probation. *State v. Motley*, 546 S.W. 2d 435 (Mo. Ct. App. 1977) (McMillian, J. dissenting).

During his years with the Missouri state courts, Judge McMillian served as a faculty member, associate professor or lecturer at the following colleges and universities: Saint Louis University Law School (1957 to 1972); the University of Missouri at St. Louis (1968 to 1978); Webster College (1977 to 1983); the National College of Juvenile Justice at the University of Nevada (1972 to 1978); and the National College of State Trial Judges at the University of Nevada at Reno (1964 to 1977).

Federal Judiciary



In 1978, Judge McMillian was appointed to the U.S. Court of Appeals for the Eighth Circuit by President Jimmy Carter. He was the first African American appointed to the federal bench in the seven states of the Eighth Circuit. During his 27 years of service, he wrote over 1200 opinions, including important decisions on desegregation, free speech, civil rights, employment discrimination, and affirmative action, some of which paved the way for landmark Supreme Court rulings.

Judge McMillian was a member of the Lawyers Association of the City of St. Louis, Mound City Bar Association, Missouri Bar Association, and National Bar Association. He served as a member of the Judicial Conference Subcommittee on Federal/State Relations from 1982 to 1987, and a member of the Committee on Space and Facilities from 1987 to 1990. He had the third longest active service as a court of appeals judge in the nation when he took senior status on July 1, 2003.

During his time as a federal circuit judge he continued to impress his colleagues and the legal community with his intelligence, intellect, objectivity, diligence, compassion, and dignity. His commitment to the law was equaled only by his commitment to the people it affected.

Notable Opinions

Jury Selection In *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983), Judge McMillian, writing for the majority, argued that the burden of proof for showing juror exclusion based on race was far too high. As in his dissenting opinions for the Missouri Court of Appeals, he acknowledged precedent

that had concluded the standard was reasonable, but he argued that reality indicated otherwise. Citing flaws in the case precedent along with detailed research showing that the standard had been met on only two occasions between 1965 and 1983, Judge McMillian made a strong case for change. Three years later, the U.S. Supreme Court ruled that such exclusions were a violation of the Fourteenth Amendment and used the research presented in *Childress* to illustrate the insurmountable burden on defendants.

Sexual Harassment In a case of first impression for the Eighth Circuit concerning sexual harassment, Judge McMillian ruled that Title VII allows a cause of action for sexually hostile environment harassment. He reasoned that to deny this cause of action would allow employers to create a work environment characterized by offensive or intimidating behavior with impunity, as long as no formal action was taken against the victim for her resistance. *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986). His ruling was supported by a similar ruling handed down by the U.S. Supreme Court later that year. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Religion and Education In *Mergens v. Board of Education*, Judge McMillian ruled that a Nebraska public school district violated the Equal Access Act of 1984 when it would not allow a Bible study group to become part of the school's official student activity program due to the group's religious focus. The Act prohibits any public high school that receives federal funds and allows non-curriculum-related student groups to meet on campus from discriminating against any student group based on the content of speech at their group meetings. He ruled that the intent behind the Act was to prevent discrimination against free speech, and that if a school allows one non-curriculum student group to use school facilities, then it must provide the same access to other student groups. 867 F.2d 1076 (8th Cir. 1989).

Community Service and Awards

As a jurist, Judge McMillian strove to improve the lives of others through his opinions. As an individual, he did this through community service and mentoring.

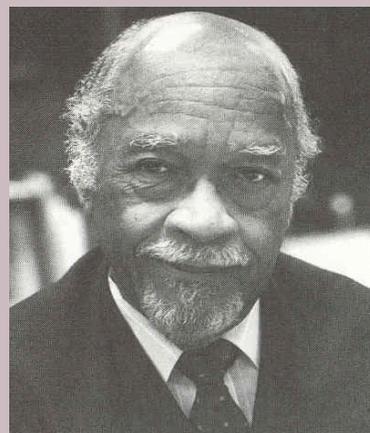
While a judge for the state of Missouri, Judge McMillian initiated a number of local and national programs designed to combat delinquency and poverty. In the late 1960s, he founded the Herbert Hoover Boys & Girls Club of St. Louis and served as its president. He served as the first board chair from 1965 to 1977 for the Human Development Corporation (HDC), an anti-poverty agency, and was on the first National Advisory Committee to the Office of Economic Opportunity's Legal Services Program, which later became the Legal Services Corporation (LSC). Both HDC and LSC have funded Legal Services of Eastern Missouri which provides free legal aid to impoverished persons. In addition, he served for a decade as president of the St. Louis Urban League and served on the board of St. Louis Catholic Charities, as well as many other civic boards.

A man of firsts in his own career, Judge McMillian also helped create beginnings for others by mentoring many budding attorneys. For over 27 years he has served as supervising judge for judicial clerkship interns with Washington University Law School and Saint Louis University Law School. In 1999, in honor of his 80th birthday, Judge McMillian endowed the Theodore McMillian Scholarship Fund for Minority Students at Saint Louis University Law School. The fund now also supports internships at Legal Services of Eastern Missouri.

Judge McMillian's contributions to both the civic and legal communities earned him numerous honors and awards. Among these are the American Judicature Society's Herbert Harley Award and Distinguished Service Award, the St. Louis Chapter of the American Civil Liberties Union's Civil Liberties Award, the St. Louis Lawyers Association, Jurist

Division's Award of Honor, the Bar Association of Metropolitan St. Louis' Foundation Award and Distinguished Lawyer Award. He was an Honorary Diplomat of the American Board of Trial Advocates, and was inducted into Saint Louis University's Order of Thomas More and the National Bar Association Hall of Fame. In 2003, he received the Spirit of Excellence Award from the American Bar Association's Commission on Racial and Ethnic Diversity in the Profession. This award is given to attorneys who are trail blazers, role models, or mentors—those who have overcome enormous obstacles to assist in the advancement of lawyers from diverse backgrounds.

Judge McMillian died on January 18, 2006, leaving behind a legacy as a man of firsts, as an advocate of civil rights, and as a wise mentor and supporter for the many individuals who needed a helping hand. Though he led an historic path of firsts, Theodore McMillian wanted to be remembered for helping those who followed behind. And despite the recognition he received for his accomplishments and humanity, he was also known for his abiding sense of modesty. A sign in his office bore his credo: "It is much more important to be human than to be important."



The Honorable Theodore McMillian

Firsts

- First in class, Vashon High School, 1936
- First African American named to Saint Louis University's Chapter of Alpha Sigma Nu, a Jesuit national honor society, 1949
- First associate editor of Saint Louis University's first law review, *Intramural Law Review*, 1949
- First in class, Saint Louis University School of Law, 1949
- First African American to serve on Missouri's state circuit court, by appointment to St. Louis City Circuit Court, 22nd Judicial District, 1956
- First African American to serve on Missouri's state appellate court, by appointment to the Missouri Court of Appeals, Eastern District, 1972
- First African American to serve on the federal bench in the seven states of the Eighth Circuit, by appointment to the U.S. Court of Appeals for the Eighth Circuit, 1978

Community Service

Founder/Charter Member

Herbert Hoover Boys and Girls' Clubs, founder and past president

Human Development Corporation of Metropolitan St. Louis, first board chair

Office of Economic Opportunity's Legal Services Program, member of first National Advisory Committee

Theodore McMillian Scholarship Fund for Minority Students, Saint Louis University School of Law

Boards and Committees

National Council of Juvenile Court Judges (president)

American Judicature Society

John Jay Steering Committee of the Academy of Criminal Justice Sciences

Missouri Council of Law Enforcement Administration

National Advisory Board of Law Enforcement Administration

National Council on Crime and Delinquency

Missouri Social Welfare Association

Urban League of Metropolitan St. Louis (president)

St. Louis Minority Economic Development Agency (chair)

President's Council of Saint Louis University

Board of Trustees of Blue Cross and Blue Shield

Advisory Council of the Danforth Foundation

Board of Directors of Tower Village (president)

Board of Catholic Charities of the City of St. Louis

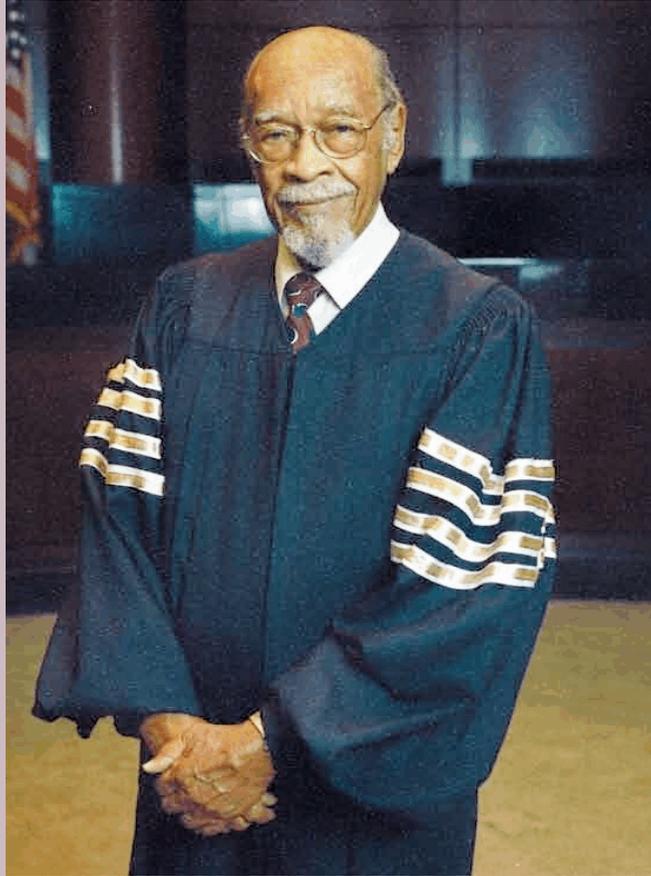
Executive Committee of the St. Louis Crime Commission

"Challenge of the Seventies" Social Division for the City of St. Louis (subdivision chair)

The Honorable Theodore McMillian

Special Awards and Honors

Resolution of Recognition, Missouri House of Representatives, 2005, 1999
Distinguished Service Award, American Judicature Society, 2003
Spirit of Excellence Award, American Bar Association, Commission on Racial and Ethnic Diversity
in the Profession, 2003
Resolution of Recognition, City of St. Louis Board of Aldermen, 2003, 1996, 1991
Honorary Doctor of Laws, Washington University School of Law, 2003
Special Recognition Award, Human Development Corporation, 2001, 1977, 1974
Distinguished Non-Alumnus Award, University of Missouri–Columbia School of Law, 1999
Order of Thomas More, Saint Louis University School of Law, 1999
Proclamation by St. Louis City Mayor, "Judge Theodore McMillian Day," March 27, 1999
Birthday congratulatory letters from Vice President Al Gore and U.S. House of Representative
William L. Clay, 1999
Recognition Award, Webster Groves Dr. Martin Luther King, Jr. Committee, 1997
Honorary Diplomate Award, American Board of Trial Advocates, 1996
Distinguished Lawyer Award, Bar Association of Metropolitan St. Louis, 1996
Civil Liberties Award, American Civil Liberties Union, St. Louis Chapter, 1995
Good Guys Award, St. Louis Women's Political Caucus, 1995
Recognition Award, St. Louis Lawyers Association, 1993
Foundation Award, Bar Association of Metropolitan St. Louis, 1992
Inductee, National Bar Association Hall of Fame, 1992
Honorary Doctor of Laws, Saint Louis University School of Law, 1992
Robert Walston Chubb Award, Legal Services of Eastern Missouri, 1989
Herbert Harley Award, American Judicature Society, 1988
Democracy in Action Award, American Jewish Congress, St. Louis Chapter, 1988
Salute to Excellence Award, St. Louis American Newspaper, 1988
Community Service Award, Saint Louis University, Black Law Student Association, 1986
Distinguished Alumnus Award, Harris-Stowe State College, 1985
Honorary Doctor of Humanities, Lincoln University, 1981
Honorary Doctor of Humanities, University of Missouri, 1978
Resolution of Recognition, Missouri Senate, 1977
Honorary Phi Beta Kappa, Saint Louis University School of Law, 1974
Certificate of Appreciation, Missouri Governor Warren E. Hearnes, 1972
Award of Honor, St. Louis Lawyers Association, Jurist Division, 1970
Alumni Merit Award, Saint Louis University School of Law, 1965
Alpha Sigma Nu, Jesuit national honor society, member since 1949
(and many more)



For more information on Judge McMillian:

A Tribute to the Honorable Theodore McMillian, 43 SAINT LOUIS UNIVERSITY LAW JOURNAL 1257 (1999).

Tribute to Judge Theodore McMillian, 52 WASHINGTON UNIVERSITY JOURNAL OF URBAN AND CONTEMPORARY LAW 1 (1997).

Stephanie Ellis, *The Importance of Being Human: The Honorable Theodore McMillian*, '49, SAINT LOUIS BRIEF, Spring 2003, at 10.

William J. Shaw, *Why Judge McMillian Worries*, ST. LOUIS POST-DISPATCH MAGAZINE, Aug. 11, 1991, at 8.

Terry Winkelmann, *Court Appeal*, ST. LOUIS TIMES, Feb. 1996, at 14.



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