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Interview: The Federal Courts: Observations From Thirty Years on the Bench

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INTERVIEW

THE FEDERAL COURTS: OBSERVATIONS FROM THIRTY YEARS ON THE BENCH

*The Honorable Robert R. Merhige, Jr.**

*J. Christopher Lemons:*** Judge Merhige, you finished your thirtieth year on the bench in August. In your thirty years, you have presided over a variety of cases. During your tenure, what changes have you observed in the structure, administration, and function of the federal courts, and have these changes had a positive or a negative effect on the federal judiciary?

Judge Merhige: Well, I'm not sure that I'm conscious of any real change in the system. When I practiced law in the federal courts, we tried more federal criminal cases, such as conspiracy to run a liquor business or running stills and that sort of thing. The federal courts changed, in my view, with the civil rights movement. I'm grateful that I was here when the individual rights of people came to the forefront. The federal courts have always been here, but I think the individual rights of people were pretty well neglected. I came on in 1967, and one of the first civil rights cases I had involved the University of Virginia.[1] Very few people know about it or concerned themselves

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1. *See* Kirstein v. Rectors & Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D.

with it. It concerned the admission of women to the University of Virginia. I had never thought about it. It shocked me, but that was the first one that I had. Then along came the school cases.[2] That's been the biggest change I think in the system. The court has been more accessible. It has always been accessible, but it's being utilized more than it ever had before in the early 1960s. That's the change I've seen.

When you talk about the structure, I haven't seen any changes except we have many more judges than we have had in the past. When I came on board in 1967, there were less than 500 federal judges, including the Supreme Court of the United States. We have many more judges than that now, which simply means that more people are asserting their rights. The federal system is a system set up, insofar as individuals are concerned, for minorities. That doesn't mean gender necessarily or race or religion. I say it's for minorities because the majority has the legislature, and the legislature is bound by the majority. The majority can change the law. When I say minorities, I mean people whose views are different from that of the majority. And not just views, but if the rights of the minority conflict with the majority's view, the minority has to have some place to go. They began to come into the federal courts after the *Dred Scott*[3] decision and after passage of the Fourteenth Amendment. That's been the biggest change, and I've seen it grow over the last thirty years. I've seen other aspects of change. I've seen people coming into the federal courts in diversity actions, for example. At one time, it was necessary to do it because there was the old boys' syndrome. There was a fellow from Connecticut who didn't think he was going to get a fair shake in Mississippi or even Virginia and that sort of thing. I don't know whether that was true or not. I know it's not true today. I know that state judges are just as sophisticated and as well-educated and as interested in the Constitution of the United States as any federal judges. I don't think that was true before. You know, it wasn't as strongly felt as it is now and

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Va. 1970).

2. *See* Bradley v. Richmond Sch. Bd., 338 F. Supp. 67 (E.D. Va. 1972); Bradley v. Richmond Sch. Bd., 325 F. Supp. 828 (E.D. Va. 1971); Bradley v. Richomond Sch. Bd., 317 F. Supp. 555 (E.D. Va. 1970).

3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

has been over the last thirty years, but that change I've seen.

Lemons: Have you seen any change in the actual day-to-day practice in the federal courts?

Judge Merhige: Well, yes, dramatically in the criminal section. We have many, many more criminal cases now than we had thirty years ago. I can tell you the favorite drug around thirty years ago was heroin. I practiced law for twenty-two years, and I had what was generally considered a heavy criminal docket, not because of me, but because of the reputation of my senior partner, Mr. Bremner.[4] In twenty-two years, I handled two drug cases . . . two. The average lawyer today that does any criminal practice handles two a week. There's been that change, and that has been a change, I guess, in society. I have seen the popular drugs go from heroin and marijuana to cocaine and then crack. I get the feeling now it's kind of slipping back to heroin because heroin is becoming more popular now. It was sort of out of the phase for a little while. The criminal docket has changed.

Lemons: In 1993, the Federal Rules of Civil Procedure were amended. Some commentators believed the new amendments were going to substantially impact the practice of law in federal courts.[5] Have those amendments produced the substantial changes that were expected?

Judge Merhige: To be perfectly frank, I think they've been very effective. Thirty years ago, there wasn't as much discovery done as there is now, at least formal discovery. There was a method, of course. The rules are contemplated to avoid ambush. When you know everything that's going to happen, it sort of takes the fun out of trying a case somtimes. But I find that the discovery aspect of the rules is more utilized than anything else. I think that's good.

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4. Prior to his appointment to the bench, Judge Merhige practiced law with Leith S. Bremner in Richmond, Virginia.

5. *See generally* Terry Griffin, Comment, *A Critical Analysis of the Formulations and Content of the 1993 Amendments to the Federal Rules of Civil Procedure*, 63 U. CIN. L. REV. 869 (1995) (stating that the goals of the amendments were to reduce the cost of litigation, minimize delays and decrease the adversarial nature of litigation).

Lemons: The Eastern District opted out of most of the 1993 amendments to the discovery rules,[6] particularly the mandatory initial disclosure guidelines of Rule 26(a)(1).[7] What factors led the Eastern District to opt out?

Judge Merhige: We thought that it was an unnecessary thing. It wasn't needed. We burden the Bar terribly, I think. I think we have too many rules, but ultimately the Federal Rules of Civil Procedure have been helpful to get to the goal that we're after, which is to serve the interests of justice, what is right. The rules help, but they put an awful burden on the parties. If you add on more rules than the basic ones, it's just a burden on the people, the client. It costs money to do these things. It's why we got into this terrible, I think horrible, "billable hour syndrome." Lawyers felt an obligation to get as many billable hours they could do, much of it unnecessary, and we just proved it was unnecessary. It's just as simple as that. And we have a lot of federal and local rules, which I'm embarrassed to say, I'm not as well versed with as I should be. I may be the wrong guy to be talking with about these things because I'm main-stationed here. I've practiced just literally all over the country, and the Bar is different depending on where you are. The Richmond, Virginia Bar, I think, is the best Bar in the whole country. The lawyers are dedicated to doing the right thing.

Lemons: The Advisory Committee Notes to the 1993 Amendments to Rule 11 indicate that the purpose of the amended rule is "to reduce the large number of motions for sanctions presented under the previous rule."[8] Has revised Rule 11 been successful in providing practical and effective deterrence to unacceptable conduct?

Judge Merhige: I haven't seen any particular change, to be perfectly honest with you. Let me describe it this way. In the last five years, I have not "formally" heard five discovery motions or contested discovery motions a year. I say "formally" because I have another system that may or may not be the right one. Today, the lawyers are so cooperative. They work it

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6. *See* E.D. VA. LOC. R. 26(A)(2) (effective Feb. 1, 1997).
7. FED. R. CIV. P. 26(a)(1).
8. FED. R. CIV. P. 11 advisory committee's note.

out. Most motions come up when somebody doesn't deliver some discovery material, or you get into something like a lawyer very foolishly telling a client at a deposition not to answer the question. The ruling that the court makes generally would not constitute reversible error, even if the judge were wrong. The Bar in Richmond knows that, with me, if they get into discovery situations such as depositions and there is a difference of opinion, they don't have to come down here and set a date for a formal hearing. They pick up the telephone. If they don't believe that the ruling is contrary to what somebody wants and would be reversible error, they just pick up the telephone and we have a conference call. If they think the issue is important enough and if the judge, me, made an erroneous ruling that would be reversible, then they simply call my secretary and say, "Can you tell the judge we've got an issue that we'd like to be heard on." And I get my court reporter and hear the motion. That's the whole point. But hearing it in the court, I know I don't have five formal hearings a year on any discovery problems. We have a cooperative Bar. That may not be true some places. I think it's about being a Virginian, if you want to know the truth of the matter.

Lemons: Have you experienced difficulty in other jurisdictions where you've presided?

Judge Merhige: Well, I wouldn't say difficulty. You don't have difficulty with me when you are the guy who calls the shots. I will tell you that there is something about the robe that helps. But I don't find all districts to have a Bar as conditioned to be as cooperative as we have here in Virginia. I think that's the best way to describe it.

Lemons: Justice Thomas joined Justice Scalia to express their opposition to the proposed Rule 11 amendments. Justice Scalia argued that the reversion from mandatory sanctioning under former Rule 11 to discretionary sanctioning under amended Rule 11 would, in Justice Scalia's words, "render the Rule toothless."[9] In support of his argument, Justice Scalia asserts that judges are not free from the human inclination against imposing punishment when it's not actually required, especially

9. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 507 (1993) (dissenting statement of Justice Scalia).

when the receiver of such punishment would be a colleague or a professional acquaintance.[10] Do you agree with Justice Scalia?

Judge Merhige: No. But I'm what can be described as an activist judge. I guess it's true, but I don't know. I don't feel any different than anybody else. Because I think the first function of the federal judge, or any judge, is to settle the case. And I can only speak for myself; I can't even speak for all the federal judiciary. My personal view is that the best way to get rid of a case is to settle it. Sometimes I'm of the view it's the only way to do it. A judgment doesn't settle a case. What it does is prepare the client for two more years of worrying about the matter because there's an automatic appeal, and sanctions harden people.

The Bar knows me well enough. Good lawyers have a book on all the judges. I don't encourage or even acquiesce in skirting the rules, or failing to live up to them, but I have found that when you issue sanctions, you harden people. And I'm interested in seeing every case resolved amicably. Good lawyers will tell you that I take the issue of motions for sanctions under advisement. I admit it is held over, sort of like a threat, which may be cowardly, but it's much more effective, and they go away. Time has a tendency to heal everything, and I don't want to discourage attorneys from discussing settlement. When you start slapping sanctions on lawyers and embarrassing them, sometimes it is destructive. Generally, the lawyer controls that and you don't want to get the client unnecessarily discouraged with his lawyer. You don't want to embarrass a lawyer. When you have to do it, you have to do it. Not embarrass him, but when you have to take action, you have to take action.

I think I'm pretty lenient on sanctions of any kind, and I've been here over thirty years. I know that I have never imposed a fine on a juror for not coming or being late. Admittedly, I've threatened. I only have a recollection of having imposed a fine on a lawyer and even that was de minimis, twenty-five dollars or something of that nature. They'll go out of here from time to

10. *See id.* at 508.

time and say, "Oh my God, he's going to put me under the ground," or something like that, but the good lawyers know that's just nonsense. I'm really not going to do it. I'd do it if I have to, but I'm not much on sanctions. I don't think they accomplish much.

So to that extent, I disagree with Justice Scalia. But you have to remember that although Justice Scalia and I share the same ultimate goal, I think the way we get to it may be different. For example, I don't think he is particularly interested in whether or not I get the case of *John v. Smith* settled. I, on the other hand, am interested, but not for any statistical part. I don't have any cases on a contingent basis. I don't get paid piece work.

I just think that the system works best if we can try to get people to reason together. For instance, in cases regarding corporate and business law, who is better suited to decide a business controversy than business people? Not a fellow like me. No, it's a matter of economics, and if I knew anything about economics, I would never have accepted this appointment. That's not true. I would have accepted for any reason as it turns out. That's not the way I felt at the time though. I was not sure it was the right thing for me to do, but it turned out to be an exciting, wonderful and inspiring experience.

Lemons: The Eastern District operates under the "rocket docket."

Judge Merhige: Well that is a newspaper reporter's characterization of us. That's the truth. Somebody wrote a story and called it the "rocket docket."[11] I'm glad to talk about it because people don't comprehend it. Some people, even lawyers, don't understand, but the Bar here does. You want to know how I do it? I can only speak for myself. I'm not even sure of the way my colleagues do it, but I think generally they do almost the same thing I do. If a party files a suit here today, and it is served on the opposing party ten days from now, the deputy clerk of the court, Rob Walker, sends out a notice to both parties to appear before the judge within ten days. If it is filed

11. *See* Paul M. Barrett, *"Rocket Docket": Federal Courts in Virginia Dispense Speedy Justice*, WALL ST. J., Dec 3. 1987, at 33.

and no answer or pleading is filed within twenty days, the notice goes out to the guy who filed it and to the defendant, whoever it is. And if he doesn't have a lawyer, that's too bad. You send it to him to appear before the judge and try to have him appear within seven days after the elapsed time.

The goal is to have the case set for trial within thirty days of the filing. Now that's not always possible because if the parties don't get service, then we have to wait twenty days before we can do anything. That waiting period is a right. We call it a pretrial conference which is a misnomer. It's really a docket call. I give Rob dates, I try to give them a minimum of three a month like January 15th at 8:30, 8:45, and 9:30. We try to do it all early for two reasons. First, we do not want to interfere with state court dockets. State courts are rarely opened before 9:00 a.m. Second, we want to accommodate the lawyer's schedule. A lawyer can only be one place at a time. So, we do it in segments of maybe forty-five minutes, and maybe I'll only have seven cases.

It's ridiculous sometimes because the lawyers come in here and sit exactly where you're sitting, and we chat for a minute. There's about a three to five minute span between each of them. I'll have the original docket sheet which shows me the nature of the case, like civil rights and anti-trust or something, but that's all it shows. I'll ask what the case is about, and I'll take maybe a minute and a half to hear it. Next, I ask whether the attorneys have discussed settlement, and whether they have thought about a pretrial order that they're going to get before they leave. The pretrial order insists that they meet within so many days in an attempt to stipulate whatever facts they can stipulate so they don't waste their time with discovery. I also give them a trial date.

Now the way it has gotten misinterpreted is, the original order that tells the parties to come into the court says something to the effect that the parties should be prepared to try the case within ninety days or something. That's fine. I'm not going to hurry anybody, but the truth of the matter is we go through a regular ritual. I'll ask the plaintiff when they want to try the case, which really means, "How much time do you need to get ready for trial?" Sometimes when we have complex

cases, they say, "Judge it's going to take us eight to ten months for discovery."

How about the defendant? I also get his view. If I'm satisfied, I try to find a date that is agreeable. I don't think it happens once a year where I'll say, "This is the date whether you like it or not." Even when I take that course of action, the conference may be on a Saturday so it doesn't interfere.

You'd be shocked how many cases get settled if you set them for trial. My rule is if you need more than six months and you satisfy me that you do, around here when the lawyer tells you something you generally accept it. The old expression, "fool me once good for you; fool me twice good for me," it doesn't happen very often. If it's more than six months, the lawyers must report to me once a month and tell me what they've done toward discovery. The threat is that if nothing has been done by the time the attorney gives me his first report, the case is going to be moved back. Instead of waiting until next March, we're going to move it back until October. That's not much of a threat because the Bar doesn't wait. Where they misinterpret the rule is when they think the "rocket docket" means that we say, "Your case is going to be tried in 90 days whether you like it or not." We don't do that, and we wouldn't do that.

Now, you're not interested in this, but I have what I call my "Hague days." It's my way of moving the docket along. It's my rule, and just my rule. It's not in the Rules of Civil Procedure. It comes from a very interesting story from the firm that is now Hunton and Williams. Mr. Gay was a well-known, well-respected lawyer who was the head man in that firm. He'd tell the story of a lawyer, a young lawyer from that firm who went down to the country to get a case set for trial. I think they still do it everywhere including Richmond. He called it docket day which is the same as what I do, called pretrial conferences, in which the lawyers get down before the judge and the judge had the case called and said, "All right, Mr. Jones, does this date suit you and Mr. Smith?" They go back and forth, the same way I do until they reach a date.

As the story goes, when the judge would suggest a day, this young lawyer would come back and say, "Well I'm sorry, but Mr. Gay has to be in St. Louis on that date or Mr. Gay has to

be in New York on that day." That went on and on. The country lawyer had a country practice, and those dates were all agreeable to him. They finally got a date that was agreeable to the young city lawyer who said, "Mr. Gay can be here on that date," and the Judge asked the other fellow, "Is that date all right with you?" The response was, "I'm sorry Your Honor, I'm scheduled to be in Hague on that day."

Now my Bar knows that, and when I have a problem getting them together on a certain day because they say, "I'm sorry Judge, but I've got another case," we won't interfere with any other docket. We have no authority to do that, and we wouldn't do it anyway. Our rule, at least mine, and I think the rule of the other judges too, is that whichever case is set first has priority. That includes the general district court, traffic court, or whatever it is. We should not be so bold as to interfere with any court's docket.

But sometimes you get lawyers who say, "Oh Judge, I've got a case in Manassas" or "I've got one in Texas." Sometimes you just have the feeling that they're really not that busy. I say, "Let me give you one of my Hague dates," and the Hague date is a Saturday. The lawyers can't say they're in court somewhere else. You'd be surprised how infrequently you have to try a case on Saturday. The lawyers usually state, "Wait a minute Judge, I can move this or I can move that."

It doesn't happen often, but that's the "rocket docket." The whole theory, at least mine is, that the best way to get a case settled is to set it for trial. The earlier you set it, the earlier the parties are going to get together and try to settle it.

Lemons: Docket management is a problem with many courts, and the Eastern District has, as you just described, a mechanism for managing the docket and for moving cases along.

Judge Merhige: But we all have the same philosophy that the best way to dispose of the docket is to set it for trial. Judges sit around like everybody else, and if nobody's bothering you about something, you might put it on the side of the desk. Lawyers do the same thing. The squeaky wheel gets the oil. I guess that's the expression.

Lemons: Many courts have problems with their dockets, though, because they don't treat the cases the way that you do.

Judge Merhige: Well, let me tell you why. I was shocked to learn this, although I'm not critical of it, it's just different. I have all these Dalkon Shield cases. I'm the supervising judge, and I want to get rid of all these cases. I want them either tried or settled. The ones that are in suit now are going to be tried because we don't negotiate. There will not be any settlement. We've already made our offer and if they turn it down, good for them, let them go to trial. That's okay. We can't close this bankruptcy until we get rid of all the claims. There were about 400,000 claims to start with. We're now down to about seventy, and they're all either in court or waiting for arbitration. They made their selection, and that is what will be done. I asked for a list of litigation cases without trial dates. Some of them were filed in 1986. Some were filed in 1984. That's fourteen years. We wouldn't be so bold as to say to another judge, "You don't do that." We'll ask the lawyer whose representing the Dalkon Shield to see if he can't get the judge to set a trial date.

We have learned that there are some courts, and maybe it's a good system, that will not set a trial date until the plaintiff, the guy who filed the suit, asks for it. Sometimes suits are filed and they're just not pursued, and that was a surprise to me. I'd never heard of that. I'm not critical of that system, but the docket can get jammed up, I would think. My theory is that plaintiffs can't run the court and neither can defendants. Judges have the responsibility of handling the court. My system works for me. Eighty-five percent of the cases that I set for trial go away. If I didn't lift another finger, they go away.

Lemons: The subject of judicial vacancies has undergone recent discussion. Presently, 82 out 846 seats on the federal judiciary are unfilled.[12] Almost 10% of the federal judiciary is vacant. Chief Justice Rehnquist, in his year end report, writes that the continued vacancies are in his words, "eroding quality of justice that has traditionally been associated with the federal judiciary."[13] What's your reaction to the Chief Justice's comment?

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12. *See Annual Report: Chief Justic's Annual Report Criticizes Senate's Slowness in Confirming Judges,* 66 U.S.L.W. 2408 (1998).

13. *Id.*

Judge Merhige: It's hard to be completely objective when asked to comment on the Chief Justice of the United States, but I think he's exactly right. I read the papers about this. Obviously, politics are involved somewhere, at least I read that people wait to see if there's going to be a different administration and if there are going to be different judges and things like that. I don't pay too much attention to that, but I have read that some congressman said, "Oh, there are too many judges now. We don't need them." Do you know how we get judges? Congress allocates them, the judiciary doesn't. Congress says the Eastern District of Virginia is to have twelve judges or eight judges, or four, or whatever it might be. There's a recommendation by the Judicial Conference of the United States, but Congress has the authority.

So when I hear members of Congress saying there are too many judges, they ought to go to their colleagues in Congress and tell them. The judiciary does not set the number. I don't think there's any one thing that gives us a risk of not being able to administer justice reasonably. It's a combination of things. One issue is the Speedy Trial Act.[14] The other is the Sentencing Act.[15] One thing as a judge that I'm firm on is that I can never be critical of a law that's passed. My job is to stay by it. Sometimes my critics say, "Oh boy, the papers gave you heck about this and that." That doesn't bother me. My critics are right up in the Supreme Court of the United States and the court of appeals. They're the only ones whose criticism is material to me. Like everybody else, I love to be loved, but I'm not going to be loved by everyone. I might be loved by half of the litigants that come in here, the guys who win, maybe, but that's not my ambition.

I get disturbed when the Supreme Court says I've been wrong, which doesn't make me wrong. It also means that when they affirm me, it doesn't make me right, but it's our system, and I feel very strongly about the system. I don't think it adds to the system for judges of any kind to criticize the system. The Speedy Trial Act has slowed us down to some extent. Now that we're getting jammed up, it becomes a real concern. We must

14. 18 U.S.C. § 3161 (1994).
15. 28 U.S.C. § 994 (1994).

try cases within seventy-two days of the arrest. Sometimes that isn't easy to do, and the lawyers understand. They're delighted to have the case longer than that. They also get their clients to waive the Speedy Trial Act. I mean there are different kinds of ways. A motion to suppress is made pre-trial, and the time is tolled in that circumstance. Judges are very conscious of the Speedy Trial Act, and nobody wants somebody charged with an offense to walk in without a trial. I don't know what the need was for the Speedy Trial Act. I'm concerned though. When I first came here, I was given a list of all the defendants who were incarcerated. I got that list every week, and I could see how long they were incarcerated. I inquired about it when I saw that some of them had been in jail for a month, six weeks, or longer. I would ask why they were in jail so long. Sometimes there were valid reasons, such as psychiatric exams or the lawyer didn't want a trial. There were lots of good things with legitimate reasons. It was very effective. One reason for the Speedy Trial Act, I suspect, is presumptively so somebody who is presumable innocent doesn't sit in jail.

I was asked to go to Africa a few years ago by the Administrative Office of the United States and the State Department. My whole task was to encourage the government of Zambia to have an autonomous judiciary that was effective. I was shocked that some people who were charged with crimes had been in jail for eight years. I looked at the records of one person in jail, and I said, "This fellow looks like he's been in jail for eight years." The government official who was the equivalent of our U.S. Attorney said, "Well, he has." I said, "Why don't you do something about it?" He said that he would. And about a week later, the case was dismissed. That was just sloppy work, and we'd never have anything like that here, I don't believe. I don't see the need for the Speedy Trial Act, but we have it.

Likewise, there is the Sentencing Act. Under that statute, it takes us seventy-five days after somebody is found guilty before we can sentence them, because it takes that long for the probation officer to do the report and then send a copy of that report to counsel for the defendant and the government. Then they have ten days to make objections to it. All of that may be good, but it's time-consuming and things back up. We're rapidly reaching a jammed-up stage here.

I'll do a little bragging here because I'm fond of it, but take me out of the picture; we don't have a lazy judge in the Eastern District of Virginia. As a matter of fact, I don't know of a lazy judge in the whole system. There may be one, but I don't know who it is. There's not a one that doesn't work as hard or harder than he or she did practicing law. We're getting to the point now that I'm a little bit disturbed about my plans to leave the bench because right here in this division we will have two active judges and one senior judge when I leave.

Lord knows that Judge Williams, the other senior judge here, deserves to act like a senior judge. As a senior judge, you don't have to work full-time. You just give 25% of your time. Neither Judge Williams nor I have done that. We've each given a full 100%. But if Judge Williams wants to slow down a little and we don't see any replacement judge, Judge Payne and Judge Spencer are going to be snowed under. They don't mind that, and none of us are afraid of work, but I don't think it adds to the administration of justice.

Sometimes justice delayed works well, but if you remember the fable, it was the turtle that won the race. There's much more to litigation; it's not two cold corporations all the time. It's people, individuals. It's got to wear on them. It must be a terrible thing when somebody is suing you or charging you with an offense. I think we owe them the duty to dispose of the case in a reasonable time.

Lemons: Recently, the *Wall Street Journal* ran a front page article describing the potential for consolidation of the current diet pill litigation.[16]

Judge Merhige: That case has gone through Judge Bechtle. He's on the multi-district panel with me, and it seemed to me that he was assigned that the last time we met. The multi-district panel is a court appointed by the Chief Justice. There are seven of us on the panel, and we serve at the Chief Justice's pleasure. We are there for cases where some company or companies get sued in various districts throughout the country, and they wish to consolidate the cases for discovery. Well, every lawyer

16. *See* Richard B. Schmitt, *Diet-Pill Litigation Finds Courts Frowning on Mass Settlements,* WALL ST. J., Jan. 8, 1998, at A2.

wants the case in his backyard, and every litigant wants the same. So they come to us on the multi-district panel, and they give their argument as to convenience of the parties, justice and so forth. We select the district where they will go for discovery, and the judge who will hear it. As a practical matter, more often than not, it stays there. More often than not, the parties will agree, "Well, Judge, you know more about it now since you've had all this discovery." It's very important.

Lemons: The article used the diet pill litigation to talk more broadly about consolidation of mass tort cases. The author reflected upon the Amchem Products case handed down by the Supreme Court in June 1997.[17] In *Amchem*, the Supreme Court approved decertification of the class.[18] Are courts rethinking their approach in mass tort cases? What is your approach to these situations and how has it adjusted, if at all?

Judge Merhige: I have one of these cases now. Well, I can't really speak as to whether I have gelled on the propriety of my thinking. This one has to do with the apple juice litigation that's just been assigned to me. The plaintiffs claim they bought apple juice that was labeled "100% pure apple juice." They claim that it was diluted, that something was added to it. Now that's just an allegation. I don't know precisely, maybe a sweetener. Nothing that can really harm you. The plaintiffs claim they paid seventy-five cents a bottle because they thought it was pure, and they would not have paid that had they realized that it was not 100% pure. It's an economic thing. Nobody has claimed, so far, that they were injured physically. It's a commercial injury.

What's going through my mind is that it's harmful to the system, I think, when people read there's been a class action, it's been settled and the successful plaintiffs received a coupon giving them a discount on something they might buy. And the lawyers have collected a substantial fee. It worries me. How far that should go? In my view, I've got to wrestle with, and I will, with the question of certification. But I'm giving it serious thought that I ought not to certify a class. I have done this. I did it on the record to the lawyers. I stated on the record that

17. *See* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).
18. *See id.*

it appeared at first blush (and I don't mean there was any unethical conduct on anybody's part), but it appeared at first blush that this may well be what I call "a lawyer's case," that it's more for the benefit of lawyers than for the clients.

They would, perhaps with some justification disagree with me, but I said, "I want you to know before you get too involved in this, that this is the type of case that's going to end up with coupons for the successful plaintiffs, and if they are successful, you better prepare to accept coupons for your fee." Okay, I laughed too. I didn't laugh then, but I laughed when I thought about it later. It may turn out to be a stroke of genius. Within a couple of weeks, I got a communication which said, in effect, that the parties might settle. It's a real problem because we don't want to discourage people from taking up these cases. We're sort of like private Attorneys General. I'm going to only hold it up until Monday, and I'll have a conference call with the lawyers and tell them to make up their minds. Either turn me loose to do what I think I should do as the judge, or settle the case. I don't know what I'm going to do, whether I'm going to certify it or not. I'm going to look at the latest Supreme Court case again. This is a wonderful job. I have something challenging everyday. I can't imagine being without it.

Lemons: Previously, we spoke of settlements. In 1976 you stated, "I think it's our responsibility to push settlements. A lot of judges think it isn't. I think it is because I don't think we could run the courts if we didn't get it and you know most cases are going to get settled. Most cases should be settled."[19]

Judge Merhige: Well, I still feel that way. I don't know if we couldn't run the courts. That may have been an exaggeration. Today, people can have their issues determined, at least at the trial level, generally within a year. If we didn't have settlements, you can expand that time four fold, because, as I said, I think eighty to eighty-five percent of the cases that come before me settle before trial. I have a rule here that if you don't settle before your jury comes in, you have to pay for the jury. That's not much of a threat, especially if it's a big corporation. They're not concerned about $40 a day plus mileage for thirty or forty

19. The Honorable Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 89, 217 (1976).

people, but the threat is there and I use it. Most of the lawyers get a case settled if they're wise. As reputable as they are around here, they try to settle.

Sometimes you can't settle cases. Some cases just can't be settled. That seems strange to me, but they tell me they can't settle because of all of these other reasons. Yeah, I think it would have an effect on the system, but I probably was not accurate by saying that the courts couldn't run. I think we can do anything. The courts can do anything, which is why I'm not excited about mediation. I approve of arbitration because that ends it.

Settlement is a very delicate thing. You don't want to inject yourself in somebody's case. That's not right. I do it a certain way. I expect all parties to try to dispose of it amicably. If I can be of any assistance, let me know. I don't mind doing that. I don't even mind pushing because I practiced law, but no judge ever made me settle a case. I have had judges tell me I ought to settle and I was foolish not to and so forth. Most of the time, I made an honest effort. And most of the time, we got the issue settled. But it wasn't because the judge pushed me. We settled because I thought it was in the best interest of my client. It depends on who you're dealing with. If I'm dealing with good lawyers, as fortunately I am most of the time, I don't worry about it because I know I'm not going to push them, and they are not going to get any different treatment from me if they do not settle than they would under any other circumstances.

I view it as an obligation of the court, but it's a limited obligation. If somebody doesn't want you involved in a settlement, I stay out of it. More times than not, though, the lawyers say, "Judge, we appreciate the help." The good lawyers don't have to keep the clock running. They have plenty of people, and plenty of cases. We live in a litigious society. If they're not in this case, they'll be in the next case.

On another note, that's why I find this advertising so disgusting, because good lawyers don't need all this. It's within the First Amendment, and I wrote an opinion before *Bates*[20]

20. *See* Bates v. State Bar, 433 U.S. 350 (1977) (holding an attorney's advertisement fell within the protection of the First Amendment).

came down expressing that same view. Some of it has gotten out of hand in my opinion.

Lemons: The topic of judicial independence has been debated considerably over the last few years. There are those who argue that some judges have overstepped their constitutional boundaries and, therefore, some degree of judicial reform is necessary.[21] There are other commentators who defend the current state of the judiciary and oppose judicial reform.[22] What is judicial independence, and is judicial independence currently under attack?

Judge Merhige: I think it may be under attack from time to time. You know that's "the American way," so to speak. People express themselves. Nobody has come up with what I think is a better system. I don't think the criticism has been effective. It certainly isn't effective in the federal system, as far as I'm concerned, and I don't think it is in the state system either. The drafters of Article III gave a great deal of thought to that. That's one reason why federal judges are appointed during good behavior and receive no diminution of their salaries. The Founders didn't draft those provisions without some consideration of their own experience.

When judges were appointed by the King of England, if the judges didn't do what the King wanted, the King either got rid of them or reduced their salaries so they walked away. The Founders had that in mind, and I think those are two important things. It depends on the individual. It never occurred to me to be concerned about what other people thought. My critics, effective critics, are the court of appeals and the Supreme Court of the United States. The oath I took requires me to follow their mandates whether I agree with them or not. Now, that's not being a robot, because we get plenty of cases here in which they haven't spoken. That's exciting when you get those. When your court of appeals or the Supreme Court have not

21. *See* The Judicial Reform Act of 1997, H.R. 1252, 105th Cong. (1997) (sponsored by House Judiciary Committee Chairman Rep. Henry J. Hyde); ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 117 (1996); Katharine Q. Seelye, *House G.O.P. Begins Listing a Few Judges to Impeach*, N.Y. TIMES, March 14, 1997, at A5.

22. *See* Editorial, *Misguided Judicial Reform*, 81 JUDICATURE 4 (1997).

spoken on the issue, you can really express yourself as to what you believe the law to be.

We make mistakes, you know, we're human beings and human beings will make mistakes. I happen to be a judge that is comforted to know that there's a court of appeals that looks over my shoulder. Judge Haynesworth, who I was very fond of, expressed to me one day that when the court of appeals reverses somebody, it doesn't mean they're wrong. Of course it doesn't. I told him there was little comfort in that, because it seems to me that the opposite must also be true. When they affirm, it doesn't mean you're right. We have a system that works well. You have to walk in the other guy's shoes to know what it's like. I have never felt any pressure. I knew that I was to do what the law was.

The only weakening of independence, depending on how people view it, is that I'm not free to do what I think is right. I am to do what the law is, and the law is as pronounced by my appellate court. Now, sometimes they might tell me I misinterpreted what they did or something of that nature, and that's okay. That's kind of comforting to me. When a reversal comes, and there haven't been many, I've been lucky, and I'm proud of that. When the reversal comes, if I have any concern, it's that the litigants have been put to the extra time, worry and expense, and I'm not so stupid to think that just because the court of appeals says it, that's it. No, its what I'm bound by, that's all it is.

Lemons: What about the public criticism particularly by the media and by politicians?

Judge Merhige: Well, they have an agenda, at least the politicians and the media. They have an agenda. They want things that sell newspapers.

Lemons: Doesn't that have, not necessarily a direct, but an indirect effect on the judiciary as an institution and the public perception of the judiciary?

Judge Merhige: It may. I'll assume, hypothetically, that it does, but we have to decide which of our values is more important, the First Amendment right to criticize the King or the right to administer the law by majority. You know, we don't do it by majority. You can't do it. You can't go out there and ask, "How

many people think we should hang him? Raise your hand." We don't decide cases by consensus, and a judge has to keep that in his mind all the time. I know what this community thinks about some things. I think I know. Sometimes my rulings are contrary to what the majority of people think, and that's unfortunate. Everybody would love to be loved. I have no hope of attaining that and would be a little bit concerned if it were so. My concern is whether I have rendered a correct judgment in the eyes of my superior courts, and that's the only concern. You know, if that was so, the school cases[23] would have been absolute hell for me. I don't know how many I had, forty or forty-one. My recollection is that 90% of those were appealed, and 89% plus were affirmed. I was very satisfied. I would have been more influenced by all the noise that reportedly was out there had I been reversed on 90% of them, but I wasn't, so criticism meant nothing to me. I had a lot of it. I didn't have marshals with me for two years because I was Mr. Popularity. It's not a popular job for any judge.

Lemons: Have the institution of mandatory minimum sentences and the creation of sentencing guidelines from the United States Sentencing Commission diminished judicial independence or dampened the discretion of individual judges?

Judge Merhige: Well, there's a difference in discretion and independence. I don't think it has taken away from independence. I don't think we were born with rights to do anything. Our rights stem from the Constitution of the United States. If you asked me if I like the sentencing guidelines and the mandatory minimum sentences, I'll tell you no, I don't. I follow them because they're the law, and that's good enough for me.

You know, if I were a legislator, I'd be hard put to encourage the passage of statutes calling for mandatory sentences. I think they're a mistake. I don't think they help anyone. The thought is not in a vacuum. We've had the death penalty in the system for a long time. I never had to face it. I worried for awhile what I would do if I had a case which required imposing the death penalty. There are lots of reasons not to do it. There's a

23. *See* Bradley v. Richmond Sch. Bd., 338 F. Supp. 67 (E.D. Va. 1972); Bradley v. Richmond Sch. Bd., 325 F. Supp. 828 (E.D. Va. 1971); Bradley v. Richomond Sch. Bd., 317 F. Supp. 555 (E.D. Va. 1970).

moral aspect. I concluded that if I were faced with it and if I couldn't do it, I swear I would ask God to make me live up to it. If I find anything in the law that is so repugnant and against all of my beliefs and teachings, I think I have enough courage to get off the bench before I desecrate the law. I think too much of it. Without the law we would be a bunch of cannibals.

For instance, I was in World War II. I flew on B-17's where we dropped a lot of bombs on a lot of people, and I was a party to it. I don't think I gave any thought to the moral aspect of it. I wasn't even there for some of it. The main goal was to get off that target and get out of there. So I've concluded that I can't honestly say that I find it to be so, I find it repugnant, but to be so repugnant that I couldn't do it. I had to measure it against my responsibility to do it. I would hope it would never come before me, but I'm not going to duck it.

Punishment, though, is retribution to a great extent, and the public commands retribution. It's not my cup of tea. That doesn't make it wrong. I don't believe, for example, incarceration does much good except to protect you against the guy you've incarcerated. Some of it deters others. I don't think the death penalty deters anybody except for the guy that's killed. He'll never do it again.

You have got to put people away sometimes, not only because they're dangerous to society, but the public demands it. They're the ones who pay the price. You've got to be careful about that. You've got to weigh it. You can't do it just because they're the taxpayers, and I think the retribution is part of it. Just for people like me who think the death penalty is senseless, you have to say to yourself, "Suppose it was your child, wife, brother, mother who was the victim of one of these heinous crimes?" I doubt if I could control myself, speaking from a moral aspect. It's scary. The mandatory part of sentencing upsets me. I think there's a big distinction between the man who steals a loaf of bread to feed his children and the man who steals a loaf of bread because he was just too damn lazy to work, and mandatory sentencing takes that away. You've got to weigh that against the good. I see the good in drug cases where we have a mandatory ten years to life for conspiracy to possess and distribute crack cocaine. I think that has a deterring effect. But I

tell you, judicial independence isn't taken away with it. They've given the discretion to the United States Attorney in sentencing matters. That's what the law wants, and that's okay with me. We're careful about who we get as United States Attorneys.

Lemons: After thirty years of judicial service, what are the highlights of your career?

Judge Merhige: Oh, tomorrow's case. I mean that. I don't know how it sounds, but I truly mean that. People ask me what the most interesting case I've ever had is and my stock answer is it's always tomorrow. That's the wonderful thing about it. Oh, I've had some cases before, I can't call them highlights. I can call ones that stick with me. I tried the *Westinghouse Uranium* case.[24] I was excited about that case. It took us ninety-two days to try it without a jury, and I had trouble slowing down to get down here in the morning. I'd get up and shave and shower and dress and rush down to court to watch the lawyers. I had the finest group of lawyers that I have ever seen assembled at one time. They were just absolutely terrific. It was exciting and a thrill to watch them, you know.

I also had the shoot-out case down in North Carolina.[25] I found that case to be one of the more interesting ones because I had about fifteen plaintiffs and eighty defendants in a civil case. That took us about six weeks. Some of them wouldn't accept counsel. They were allegedly the Ku Klux Klan folks. That was an interesting case. Just controlling the case, I found to be a challenge.

There have been so many other cases, but tomorrow's case is the one I look forward to.

Lemons: Do you have any regrets?

Judge Merhige: Well, if I had to do it over again, I would accept the position, let me put it that way. With regrets to this extent, I don't know how fair I've been to my family, and I regret that. They went through hell because I insisted on conforming myself to the law, and I can't be so cocksure that I do

24. *See In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440 (E.D. Va. 1981).

25. *See* Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

that every instance. I try, but I did it in the school cases, and I was satisfied. I explained to my family, look they're fooling with other people's children. People can't be quiet and objective when their children are involved. So I understand all this hullabaloo because they think I'm doing it, me, but I have a choice. I thought it was the right thing, and that's what made it easier for me.

When you stick to the law and you think it's the right thing, that is what makes it easier. But they're going to appeal my decisions, and then when I get affirmed, which I think I will be, then I think the attitude in the papers will be, "Well, we don't like him and we don't like the law, but he's doing what he's sworn to do, following the law." That didn't happen. I kept getting affirmed, and I don't think they ever printed that. I don't know whether they did or not.

I have no regrets except my family maybe. I made some financial sacrifices. The salary was $30,000 when I came on board. I came from a law practice, which was paying substantially more than that. It's hard to complain about the salary that I get now because to the average person that sounds pretty good, and I guess it is, but when you look at what happened over the years, what's happened for thirty years, it's not so good. You couldn't make up for the losses, but I'd do it again. I'm glad, to tell you the truth. I wasn't keen on leaving my law practice even then, but I'm glad I came. I'm glad for all the hell that was raised. It was an experience that I wouldn't want to do again. It was like flying combat missions. I wouldn't want to do it again for ten million dollars, but I wouldn't take a million dollars for having done it. I feel the same way about this. I'm glad I was here.

Lemons: What are the biggest challenges facing attorneys and judges in the future, and what advice would you give to young attorneys and those attorneys who aspire to judicial service?

Judge Merhige: I think the biggest challenge that every lawyer and judge has is the challenge to keep up with the law, to comprehend it. I don't know all the law, but I try to keep up with it. I'm shocked at the number of people who come before me who have not read what the Supreme Court or the court of appeals has said. There are people who get their view of the

law from newspaper articles and argue cases from what they've read somewhere. That, I find challenging. I think the challenge to every judge and lawyer is to keep up with the study of the law.

Judges have a challenge. You know we're going to get overwhelmed pretty soon. We're going to get overwhelmed here. I'll be part of it when I leave. I know Judge Williams exercises his rights, and there's no reason why he shouldn't. If he doesn't stay full time, Judge Payne and Judge Spencer are going to be snowed under. That's going to affect the individual litigants more than them. I hope they'll be intelligent enough not to kill themselves on it. You can only do so much. They're doing the best they can now, as we all are. That's a challenge that we all have, but we just get frustrated just like anybody else. I get frustrated on the bench sometimes. I come in here and turn the cold water on my wrists and look in the mirror and say you're the judge, act like a judge. You've got to subjugate your own personal feelings and moods. I don't know if I'm successful at it or not, that's for somebody else to judge, but I try, you know, and that's comforting.