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## REMEMBERING JUDGE MERHIGE

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When first approached about writing this article, the instructions were to write something “on the Judge,” not to exceed five to ten pages. Synthesizing anything about the Judge in five to ten pages is questionable, adding only to the fear of not saying all that should be said, or saying it in the wrong way. Most of us who knew him have preferred just to remember him, adding our own stories to the banter which always seems to get around eventually to him.

A comprehensive biography was not necessary inasmuch as the highlights of his career have been recounted in numerous articles before and after his death. A native of New York, he came south to High Point College in North Carolina to play basketball. Thinking he would give law school a try, he was directed to Richmond, having been told that William and Mary was located there. Discovering his error but with no money in his pocket for the trip to Williamsburg, the Judge sought admission to and was admitted as a student at the University of Richmond’s T.C. Williams School of Law. During law school, the family of a classmate put him up in a small apartment above their garage, and he financed his way with odd jobs, including coaching the St. Christopher’s High School football team. Following an exemplary law school career, and service as a member of an Army Air Corps bombing group in Europe during World War II, he settled in to a law practice in Richmond.

Moreover, any in-depth recitation of landmark decisions as the focal point of this article seemed superfluous. Many accounts in various forms are readily available about the cases that influenced our lives and shaped our jurisprudence. The H. Rap Brown First Amendment case in 1967 and the Dalkon Shield cases (and

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subsequent A.H. Robins Bankruptcy) near the end of his judicial term serve as bookends for a variety of civil and criminal cases interspersed with such haymakers as the school and prison desegregation cases, the Wounded Knee protest case, the Kepone Environmental case, the Westinghouse Uranium case, the integration of women into the student body at the University of Virginia, and the case in Greensboro, North Carolina which pitted the Communist Workers Party against the Klu Klux Klan and American Nazis, among the many others.

It was my good fortune to have served as one of the Judge's law clerks, practiced in his court for roughly thirty years, and gathered stories from others recounting some of the traits and characteristics that combined to make him a great jurist. Fortunately, there are others who knew him well—at least as well as I—who over time will share other stories and remembrances, and broaden the legend. While one could reasonably advance several arguments to account for his legacy, for my part, it was a confluence of certain personal characteristics and job requirements that made him unique to the bench, and exemplary in the manner in which he dispensed justice.

Overarching this combination of traits were two distinct characteristics. First, Judge Merhige *loved the law*. He was unafraid to say it, and he loved everything about it—including his job and the people involved in the job's administration. He looked forward to each day on the bench and used to joke that his "last real job was delivering ice to yachts on Long Island" as a teenager. Second, Judge Merhige genuinely *liked people*, but a "people person" is an inadequate description. Lawyers, law clerks, court staff, and the like, all integral to his life on the bench and participants in the success of the system, formed *concentric circles of family*. As a result, lawyers never sought to avoid his court, but rather sought it out. Whether winning or losing, no lawyer had to worry about being embarrassed or treated unfairly. None had to fear tirades, snap judgments, or hidden agendas. It was important to him that all litigants, especially the losers, walked away with a sense of having received their fair day in court, a requirement the Judge explained as a solemn duty of every judge.

One of the best examples of his *compassion* for people was his sensitive management of the Dalkon Shield / A.H. Robins bankruptcy litigation. There can be no doubt that Judge Merhige felt deeply about the plight of each injured woman and demanded fair

treatment of each. While he made absolutely sure that each was fully compensated for her injuries, the Judge was not unmindful of the A.H. Robins employees who stood to lose their jobs should the company disappear. Nor was he blind to the plight of the Robins family who saw a fine, successful, and distinguished family business impaired. Through the eventual sale of the business to American Home Products, all of these interests were addressed to every extent possible under the circumstances.

The prominent cases and other examples of how he managed his court were not the only aspects of his life that helped shape and define the personality so integral to his judicial career. His upbringing no doubt had something to do with his *self-effacing* nature, *humility* and *humor*, dispelling any notion that he thought it necessary to run away from his beginnings, masquerade as something he was not or change his skin. He found a way to humanize himself, especially when he put on a black robe. He always put those in his courtroom at ease, enabling them to focus attention on what was important to the fair resolution of a dispute.

The Judge was quick to require strict adherence to and respect for the institution of the Court. At the same time, he drew a sharp distinction between respect required for the Court and what was owed to the person sitting as judge. He once said: "Respect for the Court does not mean that you need to think that I am very bright—my wife doesn't; you need not like me—sometimes my wife doesn't; and you need not be afraid to say so—my wife isn't." To him, it was the institution, the system, not the person sitting in the judge's chair, that had to be respected. Understanding the difference was a key to affording the necessary protection to the system.

The Judge's signature sense of humor crept in at every turn, reinforcing that wonderful self-effacing nature of his. Years ago, a young lawyer from Richmond was making his pitch one afternoon, but going nowhere with it. Rather than cut him off, belittle him, or shatter his confidence, the Judge remarked: "I know you think that I am missing your point, but for \$54,000 a year, you don't get John Marshall."

While not the only factor in his development as a judge, the constant barrage of big cases did help define him. It took *resilience* to handle a caseload laced with emotionally draining deci-

sions. In fact, the Judge told many a young lawyer, including this one years ago, that while confidence, hard work, good sense, judgment, and fair play are necessary ingredients for any trial lawyer, "resilience is the glue that holds it all together." In other words, one has to be able to pour his heart and soul into a case, only to suffer the inevitable emotional and consequential ups and downs, and still show up the next day and pick up the next file. Experienced trial lawyers knew exactly what he meant and, in the Judge's view, the trait was necessary for judges as well.

There really was no surprise about the relationship which developed between the Judge and those who worked and practiced in his court. He had been an extraordinary lawyer, and a well-respected, close friend of his peers. As M. Wallace Moncure, a civil trial lawyer one generation senior to the Judge and universally considered one of the best, said, "He was born to be a lawyer until it was time for him to become a judge."

From the day in August, 1967, that Robert R. Merhige, Jr. was sworn in as Judge of the United States District Court for the Eastern District of Virginia, friends and family referred to him only as the Judge. At the swearing in ceremony in Richmond, law partner, mentor, and best friend, Leith S. Bremner, addressed the group assembled in what was to become Judge Merhige's courtroom on the third floor of what is now the Lewis F. Powell, Jr. U.S. Courthouse. Mr. Bremner spoke on behalf of the Bar Association of the City of Richmond, of which both he and Judge Merhige had served as President. Mr. Bremner's practice, like Judge Merhige's, was principally criminal. The Judge always said that Mr. Bremner was hands down the best. Mr. Bremner also had a reputation (which he denied) for seeking and obtaining continuances of cases in the hopes that memories of witnesses would fade, all to the advantage of his clients. Calling on that reputation, Mr. Bremner addressed the Court of the soon to be sworn in Robert Merhige, "I trust the Court would indulge those of us here today and see fit to grant a continuance of these proceedings." Mr. Bremner spoke that day for all in attendance, especially the lawyers, and echoed everyone's feelings of friendship and admiration for the Judge. While those in attendance strongly supported Robert Merhige's wish to become a judge, they would have been happy to see things stay just the way they were.

The Judge engendered such *respect* among the bar in large part because he showed respect for the bar in the first instance. This

mutual admiration had a positive effect on how lawyers conducted themselves and handled their cases in his court. Nobody wanted to leave his courtroom thinking that the Judge thought less of him, his preparation, or his ability. Hence, cases were better prepared, professionalism and civility were insured, cases moved along and the interests of the litigants, not to mention the administration of justice, were best served. A lawyer from another state in a hotly contested antitrust case made the comment to me that "win or lose, I don't want the Judge to think our lawyers are any less than what he expects or is accustomed to." That lawyer, by the way, like most, stayed in contact with the Judge from the trial of that case up to the Judge's death some thirty years later.

One trick of his trade needs mentioning here. As alluded to earlier, the Judge ran a thoroughly efficient courtroom with the utmost regard for jurors and empathy for litigants. In jury cases, he often mentioned to his law clerks that he "and the jury would be best of friends in 10 minutes, and I am sure that we will have no worry of being picked on by the lawyers." He did what he set out to do, with that twinkle in his eye and quick wit, and any lawyer paying attention knew that giving the Judge a problem meant a problem for the lawyer with the jury.

On occasion, Judge Merhige would involve himself in settlement efforts, using his *natural mediation instincts* to help resolve the cases. The practice is shunned by some judges and avoided by others outright. There are legitimate arguments both ways. Judge Merhige displayed the *judgment* and exhibited the uncanny talent to identify those cases the court should push toward settlement. He remained *constrained* to the extent of never overusing or abusing the power of the robe or allowing himself to become compromised by the settlement process, recognizing that a case might ultimately have to be tried. He was second to none in walking this tightrope.

He thought that many civil cases, particularly commercial ones, fit the settlement category. In the Judge's view, business people were in a far better position to assess the various risks and rewards than were judges and juries in commercial cases, and were certainly better equipped to craft business solutions to resolve business problems.

Once the Judge embarked on settlement, his means and methods were unique and even became the subjects of legal lore. One example of the Judge at his best was the Westinghouse Uranium case. It seemed simply unsolvable from the standpoint that it was a "bet the company" case—the utilities had to have the uranium to provide the power, and Westinghouse, if made to honor its contract with the utilities at the contract price for which it had agreed to provide uranium, was out of business. Emotions ran high and collateral considerations mitigating against settlement, including uncontrollable foreign interests, were considerable. The various Utility Regulatory Commissions also were an impediment to settlement. They informed the utility parties which they regulated that if approval was sought to pass along increases to rate-payers for the cost of uranium, such increases would have to be triggered by an adverse judgment, not a settlement. The easy way out, of course, would have been for the Judge simply to try the case, let the cards fall, close his file, and move on. His judgment was to the contrary and driven by a desire to see the interests best served of those who found themselves before his court.

The Judge knew that to forge a settlement, both parties had to be at risk, and they had to trust each other to the extent that an honest and good faith negotiation could take place. Additionally, he concluded that he needed an acceptable Special Master to work with the parties in the ongoing mediation process. As to putting both sides at risk, the Judge bifurcated the liability case from damages and held that Westinghouse's principal defense, commercial impracticability, was to no avail. Thereafter, however, he told the utilities that he had grave doubts as to their damage claims. To build the trust factor, he had the lawyers for the parties and their clients meet and spend time together socially. Intuitively understanding that a venue for socializing was important to the process, the group was entertained by Mrs. Merhige and the Judge at their home. With a stroke of genius, the Judge appointed the Honorable William B. Spong, Jr., a highly respected former United States Senator from Virginia and the then Dean of the Marshall-Wythe School of Law, College of William and Mary, as Special Master. Not only was the case resolved, but years later and within months of his death, there was a Westinghouse reunion, hosted by and at the home of Mrs. Merhige and the Judge.

There were, however, those cases that could not be settled, and fortuities of time and geography dropped some of them right in the Judge's lap. The public school desegregation cases were just such cases, super-charged with public outrage not only by the underlying issues, but more so by the remedies that had to be forged to correct the wrongs. Dealing with these cases took not only great *acumen*, but an overdose of *courage* as well.

How he decided and what he did is public record. One has but to look at some of the atmospheric elements in which those decisions were made to appreciate truly what a courageous judge he was: late 1960s to mid-1970s timeframe; integration of the public school system; busing as the remedy to achieve integration; local media and populace vitriolic in their opposition and criticism; localities in or around the Judge's hometown being affected; his guesthouse set on fire; the family dog shot; threats against the Judge's life and those of his wife and children; having to place a coin on the hood of his car in the mornings to make sure in the afternoon that it had not been tampered with; the U.S. Marshal Service in and around his home constantly; hate mail and telephone calls; and the list goes on.

It would be difficult to assess one of the Judge's personality traits as predominant, but courage would be right at the top of the list.

Considering the pressures during the early desegregation days, the *patience* he displayed was remarkable. There was a series of cases which focused on the desegregation of jails. One case involved a jail not far from Richmond. The Sheriff refused to comply, and the court issued a show cause order for contempt of court. The Sheriff appeared with his counsel, who happened to be the local Commonwealth's Attorney and an old friend and acquaintance of the Judge, and the Sheriff stated in his defense that "no damn federal judge will tell me how to run my jail." This event happened during my clerkship, and I anticipated an explosion, having figured out by that time that the Judge was no shrinking violet.

The anticipated explosion did not occur. After a long pause, the Judge dispatched me to recess the court for 15 minutes, and he requested counsel to see him in chambers. The Judge, calmly, suggested to defense counsel that now that his client had cleared his chest, perhaps he should consider the problems he faced, not the least of which was jail time with his own prisoners. Shortly



thereafter the Sheriff reappeared, apologized, promised to comply with the court order, and the show cause proceeding was dismissed by the Judge.

Judge Merhige was *consistent* and *balanced*. Lawyers knew where he stood and also where they stood with him. Even with his longevity on the bench, praise from others, and awards too numerous to count, he never considered himself to be omnipotent. He knew it was important to be a *listener*, one who truly believed that the lawyers knew more about their cases than he. Practicing what he preached allowed him to be in a position to learn more, or understand better and be, as he put it, "unpersuaded." Surely his long and active practice as a lawyer developed a keen sense of what lawyers expected, or at least hoped for, from a judge, and he felt it his duty to be responsive.

Judge Merhige was also buoyed by a strong *confidence* in the system, figuring that if he just did his job, "the best system developed by mankind so far" would work. He always thought of himself as nothing more than a public servant, there to call balls and strikes, and knowing that, try as he might, he could be wrong. He took comfort in a system that "would not allow a litigant to be penalized by my mistakes." For this reason, he never viewed the appellate courts as adversaries or there to cause headaches for the trial bench. While he may not have always agreed with appellate decisions, he understood that it was not the job of the courts to always agree with him, and he never let it become personal. He openly and often encouraged lawyers and litigants to test his decisions and to correct his mistakes by appealing his cases. The few times his decisions were reversed, the Judge was encouraged that the system had worked and that justice had been done.

This view of the system enabled him to approach cases and their resolution with *intellectual honesty*, another significant trait of his. What more can we ask of our judges?

Much has been made over the years about the Eastern District of Virginia's so-called "rocket docket," some comments pro and some con. This is not the place for that debate, but with Judge Merhige, the debate was irrelevant. He never asked any lawyer to do more than he himself did. I am proof positive from my year as a law clerk and my years in practice thereafter that no lawyer came to work earlier or left later. Also, there was something else about him in this context that stemmed any rocket docket abuse

and, no doubt, arose from his having been such a good lawyer—he knew full well the difference between good lawyers who found themselves in circumstances beyond their control, and lawyers who created their own unfortunate circumstances. He may have chided the good lawyer in a friendly way, but that lawyer never suffered unnecessarily from the rocket docket.

From some quarters, and growing out of the emotion-filled cases, particularly the desegregation cases, came the constant drum beat that Judge Merhige considered himself a super-legislature, put in place to draft laws and rewrite the Constitution to suit his wishes. Those who said it were wrong, and did not know him. His approach was to apply the law, not make it. He was far too much of a disciple of the system to presume to make things as he wanted them to be or thought they should be. It was intuitive for him to apply this formula to decision making because of the unique blend of personality traits he embodied.

His win-loss record, although not mentioned as his test for a Judge's legacy, bears out the use of this approach to decision making. I cannot give you his reversal percentage, but I can assure you that it was miniscule. Judges who go their own way without adherence to the law do not have miniscule reversal records. Even his order providing for busing of Richmond students into surrounding political subdivisions to do away with segregation, criticized for being "overreaching" and "way out of bounds," ended up in a four-to-four decision by the Supreme Court of the United States, Justice Powell having recused himself because of his service on the City of Richmond School Board. A four-to-four decision is not synonymous with going one's own way, overreaching, or being way out of bounds.

This age old "making the law" criticism of judges always depends on the bias of the reporter. Ironically, while being accused of drafting and rewriting the law in the 1970s, later in his career there were those who accused Judge Merhige of not drafting or rewriting enough. Taken in combination, the two contrary descriptions could be thought descriptive of a balanced, consistent jurist striving to follow the law, not make it.

There are two other traits generally ascribed to judges considered to be good ones—*bright* and *quick*. He was overloaded with both qualities, and if I need to give further examples of either, then I have failed miserably in outlining the other traits which

set in motion his judicial approach, and why he receives universal acclaim as a judge.

There was a final trait, although not one of the personality variety, which he had to struggle with his entire judicial career. The Judge always considered himself *a lawyer*, and often said so. This is not a surprise considering what a good lawyer he was. In those few cases where one of the lawyers, for whatever reason, was not quite up to the task, he found it very difficult not to become the lawyer for the disadvantaged client. The impulse was not driven by his personal choice of sides, but rather a belief that the fight should always be a fair one. He became quite adept at quietly grinding his teeth as opposed to jumping in the fray, but never lost the propensity to always hope that the fight was a fair one.

In short, Judge Merhige was one of a kind.