

1989

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Recommended Citation

Ronald J. Bacigal & Margaret Ivey Bacigal, *When Racists and Radicals Meet*, 38 Emory L.J. 1145 (1989).

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Essay

WHEN RACISTS AND RADICALS MEET

*Ronald J. Bacigal**
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INTRODUCTION

On November 3, 1979, an ideological clash between political extremists erupted into armed confrontation in Greensboro, North Carolina. The violence was triggered by a "Death to the Klan" rally which pitted the Communist Worker's Party against the Ku Klux Klan and a small group of American Nazis. Within eighty-eight seconds of their meeting, these volatile groups fired thirty-three shots and left five participants dead on the streets of Greensboro.¹

The violence in Greensboro stands as one of the bloodiest and most dramatic episodes in the history of this nation's civil rights movement. The tragedy served as the basis for a public television documentary, *88 Seconds in Greensboro*, and an off-Broadway play entitled *Jerico*.² Despite the extensive publicity, there has been little academic analysis of the Greensboro incident. This neglect may be due to the fact that litigation surrounding the occurrence was confined to the trial court level, thus depriving legal scholars of published appellate opinions which might clarify the factual situation and frame the issues in broad jurisprudential terms.³

In order to stimulate scholarly discussion, this Essay presents an empir-

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¹ See Taylor, Waller v. Butkovich: *Lessons in Strategy and Tenacity for Civil Rights Litigators*, 1 POLICE MISCONDUCT & CIV. RTS. L. REP. 145 (1986); *Shootout in Greensboro*, TIME, Nov. 12, 1979, at 31.

² See *infra* Appendix A.

³ All published opinions on the Greensboro incident address procedural rulings. See Waller v. Butkovich, 605 F. Supp. 1137 (M.D.N.C. 1985); Waller v. Butkovich, 593 F. Supp. 942 (M.D.N.C. 1984); Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

ical account of the Greensboro incident from the perspective of those who participated in the episode and in the resulting civil rights trial. The Essay traces the circumstances leading to the violence and reviews the resultant litigation with special attention given to the role of the trial judge in politically volatile cases. The candid reflections offered by the trial judge and other participants allow the reader to examine both the event and the litigation, not merely in the abstract, but as implemented by flesh-and-blood lawyers, litigants, and judges.

A. *The Role of the Trial Judge*

The role the trial judge plays in civil rights litigation is frequently ignored because legal scholarship often seems preoccupied with the United States Supreme Court. From Chief Justice John Marshall to recent nominee Robert Bork, the personalities and judicial philosophies of Supreme Court Justices attract national attention⁴ while trial judges ply their own form of jurisprudence in virtual obscurity. Scholarly neglect of the trial courts has perpetuated a tendency to dismiss federal district (trial) judges as third-string players whose errors can always be reversed by the appellate courts. The lack of interest in trial courts helps obscure 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, how our society punishes its violent and its white-collar criminals.⁵

Perhaps the ultimate embodiment of a trial judge's power to alter social conditions rests in the personage of Federal District Judge Robert R. Merhige, Jr., who presided over the civil rights litigation arising from the violence in Greensboro. Judge Merhige is one of this nation's most respected trial judges, and a forthcoming biography⁶ recounts his involvement in a number of high visibility trials such as the Dalkon Shield/A.

⁴ See, e.g., Urofsky, *Conflict Among the Brethren: Felix Fränkfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71.

⁵ J. GOULDEN, *THE BENCH WARMERS* 2-3 (1974).

⁶ This Essay is excerpted from the biography. All rights reserved.

H. Robins bankruptcy proceeding,⁷ the Westinghouse Uranium case (perhaps the first of the modern-day "complex" cases to attract national attention),⁸ and the Kepone pollution case in which Judge Merhige imposed the largest fine recorded under federal antipollution laws.⁹ The judge has also been involved in a number of important civil rights cases including litigation surrounding the impeachment of President Nixon,¹⁰ the Black Power and Vietnam War protests,¹¹ the prisoners' rights movement,¹² the Indian uprising at Wounded Knee,¹³ and a school integration case which split the United States Supreme Court in a four-to-four vote.¹⁴ No other trial judge, state or federal, has been at the center of so many controversial cases, cases which have cut to the heart of many weighty issues in America in the last few decades.

Judge Merhige's performance in so many landmark cases has prompted his admirers to label him a problem-solver and a judicial activist¹⁵ who uses his power to correct the injustices prevalent in our society. His critics, however, charge that the judge pushes his judicial power to its limits,¹⁶ and that he plays a "strikingly activist judicial role of a kind not often seen in federal courtrooms."¹⁷ When Judge Merhige was assigned to preside over the Greensboro case, both admirers and critics of the judge predicted that the trial would become a morality play in which the "activist"

⁷ See McCallister, *Trying Times, Trying Cases*, 74 A.B.A. J., Jan. 1988, at 48.

⁸ See Bacigal, *An Empirical Case Study of Informal Alternative Dispute Resolution*, 4 OHIO ST. J. DISPUTE RESOLUTION 1 (1988).

⁹ See Bacigal & Bacigal, *Criminal Prosecutions in Environmental Law: A Study of the "Kepone" Case*, 12 COLUM. J. ENVTL. L. 291 (1987).

¹⁰ See *United States v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd*, 435 U.S. 589 (1978); *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976).

¹¹ One of Judge Merhige's first judicial acts was to order the release of militant black power leader H. Rap Brown. Judge Merhige was also the first federal judge to rule that the Vietnam conflict was a "war" within the meaning of the Constitution. Interviews with the Honorable Robert R. Merhige, Jr., in Richmond, Va. (1985-1987) [hereinafter Merhige interview].

¹² See Bacigal, *Annals of the Prisoners' Rights Movement: The Contribution of Judge Merhige*, 24 CRIM. L. BULL. 521 (1988).

¹³ See Bacigal, *Judicial Reflections Upon the 1973 Uprising at Wounded Knee*, 2 J. CONTEMP. LEGAL ISSUES 1 (1989).

¹⁴ See Bacigal & Bacigal, *A Case Study of the Federal Judiciary's Role in Court-Ordered Bussing: The Professional and Personal Experiences of U.S. District Judge Robert R. Merhige, Jr.*, 3 J. L. & POL. 693 (1987).

¹⁵ Statement of Professor A.E. Dick Howard, N.Y. Times, July 3, 1988, § 3, at 4, col. 2.

¹⁶ Wash. Post, Aug. 12, 1985, at A6, col. 1.

¹⁷ Wash. Post, Jan. 22, 1989, at H9, col. 1.

judge would interject his own views of justice and equity. The accuracy of that prediction can be tested only by placing the judge's performance within the entire context from which the controversy arose. This Essay describes that context and provides a basis for assessing the manner in which a trial judge can influence and control the proceedings in cases which impact social and political conditions in our society.

B. The Background of the Case

Described in the 1950s by Princeton sociologists as "one of the most prosperous and industrialized political units in the state,"¹⁸ Greensboro was labelled the nation's third most desirable place to live in 1981.¹⁹ The city, however, is a study in contrasts and the events of November 3, 1979 reflect its diverse historic, economic, and social heritage. Named after General Nathaniel Greene, who defeated Cornwallis' forces at the Battle of Guilford Courthouse, Greensboro was an early center for Quaker anti-slavery activity. In the late nineteenth and early twentieth centuries, construction of the area's textile mills brought increased racial and economic diversity. The resulting economic prosperity led to a flourishing of education as five institutions of higher learning were established in Greensboro, including the predominantly black A & T State University and Bennett College. These institutions helped develop a black middle class population.²⁰ Paradoxically, predominantly black, low-income housing projects also existed within the shadow of the two colleges. The poverty in the black communities combined with the heightened expectations of black college students to lead Greensboro into the civil rights movement of the 1960s.

The first sit-in strike in the nation occurred in Greensboro when four black A & T University students sat at Woolworth's "all white" lunch counter and demanded to be served. The incident opened the era of sit-ins and a new stage of the civil rights movement. Throughout the early 1960s,

¹⁸ W. CHAFEE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 19 (1980).

¹⁹ R. BOYER & D. SAVAGEAU, PLACES RATED ALMANAC 370 (1981).

²⁰ The *Washington Post* described Greensboro as bearing "the trappings of newly-found black success. More neighborhoods are integrated, many blacks have become affluent at an earlier age, the school system is no longer segregated and the new black middle class here has developed its own tinsel-like, Piedmont chic style to show off its new found wealth." Wash. Post, Feb. 7, 1980, at DC4, col. 3.

demonstrators picketed Greensboro's segregated facilities, demanding equality. By the end of the decade, however, the non-violent era of Dr. Martin Luther King, Jr. gave way to the black power movement. No longer content to work within the confines of the existing power structure, Greensboro's young blacks accepted the black power movement's challenge to seize power from the white establishment.²¹ Among those answering the call for increased militancy was Nelson Johnson, who would play a prominent role in the "Death to the Klan" rally.

A native of eastern North Carolina, Johnson entered A & T State University in the fall of 1965. Capitalizing on his organizational skills and fiery rhetoric, Johnson established himself as a militant force in campus and city politics. He forged a coalition between students and the black community in order to support striking A & T cafeteria workers who were protesting alleged management exploitation. His name was also linked to an armed insurgence which resulted in a stand-off between students and law enforcement officials on the A & T campus in 1969.²² Johnson's advocacy of radical social change ultimately led him to become a spokesman for the Communist Workers' Party (CWP).

Characterized as one of the smaller sects on the far left, the CWP was a Maoist, anti-Soviet group, which had its origins in the civil rights, anti-war, and women's movements of the sixties. The CWP proclaimed its goals as:

- Workers' democratic control of factories and other work places, and a national plan for coordinating production;
- Jobs at union-scale wages for everyone;
- National health and retirement insurance, free child care, free education through college, and reduced housing and utility costs;
- Dismantling military alliances and the systematic reduction of arms worldwide.²³

²¹ See W. CHAFEE, *supra* note 18, at 247.

²² The National Guard was called in to quell the demonstration and one student was killed. Wash. Post, Feb. 7, 1980, at DC4, col. 5.

²³ Interview with Lewis Pitts, plaintiffs' attorney, in Greensboro, N.C. (Sept. 1986) [hereinafter Pitts interview].

According to the CWP, racism and violence were the inevitable results of capitalism, hence the Ku Klux Klan was the ultimate embodiment of the capitalist class. The North Carolina Ku Klux Klan, one of the largest in the nation,²⁴ became a natural enemy and convenient target for the CWP. The CWP labelled the Klan as "one of the most treacherous scum elements produced by the dying system of capitalism" and exhorted CWP members to "physically smash the racist KKK wherever it rears its ugly head."²⁵ Violence was narrowly averted in China Grove, North Carolina, when the CWP disrupted a Klan recruiting rally and burned the Confederate flag. Buoyed by their success in China Grove, the CWP challenged Klansmen to attend a "Death to the Klan" rally in Greensboro. An open letter, drafted by Nelson Johnson, warned that "the Klan will be smashed. . . . Klanspeople, and your Nazi friends — you are a temporary pest and an obstruction in our fight to end all exploitation and oppression. But, we take you seriously and we will show you no mercy. DEATH TO THE KLAN!!!"²⁶

Johnson's public challenge to the Klan drew the anticipated response when Grand Dragon Virgil L. Griffin used the pulpit of a local church to proclaim that communists were marching in the streets and church people were letting them.²⁷ At Griffin's prompting, the Klansmen reached a consensus to join forces with the Nazi Party²⁸ in order to present a united racist front against the CWP. The *Washington Post* graphically described the mentality of the groups preparing for confrontation:

²⁴ The B'nai B'rith Anti-Defamation League estimated that North Carolina was home to some 800 Klan members. *Wash. Post*, Mar. 2, 1980, at C5, col. 2. This estimate deals with six factions of the Klan operating in North Carolina. Three representative factions were known as the White Knights of Liberty, the United Klans of America, and the White Patriot Party (formerly the Confederate Knights of the Ku Klux Klan). Although there were differences in ideology among the various Klan factions, all advocated white, Anglo-Saxon, Protestant supremacy. *Id.*

²⁵ An Open Letter from the Workers Viewpoint Organization to Joe Grady, Gorrell Pierce, and All KKK Members and Sympathizers (Oct. 22, 1979). The entire letter appears *infra* Appendix B.

²⁶ *Id.*

²⁷ *Greensboro News & Record*, Mar. 28, 1985, at D3, col. 1.

²⁸ The Nazi "Party" may be a misnomer in light of the chaos within the organization. In 1958, George Lincoln Rockwell formed the American Nazi Party based on the doctrines of German dictator Adolf Hitler. Rockwell was killed in 1967 by a former follower. Without Rockwell's leadership the party fragmented and withered. Several years later the National Socialist Party of America was formed in Chicago. Harold Covington, a North Carolina native, assumed leadership and moved the party headquarters to Raleigh, North Carolina. Covington disappeared in 1981, and the North Carolina Nazi Party has dissolved into splinter groups. For a general history of the American Nazi Party, see D. DOWNS, *NAZIS IN SKOKIE* (1985); D. HAMLIN, *THE NAZI/SKOKIE CONFLICT* (1980).

The members of each group think they represent the true beliefs of a majority of working class Americans. Each sees the other not as an isolated group of extremists, but as the shock troops of a well-organized conspiracy. Their separate passions and obsessions seem to have driven them inexorably together, first to occupy the center of each other's hatred and then to shed blood.²⁹

C. *The Confrontation*

On the day of the "Death to the Klan" rally, the Klansmen and Nazis gathered outside Greensboro to form a motor caravan. Many of the participants were boisterous and belligerent as they loaded rifles and semi-automatic weapons into the trunks of several automobiles. Nearby in Morningside Manor, a predominantly black housing project, preparations were underway for the "Death to the Klan" rally. Demonstrators, dressed in hardhats, jeans, and blue workshirts, made placards and set up a speaker's platform on the back of a flatbed truck. A CWP member strummed a guitar, leading a group of adults and children in protest songs. The lyrics "People, people, have you heard, revolution is our word" drifted through the midday air.³⁰

The tranquility of the scene was shattered as a line of vehicles moved up the street toward the demonstrators. The caravan of Klansmen and Nazis was led by an automobile with a Confederate flag on its license plate. As the vehicle approached the demonstrators, a passenger called out, "You asked for the Klan, now you've got them."³¹ CWP members returned the verbal taunt with cries of "Ku Klux Klan, scum of the land," as they began beating on the automobile with a stick.³² Klan members exited from their vehicles and initiated a scuffle. At some point a single shot rang out, then the air exploded with the sound of gunfire and sticks pounding against flesh and concrete. In eighty-eight seconds the massacre was over. Four CWP members were killed instantly, a fifth died at the hospital, and another was permanently paralyzed.³³ All but one of the

²⁹ Wash. Post, June 22, 1980, at A17, col. 1.

³⁰ Pitts interview, *supra* note 23.

³¹ *Id.* See also *88 Seconds in Greensboro* (PBS television broadcast, Jan. 24, 1983).

³² *Id.* See also Wash. Post, June 22, 1980, at A1, col. 1.

³³ The deceased were: Sandra Smith, 29, former student body president of Bennett College; Caesar Gauce, 28, a Cuban refugee and a 1975 magna cum laude graduate of Duke Medical School; Michael Nathan, 33, a 1973 graduate of Duke Medical School; and James Waller, 37, a graduate of

victims were white, and all were dedicated revolutionaries who had given up promising careers to support the CWP.

The victims of the violence were mostly northern whites in their late twenties and early thirties who had been educated in some of the nation's leading universities.³⁴ Four of the five slain CWP members were medical school graduates. The widow of one victim proclaimed that her husband became a radical when serving an internship at Lincoln Hospital in New York. "It was like a part of the Third World," she explained. "He was beginning to see that the whole system of capitalism was creating injuries faster than he could put on Band-aids."³⁵ The disillusioned doctor moved to North Carolina, studied Marxism, and joined the CWP. Reflecting his view that a revolution would come from communist organization of the working class, the doctor abandoned his medical career and began working in Greensboro's non-unionized textile mills.

In contrast to their well-educated victims, the men who shot them were mainly high school drop-outs. Most worked in the textile mills and all professed to love America and hate communism. Grand Dragon Virgil Griffin, who typified the Klansmen, explained that his membership in the Klan came about because, "I have five kids, I'm a taxpayer, and I don't like what's going on in the schools. They're takin' prayer and Bible out and puttin' niggers and sex education in."³⁶ Griffin claimed that the Klansmen and Nazis "went down to Greensboro to fly the American flag and say we believed in America and believed in God."³⁷

Another typical Klansman who participated in the demonstration was Jerry Paul Smith, who had dropped out of the tenth grade, worked in Greensboro's textile mills, drove a truck cross-country under the CB handle "Southern Babymaker," and rode with a motorcycle gang. Tall, heavy-set, with tattooed arms and a short temper, he lost two front teeth in a fight and confessed that he has been "known to throw the first

the University of Chicago Medical School and a former professor at the Duke Medical School. William Sampson, 31, later died in the hospital. A native of Richmond, Virginia, Sampson attended the Sorbonne, Harvard Divinity School, and the University of Virginia Medical School. Paul Bermanzohn, a native New Yorker and a 1974 Duke Medical School graduate, survived his gunshot wounds, but is permanently paralyzed. Pitts interview, *supra* note 23.

³⁴ See *supra* note 33.

³⁵ Wash. Post, June 22, 1980, at A17, col. 2.

³⁶ *Id.* at A18, col. 2.

³⁷ *Id.* at col. 3.

punch.”³⁸ He claimed that he did not know there was going to be a fight in Greensboro, but insisted that “if you smack a man in the face with an egg, you got to expect to get your butt whipped.”³⁹ Smith admitted that he enjoyed the stick fighting at the rally until the guns came out. He also conceded that, “It’s a hell of a thing to see a man layin’ there, gasping, the life running out of him in the street, but that’s what they intended to do to us.”⁴⁰

Each side blamed the other for the outbreak of violence, but the factual investigation of the November 3 event raised more questions than answers. Who had fired the first shot? Why had the police not been present? What role did state and federal law enforcement agencies play in the events leading up to November 3? Was there a cover-up by the police? Satisfactory answers to these questions have never emerged because confusion seems to have reigned on the day of the massacre.

Reconstruction of the events of November 3 disclosed that the CWP parade permit indicated that the march would begin at noon at Washington Street and Carver Drive. A different starting point, however, was identified by posters advertising the march. According to police, efforts to clear up the discrepancy with CWP members on the morning of November 3 prompted chants of “Death to the Pigs.”⁴¹ Nelson Johnson warned police to “stay out of our way,” but later asserted that he had only intended to caution police not to interfere with the rally. The police, however, charged that the CWP sought a confrontation and created a situation where the police were trying to protect people who did not want them around. After concluding that a show of force might result in unifying all groups against the police, law enforcement authorities made a tactical decision to keep a low profile. Officers assigned to monitor the march were told “to grab a quick lunch and be in place by 11:30 a.m.”⁴² When word came that the Klan was moving earlier than anticipated, the police were ordered to their pre-assigned positions, but the message came too late to avoid tragedy.

³⁸ Wash. Post, Nov. 19, 1980, at A2, col. 3.

³⁹ *Id.* at A1, col. 2.

⁴⁰ *Id.* at A2, col. 1.

⁴¹ Pitts interview, *supra* note 23.

⁴² *Id.*

D. *The Alleged Police Conspiracy*

On the anniversary of the shootings, sixteen individuals, including CWP members and relatives of the slain victims, filed suit against eighty-seven defendants. The charges included wrongful death, assault and battery, and a claim that Klansmen and Nazis conspired with city, state, and federal agents to violate the civil rights of those participating in the anti-Klan rally.⁴³ The conspiracy allegations focused on two key figures linking state and federal officials in the conspiracy theory: Greensboro police informant Eddie Dawson, and Bureau of Alcohol, Tobacco and Firearms (BATF) agent Bernard Butkovich.⁴⁴

Dawson, described as a loner, had a long history of involvement with the Klan. While serving time in prison for Klan-related activities, he was recruited as an FBI informant and worked undercover for several years. As part of his undercover work, Dawson developed close contacts within the Greensboro Police Department. When the police learned of the CWP's plans for a "Death to the Klan" rally, they turned to Dawson as their primary source of information on the Klan. Dawson renewed his relationship with the Klan and assumed a leadership role in planning for the November 3 rally. He designed a flyer that equated communists with murderers, and he spoke at a Klan meeting denouncing blacks and communists. He admitted that he urged Klansmen to attend the upcoming CWP march in Greensboro, while the CWP, as well as some Klansmen, claimed that Dawson also used this occasion to encourage members to bring guns to the rally.⁴⁵

The night before the rally, Dawson obtained a copy of the CWP's parade permit from his police contacts and drove Klansmen over the parade route. The day of the rally, Dawson helped assemble Klansmen

⁴³ The *Washington Post* opined that there was "a feeling of kinship between city authorities and the Klan." *Wash. Post*, Feb. 7, 1980, at DC4, col. 3. The plaintiffs' charges consisted of: a conspiracy to violate the plaintiffs' right to assemble, right to life, and right to equal protection of the laws, see 42 U.S.C. § 1985 (1976); participation in the conspiracy by government officials, see 42 U.S.C. §§ 1983, 1986 (1976), and a separate conspiracy to conceal the initial conspiracy, see 42 U.S.C. §§ 1983, 1985 (1976). *Greensboro News & Record*, May 19, 1985, at C3, cols. 1-2.

⁴⁴ Neither Butkovich nor Dawson was indicted or called to testify in the state criminal prosecution of Klansmen and Nazis. Tabb & Nathan, *The View from N.C.: Civil Rights, the Klan & Reagan Justice*, THE NATION, Aug. 21, 1982, at 141.

⁴⁵ In the course of his interview for the public television documentary *88 Seconds in Greensboro*, Dawson denied that he encouraged the use of firearms.

and Nazis at the home of a fellow Klansman. On two separate occasions, Dawson broke away from the group to telephone Jerry "Rooster" Cooper, who was his contact within the Greensboro police department. Dawson advised Cooper that approximately fifteen Klan and Nazi members had gathered for the rally and that many had brought guns.⁴⁶ As 11:00 a.m. approached, Dawson joined Grand Dragon Virgil Griffin in the lead car and started the caravan moving. Police Officer Cooper remained several blocks behind while radioing a warning that the group had begun to move. The police, however, missed two key transmissions from Cooper advising that the caravan was heading in the direction of Carver Drive rather than toward the planned origination point. When shots rang out, officer Cooper was still a block away.

Bernard Butkovich, the other undercover agent who allegedly played an active role in planning the events of November 3, was not in Greensboro for the rally. Butkovich became involved with the Nazi party in July 1979 when the BATF sent him to North Carolina to infiltrate the party and investigate the group's possession of illegal weapons. The BATF, however, ordered agent Butkovich to stay away from the "Death to the Klan" rally because it was too "public."⁴⁷ While Butkovich avoided the rally itself, he participated in planning for the confrontation when Klansmen met with Nazis and extended the invitation to join forces.⁴⁸ At the meeting, Butkovich was alleged to have encouraged the Nazis to bring guns to the November 3 demonstration. One participant at the meeting recalls Butkovich stating, "Well, I wouldn't go unless I had my gun. It isn't against the law to have one locked in the car."⁴⁹ At trial, Butkovich testified that he might have encouraged the Nazis to produce their illegal weapons in order to facilitate seizure by the authorities.⁵⁰ Butkovich and other BATF agents, however, insisted that they believed the Nazis when

⁴⁶ In describing the scene at trial, former Nazi leader Roland Wayne Wood testified that there were enough guns at the house to look like they were "preparing for war." Pitts interview, *supra* note 23.

⁴⁷ Greensboro News & Record, May 9, 1985, at C2, col. 5.

⁴⁸ The meeting was held in Winston-Salem in a garage belonging to Roland Wayne Wood. Wood was under investigation for illegally owning a fully automatic weapon, and was considered by Winston-Salem police to be one of the most dangerous men in the area. Pitts interview, *supra* note 23.

⁴⁹ Garrow, *The Greensboro Boys: Klan and State in North Carolina*, THE NATION, Aug. 6, 1983, at 107 (quoting comment made by Nazi defendant Raeford Milano Caudle).

⁵⁰ See Greensboro News & Record, May 19, 1985, at C3, col. 4.

they stated that they would not take firearms to the rally. The BATF also denied allegations that it informed other law enforcement agencies of the Nazis' planned participation in the confrontation with the CWP.

The third law enforcement branch to be implicated in the alleged conspiracy was the FBI.⁵¹ Having learned in October, 1979 of the "Death to the Klan" rally, the agency launched an investigation of the CWP. According to the FBI, however, the rally was not the focus of its investigation, nor were any FBI agents involved in local law enforcement planning for the November 3 event. Nonetheless, the plaintiffs argued that the FBI had sufficient warning of the potential for violence in Greensboro and should have taken preventive measures. In support of their allegations, the plaintiffs introduced evidence that the leader of the Winston-Salem, North Carolina KKK had advised FBI agents that, after the flag-burning incident in China Grove, there would be violence if the CWP and the Klan ever met again. As part of his undercover work, Ed Dawson had warned an FBI agent that certain dangerous individuals were coming to the "commie rally."⁵² The local U.S. Attorney also revealed that several FBI agents informed him that there might be trouble at the anti-Klan rally. Despite such information, the FBI characterized its investigation of the CWP as "nothing urgent."⁵³ At trial, Judge Merhige questioned such a characterization while pointing to an FBI memorandum predicting that the "Death to the Klan" rally "involves or will involve the use of force or violence."⁵⁴ Merhige observed that the memorandum was issued less than two weeks before the demonstration and asked why the FBI took no action. The chief of Greensboro's FBI office conceded, "Yes, I should have given it more priority."⁵⁵

The allegations of government agencies actively or passively bringing about the Greensboro confrontation suggested for the first time in almost a decade that government undercover agents may have been involved with an extremist group involved in violence. In 1974 *The New York Times*

⁵¹ At the funeral march for the slain victims, the CWP issued a new explanation of the shootout: "On November 3, 1979, under the direction and aid of the FBI and the rest of the overt repressive machinery of the capitalistic state, the KKK and Nazis with military precision assassinated five members of the Communist Workers' Party . . ." Wash. Post, Mar. 2, 1980, at C5, col. 4.

⁵² Greensboro News & Record, May 19, 1985, at C3, col. 6.

⁵³ Greensboro News & Record, May 15, 1985, at B2, col. 3.

⁵⁴ *Id.*

⁵⁵ *Id.*

had reported a "massive illegal domestic intelligence operation"⁵⁶ designed to harass and discredit political extremists, including members of the Communist Party, the Ku Klux Klan, militant black organizations, and the antiwar movement. Disclosure of the government's infiltration of domestic political groups prompted the impaneling of an investigatory commission chaired by then Vice President Nelson Rockefeller.⁵⁷ The Rockefeller commission documented a history of the government's "plainly unlawful" conduct and recommended significant restrictions on domestic surveillance.⁵⁸ Many of the commission's recommendations were codified in the National Security Act.⁵⁹ The Greensboro plaintiffs charged that the FBI and BATF had violated the National Security Act's strict guidelines for federal agents engaged in undercover operations.

The allegations of governmental misconduct as well as the other issues raised by the plaintiffs' federal suit were not resolved for four years in order to provide state authorities and the Justice Department an opportunity to prosecute criminal charges against individual Klansmen and Nazis. The state and federal trials resulted in the Klansmen and Nazis being acquitted by all-white juries.⁶⁰ The CWP blamed the acquittals on government prosecutors whom they accused of concealing the government conspiracy. Other observers pointed out, however, that CWP members refused to testify or cooperate with the prosecutors.⁶¹ In response to such criticism, the CWP announced that it would utilize the federal civil rights suit to present its side of the story. "What got presented to the two previous juries is a skewed view of the entire civil rights conspiracy," plaintiffs' counsel declared. "We're going to present a complete picture of it."⁶² A

⁵⁶ N.Y. Times, Dec. 22, 1974, § 1, col. 1.

⁵⁷ See Exec. Order No. 11,828, 3 C.F.R. 933 (1975).

⁵⁸ See COMMISSION ON C.I.A. ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT, at 10 (1975).

⁵⁹ 50 U.S.C. §§ 401-05 (1982). For current provisions, see generally Note, *Executive Order 12,333: "Unleashing" the CIA Violates the Leash Law*, 70 CORNELL L. REV. 968 (1985).

⁶⁰ The defendants were acquitted in state criminal proceedings on November 17, 1980, and in federal proceedings on April 15, 1984. Taylor, *supra* note 1. See also *A Litany of "Not Guilty": Klansmen and Nazis are Freed in Greensboro Killings*, TIME, Dec. 1, 1980, at 25.

⁶¹ Nelson Johnson issued a news release stating that "We reject this whole fascist judicial proceeding. We reject it completely, thoroughly, unconditionally." Wash. Post, June 17, 1980, at A6, col. 5. A juror at the criminal trial subsequently stated that "The CWP really missed the boat. They should have testified. They would have helped us understand. . . ." Wash. Post, Nov. 21, 1980, at A2, col. 2.

⁶² Greensboro News & Record, Mar. 11, 1985, at A1, col. 3.

Greensboro defense attorney in the criminal trials warned that, "I expect all of the Communists to come out of the closet and testify to things they never testified to before. That ought to make for quite a difference in the [civil] trial."⁶³

E. The Civil Rights Trial

The long-awaited trial was further delayed when the North Carolina federal judges disqualified themselves from presiding over the case. Judge Merhige, who over the years has been consistently tapped to handle some of this country's most difficult cases, was appointed to try the case in December, 1983. One attorney explained Merhige's selection:

He is very sharp and loves the law. He 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.⁶⁴

Merhige willingly accepted the challenge to handle this potentially volatile case while expressing only one reservation. Faced with adjudicating a dispute between Klansmen, Nazis, and Communists, Merhige quipped, "The only thing I'm afraid of is that somebody might come out of [the case] saying they like me."⁶⁵

Shortly after his appointment, Merhige travelled to North Carolina to rule on pretrial motions and to set the date for trial. His law clerk accompanied him and recalls that the first courtroom hearing was attended by litigants who indicated that they intended to use the trial as a forum for their political views. The Nazis appeared at the hearing in military boots, brown shirts, and other vestiges of the Nazi uniform. The Klansmen engaged in less courtroom bravado, but were equally adamant in denouncing blacks, Jews, and communists. Despite their openly racist views, Merhige's clerk expressed sympathy for the Klansmen "because they seemed to be poor working folks bred into racism as an outlet for life's

⁶³ *Id.* at col. 1. Today, civil rights litigators have increasingly filed financial damage suits against the Klan. See Curriden, *Hitting the Klan — Civilly*, 75 A.B.A. J., Feb. 1989, at 19.

⁶⁴ Pitts interview, *supra* note 23.

⁶⁵ Interview with Ann Holton, Merhige's former clerk, in Richmond, Va. (Oct. 3, 1986).

frustrations.”⁶⁶

When Merhige convened the first hearing, a Klansman arose to complain that he could not hear anything that was being said in the courtroom. “Why don’t you come up and sit by me?” offered Merhige, putting the man in the jury box next to him. According to Merhige’s clerk, the incident typified the judge’s handling of volatile and politically outspoken litigants. “Judge Merhige has a real good way with pro se defendants,” the clerk explained. “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 whole system work better.”⁶⁷

Although the hard-of-hearing Klansman was delighted with his front-row seat, the federal marshals were alarmed over the potential security threat posed by the Klansman’s proximity to Merhige. The marshals’ concern for tight security had been prompted by a Nazi bomb threat⁶⁸ and a scuffle between police and CWP members during the state criminal proceedings. A full-time bodyguard was assigned to Merhige, and the judge was forced to forego his evening stroll and early morning jog. A SWAT team patrolled the roof of the courthouse; only federal marshals were allowed to carry weapons into the courtroom. Weapons belonging to FBI agents and other police authorities were surrendered at the courthouse door. Firearms to be used as exhibits in the case were checked and rechecked as Merhige warned, “I don’t even want a spitball in them.”⁶⁹

All cameras and recording devices were likewise barred from the courtroom. Unlike the judges in the prior criminal prosecutions, however, Merhige did not impose a gag order prohibiting the parties from taking their political agendas to the press. The CWP, employing a full-time media specialist, took advantage of this opportunity to further its cause with the public. The CWP insisted that media coverage was needed to educate people about the trial and the government’s involvement in the shootings,

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Several individuals were prosecuted as a result of these threats. For the background and disposition of these prosecutions see *United States v. Caudle*, 758 F.2d 994 (4th Cir. 1985); *United States v. Talbert*, 706 F.2d 464 (4th Cir. 1983).

⁶⁹ Merhige interview, *supra* note 11.

particularly in light of the allegedly biased news coverage of the CWP.⁷⁰ Counsel for the City of Greensboro, however, complained to Judge Merhige that "I can't turn on the radio going back and forth to work without hearing what some plaintiffs have said about one of the court's rulings. . . . We defendants . . . have been bombarded and spoken ill of from day one. But we've kept our mouths shut. We want to try this case in a court of law."⁷¹ In response, Merhige acknowledged, "I must say they [the CWP] have the right to do it. But it takes away from the appearance of justice."⁷² Merhige cautioned the parties against trying their case on the sidewalk, but never took any action against plaintiffs' lawyers for critical remarks made to the press.

The lawyers who spoke to the media were often as colorful and unorthodox as their clients. The plaintiffs' lawyers were led by Lewis Pitts of the Christic Institute, an ecumenical center for public policy and public interest law based in Washington, D.C. Born and raised in South Carolina, Pitts is a political activist who has devoted his career to defending people and causes in which he believes. After graduating from law school, he worked as a public defender before opening his own office in a predominantly black, rural county of South Carolina. His representation of economically disadvantaged plaintiffs in civil rights cases brought him little remuneration and he was eventually forced to dissolve his practice. He then became involved in the anti-nuclear movement and worked for attorney Gerry Spence in the Karen Silkwood litigation. Pitts also organized and participated in civil disobedience protesting nuclear power.⁷³

When the Silkwood case ended in 1979, Pitts was asked to assume responsibility for the Greensboro case and to generate publicity for the plaintiffs' cause. Prior to Pitts' arrival, the initial legal effort was spearheaded by the Greensboro Justice Fund, which was formed primarily by the family and friends of slain CWP members. The group was closely associated with communism and generated little public sympathy. By disbanding the group and replacing it with the Greensboro Civil Rights Fund, Pitts sought to form a broad-based coalition of support for the plaintiffs. The new organization was successful in drawing support

⁷⁰ Greensboro News & Record, Mar. 22, 1985, at C2, cols. 4-5.

⁷¹ *Id.* at col. 4.

⁷² Merhige interview, *supra* note 11.

⁷³ Pitts interview, *supra* note 23.

from the National ACLU and various religious organizations.⁷⁴

Throughout the Greensboro trial, Pitts led a team of social-activist lawyers who entered into a stormy relationship with the judge. According to Pitts, "We had a very hostile relation with Judge Merhige for a while. He put a lot of pressure on at first and just beat the hell out of us. Later he came off the bench and admitted that he had tried to push the case too much. He backed off a bit and slowed down."⁷⁵

While the plaintiffs' attorneys were self-avowed social activists, several of the defense counsel were equally adamant about the political aspects of the case. The City of Greensboro was represented by a team of local attorneys led by an ardent anti-communist. On several occasions he responded to the plaintiffs' allegations by declaring: "But, Your Honor, these . . . these people are, . . . well, they're communists." Judge Merhige would merely smile and reply, "Well, that's paragraph one of the complaint. Can we go on?"⁷⁶

While the plaintiffs focused their attention upon the alleged conspiracy of federal and state law enforcement agents, individual Klansmen and Nazis were also named as defendants in the civil rights suit. Five of the individual defendants claimed indigency, and Merhige requested that the Greensboro bar donate their legal services to the defendants.⁷⁷ When no volunteers came forward, the local bar's reluctance to be associated with either political fringe group was parodied in an advertisement in the local newspaper:

Wanted: Energetic attorneys to represent . . . indigent Nazi-Klansmen named conspirators in a \$48 million lawsuit. Trial lasts two months, trial preparation even longer. Needed immediately. Overtime work and out-of-town travel required. No benefits. No pay.⁷⁸

Merhige failed to see the humor in the situation and assembled the lead-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Interview with Gerard Chapman, defense counsel, in Greensboro, N.C. (Sept. 1986) [hereinafter Chapman interview].

⁷⁷ There is no statutory authority for a federal district court to require an unwilling attorney to represent an indigent in a civil action. *Mallard v. U.S. Dist. Court*, 109 S. Ct. 1814 (1989). The court's inherent power to do so is unclear. *Id.* at 1823.

⁷⁸ Chapman interview, *supra* note 76.

ing partners from the area's largest law firms. He threatened that either they provide a solution to his dilemma or he would. The law firms reluctantly agreed to make financial contributions to the indigents' defense, and two young lawyers came forward to represent the Klan and Nazi defendants.

Larry I. Moore, a former member of the NAACP, was assigned to handle the Nazis' defense, while Gerard M. Chapman was given responsibility for the Klansmen. When asked how he felt about representing his avowedly racist clients, Chapman replied, "It was hard to separate the people from the issues. I mentioned to one of the Nazis that I was in a Jewish fraternity in college. I'm still surprised the fellow doesn't have a slipped disc from the double take he did. But once I got to know the defendants as people, I focused on my obligation to give them the best representation I could."⁷⁹

With the lawyers in place, Merhige sought to step up the pace of the proceedings. At the first meeting of counsel, the judge announced that the trial would start promptly at 8:30 a.m. every day and continue until noon when the jury would be dismissed for a one-hour lunch period. During the luncheon period, Merhige and the lawyers would attend to procedural matters. The trial would resume at 1:00 p.m. and continue until 6:00 p.m. Any motions to be argued by counsel would be heard after the jury was dismissed for the evening. One attorney discounted Merhige's proposed timetable as a bluff because it was obvious that such a schedule could not be maintained. To his surprise, the attorney discovered that Merhige was very aggressive in exercising control of the case, and that the judge would do whatever was necessary to hasten the pace of the proceedings. "Although," the lawyer concedes, "Judge Merhige never asked the lawyers to do something he wouldn't do. He met all the deadlines himself and he worked nonstop, including weekends."⁸⁰

Merhige initially announced that trial would begin within four months, but he relented when the lawyers' protested that additional time was required for pretrial preparations. Subsequent requests for additional continuances were brushed aside when Merhige promised: "The trial date is

⁷⁹ *Id.*

⁸⁰ *Id.*

not being moved unless the good Lord takes this federal judge's life."⁸¹ The plaintiffs called a press conference to criticize the judge's "rush to judgment" attitude as a threat to the fundamental principle of fairness under the law.⁸²

F. *The Discovery Process*

Much of the pretrial delay, which not even an "activist" trial judge could avoid, was necessitated by extensive discovery motions. The plaintiffs insisted that investigation of a government conspiracy and coverup was akin to the process of peeling an onion: "When one layer of evidence is exposed, it leads to yet another layer that must be untangled."⁸³ Merhige, however, characterized the case as the most over-discovered case he had seen in his life. Klansman Ed Dawson's deposition alone took more than three days, which an irate Merhige characterized as bordering on the ridiculous. "If you can't get what you want out of a witness in two or three days, you don't have much to begin with," Merhige fumed. "You're never going to find out, and you're wasting your time."⁸⁴ The judge warned that he would impose a substantial fine on the responsible attorney if there were any duplicate questions in the typed transcript of Dawson's deposition. Merhige also questioned the number of documents needed by plaintiffs' attorneys, saying, "[t]he more documents you have, the more confusing the case will be . . . I'm here to try and narrow the scope of this thing — not widen it."⁸⁵

The sheer volume of paperwork proved to be staggering, as over 100,000 pages of pleadings and documents were lodged with the clerk's office in Greensboro.⁸⁶ The papers were bound in twenty volumes, packed in eight cardboard boxes, and transported to the federal courthouse in Winston-Salem, North Carolina, where the case was tried. In addition, there were one hundred depositions, most over a hundred pages long, and numerous documents not made public pursuant to court order. Merely keeping track of the contents of the documents proved to be a difficult

⁸¹ Merhige interview, *supra* note 11.

⁸² Pitts interview, *supra* note 23.

⁸³ *Id.*

⁸⁴ Merhige interview, *supra* note 11.

⁸⁵ *Id.*

⁸⁶ Greensboro News & Record, Mar. 3, 1985, at A6, col. 1.

undertaking. On one occasion, when plaintiffs' lawyers asked the government to provide a document for examination, the exasperated Justice Department lawyer declared, "They have it, they just don't know they have it."⁸⁷

Efforts to organize the documentary evidence, combined with the pressure of Merhige's time constraints, caused tempers to flare as cooperation among counsel dwindled. The judge was forced to schedule numerous pretrial hearings to resolve disputes among the parties. At one hearing, Judge Merhige chastised an attorney with the Justice Department for the length of time it was taking the FBI to produce court-ordered documents. "We haven't had the speediest action out of Washington. . . . What's the problem?" Merhige asked. "Don't those guys work after 5 o'clock?" The attorney responded, "The FBI has told us that, as these things go, this has gone relatively fast." Merhige merely sighed, "We're all in trouble."⁸⁸

G. Jury Selection

In addition to delays caused by pretrial discovery, the process of selecting a jury proved to be an arduous task.⁸⁹ The previous acquittals from all-white juries convinced the plaintiffs that jury composition would be crucial to their case.⁹⁰ On July 2, 1984, the plaintiffs asked to suspend trial proceedings on grounds that the jury plan in effect in North Carolina substantially underrepresented blacks.⁹¹ When Merhige denied the request, the plaintiffs asked for permission to appeal the decision to the Fourth Circuit Court of Appeals. Numerous black and religious affiliated organizations filed amicus briefs in support of the motion.⁹² Merhige, however, ignored the protests and began jury selection with an extensive voir dire requiring each prospective juror to reveal his opinion of the litigants, racial issues, and governmental use of undercover agents.

⁸⁷ *Id.* at col. 3. The FBI reported that it had spent \$60,000 tracking down and making documents available for plaintiffs. *Id.*

⁸⁸ *Id.* at col. 2.

⁸⁹ Nearly 300 prospective jurors were examined to produce a six-person jury. Taylor, *supra* note 1, at 149.

⁹⁰ Greensboro News & Record, Mar. 22, 1985, at C2, cols. 1-2.

⁹¹ Waller v. Butkovich, 593 F. Supp. 942 (M.D.N.C. 1984). Plaintiffs claimed that the Middle District's plan of using questionnaires to cull "unqualified, exempted, or excused" persons from the qualified jury list resulted in underrepresentation of blacks on juries. *Id.* at 945.

⁹² Taylor, *supra* note 1, at 149.

Although jury selection required 129 interviews over a period of nine days and involved serious consideration of racial and political attitudes, Merhige was able to ease the tensions with humor. On one occasion, the judge pressed a potential juror to determine whether her political beliefs would cause her to favor one of the litigants. When the woman failed to comprehend the question, the judge continued:

“Let me put it this way. If one of the plaintiffs and one of the defendants went fishing together and stopped by your house to tell you about the big fish that they caught, who would you believe?”

The woman paused a moment and said, “I don’t really think they’d go fishing together, Your Honor.”

“Assume that they did,” Merhige pleaded.

“Well,” the woman replied, “I guess if either of them caught a fish, I guess either of them could tell some truth about it.”⁹³

Another middle-aged white woman informed Merhige that she would rather see her daughter marry a “Southern gentleman” than a black. Merhige asked if she would allow her daughter to marry a man from New York. Upon receiving a negative response, the judge smiled, “My wife didn’t mind marrying a New Yorker. Do you really think the South is going to rise again?”⁹⁴

Throughout the jury selection process, both sides charged that Merhige was too lenient in qualifying jurors for the other side. According to the plaintiffs, “There’s a presumption that blacks have a bias toward the Klan that they can’t overcome. They get grilled for an hour-and-a-half and get all the tricky questions.”⁹⁵ The same standard, they contended, was not being applied to prospective white jurors. The plaintiffs complained that Merhige went “so far out of his way to be tolerant of the Klan”⁹⁶ that the panel was likely to be composed of jurors partial to the defendants. Such leniency was said to be exemplified by the court’s acceptance of a woman who claimed that she could be impartial even though her son was a member of the Klan and she had a casual acquaintance with two other members of the Klan and the American Nazi Party.⁹⁷ While

⁹³ Chapman interview, *supra* note 76.

⁹⁴ Merhige interview, *supra* note 11.

⁹⁵ *Id.*

⁹⁶ Pitts interview, *supra* note 23.

⁹⁷ The juror said that she knew little about the Klan, never discussed it with her son, and would

the plaintiffs charged that Merhige favored jurors with ties to the Klan, the defendants voiced concerns that Merhige displayed an excessive zeal to seat black jurors.⁹⁸ Each side began jury selection convinced that Merhige was biased against their side. By the conclusion of the jury selection process, both sides had agreed that the judge was biased against everyone.

The jury pool approved by Merhige consisted of forty-three jurors, nine of whom were black. Convinced that an impartial trial jury could not be selected from the pool, the plaintiffs renewed an earlier motion seeking to move the trial out of North Carolina.⁹⁹ They asserted that the media's all-encompassing coverage of events was highly prejudicial and would necessarily influence jurors, nearly all of whom admitted that they were familiar with the case. In an impassioned courtroom speech, one of the plaintiffs' attorneys predicted the impanelment of yet a third all-white jury. While the attorney spoke, Merhige quickly reviewed the memorandum presented in support of the plaintiffs' motion. As he did so, his jaw visibly tightened. Looking up, Merhige interrupted counsel, and complained that counsel's motion contained no law to support the plaintiffs' position. "You people seldom give me any authority — any legal authority," Merhige snapped. "All you people give me is argument, argument, argument. I need cases. I've done more research on this thing than you have. That's not fair. . . . I don't want to embarrass you, but it's almost as if you people have never used the law library."¹⁰⁰ Undeterred, counsel replied that the Constitution was his authority.¹⁰¹

Merhige denied the change of venue motion, but took steps to insure that an all-white jury was not selected. He employed a method of exercising peremptory challenges which precluded the defendants from striking all blacks from the pool.¹⁰² The jury ultimately selected consisted of five whites and one black, who was appointed foreman.

render an impartial verdict. *Id.*

⁹⁸ Chapman interview, *supra* note 76.

⁹⁹ Waller v. Butkovich, 593 F. Supp. 942 (M.D.N.C. 1984).

¹⁰⁰ Greensboro News & Record, Mar. 22, 1985, at C2, cols. 2, 3.

¹⁰¹ Plaintiffs' original venue motion contained numerous references to case law, which, according to the plaintiff, reflected three weeks of legal research.

¹⁰² There were nine blacks in the pool of 43 prospective jurors and the defendants had been accorded a total of ten peremptory challenges. Judge Merhige's restraints on the use of peremptory challenges pre-dated Batson v. Kentucky, 476 U.S. 79 (1986).

H. Civil Rights Counterclaims

In addition to the delays caused by jury selection, the pace of the proceedings was slowed by the Klan and Nazi defendants' submission of counterclaims for over \$40 million in damages. The counterclaims alleged that the CWP conspired to deprive Klan and Nazi members of their rights to free speech, assemblage, and travel, as well as their right to adequate police protection against unprovoked attacks.¹⁰³ According to the defendants, the CWP's "Death to the Klan" campaign was motivated by an anti-Christian, anti-white animus.

Although the Klansmen and Nazis failed to base their counterclaims on any particular federal statute, they unwittingly placed themselves within the protection of the federal Ku Klux Klan Act.¹⁰⁴ Passed as part of the Civil Rights Act of 1871, the law was designed to protect newly-enfranchised blacks against racial terror promoted by the Klan and similar groups. The Greensboro case was the first time Klansmen had ever attempted to use the Civil Rights Act for their own benefit. The irony of the situation weighed heavily on plaintiffs' counsel Lewis Pitts, who telephoned defense counsel Jerry Chapman to argue that it was immoral to use the anti-Klan statute to protect the Klan. Pitts accused Chapman of going beyond "proper lawyering,"¹⁰⁵ but Chapman refused to accept criticism for representing his clients' interests.¹⁰⁶

In the courtroom, plaintiffs' counsel vigorously opposed the counterclaims as a subversion of the Congressional intent underlying passage of the Civil Rights Act.¹⁰⁷ When Merhige authorized the counterclaims, the plaintiffs' lawyers called a press conference to announce that the decision was "outrageous" and that the judge was engaging in "judicial trail blazing."¹⁰⁸ Plaintiffs' counsel Flint Taylor stated, "I've been litigating under the Act for 15 years now. In all my travels and research, I've never seen such a distortion of the use of this act."¹⁰⁹ Merhige's ruling also drew

¹⁰³ Waller v. Butkovich, 605 F. Supp. 1137, 1142-43 (M.D.N.C. 1985).

¹⁰⁴ 42 U.S.C. § 1985(3) (1982).

¹⁰⁵ Pitts interview, *supra* note 23.

¹⁰⁶ Chapman interview, *supra* note 76.

¹⁰⁷ According to the plaintiffs, the law under which Klan/Nazi members were proceeding was designed to prevent animus against "traditionally disadvantaged classes," not animus against Christians or anti-communists. Waller v. Butkovich, 605 F. Supp. 1137, 1143 (M.D.N.C. 1985).

¹⁰⁸ Greensboro News & Record, Mar. 17, 1985, at C1, col. 5.

¹⁰⁹ *Id.*

criticism from the National Black Leadership Roundtable, a group composed of more than 200 national black organizations, including the NAACP and the Southern Christian Leadership Conference. A Roundtable spokesman expressed the feeling that "injustice has prevailed when the Klan is allowed to sue for damages against the ones who died at their hands."¹¹⁰ Additional criticism came from the Chairman of the Congressional Black Caucus, who declared that "the Klan is playing some manipulative gymnastics with the law and we just don't like that. . . . If the judge had the right to do what he said, that represents a loophole in the law."¹¹¹

Legal scholars, however, supported Merhige's ruling that the language of the Civil Rights Act does not limit its protection to blacks. "It is certainly not true that [the Act] can only be invoked by black persons or Klan victims," said Professor William Van Alstyne, a constitutional law scholar at Duke University. "It is couched in universal terms. This statute is good for everyone."¹¹² Defense counsel Larry Moore also defended Merhige's decision on grounds that, "when you start trying to decide who can be protected by the laws and who can't, aren't you supporting a type of legal process that this law was designed to prevent in the first place?"¹¹³

Merhige, who was attacked as a judicial activist for his liberal stance in school integration cases,¹¹⁴ now found himself portrayed as a strict constructionist willing to apply the letter of the law with complete disregard for moral and ethical concerns. In response to the criticism, the judge issued a lengthy opinion explaining his conclusion that the Constitution's equal protection clause and first amendment right of association would not permit Congress to exclude the Klan or similar organizations from invoking the protections of the Civil Rights Act. Merhige accepted the Civil Rights Act on its face and refused to enter a thicket of speculation as to legislative intent. He observed that:

It may be that when Congress passed the Civil Rights Act of 1871 it did not foresee that situations would arise in which violent attacks were directed at Klan members. But this does not mean that Con-

¹¹⁰ *Id.* at C5, col. 3.

¹¹¹ *Id.* at C1, col. 3.

¹¹² *Id.* at col. 4.

¹¹³ *Id.* at col. 5; *id.* at C5, col. 2.

¹¹⁴ See generally Bacigal & Bacigal, *supra* note 14.

gress intended, as a *per se* matter, to exclude members of the Klan and similar organizations from the protection of the Act. . . . Plaintiffs provide no authority, in the form of legislative history or otherwise, that suggests that Congress intended such a limitation¹¹⁵

The plaintiffs regarded Merhige's ruling as an important psychological victory for the Klan. According to the plaintiffs, recognizing the counterclaims gave the court's stamp of approval to the Klansmen's contention that they were the victims of a communist attack. The Klan's procedural victory, however, was short-lived because Merhige subsequently ruled that the counterclaims would be tried before a separate jury. Defense counsel Gerard Chapman complained that Merhige had outmaneuvered the Klan with a tactical ploy which recognized the validity of the counterclaims, but prevented the jury from learning that the counterclaims had some relevance to this case. Had the counterclaims gone to the jury along with the CWP's claims, Chapman believes that the defendants could have taken the offensive and shifted the blame to the CWP.¹¹⁶ Under Merhige's ruling, the Klan and Nazi defendants were left in a wholly defensive position.

I. *The Evidentiary Hearing*

The resolution of the counterclaims marked the end of pretrial legal maneuvering. The trial on the merits of the case began on March 25, 1985 before a packed courtroom. The first witness called was a Durham television cameraman who used videotapes and elaborate exhibits to reconstruct the events of November 3. In order to insure visibility of the videotapes, monitors were strategically placed about the courtroom, one at each counsel table, two before the jury, and one each before the judge and the witness. Seeing his courtroom transformed into a viewing studio with wires snaked across the floor, Judge Merhige admonished plaintiffs' counsel that even though he knew it was necessary, he really wanted "to get this stuff out of here as quickly as possible."¹¹⁷ Although Merhige professes to hate modern technology and still fumes over push-button telephones, it was the judge who made the most effective use of the electronic equipment. When a witness testified that he was unsure of the weapons

¹¹⁵ Waller v. Butkovich, 605 F. Supp. 1137, 1145 (M.D.N.C. 1985).

¹¹⁶ Chapman interview, *supra* note 76.

¹¹⁷ Pitts interview, *supra* note 23.

possessed by a defendant, the newsreel footage of the scene was played for the jury. Merhige barked instructions like a movie director: "Stop the action! Rewind! Play-back! Rewind, again. Now play-back in slow-motion. Freeze it there!" On the screen the jury could see the defendant with a gun in each hand.¹¹⁸

When the electronic equipment was removed from the courtroom, the plaintiffs offered eight weeks of testimony involving seventy-five witnesses. A pattern evolved of first calling a plaintiff and then a Klan or Nazi defendant. Through this interposition of plaintiffs' and defense witnesses, the jury was able to focus on the starkly contrasting political beliefs of the litigants. The demeanor of the witnesses also served as a dramatic expression of political extremism.

One of the most flamboyant witnesses was Roland Wayne Wood, who had been acquitted of murder and conspiracy in the earlier criminal trials.¹¹⁹ "The more they try me, the meaner I get," Wood declared. "I'm tired. I'm fed up. I've been charged twice before and found not guilty. Not one of them [(communists)] has had to answer for a single thing they did that day."¹²⁰ According to Wood, his first amendment rights were violated by communists who attacked him on a public street. He claimed that he acted in self-defense by firing his 12-gauge shotgun at people who were aiming weapons at him. Wood complained of continuing harassment by the communists and disclosed that he had been evicted from his home because the landlord was afraid that the communists would burn it down. As a result, Wood declared, he was living in the back seat of a car.

By the time of his testimony, Wood had left the Nazi Party and turned to religion. He claimed to have earned a master's degree from a nationally known bible college and was working on his doctorate. However, he remained adamantly opposed to racial mixing and communism. "I'm a racist," he asserted, "the Bible teaches it," pointing to *Genesis: 1* which says "Each after his own." "As for communists," Wood sneered, they are "op-

¹¹⁸ *Id.*

¹¹⁹ Wood was charged in state court with five counts of first-degree murder and one count of engaging in a riot in connection with the November 3 incident. He was charged in federal court with five counts of conspiracy resulting in injury and one count of conspiracy resulting in death. Greensboro News & Record, Mar. 14, 1985, at D1, col. 2.

¹²⁰ *Id.*

posed to the ideals of freedom.”¹²¹

In addition to his belligerent testimony, Wood projected a defiant demeanor to the jury. A strapping 6-foot 2 inches, 285 pounds, Wood’s attire contrasted sharply with the lawyers’ three-piece suits.¹²² The first day of trial, Wood appeared dressed in jeans and an olive-drab T-shirt with the slogan “Eat lead, you lousy Red” encircling a figure in army fatigues spraying automatic weapon fire. The next day, he wore a grey T-shirt emblazoned with a Confederate flag and the slogan “Lee surrendered, I didn’t.” On another occasion, he appeared dressed in a three-piece navy blue suit with white tennis shoes, dark glasses, a Confederate flag pin, and five small skull pins on his left breast pocket. According to Wood, the pins represented the five times his civil rights were violated by the communists. When a plaintiffs’ attorney asked whether the pins represented the five communists who died, Wood denied it. Upon further questioning, Wood began singing, to the tune of *Jingle Bells*, a song about gassing Jews.¹²³

As additional evidence unfolded, the Klansmen’s propensity for carrying weapons became apparent. During one exchange with a Klan defendant, a plaintiffs’ attorney asked: “Isn’t it true, no one really threatened you at China Grove?”

Witness: You have got to be kidding!

Counsel repeated the question.

Witness: That weren’t no group of civil rights marchers with love in their hearts.

Counsel: Did Joe Grady (Imperial Dragon) have a gun at China Grove?

Witness: Well, he had his pants on so I reckon he had a gun.

Counsel then questioned the witness about his own cache of firearms.

Witness: I just love guns!¹²⁴

¹²¹ *Id.* at col. 4.

¹²² *Id.* at col. 2.

¹²³ Pitts interview, *supra* note 23.

¹²⁴ Chapman interview, *supra* note 76.

On another occasion, a Klansman testified, "I always take my guns. You never know who might knock you in the head." Merhige interrupted the questioning, asking, "Do you take them to church?" The witness replied, "No, I take them if I go out of town. Guns are hard to replace, Your Honor."¹²⁵

In addition to serving as witnesses, several defendants acted as their own lawyers and proved to be adept questioners. Virgil Griffin, Grand Dragon of the Ku Klux Klan, is a diminutive man, but according to the lawyers, Griffin learned to "hit home runs on cross-examination."¹²⁶ When Griffin was given an opportunity to interrogate a plaintiff, Griffin fired off a question that the lawyers had carefully avoided: "You're a communist and you advocate the violent overthrow of the U.S. government, don't you?" The plaintiff replied, "Yes." Griffin sat down quietly, having established the essence of his defense.¹²⁷

As the trial dragged on, Merhige voiced concern over many needless and repetitious questions. "I've jurors here asking how much longer, how much longer," Merhige complained. "You're taking advantage of it [the judicial system] to the detriment of your clients."¹²⁸ Threatening to place a time limit on plaintiffs' presentation of evidence, Merhige scolded plaintiffs' counsel Lewis Pitts: "You'd better hurry up or you'll be only half-way through your case when I declare this trial is over."¹²⁹ According to Pitts, "When Merhige threatened that he would close the case . . . if we weren't finished, we didn't know if he would do it or not, with his temper. It does a number on your head, and he works that — yelling and screaming at you. He's an intimidating guy."¹³⁰

Merhige escalated the pressure on counsel by charging that the plaintiffs had failed to produce even a scintilla of evidence against some of the sixty defendants. "I'm glad I wasn't driving through Greensboro on November 3, 1979," the judge quipped, "because I guess I'd have been sued too." On numerous occasions, the judge threatened to order the plaintiffs to pay legal expenses for any defendant against whom no credible evi-

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Greensboro News & Record, May 9, 1985, at C2, col. 3.

¹²⁹ Pitts interview, *supra* note 23.

¹³⁰ *Id.*

dence had been presented. Reaching the limits of his patience with plaintiffs' counsel one afternoon, Merhige sent the jury out and ordered counsel into his chambers. The judge accused the attorney of conducting the most disgraceful cross-examination he had seen in twenty years of practice:

You people have done a disservice to your own clients. You sued everybody. . . . You didn't have a snowball's chance in hell, and I'm satisfied you had no evidence when you brought your lawsuit. . . . I am going to assess sanctions in every case, as to every individual defendant that you sued that you don't have reasonable cause to sue. . . . Now if you've got any evidence against [this defendant], I want you to put it on and stop wasting time and costing the government thousands and thousands and thousands of dollars, and everybody else here, needlessly, foolishly. For what? Publicity? Let's go.¹³¹

When plaintiffs' counsel asked for an adjournment for the day and expressed concern about Merhige's "attitude of hostility," the judge retorted, "Be concerned about it; go to the Fourth Circuit. Let's go."¹³²

When the plaintiffs finally rested their case, defense counsel moved to remove their clients from the case due to the plaintiffs' failure to establish a prima facie case. "The easy way out is to deny [all the motions]," Merhige conceded. "I'm not going to take the easy way. . . . If I left [all the defendants] in, I don't think the jury would be able to make anything out of it."¹³³ Of the original sixty defendants, Merhige dismissed the suits against fifteen individuals, including the former city manager of Greensboro and fourteen police officers who Merhige determined were merely following orders from their superiors. The plaintiffs were ordered to pay these defendants' court costs.

One of the defendants granted an early dismissal was FBI agent Tom Brereton. He conducted the preliminary investigation of the shootings and subsequently served as chief investigator for the special grand jury. Following fourteen months of extensive interviews and meticulous FBI lab work,¹³⁴ Brereton's findings were published in a 15,000 page report.

¹³¹ Transcript of Conference in Judge's Chambers Before the Honorable Robert R. Merhige, Jr., Apr. 26, 1985, Civil Action No. 80-605-G.

¹³² *Id.*

¹³³ Greensboro News & Record, May 21, 1985, at B1, col. 1 (Rockingham ed.).

¹³⁴ The FBI's audio-analysis tracing the origins of the 39 shots fired in the melee proved to be crucial evidence establishing the claim of self-defense. "The 'shot chart' showed that roughly half of

(This investigation was the second most extensive investigation in the agency's history, exceeded only by the agency's report on the Indian uprising at Wounded Knee, South Dakota in 1973.)¹³⁵ From the beginning of his investigation, Brereton suspected that it was only a matter of time before he would be named as an agent-provocateur in the CWP's conspiracy charge. But he was unprepared for the emotional toll the suit took upon him and his family. Guilt by association spread as public petitions were circulated to have Brereton fired, and a speech was delivered against him in his church. The strain was particularly hard on his wife, who suffers from muscular dystrophy and who developed multiple complications during this period. The entire experience was emotionally draining, leaving Brereton with an unresolved bitterness about Judge Merhige's failure to protect the government agents named as defendants in the alleged political conspiracy. Brereton insists that "if the law gave half the protection to civil defendants that is given to criminal defendants, there would be far fewer civil suits. There is no requirement of probable cause for a civil suit, just an open door to the courthouse."¹³⁶

The defendants who were not dismissed from the case presented their evidence in four days, far shorter than the projected four weeks of testimony. The essence of their defense was that the CWP had orchestrated the violence in order to build the party and to show that social change was impossible without confrontation.¹³⁷ In response, the plaintiffs charged that it was city and federal officials who used undercover agents to set up the CWP "as bait to generate this conspiracy, this monster."¹³⁸

J. The Verdict

At the conclusion of the evidence, both plaintiffs and defendants expressed concerns over Merhige's power to control the jury by virtue of his instructions on the law. Throughout the trial, Merhige had shielded the

the shots — 17 to 22 — came from the Communists." *A Litany of "Not Guilty,"* TIME, Dec. 1, 1980, at 25, 28.

¹³⁵ See Bacigal, *supra* note 13, at 6.

¹³⁶ Interview with Thomas Brereton, FBI agent, in Greensboro, N.C. (Sept. 1986) [hereinafter Brereton interview].

¹³⁷ Days before the "Death to the Klan" rally, a CWP member confided that the CWP needed a martyr to spur a sagging recruitment drive, and that the CWP planned to change its tactics from non-violence to violence. Wash. Post, Nov. 21, 1980, at A2, col. 2.

¹³⁸ Greensboro News & Record, June 6, 1985, at C2, col. 3.

jurors from the local community's strong feelings about the racial and political issues in the case. The judge was also generally solicitous of the jurors' physical safety and comfort, and his normal practice was to ask the jurors to send him a list of the personal supplies that might ease the burden of being sequestered. When one juror asked for Diet Coke, the local court clerk refused the request because he could obtain only Diet Pepsi at a discount. Merhige informed the clerk that he wanted the jury to be happy and that Diet Coke must be provided. A week later, the clerk handed Merhige another request from a juror and asked, "What do I do with this one?" An elderly juror insisted that Charmin toilet tissue be placed in all the bathrooms. When Merhige acceded to the juror's demand, he ensured his status as the jury's benefactor.

Plaintiffs' counsel, Lewis Pitts, observed that Merhige is a "master at having the jury eating out of his hand." According to Pitts, "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.'" Pitts concedes, however, that Merhige also assisted the attorneys by setting the tone in keeping the jury's attention as long as they did. "If the jury's attention was waning, Merhige would give them a drum roll by announcing, 'Now this is an important matter.'"¹³⁹

On June 6, 1985, Merhige instructed the jury as to their role in deciding the case and the applicable law. Conscious of the charges that he was manipulating the jury, Merhige prefaced his instructions with the comment, "Your mind must be popping with all this legal mumbo jumbo. My personal feeling is that I wish I could just sit down and talk with you. But they won't let me, so I've got to do it this way."¹⁴⁰ After two and a half hours of legal instructions from the judge, the jury retired to begin deliberations. The next morning, the jurors informed the court that they were unable to agree on a verdict. After consulting with counsel, Merhige urged the jurors "not to give up at this early stage. It may be that you need a few hours off — a day off."¹⁴¹ Merhige also assured the attorneys that "I'm not leaving town in this terrible state of frustration. Not yet at

¹³⁹ Pitts interview, *supra* note 23.

¹⁴⁰ Merhige interview, *supra* note 11.

¹⁴¹ *Id.*

least.”¹⁴²

Later in the day, after eleven and a half hours of deliberation, the jury returned its verdict. The City of Greensboro, the federal agents, and all but two city police officers were absolved of any wrongdoing. Verdicts were returned against the Greensboro police field commander, J. H. “Rooster” Cooper, control agent for Ed Dawson, and five Klan-Nazi defendants, including Dawson. The jury found against these defendants on several counts of wrongful death and assault and battery. The jury further found that none of the defendants had participated in a conspiracy.

Damages of \$398,559.55 were awarded, \$358,700 of which were granted to a non-CWP member, the widow of a slain demonstrator. A CWP member who remains permanently paralyzed was awarded \$38,359.55, while another CWP member who received birdshot wounds was given \$1,500. Following the jury’s verdict, Merhige issued a permanent protective order to prevent jurors from being questioned about their deliberations. Although Merhige acknowledged that the first amendment entitled the jurors to voluntarily discuss the case, he admonished them that “they’d be crazy to.”¹⁴³ Before he adjourned the court, Merhige turned to the CWP. He acknowledged their views on the need for social reforms, but advised: “I know of one way you don’t make them, that’s by spending all your time in litigation. The incident that gave rise to this suit was certainly tragic. I don’t know of anyone, even the defendants, who don’t agree. But there ought to be an end to this litigation.”¹⁴⁴

The plaintiffs’ initial reaction to the verdict was one of disappointment. Lead counsel Lewis Pitts speculated that the jurors “got caught up in the ideological issues and didn’t relate much to the people — the victims.”¹⁴⁵ Despite his disappointment, Pitts regarded the verdict as significant because it was the first time a Southern jury held the Klan responsible for a death. CWP leader Nelson Johnson agreed that the verdict was “a major victory in this case and in the larger struggle for justice.”¹⁴⁶ Perhaps in response to Merhige’s suggestion that there be an end to the five years of litigation, Johnson announced, “We extend our hand in fellowship to all

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Greensboro News & Record, June 9, 1985, at A12, col. 2.

¹⁴⁵ Pitts interview, *supra* note 23.

¹⁴⁶ Greensboro News & Record, June 9, 1985, at A12, col. 2.

who desire to move from this day to rechannel those energies into solving the problems of inadequate housing, jobs, equality, and peace for all our citizens.”¹⁴⁷

Following the trial, various motions were filed by both sides asking the court to set aside unfavorable portions of the verdict and to grant a new trial. When all motions were denied, the City of Greensboro’s insurance company paid the entire amount of the judgment in an attempt to put an end to the litigation. The plaintiffs withdrew their appeals and dropped a second lawsuit that had been filed. Nazi and Klan defendants failed to pursue their counterclaims, and there were no further judicial inquiries into the events surrounding the November 3 incident.

The precise sequence of events leading up to the killings may never be discovered and the question of what prompted the first shot remains unanswered. The lack of definitive answers to such questions is due to the fact that there was nothing precise about the incident. FBI agent Thomas Brereton filed a 15,000 page investigation of the incident, but concluded that there was no conspiracy or well-thought-out plan of action by either side. Brereton characterizes the incident as a street fight that got out of hand:

Both groups had the mentality of juvenile gangs. Judge Merhige and I were both raised in New York City and can understand that. Few gang fights ever start with the idea of killing. One gang says we’ll be there and to make sure we don’t get hurt, we’re bringing our sticks, clubs, knives, and guns. The other group does the same thing. They all get together and there is spontaneous escalation. They hit cars with sticks to show how powerful they are. Someone gets knocked down and kicked. To scare off the aggressor, someone shoots into the air. The guy on the other side responds and shoots his gun in the air. The two stand there firing, staring each other down. About a hundred yards away, the rest hear the shots and say, ‘Holy shit, they’re shooting.’ They run and get their guns then open a barrage of gun fire. Then everyone is dead and wounded and the survivors say, ‘Gee, what happened?’ What happened in Greensboro was that these ‘rival gangs’ met face-to-face and just blew up.¹⁴⁸

¹⁴⁷ *Id.*

¹⁴⁸ Brereton interview, *supra* note 136.

CONCLUSION

If the facts underlying the Greensboro case remain unclear, the role that Judge Merhige played in the litigation is equally ambiguous. Assessing Merhige's performance in controversial cases, a prominent constitutional scholar characterized the judge as "a problem-solver and an activist"¹⁴⁹ akin to the late Supreme Court Justice William O. Douglas. According to this scholar, "[b]oth men seem to have a distinct awareness of the way judges could use power and equity to the benefit of society."¹⁵⁰ The characterizations of Merhige as a "liberal activist" trace back to the start of his judicial career when he ordered the release of militant black leader H. Rap Brown and issued the first judicial ruling that the Vietnam conflict was a war within the meaning of the Constitution. While ordering massive busing and school consolidations in the former capital of the Confederacy, Richmond, Virginia, Merhige spoke out from the bench:

I'm ashamed and embarrassed that we let these things develop. Who said this stupid thing about human beings riding on 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.¹⁵¹

In light of Merhige's reputation for outspokenness, the Greensboro litigants had hoped that the judge would permit them to turn the trial into a morality play wherein the victims could tell their tragic stories, and the judge (like a modern Greek chorus) could certify the truth while defining good and evil. If litigation is civilization's answer to revolution, then the Greensboro trial was a final confrontation between political zealots who apparently had gotten what they sought from violence itself. The Klansmen and Nazis used the violent encounter to rebut charges of cowardice and to boast that they had gunned down five "dirty commies."¹⁵² In turn, the CWP touted its five dead "martyrs" as proof that there was no justice under capitalism. The only task that remained for the judge was to verify either side's version of the facts.

¹⁴⁹ N.Y. Times, July 3, 1988, § 3, at 4, col. 2 (statement of Professor A.E. Dick Howard).

¹⁵⁰ *Id.*

¹⁵¹ Bacigal & Bacigal, *supra* note 14, at 725.

¹⁵² Wash. Post, Nov. 21, 1980, at A2, col. 2. One defendant insisted that, "Anytime you defeat communism it's a victory for America." Wash. Post, Nov. 19, 1980, at A2, col. 1.

Although Merhige lived up to his activist reputation by procedurally shaping the scope, tenor, and content of the proceedings, he refused to openly discuss the substantive merits of either side's case. Deprived of a definitive ruling on the morality of their positions, the litigants attacked Merhige's procedural rulings. The CWP characterized Merhige as a representative of a conservative judicial system which had distorted the law in order to permit Klansmen and Nazis to take advantage of a loophole in the Civil Rights Act.¹⁵³ According to the CWP, the time constraints placed on the plaintiffs¹⁵⁴ and Merhige's tolerance of the Klan¹⁵⁵ created a trial atmosphere favorable to the racist elements in society. On the other hand, the Klansmen and Nazi defendants charged that the "liberal" judge had manipulated the proceedings¹⁵⁶ to ensure that only the radical plaintiffs could receive a full hearing on the charges. Both sides could agree only on their allegation that the judge had abused his discretion in an attempt to move the proceedings toward a result which fit the judge's personal perception of justice.

The parties' criticism of Merhige's judicial conduct in the Greensboro case presents a microcosm of the historic struggle for a working compromise between two 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. With respect to substantive law choices, the controversy over judicial discretion is reflected in the Hart-Dworkin dispute about the way judges function "at the margin of rules and in the fields left open by the theory of precedents."¹⁵⁷ Hart argues that situations arise in which no rule is clearly appropriate, and so the judge must exercise broad discretion. In contrast, Dworkin maintains that a judge is never free from authoritative legal standards to decide as he wishes.¹⁵⁸

Judicial discretion, however, is not limited to the type of substantive law choices which Hart and Dworkin debate. It was apparent in the Greensboro case that judicial discretion also extended to procedures, timing, degrees of emphasis, and many other subsidiary factors. No matter

¹⁵³ See *supra* text accompanying notes 104-15.

¹⁵⁴ See *supra* text accompanying notes 129-30.

¹⁵⁵ See *supra* text accompanying notes 96-97.

¹⁵⁶ See *supra* text accompanying note 98.

¹⁵⁷ H. HART, *THE CONCEPT OF LAW* 132 (1961).

¹⁵⁸ Dworkin, *Is Law a System of Rules?*, in *THE PHILOSOPHY OF LAW* 38 (R. Dworkin ed. 1977).

how minute and detailed the body of substantive rules articulated by scholars and appellate courts, no system of justice is administered "wholly by rule without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the cause before him."¹⁵⁹ At one extreme, the judge's perception of a just result may be whimsical and depend on the individual idiosyncrasies of the judge. At the other extreme, the judge's discretion may accommodate changes in social attitude and enable the law to reflect the "moral sense of the community."¹⁶⁰

A trial judge's effort to ensure a just result in the particular case may come in conflict with the concept of an adversary system which leaves the responsibility of presenting the case to the parties. While a judge who subscribes to a doctrine of judicial restraint may content himself to function as an umpire or arbiter, merely reacting to the issues framed by the litigants, an "activist" trial judge is more prone to believe that distortions arising from the commitments of the adversaries will produce injustice. By inaction, the judge may become the abetting instrument of injustice.

Trial counsel's ability to control the presentation of the Greensboro case was affected by Judge Merhige's largely discretionary rulings with respect to: 1) the timing of the case — the plaintiffs insisted that they were not given adequate time to probe and expose the alleged government conspiracy; 2) the selection of the jury — both sides charged that the judge impaneled a jury prejudiced against them; 3) the scope of the cognizable claims — the plaintiffs maintained that recognition of the counterclaims was a travesty of justice, while the defendants charged that the judge separated the counterclaims in a deliberate attempt to undermine the defendants' position; 4) the questioning of witnesses — successful advocacy may depend on the flow of questions, and if counsel is interrupted by an "activist" judge, a carefully planned line of questioning may be irreparably destroyed; 5) the efforts to stop counsel from wasting the court's time, from acting unfairly toward the opposing party, or from misleading the jury — in the eyes of the jury, counsel and client are so closely identified that a trial judge's belittling of counsel may be prejudicial to the client; 6) the public nature of the proceedings — the defendants requested that the

¹⁵⁹ 2 R. POUND, JURISPRUDENCE 355 (1959).

¹⁶⁰ *Id.* at 367.

court issue gag orders, while the plaintiffs employed a full-time media specialist; 7) the instructing and administrative handling of the jury — jurors are undoubtedly influenced by any lead, or suspected lead, which the judge gives.

Many of the trial judge's rulings concerning scheduling, joinder of counterclaims, and the like, are subject to appellate review, although the rulings may be so grounded in the particular facts of the case that they are reviewed only for gross abuse of discretion. Other rulings and actions of the trial judge are, as a practical matter, beyond appellate review. In the absence of videotaping of trials, the appellate court cannot assess the trial judge's tone, his emphasis, his smile or his shrugs when receiving evidence or instructing the jury. In the Greensboro case, the most serious charge of abuse of judicial discretion, and the one least subject to appellate review, was the claim that Judge Merhige's "courting" of the jury enabled him to manipulate the jury to a desired result, assuming that the judge in fact desired a certain result.

Complaints of judicial bias lodged by dissatisfied litigants, particularly litigants with strongly-held political beliefs, must be viewed with skepticism. Although the litigants have first-hand experience with the judge's performance, their status as advocates weakens their neutrality and objectivity. Unfortunately, there are also weaknesses in overtly objective and theoretical analysis which divorce the issue of judicial discretion from the specific factual occurrences within the course of a trial. Empirical accounts of a judge's efforts to provide soft toilet tissue for elderly jurors may approach the theater of the absurd, but it is equally meaningless to reduce discussions of judicial conduct to theoretical platitudes. Like many jurists, Judge Merhige attempts to circumvent discussion of his "activist" bent by invoking Chief Justice Marshall's sentiment that his greatest satisfaction was that he never sought to "enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required."¹⁸¹

Such lofty words can be given content only by placing them within the context of actual litigation. This empirical account of the Greensboro case has described the turbulent world in which civil rights cases arise in order

¹⁸¹ Letter from Chief Justice John Marshall to the Philadelphia Bar (1831), *quoted in* 4 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 522 (1919).

to provide a context in which to assess the role of trial judges in such cases. The acid test of a theory of the judicial function is not whether the theory is "true" in a purely scientific sense, but whether the theory is useful in describing the "real world."¹⁶²

¹⁶² Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 92-93 (1985).

APPENDIX A

Chronology of Events Surrounding the Shootings

1979

July 8 — The CWP (then known as the Workers Viewpoint Organization) confronts a Klan recruiting rally in China Grove, North Carolina.

Sept. 22 — CWP leader Nelson Johnson applies for a parade permit for a "Death to the Klan" rally.

Nov. 1 — Klan leader Virgil Griffin sends representatives to urge Nazis to join the Klansmen in presenting a united racist front at the rally.

Nov. 3 — Four CWP members die in a shootout between Klansmen, Nazis, and anti-Klan demonstrators. A fifth dies two days later. Eight people are injured.

Nov. 11 — Four hundred CWP members and sympathizers stage a funeral march. More than a thousand police, National Guardsmen, and reporters are at the march.

1980

June 16 — Six Klansmen and Nazis stand trial for murder in state criminal prosecutions. CWP supporters demonstrate outside the courthouse and create a disturbance within the courtroom.

Nov. 3 — CWP members file a civil rights suit in the U.S. District Court for the Middle District of North Carolina alleging that Klansmen and Nazis conspired with city, state, and federal agents to violate their civil rights.

Nov. 17 — An all-white jury acquits six Klan and Nazi defendants in the state criminal trial.

1981

Mar. 2 — Federal agents arrest six Nazis on charges that they planned to detonate bombs in Greensboro if the defendants in the state murder trial had been convicted.

Sept. 18 — The six Nazis charged in the bomb plot are convicted in a

second trial. (The first trial ended in a hung jury.)

1982

Mar. 22 — A federal grand jury begins investigating the November 3, 1979 shootings.

May 3 — Plaintiffs in the civil rights suit amend their complaint to seek \$48 million in damages.

1983

Jan. 24 — *88 Seconds in Greensboro*, a public television documentary, reviews the shootings and reveals the role played by undercover agent Eddie Dawson.

Apr. 21 — A federal grand jury indicts nine Klansmen and Nazis for conspiring to violate the civil rights of the slain demonstrators.

Dec. 3 — U.S. District Judge Robert R. Merhige, Jr. is appointed to preside over the civil rights suit. He schedules trial to begin August 1, 1984.

1984

Jan. 9 — The federal criminal trial for nine Klan and Nazi defendants begins with secret jury selection in Winston-Salem, North Carolina in the U.S. District Court for the Middle District of North Carolina.

Apr. 15 — An all-white jury acquits the nine defendants of charges of violating the civil rights of the demonstrators.

June 16 — Judge Merhige reschedules the trial date for the civil suit in response to attorneys' request for additional time for pretrial preparation.

Sept. 5 — Judge Merhige again resets the date for trial.

Nov. 9 — The events surrounding the November 3 shootout are dramatized in an off-Broadway play entitled *Jerico*.

1985

Feb. 19 — Plaintiffs in the civil rights suit file a motion to move the trial out of North Carolina because of five years of prejudicial publicity

from regional media. (The motion is eventually denied.)

Mar. 11 — The civil rights trial begins.

Mar. 21 — Judge Merhige approves the defendants' counterclaims, but orders that they will be tried separately.

Mar. 25 — A jury of five whites and one black is selected to hear the lawsuit.

June 7 — The jury returns a verdict against two Greensboro police officers, a police informant, and five Klansmen and Nazis.

APPENDIX B*

DATE: October 22, 1979

RE: AN OPEN LETTER TO JOE GRADY, GORRELL PIERCE,
AND ALL KKK MEMBERS AND SYMPATHIZERS

Klansmen Joe Grady and Gorrell Pierce,

The KKK is one of the most treacherous scum elements produced by the dying system of capitalism. Your treacherousness is exceeded only by those who promote and scretly [sic] support you. You, as the so-called leaders deserve the full hatred and wrath of the people. Your program is based on lies and is being promoted to fan racial and national prejudices. It is used to turn worker against worker, white against black, Indians, or Chicano, Protestant against Catholic, or Jews. The Klan is being promoted to make it harder to fight this capitalist system which is the real source of the problems of the American people.

Grady and Pierce, you and your Klan followers put up a brave front. But when the surface is scratched, you are nothing but a bunch of racist cowards. Your militant front is calculated to attract whites and particularly white youths who are being crushed daily by this system and who are mad and looking for someone to fight. You hope to frighten and terrify blacks, Jews, and anyone who fights against this system. You don your hoods and run around with guns spreading your poison. But, as we showed in China Grove, the Klan is a bunch of cowards.

We are having a march and conference on November 3, 1979 to further expose your cowardness, why the Klan is so consciously being promoted, and to organize to physically smash the racist KKK wherever it rears its ugly head. Yes, we challenged you to attend our November 3rd rally in Greensboro. We publicly re-new that challenge. You were quoted in the AP press release as saying that "if the communists think they are going to get me to attack them, they are crazy as hell." No Grady and Pierce — we are not crazy. We are very clear on what you are doing and that you and the KKK are a bunch of two-bit cowards. You "invited" us to show up at Klan rallies. *Grady and Pierce, we accept! Where in the hell are you holding your scrum [sic] rallies?* You cowards manage to keep the

* All emphasis in original.

location of your rallies a secret. We challenge you to say in public where and when you hold your rallies so that the people can organize to chase you off the face of the earth.

It would be improper if we ended without emphasizing why the KKK is treacherous. The Klan wants people to think that we are paying a dollar a gallon for gas and being laid off by the tens of thousands because of “niggers and Jews.” At the same time, you say people won’t work because they are lazy and that causes inflation. Who benefits from this vicious racist, program of Klan lies? Certainly not white workers, white youth, or white people generally. Not Indians, black people, or chicanos. Grady and Pierce, only the rich, the ruling class, the capitalists benefit from what the Klan is doing.

What you do is disorganize the people and make it difficult for workers and oppressed people of all races and national backgrounds to unite and fight together against the daily abuses of the capitalist system. But, in spite of your treacherousness, the Klan will be smashed physically. Grady and Pierce, all Klanspeople, and your Nazi friends — you are a temporary pest and obstruction in our fight to end all exploitation and oppression. But, we take you seriously and we will show you no mercy.

DEATH TO THE KLAN!!!

Workers Viewpoint Organization (WVO)

