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In Memoriam: Robert R. Merhige, Jr.

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IN MEMORIAM
ROBERT R. MERHIGE, JR.

TO PRESERVE, PROTECT, AND DEFEND THE CONSTITUTION OF THE UNITED STATES

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It is difficult to write about Judge Merhige in an academic journal. His greatness lay not in formulating abstract legal doctrine, but in applying the law to real life situations. When I began researching his biography in 1986,[1] the most pleasant part of the process was personal interviews with the Judge spanning two and a half years and filling some fifty audio tapes.[2] Unfortunately, I was never able to capture his humanity in print and may have done him a disservice by writing his biography the way a law professor does—focusing on the intellectual aspects of his famous cases, rather than on the man himself. I will not repeat that mistake here. Although I have provided the context and back-

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1. *See* RONALD J. BACIGAL, MAY IT PLEASE THE COURT: A BIOGRAPHY OF JUDGE ROBERT R. MERHIGE, JR. (1992). The book is out of print, but a number of chapters have appeared in legal journals. *See* Ronald J. Bacigal & Margaret I. Bacigal, *A Case Study of the Federal Judiciary's Role in Court-Ordered Busing: The Professional and Personal Experiences of U.S. District Judge Robert R. Merhige, Jr.*, 3 J.L. & POL. 693 (1987); Ronald J. Bacigal, *An Empirical Case Study of Informal Alternative Dispute Resolution*, 4 OHIO ST. J. ON DISP. RESOL. 1 (1988); Ronald J. Bacigal, *Annals of the Prisoners' Rights Movement: The Contributions of Judge Merhige*, 24 CRIM. L. BULL. 521 (1988); Ronald J. Bacigal & Margaret I. Bacigal, *Criminal Prosecutions in Environmental Law: A Study of the "Kepone" Case*, 12 COLUM. J. ENVTL. L. 291 (1987); Ronald J. Bacigal, *Judicial Reflections Upon the 1973 Uprising at Wounded Knee*, 2 J. CONTEMP. LEGAL ISSUES 1 (1988); Ronald J. Bacigal, *The Theory and Practice of Defending Judges Against Unjust Criticism*, 23 CONN. L. REV. 99 (1990); Ronald J. Bacigal & Margaret Ivey Bacigal, *When Racists and Radicals Meet*, 38 EMORY L.J. 1145 (1989).

2. The author is presently editing those tapes, which will be available as part of the Robert R. Merhige, Jr. collection of papers at the University of Richmond Law Library.

ground for the Judge's comments, this time I will let his words speak for themselves.[3]

The academic view of Judge Merhige was best summarized by a prominent constitutional scholar who labeled Judge Merhige "a problem-solver and an activist" akin to the late Supreme Court Justice William O. Douglas—"[b]oth men seem to have a distinct awareness of the way judges could use power and equity to the benefit of society."[4] Critics who saw less "benefit" to society accused Judge Merhige of utilizing judicial power to impose his personal views of equity and justice upon the citizenry. Judge Merhige discounted such charges while explaining:

> I didn't go looking for social causes to advocate from the bench. I opened my courtroom one day and asked, "Is anybody here?" A lot of people answered back, "We're here judge, and we want our constitutional rights." So I did the only thing I could. I listened and tried to do the fair thing, the right thing.[5]

Whether a judge is free to do "the right thing" or must follow "the letter of the law" is an important aspect of the historic struggle for a working compromise between two competing ideals: judicial discretion (the trained intuition of the judge) on the one hand, and the letter of the law (superior to and binding upon the judge) on the other. At the Supreme Court level, from Chief Justice John Marshall to the ill-fated nomination of Robert Bork, the proper exercise of judicial power has been the subject of a long-standing and well-publicized dispute. In contrast to Supreme Court Justices, trial judges like Judge Merhige normally plied their own form of activism or restraint in virtual obscurity. Such obscurity results from a tendency to identify the federal judiciary with the justices of the highest tribunal while dismissing the district (trial) judges as third-string players whose errors can always be reversed by the appellate courts. This perception overlooks the fact that:

> United States district judges do damnably important business in our nation. Their decisions affect how we make and spend our money, where our children attend school, our neighborhood living patterns, the quality of the environment around us, how the big national corporations conduct their affairs, [and] how our society punishes its violent and its white-collar criminals.[6]

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3. Unless otherwise noted, all quotations are from Judge Merhige.

4. Stephen Labaton, *A Case to Cap a Controversial Career*, N.Y. TIMES, July 3, 1988, at F4.

5. Judge Merhige would often add that "to do justice, one must ensure fairness."

6. J. GOULDEN, THE BENCH WARMERS 2–3 (1974).

Judge Merhige did his "damnably important business" in landmark cases such as the Dalkon Shield / A.H. Robins Bankruptcy proceeding, the Richmond school integration decision, which split the Supreme Court in a four-to-four vote, the Westinghouse Uranium case involving $2 billion in damages, and the Kepone pollution case in which Judge Merhige imposed the largest recorded criminal fine under the federal anti-pollution laws. He also was involved in civil rights litigation surrounding the impeachment of former President Nixon, the fatal confrontation between the Ku Klux Klan, Nazis, and Communists in Greensboro, North Carolina, the Indian uprising at Wounded Knee, South Dakota, the Black Power and Vietnam War protests of the 1970s, and numerous other important cases. No other trial judge, state or federal, served at the center of so many controversial cases that cut to the heart of many of the weightiest issues facing the nation in the final decades of the twentieth century.

Judge Merhige left his imprint on all those landmark cases, but his efforts to reconcile doing "the right thing" with following "the letter of the law" was most apparent in the school integration cases of the 1960s and 70s. Cognizant of the fact that the American system of justice requires federal judges to accord proper deference to the decisions of state officials, Judge Merhige observed:

> If I ever lose sight of that point, all I have to do is glance out of my office window and contemplate the intriguing physical arrangement of government buildings in Richmond. The Virginia General Assembly, the State Supreme Court, and the Governor's Mansion are situated on the crest of a hill in downtown Richmond. There is a beautiful lawn with a quiet pastoral atmosphere running down to the *bottom* of the hill, where the federal courthouse sits. It makes one wonder if that physical arrangement was designed to encourage modesty on the part of the federal judiciary. Many a time when I am forced into a confrontation with state government, I can glance up the hill at the State Capitol and think, so near, and yet so far.[7]

At the same time, Judge Merhige never backed away from what he said from the bench when he ordered the consolidation of Richmond area school districts:

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7. Judge Merhige's judicial chambers had once been part of the presidential suite of the Confederacy's Jefferson Davis. Davis was arraigned for treason in what became Judge Merhige's courtroom.

> I'm ashamed and embarrassed that we let these things develop. Who said this stupid thing about human beings riding in the back of the bus? Who said this stupid thing about not letting people live where they choose? Integration is not only the law, it's the right thing to do. And I feel good about doing the right thing.

The Courtroom Tyrant

In addition to being labeled a social activist, Judge Merhige was praised and damned for his activist bent in the courtroom. Joseph Spivey, III, lead counsel for the Virginia Electric and Power Company in the Westinghouse trial, felt that:

> Judge Merhige enjoys the difficult cases because they are intellectually stimulating and a real challenge to him. Plus, he handles the heat well. The hotter it is, the more Merhige likes it. The judge can handle the press and high-powered lawyers because once he gets them in that courtroom, he is in charge. And Merhige knows that they've all got to come to his courtroom at some point.[8]

Lewis Pitts, one of lead counsel in the Ku Klux Klan case, agreed that:

> Merhige will use his personality and friendship to move you where he wants to have you. I think that's why he is put in these controversial cases. When they figure there will be a bunch of rowdy and radical lawyers, they want an ironman like Merhige in the courtroom. He'll throw them in jail if necessary to move the case along.[9]

In that very same Ku Klux Klan case,[10] however, Judge Merhige demonstrated that his most intimidating postures were reserved for the trial lawyers. When the Judge convened the first hearing in the trial, a Klansman arose to complain that he could not hear anything that was being said in the courtroom. "Why don't you come on up and sit by me," offered Judge Merhige, putting the man in the jury box next to him. According to the Judge's clerk, Anne Holton, the incident typified the Judge's handling of volatile and politically outspoken litigants. She explained that:

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8. Interview with Joseph M. Spivey, III, in Richmond, Virginia (Aug. 12, 1986).

9. Interview with Lewis Pitts, in Greensboro, North Carolina (Sept. 1986).

10. Faced with adjudicating a dispute between Klansmen, Nazis, and Communists, the Judge quipped: "the only thing I'm afraid of is that somebody might come out of the case saying they like me."

> In contrast to his "ironman" treatment of lawyers, Judge Merhige has a real good way with nonlawyers. He makes them feel so at ease. He listens to them, lets them know they've been listened to, just makes them feel comfortable and better about having their day in court. It's a characteristic that makes the court system work better.[11]

While Judge Merhige sometimes bullied the lawyers, he was seen as a "master at having the jury eating out of his hand." According to Lewis Pitts, counsel in the Ku Klux Klan case:

> The power of a federal judge to control a jury is a very dangerous thing. In our case, Merhige courted the jury and had them idolizing him. He's a very charming person. He sends implicit messages to the jury when he tells a lawyer in open court, "you don't have evidence here of a conspiracy, move on to something else."[12]

Pitts conceded, however, that Judge Merhige also assisted the attorneys by setting the tone in getting the jury to pay attention during lengthy trials.[13] "If the jury's attention was waning," Pitts explained, "Merhige would give them a drum roll by announcing: 'Now this is important evidence.'"[14]

The "Settlement Judge"

Outside the courtroom, Judge Merhige pioneered judicial use of Alternative Dispute Resolution, a legal euphemism for settling cases without trial, with or without arm twisting. To Judge Merhige, Alternative Dispute Resolution simply meant that "if you lock two businessmen in a room and tell them they must come to some agreement; they can do it and do it better than the courts can." The Judge put this theory to the test in a complex financial case involving millions of dollars in damages and a trial projected to last six to eight weeks. On the Sunday night before trial was to begin, Judge Merhige brought the parties to his home and sat them down in his sun room. The Judge pointed out the expense of trial and the fact that the disputed issue involved a business decision that could be better made by corporate executives, rather than by a jury who knew nothing about the business. Then Judge

11. Interview with Anne Holton, in Richmond, Virginia (Oct. 3, 1986).
12. Interview with Lewis Pitts, *supra* note 9.
13. *Id.*
14. *Id.*

Merhige left the room and closed the door. In forty-five minutes the parties emerged and informed the Judge: "We tried, but it's just impossible." Judge Merhige responded, "For you to tell me it's impossible really frightens me because I didn't think anything was impossible for American businessmen. I didn't think people got to be executive vice presidents by having 'impossible' in their vocabulary." The executives shrugged, "I guess that's not the right word. It's not impossible." "Well, then," suggested Judge Merhige, "why don't you try again?" The two men were escorted back to the sun room a second time. Fifteen minutes later they had reached a settlement.

Faced with suggestions that his settlement efforts amounted to coercion, Judge Merhige insisted: "Judges can't force settlement because good lawyers can't be forced to do anything." At least to his own satisfaction, Judge Merhige distinguished between helping the parties settle a case, and moving in and taking the case away from the lawyers. He felt that criticism of his settlement efforts came from attorneys who didn't like the Judge's approach of bypassing the lawyers and involving the parties themselves in direct negotiations. Such critics fail to realize that the Judge became frustrated with "lawyer talk" when the ultimate power of decision rested with corporate chief executives who remained remote from the litigation. Judge Merhige insisted that, "when a court addresses the threatened survival of one of the world's corporate giants, the leaders of industry must get together and work out their problems so that the potential loss is held to a minimum." According to Judge Merhige, "I just try to get both parties to recognize what strong arguments the other side has. Even a pancake has two sides."

The "Rocket Docket"

The speed and efficiency of the Eastern District of Virginia earned it the title of the Rocket Docket. Judge Merhige more than pulled his weight, as disclosed by a statistical study compiled on his twentieth anniversary on the bench. The Judge had presided over 11,619 cases in his home district, 323 cases sitting in other locales, and in the last ten years had sat on ninety cases with various courts of appeals. Such statistics were not surprising in light of the fact that he had never missed a day in chambers when he was physically capable of being there. Aside from a debilitat-

ing back injury, Judge Merhige boasted that, "in nineteen years, I don't think I missed a day being in this office sometime. Saturday, Sunday, Christmas, New Year's, you name it."

Judge Merhige expected the same dedication from all lawyers who appeared before him, and had a standing rule that counsel must always be prepared to keep the proceedings moving rapidly. When Matt Ott, Judge Merhige's first law clerk, appeared some years later as counsel in a criminal case, he tried to get around that rule. Matt had not had time to prepare a defense witness, so he asked the Judge to declare an early lunch recess. "Call your next witness," Judge Merhige scowled. Matt called John Smith to the witness stand and began to stall: "Good Morning, Mr. Smith, my name is Matthew Ott, the defense counsel in this case. This is my client, Mr. Tom Jones, whom you know. Over here is the prosecutor, Mr. John Doe from the U.S. Justice Department." An angry Judge Merhige interrupted: "Yoo hoo, Mr. Smith. I'm Bob Merhige and I'm the judge. This is Gil Halasz, he's the court reporter. This is the jury over here. Jury, this is Mr. Smith." The courtroom erupted in laughter as Judge Merhige turned to his embarrassed former clerk. "Mr. Ott, now that Mr. Smith knows everybody, can you ask him a relevant question?" Matt struggled through a couple of questions until the Judge declared an early lunch recess. Summoning Matt into chambers, Judge Merhige cautioned him: "I thought I told you never to do that. Don't do it again!" As Matt apologized, Judge Merhige interrupted, "I know what defense you're planning. Your client is going to escape during lunch."

The Judge's passion for efficiency, however, did not extend to all proceedings. As thousands of prisoners' rights petitions annually clogged the federal courts, more than one clerk tried to persuade Judge Merhige that the frivolous petitions be denied by a simple one-page form order. Judge Merhige patiently explained to the clerks that the petitions came from a class of people who felt that they had been abused by the legal system and abandoned by society. The Judge felt that it was well worth the effort to demonstrate to the prisoners that the judicial system would at least afford them a fair hearing on their complaint. That much he would give them in the form of a reasoned opinion addressing their grievances, whether it took two or twenty pages to do so.

The King of Richmond

In 1979, President Jimmy Carter's advisory commission on judicial candidates for the federal bench contacted Judge Merhige about a vacancy on the United States Court of Appeals for the District of Columbia. The D.C. Circuit is generally considered second in prestige only to the Supreme Court, because unlike other circuit courts of appeals, the D.C. Circuit draws its judges from the best lawyers and lower court judges throughout the country.[15] Much of the court's workload involves important test cases brought against various government agencies headquartered in Washington, and for all practical purposes, the D.C. Circuit is the final reviewing authority over regulatory agency decisions. The court also has traditionally served as a proving ground for future Supreme Court Justices. At age fifty-nine, and with a Democrat in the White House, Judge Merhige stood a good chance of using the D.C. Circuit as a stepping stone to the Supreme Court.

While attracted to the intellectual challenges of the D.C. Circuit's caseload and the high caliber of its judges, Judge Merhige was reluctant to leave the rough and tumble of the district courtroom. "There's more action in the courtroom," he explained. "I'm comfortable there and I enjoy the repartee with the lawyers. Particularly since I'm in charge." Judge Merhige also feared that being a member of the D.C. Circuit would necessitate a major change in his judicial style. Decisions at the circuit court level were often reached by consensus after considerable give-and-take between the various judges. At the district court level, however, Judge Merhige was not required to adjust his desires to that of another judge. "A federal district judge is the most independent job in the world, no question about it," he explained. "And the loneliest. But I like being my own guy. Why would I want to be one of many powerful men in Washington, when I'm already King of Richmond?"

The judicial King of Richmond treated his courtroom and his chambers as hallowed ground. He once had a marshal remove Judge Merhige's elderly father from the courtroom because he

15. Presidents are free to look anywhere in the country for nominees to the D.C. Circuit, because the District of Columbia has no senators with whom appointments must be cleared.

had fallen asleep during a trial. A clerk found with his feet on the Judge's desk while making personal phone calls was treated to a severe tongue-lashing. On such occasions, insiders saw glimmers of Judge Merhige's fabled temper which once caused him to rip a telephone from the wall and throw it at the offender. However, the most notorious story of the Judge's temper involved an unfortunate case of mistaken identity. A well-meaning clerk informed Judge Merhige that while he was on the bench, an attorney had slipped into the Judge's chambers to use the Judge's private bathroom. An irate Judge Merhige found the attorney on the street and admonished him for intruding on the Judge's chambers without permission. Unknown to either Judge Merhige or the chastised attorney, the clerk had identified the wrong lawyer. For years afterward, the befuddled attorney was afraid to use any bathroom in the federal courthouse for fear that he would be invading Judge Merhige's inner sanctum.

A Final Farewell

In summing up his career, the final word should and must go to the Judge. He made peace with his fame and notoriety, because "courts are not places of consensus. They're places of conflict, and controversy is what being a judge is all about." If his utilization of judicial power earned Judge Merhige the label of a judicial activist, it was a label he reluctantly accepted. The Judge explained that he had shared Chief Justice Marshall's desire to be remembered as a judge who neither sought to "enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required."[16]

When Judge Merhige consulted his father about accepting a federal judgeship with life tenure, his father advised: "Take the job, you'll live forever." At least in our memories, he will.

16. 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 522 (1919).

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