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A Case Study of the Federal Judiciary's Role in Court-Ordered Busing: The Professional and Personal Experiences of U.S. District Judge Robert R. Merhige, Jr.

by Ronald J. Bacigal and Margaret I. Bacigal***

Introduction

Judge Robert R. Merhige, Jr. assumed the office of federal district judge for the Eastern District of Virginia in August of 1967. Upon discovering that federal judges had lifetime tenure, Merhige's father advised: "Take the job. You'll live forever." Neither the elder Merhige nor any observer could have foreseen the turbulence that would engulf Judge Merhige's life on the bench. Two weeks after his appointment, Merhige was faced with government efforts to silence militant black leader H. Rap Brown. Soon thereafter Merhige confronted numerous civil rights and anti-war issues, gaining some immediate notoriety as the first federal judge to declare that the Vietnam conflict was a war within the meaning of the Constitution.

Throughout his twenty-year career, Judge Merhige has attracted national attention with a docket full of landmark cases. A small sampling includes the "Kepone" pollution case, in which Merhige imposed the largest recorded criminal fine under federal anti-pollution laws; the "Westinghouse Uranium" case, in which Merhige became the first federal judge to hold court outside the United States; and the still pending bankruptcy proceedings centering around the Robins Pharmaceutical Company, manufacturer of the

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Dalkon Shield.

A forthcoming authorized biography recounts the highlights of Judge Merhige's controversial career. Excerpted in this article are two chapters dealing with the most notorious and turbulent period of Merhige's tenure. Merhige's candid reflections upon school integration and court-ordered busing reveal a major participant's perspective of a dramatic stage in this country's history.

I. Caught in the Middle

During the height of the school busing controversy, Merhige was lambasted as an activist judge pushing Virginia beyond the law and toward his personal view of a racially mixed society. Merhige, however, began the process of desegregation as somewhat of a moderate. He entered the desegregation controversy in the middle, long after the Supreme Court's landmark decision in *Brown v. Board of Education*,¹ and long before the issues of affirmative action and reverse discrimination were addressed.² His initial decisions sought the middle ground, following the lead of other federal judges in attempting to move the South slowly from outright defiance to gradual acceptance of desegregation.

Merhige's efforts to tread the middle ground often subjected him to criticism from both sides. "Every time I render a decision I make one party to the case mad at me," he muses, "but sometimes I manage to get both sides mad at me in the same case."³ From the political right came calls for his impeachment, the picketing of his home by a color guard of the Segregationist States Rights Party, and an unsuccessful attempt to arrest him by the grand dragon of the Virginia Ku Klux Klan. The grand dragon unknowingly approached Merhige in the hallway and asked for directions to the United States Attorney's Office. The Klansman then walked into the office and tried to get an arrest warrant sworn out against Merhige.

From the political left came charges that Merhige's cautious ap-

¹ 347 U.S. 483 (1954).

² See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (affirmative action); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (reverse discrimination).

³ Unless otherwise noted, all quotations are from interviews with the Honorable Robert R. Merhige, Jr., conducted in Richmond, Virginia throughout 1985-86.

proach amounted to open defiance of the United States Supreme Court's mandate to desegregate southern schools. Merhige clung to his cautious approach even though Samuel W. Tucker, a prominent civil rights lawyer, warned him that "you don't help the dog by cutting a little of his tail off at a time." Through this process of slow accommodation, however, Merhige ultimately took school integration further than any other federal judge, and further than the Supreme Court was willing to go.

Merhige presided over *Bradley v. School Board*,⁴ the case in which most of the battles over the integration of Richmond's schools were fought. During the *Bradley* litigation, Merhige was often criticized for being an activist judge who shaped the law to suit his personal preferences. A divided Supreme Court's eventual repudiation of Merhige's *Bradley* decision⁵ lends superficial support to this view. His judicial decisions, however, more accurately present an example of how the law can shape and mold a judge.

Merhige brought to the bench an absence of preconceptions about school integration, confessing with some embarrassment, "I had been too busy with my own life to worry enough about others. As a judge, you must be concerned with other people." When forced to confront racial discrimination, a sometimes reluctant Merhige moved inexorably toward the logical fulfillment of the forces that had been set in motion by the *Brown* case. Merhige's school integration decisions can be best understood by placing them in the broad context in which they arose.

In the 1954 *Brown* decision, the United States Supreme Court set forth the basic premise that separate is not equal. This modest beginning outlawed segregation in public schools but did not mandate affirmative steps to integrate. Virginia led the nation in responding to this modest premise with absolute defiance. The massive resistance movement in Virginia encompassed school closings, the cut-off of state education funds, and the establishment of tuition grants for private segregated schools.⁶ The power structure in Virginia geared

⁴ 315 F. Supp. 325 (1970), vacated, 324 F. Supp. 456 (E.D. Va. 1971); 338 F. Supp. 67 (E.D. Va.), rev'd, 462 F.2d 1058 (4th Cir. 1972), aff'd per curiam by an equally divided Court, 412 U.S. 92 (1973).

⁵ 412 U.S. 92 (1973).

⁶ See generally J. Ely, *The Crisis of Conservative Virginia: The Byrd Organization and the Polit-*

up to frustrate desegregation, and by default the task of enforcing *Brown* fell to the federal courts. Tucker, a chief architect of the desegregation movement, observed: "We never got to first base in the state courts. When Chief Justice Earl Warren spoke in Williamsburg, the Virginia Supreme Court even refused to appear on the same platform with him."⁷

The rigid posture of the state government made a judicial confrontation inevitable. Federal district judges could not ignore the Supreme Court edict, yet they were in a dangerous power vacuum. Courts must depend on the public's acceptance of the sanctity of law, for in a democratic society judicial action is only as effective as public support will allow. The refusal of Virginia's political and legal leadership to comply with *Brown* placed intolerable pressures on the federal district judges. In a contest for public opinion, the judges could not match the appeal of the popular Byrd political machine.⁸ The district judges had only two choices: act or resign.

Judge Sterling Hutchenson of Richmond was a long-standing Byrd loyalist who tried to delay desegregation. After repeated reversals by the Fourth Circuit Court of Appeals, he chose to resign rather than to enforce the law. In contrast, Judge Walter E. Hoffman of Norfolk reveled in his status as an old foe of the Byrd organization. He readily declared one of Virginia's massive resistance statutes unconstitutional on its face. "The pattern is plain," he declared. "The legislature has adopted procedures to defeat the *Brown* decision."⁹ Senator Byrd retorted that Judge Hoffman "has discredited his judicial robes by acting with such prejudice," and the Richmond News Leader called Hoffman a "third-rate Republican politician."¹⁰ Until the mid-1960s, when the United States Department of Health, Education, and Welfare threatened to cut off federal funds to Virginia if the resistance did not stop, Virginia district

ics of Massive Resistance (1976).

⁷ Interview with Samuel W. Tucker, private counsel, Hill, Tucker & Marsh, in Richmond, Virginia (March 3, 1986) [hereinafter cited as Tucker interview]. The Virginia Supreme Court did ultimately invalidate massive resistance in *Harrison v. Day*, 200 Va. 439 (1959).

⁸ The "Byrd machine" bears the name of Harry Flood Byrd who served as Governor of Virginia from 1926 to 1930, and as a U.S. Senator from 1933 to 1965. For a study of the Byrd political machine during the massive resistance era, see J. Wilkinson, *Harry Byrd and the Changing Face of Virginia Politics 1945-1966*, 113-54 (1968).

⁹ *Adkins v. School Bd.* [of Newport News, Va.], 148 F. Supp. 430, 446 (E.D. Va. 1957).

¹⁰ Ely, *supra* note 6, at 191.

judges were frustrated in their efforts to desegregate the state's schools.

By the time Merhige assumed the bench in 1967, the absolute defiance embodied in the massive resistance movement had been broken, and many of the legalistic delaying maneuvers had been invalidated. Virginia had grudgingly moved from school closings, to pupil placement boards, to tuition grants, to acceptance of the fact that state-enforced segregation of the schools would not be countenanced by the federal courts. Virginia sought, however, to hold the line at the elimination of state-enforced segregation. Freedom-of-choice plans were adopted to prevent overt discrimination, but Virginia refused to take affirmative steps to promote integration. State Senator Fredrick T. Gray presented Virginia's position to the U.S. Supreme Court:

Desegregation (i.e., the elimination of state enforced segregation solely because of race) is a legal question; integration (i.e., the compulsory assignment of pupils to achieve intermingling) is an educational question — best left for decision by educators, for educational purposes, on the basis of educational criteria. A freedom of choice plan alone honors this distinction.¹¹

Virginia's position was rejected in *Green v. School Board*,¹² when the Supreme Court held that the ultimate goal of *Brown* was "a unitary non-racial system of public education."¹³ Any plan to eliminate desegregation was to be measured by its practical effectiveness. A theoretically neutral freedom-of-choice plan could not pass constitutional muster when other alternatives would integrate the schools more quickly and more effectively. In three years of operation not one white child had chosen to attend a black school in New Kent County, and 85 percent of blacks still attended identifiably black schools. Recognizing that centuries of discrimination could not be overcome by benign indifference, the Supreme Court moved from the modest beginning of "Thou shalt not segregate" to the position "Thou shalt integrate." Affirmative action had become an integral part of constitutional law. As one district judge, Frank

¹¹ Brief for the Respondents at 32, *Green v. School Bd. [of New Kent County, Va.]*, 391 U.S. 430 (1968).

¹² 391 U.S. 430 (1968).

¹³ *Id.* at 436.

Johnson of Alabama, observed: "Just saying 'Don't do it again' is not enough when they've been doing it for one hundred years. . . . You've got to provide some sort of positive relief for past discriminatory practices."¹⁴

When freedom-of-choice plans did not work in practice, the Supreme Court charged the district courts "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."¹⁵ The duty to take affirmative steps would subsequently start the buses rolling in Virginia and throughout the South. The Supreme Court had also lost patience with Virginia's delaying tactics. Because of the complexities of dismantling the segregated school system, the South had been permitted to move with "deliberate speed."¹⁶ Some ten years after *Brown*, the Supreme Court announced, "The time for mere 'deliberate speed' has run out. . . ."¹⁷ In *Green*, the Court held that "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."¹⁸ Merhige read this language as a clear mandate to the district courts "to do it and to do it now."

After *Green*, Merhige was surprised to find just how many school integration cases were pending on his docket. He remembers his first six months on the bench as:

. . . particularly busy. I didn't have the time to familiarize myself with the many school cases which lay dormant while Virginia's freedom-of-choice plan was pending in the Supreme Court. The day after freedom-of-choice was struck down in the *Green* decision, Sam Tucker, lead counsel for the Virginia NAACP, was in my court moving on every pending case. I soon found myself with prime responsibility for integrating most of Virginia's schools, because I had to deal with my own Eastern District and also with most of the Western District of Virginia.

Judge Ted Dalton of the Western District had been a member of the state legislature, a twice-defeated candidate for governor, and an

¹⁴ R. Kennedy, Jr., Judge Frank M. Johnson, Jr. 255 (1978).

¹⁵ *Green*, 391 U.S. at 437-38.

¹⁶ *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

¹⁷ *Griffin v. School Bd. [of Prince Edward County, Va.]*, 377 U.S. 218, 234 (1964).

¹⁸ 391 U.S. at 439.

outspoken critic of the massive resistance movement. Dalton concluded that it would be inappropriate for him to rule upon the school cases in light of his former involvement with the Virginia political structure. Merhige took the additional cases, even though he would be required to travel throughout the state to evaluate numerous school board plans to integrate the rural counties. "I wasn't looking for the business," he remembers, "but my life might have been easier if my burden of cases had been a little bit heavier."

Dalton had eased Merhige's burden by retaining jurisdiction over one school case, in Dalton's hometown of Roanoke. During a period when Merhige was taking most of the heat for court-ordered integration and busing, Judge Dalton rejected part of the Roanoke school board's integration plan for elementary schools because it called for too much busing.¹⁹ Although the decision was vacated and the case remanded by the Fourth Circuit,²⁰ the local newspapers questioned why Virginia had been cursed with Merhige, instead of having an understanding judge like Dalton.

Merhige, however, has no bitterness over the incident:

I don't know Dalton's motives, but he is a man of such integrity and so little guile that he would not have deliberately sandbagged me on the Roanoke case. It's the only dirty thing Dalton ever did to me, and I believe he was totally unaware of how tough he made it for me.

Intentional or not, Merhige was left alone on the hot seat, caught in the middle of the confrontation between the strongly committed advocates on both sides of the desegregation controversy.

Aligned with the NAACP and leading the fight for integration were Oliver Hill, Samuel W. Tucker, and Henry L. Marsh, III. As lawyers, Hill and Tucker had been instrumental in the *Brown* decision, and had had a professional history of involvement with the civil rights movement. As black men, they had had a personal history of experience with racial discrimination. Oliver Hill's first exposure to racial prejudice came when he was eight years old:

Lots of children in the neighborhood were gathering bottles and taking them down to the distillery on Norfolk Avenue in Roanoke.

¹⁹ See *Green v. School Bd.*, 316 F. Supp. 6 (W.D. Va. 1970).

²⁰ See *Adams v. School Dist.* 5, 444 F.2d 99 (4th Cir. 1971).

They got a penny for them. I gathered up an armful of bottles, whiskey bottles they were, and carried them up to the distillery. I went looking for somebody, went up on the second floor. I saw several men, one of them said, "Oh let's get the little nigger." They started chasing me and of course I dropped the bottles and started running around. Then they said, "Let's castrate him." I didn't understand the word "castrate," but whatever it was, I knew it was something I didn't want to get involved with. Really, I was terrified. Finally, I eluded them, got down the steps and got out on the street.²¹

Sam Tucker's experience was more basic: "I got involved in the civil rights movement on June 18, 1913, in Alexandria [Virginia] — I was born black."²² Tucker was a pioneer in the civil rights movement, having organized a 1940 sit-in at a public library in Alexandria. When denied a library card because of his race, Tucker sent a half-dozen blacks into the library. Each man was denied a library card, and each of them removed a book from the shelf and sat at a separate reading table. No white person would sit at a table with a black man, thus the blacks had effectively monopolized the library's reading room. They were arrested for disturbing the peace and led out of the library before an alerted photographer from the *Washington Post*. Tucker cherishes the resulting photograph which hangs on his office wall because the six black men have their heads held high while the lone white police officer is attempting to conceal his face.

The junior member of the legal triumvirate was Henry L. Marsh III, who would later serve as Richmond's first black mayor. Marsh was Virginia Union University's student government president during the massive resistance era, and he decided upon a legal career after watching Oliver Hill speak to the Virginia Legislature. "When Oliver spoke to the General Assembly that day," Marsh recalls,

It was very impressive to see a tall black man stand up before a joint session of the General Assembly, shake his fist at them and tell them, "If you do this, we will have it thrown out and we will do this to you." And his finger was shaking and his veins were

²¹ *Richmond Times-Dispatch*, Feb. 10, 1986, at B1, col. 1.

²² Tucker interview, *supra* note 7.

throbbing. And I was frightened for *them*.²³

On the other side of the desegregation issue, the performance level of the attorneys varied greatly. Professional and competent representation was provided by State Senator Gray, and by E. Dortch Warriner, who would subsequently join Merhige on the Federal District bench. Although he lost most of his cases before Merhige, Gray impressed the judge with the sincerity of his commitment and the high level of his legal arguments.²⁴ Merhige, however, had little respect for Virginia's Attorney General's Office which was playing politics with the integration issue, with the many politicians involved who lacked the courage to support integration, and with the Richmond City Council which refused to take a position on the most crucial issue of the day — consolidation of the city and county schools.

In the rural counties, the level of opposition and the course of integration varied from community to community. In some counties such as New Kent, local leaders exhausted their legal appeals to the Supreme Court, then went to work and accomplished integration with a minimum of disruption. Charlottesville was another example of a peaceful transition to integrated schools, due largely to the leadership of John S. Battle, Jr.²⁵ In such counties, strong local leadership kept things running smoothly, although Merhige recognized that school integration was difficult for everyone: "When you deal with emotional issues and matters involving people's children, people are not going to be objective."

For Merhige, however, integration could work when "strong leadership is offered on the part of school, county, and city officials. As I noted in one of the *Bradley* opinions, such leadership fulfills 'a public trust to encourage what may well be considered one of the most precious resources of a community; an attitude of prompt adherence to the law. . . .'"²⁶ Reflecting upon his diverse exper-

²³ Richmond Times-Dispatch, Feb. 10, 1986, at B1, col. 1.

²⁴ Merhige remembers Gray as a sharp contrast to the "country lawyer" who once came into court bragging about the progress the community was making — how they had taken a black into the Chamber of Commerce last year. When asked about the pace of progress required by the Supreme Court's decision in *Green*, the lawyer replied that he wasn't familiar with the case.

²⁵ Mr. Battle is a senior partner with the law firm of McGuire, Woods, Battle & Booth, Richmond, Virginia.

²⁶ *Bradley*, 53 F.R.D. 28, 41 (E.D. Va. 1971).

iences in various rural counties, Merhige evolved a simple formula: "Just give me good lawyers on both sides, committed local leadership, and we could all make integration work."

Nevertheless, integration did not work smoothly in those rural counties where Merhige encountered both sincere opposition and the lowest form of rabble-rousing. He found it easy to respect those whose legal opposition derived from deeply-held beliefs, so long as they accepted the law of the land once the highest courts had spoken. Merhige explained that:

I always encouraged the parties to appeal each of my decisions in the hope that they would show some patriotism in sublimating personal beliefs to the rule of law. I had the feeling, and I was just as wrong as I could be, that we would get the cooperation of everyone once the appeals were settled.

Sam Tucker shared Merhige's disillusionment with the public's reaction to the school integration decisions: "My biggest disappointment was to learn that white people didn't have the great respect for the law that I always thought they did."²⁷

Although Merhige was sometimes disappointed with the lack of positive leadership, his anger was reserved for those leaders who sought to use the school situation for their political advantage. He cited instances when

local leaders came in to my chambers to privately offer assurances that they understood that I had to enforce the law. They asked me to understand, however, that they must offer public opposition for political reasons. I was willing to take the heat when it would ease the task of integration. As I said from the bench, "[Political leaders and school administrators] may well have, in their views, been responsive to the community. . . . [Their] burdens will be lessened somewhat . . . if [their actions] . . . are done so by mandate of this Court. Indeed the Court decrees it its duty and responsibility to do so."²⁸

However, many of those same individuals who privately recognized a judge's responsibility to enforce the law would then leave the courthouse to urge mob violence and threaten blood in the streets. When the Justice Department considered a criminal prosecution for

²⁷ Tucker interview, *supra* note 7.

²⁸ *Bradley*, 338 F. Supp. at 115.

one such incident, those same individuals again privately appeared before Merhige to apologize and admit that they had gone too far.

When the local leadership opposed integration, the communities frequently resorted to every tactic imaginable to defy the courts. "Whenever possible," explained Merhige, "I tried to proceed slowly in order to give the community time to adjust." Unfortunately, that time was often used to establish private segregated schools or create some new form of evasion. In one community, the school board asked for more time to make physical changes in the converted schools, such as lowering the height of the urinals so that elementary students could be accommodated. Merhige remembers the incident with a smile:

They made the claim with a straight face, so I was forced into a fact-finding inspection to determine that the urinals were really not all that high. Can you imagine the scene! Another fact-finding inspection produced a stroke of luck when I walked out the back door of the school and spotted a yellow school bus. I turned to the school officials and asked, 'I thought you said that you didn't have any buses to transport the children?' The feeble response was that the buses were publicly owned and the children had to pay ten cents to ride them. Technically, the buses were part of the public transportation system, but no one except school children could get on the buses to go anywhere.

The delays in the rural counties could not stop integration, but they did buy enough time for the composition of the U.S. Supreme Court to change. The NAACP and other civil rights groups pursued a deliberate strategy of moving against the rural counties first, leaving the major cities for last. Sam Tucker remembers that the strategy was not part of any grand plan, but was simply a reflection of his small town origins. Tucker admits that he "felt more comfortable with rural counties. Integration in large cities was just too complex."²⁹ By the time *Bradley* reached the Supreme Court, the Court's composition had changed and the Nixon Justices began a retreat from the full ramifications of the *Brown* decision. Merhige suggested that the decision to focus on the counties proved to be the major tactical mistake of the school integration movement in Virginia. In his view, "had they gone after the cities first, Virginia

²⁹ Tucker interview, *supra* note 7.

would have had consolidated school districts. They had the court for it.”

The pre-Nixon Supreme Court did in fact approve Merhige’s first court-ordered integration of a city school system in *Wright v. Emporia*.³⁰ Until 1967, Emporia was a “town” under Virginia law, which meant that it was a subordinate part of Greensville County. In 1967, for reasons unrelated to school integration, Emporia became a “city” and thus politically independent from the surrounding county. With political independence came the responsibility of establishing a separate city school system. Emporia, however, entered into a contract with the county whereby the county continued to administer the schools as before. Although Emporia shared the costs of the county school system, it did not participate in policy-making decisions. In 1970, Merhige ordered Greensville County to desegregate its school system, and two weeks after the order, Emporia sought to withdraw from its contract with the county and to establish separate city schools.³¹ Merhige recalled:

[T]he issue presented to me was a precursor of the Richmond consolidation case: Could a federal court enjoin local officials from creating a new school district when the existing district had not completed the process of dismantling a system of enforced segregation? I held that because the city and county functioned as one unit at the time the segregated system was created, they must properly be treated as one unit for purposes of dismantling that system. I also had misgivings about the city officials’ motives for the split with Greensville County. There was certainly some intent to avoid busing rural blacks into the city schools, but the government officials also had a legitimate feeling that the city was financially able to provide a superior quality educational program.

To Merhige, the determining factor was not the motivation of the local officials, but the practical effect on the school system. Separation by the city at that time would have constituted an impermissible interference with the standing integration order, because separation would have reduced the percentage of whites in the county schools while increasing their percentage in city schools.³²

³⁰ 407 U.S. 451 (1972).

³¹ See *Emporia*, 407 U.S. at 456.

³² The unified system was 66 percent black, a separate system in Emporia would have been 52 percent black, while the county would have been 72 percent black. See e.g., *Wright v. School Bd.* [of

The Fourth Circuit reversed Merhige because it did not find any discriminatory intent on the part of Emporia officials.³³ The Supreme Court, however, reinstated Merhige's decision and agreed with him that discriminatory intent was not the controlling factor. Rather, the Court said that "[t]he measure of any desegregation plan is its effectiveness."³⁴ Even if the political leaders were attempting to improve the quality of education for city children, such benefits could not be purchased at the price of a substantially adverse effect upon the viability of the county system.³⁵

Merhige regarded the Supreme Court decision as vindication for his holding that political subdivisions could not be manipulated to frustrate desegregation. The Supreme Court opinion, which Merhige predicted, gave him:

some guidance for the Richmond school consolidation decision [*Bradley*] which presented the other side of the *Emporia* case. If Emporia could not divide a single unit into separate parts in order to frustrate integration, then separate parts could be consolidated into one unit in order to facilitate integration. That seemed to me to be the logical corollary of the *Emporia* case.

Merhige did not foresee, however, the shift in viewpoint precipitated by the Nixon appointments to the Supreme Court.

The *Emporia* case marked the first break in the Supreme Court's longstanding unanimity on school desegregation. All four of Nixon's appointees dissented in the case, and Chief Justice Burger's dissenting opinion contained an omen of what lay ahead for Richmond. Burger maintained that a district court's power was limited when it dealt with "totally separate political entities."³⁶ The Chief Justice's position would ultimately lead to the reversal of Merhige's consolidation decision in the *Bradley* case.

Not only were Merhige's legal decisions caught up in the shifting power structure of the Supreme Court, he also became indirectly, but personally, embroiled in some of the infighting among the Justices. In one of the "strangest performances in the history of the

Greensville County, Va.), 309 F. Supp. 671, 678 (E.D. Va. 1970).

³³ *Emporia*, 442 F.2d 570 (4th Cir. 1971).

³⁴ *Emporia*, 407 U.S. at 462 (quoting *Davis v. School Comm'rs*, 402 U.S. 33, 37 (1971)).

³⁵ *Id.* at 468.

³⁶ *Id.* at 478 (Burger, J., dissenting).

Court,"³⁷ Chief Justice Burger attempted to put a conservative gloss on the Court's previous approval of busing as a tool of desegregation. In correspondence marked, "For the personal attention of the Judge," the Chief Justice admonished district judges not to overstep their bounds, and he threatened personally to block any court order requiring three hours of daily bus travel.³⁸

Burger's letter prompted calls from a number of irate judges, and Merhige recalls one touching letter sent by a judge's wife. She chastised the Chief Justice for stirring things up while her husband was the one being physically threatened for doing what he believed the Supreme Court had directed him to do. Burger's letter also elicited a response from Justice Douglas, and the media gave considerable attention to the unseemly infighting between the Justices.

Merhige endeavored to stay out of the controversy because of his involvement with the pending Richmond integration cases, but his attempt to avoid the glare of publicity failed. An ABC News reporter asked Merhige to discuss school busing and Burger's letter. Merhige refused all comment, but on the way out of the courthouse for lunch, the reporter approached him with a camera crew. Merhige gave the newsman a fierce scowl and said, "I told you that I wasn't talking." The reporter pleaded, "Make believe we're speaking. I have no microphone and this is just background film." Merhige and the newsman compared notes on the quality of a local restaurant's lunch counter, but that is not what appeared on the evening news. The reporter discussed Burger's letter and reported that a number of judges were upset with the Chief Justice. As the reporter made his oral report, the nation viewed film of Merhige scowling at this reporter. No one missed the implication that Merhige was one of the judges upset with Burger. At the close of the newscast Merhige's mother called to ask, "Can they fire you, Junior?"

Merhige laughs about it now, but at the time the television incident focused unwanted attention on the integration difficulties in Richmond. Merhige had been caught in the middle of the powerful forces dividing the country over the busing issue. He was to move

³⁷ L. Graglia, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* 140 (1976).

³⁸ *Id.*

from the middle to the forefront in the Richmond school consolidation case.

The Richmond School Consolidation Case

Merhige's decision to consolidate suburban and city schools was foretold some seven years beforehand by Judge Skelly Wright of the U.S. Court of Appeals for the District of Columbia. Judge Wright felt that it was "inconceivable" that the Supreme Court would "long sit idly by, watching Negro children crowded into inferior schools while whites flee to the suburbs to place their children in vastly superior, predominantly white schools."³⁹ He saw the Supreme Court acting "if the problem persists and the states fail to correct the evil."⁴⁰ It was Robert Merhige, not the Supreme Court, who acted to correct the problem.

Merhige inherited the *Bradley v. School Board* case from Judge John D. Butzner, whose elevation to the Fourth Circuit Court of Appeals created the district court vacancy filled by Merhige. Judge Butzner had initially held that Richmond's "feeder school system"⁴¹ was a reasonable start toward desegregation. When the Fourth Circuit reversed Butzner, he ordered Richmond to implement a freedom-of-choice plan. The plaintiffs appealed the freedom-of-choice plan to the Supreme Court, where the issue was evaded and the case remanded for a hearing on integrating the faculties of Richmond schools.⁴² The *Bradley* plaintiffs temporarily acquiesced in this disposition while pressing their challenge of freedom-of-choice plans in *Green v. New Kent Co.* When the *Green* decision struck down freedom-of-choice plans, the *Bradley* case was back before Merhige.

Merhige approached the *Bradley* case with considerable caution. In June 1970, he enjoined Richmond from constructing new school buildings only until such construction could be assessed in light of

³⁹ G. Metcalf, *From Little Rock to Boston* 179 (1983).

⁴⁰ *Id.*

⁴¹ Under the feeder school system, each student was assigned to an elementary school, then automatically to junior high and then high school within the same section. *Green v. School Bd.*, 304 F.2d 118, 120 (4th Cir. 1962).

⁴² *Bradley v. School Bd.*, 382 U.S. 103 (1965) (*per curiam*).

an overall plan for integrating the schools.⁴³ The Richmond school board had conceded in open court that they were not operating a non-discriminatory school system as required by the Constitution.⁴⁴

The Board then submitted a new integration plan prepared by the United States Department of Health, Education, and Welfare. The plan sought to create neighborhood schools but did not provide for busing because of an unwritten departmental policy that prohibited consideration of transportation resources as a means of achieving integration. Merhige "found the neighborhood school plan to be totally unacceptable, a conclusion that should have been obvious in view of the Fourth Circuit's decision in *Swann*." In *Swann*, the Fourth Circuit, and subsequently the Supreme Court, had approved the use of busing so long as it did not pose intolerable practical problems.⁴⁵

The school board's plan for neighborhood schools could not operate successfully in Richmond because the neighborhoods themselves were rigidly segregated. Overt discrimination by the federal and state government, as well as private business, had created black ghettos and white enclaves within the city. It was obvious to Merhige that neighborhood schools could not operate "unless and until there is a dismantling of the all Black residential areas."⁴⁶ Short of altering existing housing patterns, Merhige felt that his only option was to order busing between the neighborhood schools in order to achieve meaningful racial integration.

The plaintiffs in *Bradley* submitted an integration plan drafted by Gordon Foster, a noted desegregation planning expert, that called for extensive busing. Merhige rejected the Foster plan because school was to open in two weeks and immediate adoption of the plan "would be detrimental to the educational values which the Court [was] satisfied [could] be maintained by less precipitous action."⁴⁷ Instead of the Foster plan, Merhige approved an interim plan which called for less busing. The court-ordered bus trips ranged from 5.8 to 12 miles, and the average trip during rush hour

⁴³ See *Bradley*, 315 F. Supp. 325 (E.D. Va. 1970).

⁴⁴ *Bradley*, 317 F. Supp. 555, 558 (E.D. Va. 1970).

⁴⁵ *Swann v. Board of Educ.*, 431 F.2d 138 (4th Cir. 1970), *aff'd*, 402 U.S. 1 (1971).

⁴⁶ *Bradley*, 317 F. Supp. at 566.

⁴⁷ *Id.* at 571.

took thirty-five minutes. It was obvious that this interim plan was not constitutionally adequate, but Merhige felt that it was at least a "reasonable start" toward disestablishment of the segregated school system.

In light of the available options, Merhige believes that he acted with moderation. From a strict constructionist view, the school board could have been ordered to implement the Foster plan at once. The Supreme Court's decisions in *Green* and *Swann* had been strong mandates to order the immediate termination of segregated school systems. Merhige, however, wanted to avoid absolute dogma and tried to apply a rule of reason. Courts must accord school boards a modicum of flexibility in their approaches, and Merhige warned the parties that only reasonable integration plans would receive the court's approval.

Given Merhige's attempt to apply a rule of reason to busing and school integration, it is ironic that his decision resulted in his vilification by the Richmond community. He was criticized unmercifully in newspaper editorials, there were renewed calls for his impeachment, and there was even an ominous threat of a "searching investigation into . . . [his] background and conduct."⁴⁸ Merhige accepted such public criticism because "I learned soon enough that the nature of this job is that you must have a tough skin." However, the intrusions into his personal life were more difficult:

My dog was shot. Our guest house, where my then 75-year-old mother-in-law lived, was burned to the ground. The entire family lived under heavy guard by U.S. Marshals because of the numerous death threats. Every other week or so we received a cryptic letter warning that our son Mark would never live to see age twenty-one. The F.B.I. analyzed the letters and found that they came from a middle-aged, educated, white woman. It was frustrating to learn that they could tell you everything about her except the color of her eyes and who the hell she was.

We all made attempts to defuse the tension with humor. When the FBI warned us about car bombs, I asked my wife, Shirl, to start the car every morning. When she refused, I followed the FBI's advice to leave a pebble on the hood of the car overnight as a safeguard against any tampering. The practice was soon abandoned because I found that I was scaring myself to death! I then

⁴⁸ Richmond News Leader, August 18, 1970, at 7, col. 3.

took to leaving pebbles on my law clerks' cars as part of the gallows humor.

The humor soon waned, the death threats continued, and Shirl and Mark had to leave the country so that Merhige could devote himself to the integration decision. Merhige called a family conference and laid it on the line:

These kooks shouldn't be able to run a judge off the bench. Don't they know how the system works? Didn't they ever take high school civics? I don't want to quit because it would look cowardly and it would hurt the system. But I'll quit if you want me to. If I do stay, you must leave the country because I can't concentrate and do the job while your lives are in danger.

When his family was removed to safety, Merhige talked with Judge Clement Haynesworth about resigning. Merhige fumed, "This damn job isn't worth it and I'm ready to quit." Haynesworth replied, "Now calm down, Bob. Let me tell you of an experience I had." Merhige was struck by Haynesworth's modesty in failing to realize that the entire nation was aware of his having suffered through vicious personal attacks during his ill-fated nomination to the United States Supreme Court. Merhige concluded that if Haynesworth could tough it out, so could he. "O.K., forget it," he told Haynesworth. "I'll be back tomorrow and the next day, and the next day."

Merhige never again considered resigning, and upon reflection, he decided it was probably a wise decision. "It hadn't occurred to me at the time," he explained, "but I really had nowhere to go. Who would hire me as a lawyer? The press had labeled me as such a bad guy that I couldn't have appeared before any jury in the state."

The death threats continued, and Merhige received quite a few life insurance policies in the mail, along with a number of Fisher-Price toy school buses. He struggled to remain dignified and professional in the face of such vicious attacks. His staff prepared a form reply letter to all the correspondence, good and bad, that was received. The standard response was that the Judge could not comment on matters pending before the court, but that "he and his family appreciate your concern and your prayers." Merhige admits a perverse pleasure in sending such polite replies to people who had

written, "You dirty S.O.B." His only regret was that he lacked the courage to send the form letter that a Congressman had once used: "Dear Mr. Smith, did you know that some jackass is writing stupid letters and signing your name?"⁴⁹

Merhige handled the crank calls by stoically toughing it out: "I kept my name in the phone book in spite of all the crank calls because it was important to demonstrate that courts cannot be intimidated. I was not going to let them change my life. Of course I was wrong. All the controversy and hatred did change my life. I could no longer appear in public."

While Merhige struggled with the disruptions of his personal life, he continued to move cautiously in integrating Richmond city schools and the Henrico and Chesterfield county school systems. At the same time, a radical plan was developing to integrate the entire metropolitan area by consolidating Richmond city schools with the surrounding Henrico and Chesterfield county school systems. On July 6, 1970, Merhige sent a letter to all counsel suggesting that they consider consolidation and a community-wide plan for integration.⁵⁰ The plaintiffs were intrigued by the possibility and moved to join the Henrico and Chesterfield school boards as defendants in the *Bradley* case.

Merhige now faced two separate and starkly contrasting battle

⁴⁹ Merhige also lacked the creativity to handle crank calls with the flair of the NAACP lawyers, Oliver Hill and Sam Tucker. Tucker remembers that Merhige

caught a lot of flack because he was viewed as a traitor to the white community. But I'll tell you that it was no picnic being viewed as the "uppity nigger lawyers" who started all the fuss. A cross was burned on Oliver's lawn, and he just called the fire department and went back to sleep. Oliver and I both learned to be leary of the police department because you never knew how many policemen were members of the Ku Klux Klan. We were compelled to handle the harassment ourselves. There was one period where I got a death threat over the phone every night at 2 a.m. The loss of sleep was worse than the threat. I refused to get an unlisted number, and I knew the police wouldn't do much to help. It took me quite a while to figure out how a lone black man could exert any power to stop these phone calls. Finally one night I told the caller, "You know, if I can't get any sleep I'll have to do something else with my nights. Let me tell you all the fun things me and your mama could be doing right now." I was never prosecuted for making an obscene call, and I never heard from the guy again.

Tucker interview, *supra* note 7.

⁵⁰ The relevant section of the letter reads: "It may be that it would be appropriate for the defendant school board to discuss with the appropriate officers of the contiguous counties as to the feasibility or possibility of consolidation of school districts, all of which may tend to assist them in their obligation. They may well determine to look at the prospects of a 'feeder' system, consolidation, pairing, zoning, etc." *Bradley*, 324 F. Supp. 439, 452 (E.D. Va. 1971).

plans for integration. The original *Bradley* case involved integration of Richmond City schools as a separate unitary system. Merhige continued to move cautiously in this area, reaffirming the interim plan and again refusing to implement the Foster plan in January 1971.⁵¹ Moderation was less evident in the consolidation case, which was a radical attempt to strike at the root causes of segregation. This frontal assault upon discrimination brought the community's resentment to the boiling point.

Henrico and Chesterfield Counties were added as parties to the *Bradley* case in December 1970, and a motion to recuse Merhige for bias and prejudice was filed in January 1971.⁵² "The motion to recuse me was neither beast nor fowl," Merhige remembered:

It was, but wasn't quite, a motion for personal disqualification. The school boards couched their motion in terms of a concern that the poor, maligned judge had taken enough heat over school integration. They expressed concern about my health and well-being, and suggested that I pass the burden on to another judge. Such an approach, even if sincere, would not persuade me to step down. I changed my plans to retire when the Robins Dalkon Shield case arose, because I couldn't retire and dump that complicated a case on another judge. I'd be running out on a tough baby and I just never have done that.

Merhige dryly responded to the concern for his health by noting a judge's "obligation not to disqualify one's self, solely by reason of the personal burdens related to the task." Merhige was less restrained in responding to the charges of bias:

Although the law required me to accept counsel's factual allegations as true, I could not resist pointing out that I personally knew and the record reflected that the allegations were not true in fact. A copy of my consolidation letter was attached to the court opinion to illustrate how I had been misquoted by counsel.

After taking some tongue-in-cheek jabs at counsel's motion, Merhige gave serious consideration to the legal charges of bias. Precedent had established that improper judicial bias must stem from an extra-judicial source and not merely from the judge's participation

⁵¹ *Bradley*, 324 F. Supp. at 456.

⁵² *Id.* at 439 (E.D. Va. 1971).

in the case.⁵³ Merhige's "suggestion" as to consolidation arose from the case record — from the testimony of an expert witness that Richmond had physically located new schools "as near the city boundaries as was humanly possible" in order to prepare for future annexation of portions of Henrico and Chesterfield counties.⁵⁴ The record also reflected that in 1968 the Richmond school board received a study report from a team of educators and social scientists which stated: "It is obvious that no really meaningful and stable racial balance is possible in the public schools unless the annexation issue is settled. All other solutions are dependent on finding a metropolitan solution."⁵⁵

Merhige also pointed to appellate authority for every statement contained in each paragraph of his consolidation letter. The language was borrowed from Supreme Court opinions, and thus the letter could not be seen as an expression of his personal views. Judges are required to consider all options, and Merhige felt that he was attempting to meet the court's "obligation to assist the litigants in any appropriate manner to the end that the law is conformed to."

Having set the record straight on his proper judicial participation in the case, Merhige gave further consideration to the public perception of his actions. It is an important legal maxim that the perception of justice is as important as justice itself; justice must not only be done, it must be seen to be done. The *Bradley* defendants contended that the local and national publicity surrounding Merhige's letter had created a public perception, whether erroneous or accurate, that Merhige would now rule upon his own suggestion. Counsel maintained that this perception would cause irreparable harm to the public's view of the judicial system.

Merhige refused to criticize the press for its reporting, but he also refused to be controlled by press coverage:

[The] news media have a right to report what they consider to be news. They have a right, guaranteed under the First Amendment to the Constitution, to be complimentary or critical of a court.

⁵³ See *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir. 1956).

⁵⁴ *Bradley*, 324 F. Supp. at 449.

⁵⁵ Urban Team Study on Northside Schools (November 21, 1968) prepared for the Richmond Schools pursuant to a grant from the U.S. Dept. of Health, Education and Welfare.

They have a right to make their own interpretations. I have been cited to no authority which requires that news media be temperate or objective or fair or unbiased. One would hope that they would be all of these things. But regardless of whether they are or are not, courts would cease to operate if . . . the rights of the public and litigants are affected to such an extent as to permit the manner of treatment of news to control the court.⁵⁶

Merhige methodically explained why he would refuse to disqualify himself from the case, but this did not prevent further efforts to divest him of authority. In February 1971, the defendants entered a request for a three-judge panel to take jurisdiction of the case.⁵⁷ Under existing law, a three-judge panel was required whenever a federal district court enjoined or restrained any state official from executing a state statute. The defendants contended that consolidation would require them to violate a statutory directive that “[t]he public schools in each county, city, and town operating as a separate school district shall be free to each person. . . .”⁵⁸

Merhige refused to yield to a three-judge panel because other Virginia statutes clearly provided for the creation and operation of consolidated school systems which included independent cities and counties.⁵⁹ After losing on the motion for a three-judge panel, the Henrico and Chesterfield school boards made one last effort to avoid Merhige’s jurisdiction by claiming that they could not properly be joined as parties to the *Bradley* case.⁶⁰ When Merhige denied that procedural claim, he was able to “get back to moving the two *Bradley* cases toward a conclusion on the merits.”

In April 1971, Merhige replaced the functioning interim plan with a plan which would establish integrated schools in Richmond, to the maximum extent that it was possible to do so, while the city operated as an independent school district.⁶¹ The dilemma Merhige faced was how to accomplish meaningful integration in a city which was already 66 percent black and becoming increasingly so. Noting that the *Bradley* consolidation case was still pending before the

⁵⁶ *Bradley*, 324 F. Supp. at 448.

⁵⁷ *Id.* at 397.

⁵⁸ *Id.* (Citing Va. Code § 22-218 (1969 Repl. Vol)).

⁵⁹ See *Bradley*, 462 F.2d at 1071 n.3 (Winter, J., dissenting) for an explanation of these statutes.

⁶⁰ *Bradley*, 324 F. Supp. at 401.

⁶¹ *Bradley*, 325 F. Supp. 828 (E.D. Va. 1971).

court, Merhige instructed the school board that court approval of the Richmond integration plan was conditional on the plan operating as projected: "The Constitution is satisfied only when an integration plan 'works' in practice and not merely on paper."⁶² Merhige warned that continued bus-dodging and white flight to the suburbs would render the plan impotent and leave consolidation as the only course for true integration.

Merhige recognized that the problem of white flight made it nearly impossible to stabilize integration in Richmond. Historically, as the pressure for integration mounted, the migration of whites accelerated.⁶³ Every increase in federal pressure for integration reduced the relative number of white students in the city school system. The efforts to avoid integration occasionally resulted in spectacular and well-publicized forms of bus-dodging. One affluent Richmonder assigned to a ghetto school simply had her father rent her an apartment in her old school district. Another Richmonder with two school age children switched homes with a married daughter living in 92 percent white Chesterfield County.

Balanced against these spectacular examples of bus-dodging were some touching instances of compliance with court-ordered busing. Governor Linwood Holton performed what some viewed as "the single most courageous act in the politics of busing."⁶⁴ Holton enrolled his 13-year-old daughter in predominantly black John F. Kennedy High School, while his two younger children were the only whites in their respective middle-school classrooms. "It's always hard for a child to change schools," he explained. "They don't want to leave old friends. But my children go where they are assigned."⁶⁵ Holton's act was all the more heroic in light of the fact that the governor's mansion was on state, not city, property and thus exempt from Merhige's busing decree. Holton spoke as a parent when he assured other parents that the children were "going to be all right." He spoke as a governor when he commented:

⁶² *Id.* at 847.

⁶³ From 1954 to 1971, the percentage of whites in Richmond schools had dropped from 57 to 31 percent, while the percentage in Henrico and Chesterfield Counties had exploded by some 250 percent.

⁶⁴ J. Wilkinson, *From Brown to Bakke* 153 (1979).

⁶⁵ *Id.*

“They’re going to give this as much leadership as you can expect from 11 to 13-year-olds, which is right much.”⁶⁶

Unfortunately, not all Richmonders followed Holton’s leadership. Much of the school board’s litigation in the *Bradley* case was intentionally designed to afford whites the time to maneuver their way out of integrated schools. Merhige recognized this bad faith by ordering the Richmond school board to pay costs and attorney’s fees for the *Bradley* plaintiffs.⁶⁷

In this final court battle of the Richmond City integration case, the *Bradley* plaintiffs contended that, as the unwilling victims of illegal discrimination, they had been forced to bear the crushing expense of enforcing their constitutional rights in some ten years of litigation. They asked that \$56,000 in costs and attorney’s fees be assessed against the Richmond School Board. Generally, courts do not reimburse victorious litigants for the full price of their victory. However, Merhige observed that an exception exists “when a party has used the litigation process for ends other than the legitimate resolution of actual legal disputes.”⁶⁸ Merhige found that the protracted history of the *Bradley* case had been caused by the school board’s “unreasonable, obdurate obstinacy.”⁶⁹ It was apparent to him that the school board had defaulted from its constitutional duty since 1968, and thus it was “not unfair to say that the litigation was unnecessary.”⁷⁰

Merhige found that in addition to imposing needless litigation on the plaintiffs and the judicial system, the school board had also violated its public trust by failing to adhere promptly to constitutional requirements: “It inspired in a community conditioned to segregated schools a false hope that constitutional interpretations as enunciated by the courts . . . could in some manner . . . be influenced by the sentiment of a community.”⁷¹ The community was further outraged when Merhige summoned the school board members to his courtroom and threatened them with contempt if the costs were not paid

⁶⁶ Id. at 153-54.

⁶⁷ *Bradley*, 53 F.R.D. 28 (E.D. Va. 1971).

⁶⁸ Id. at 36.

⁶⁹ Id. at 39 (quoting *Bradley v. School Bd.*, 345 F.2d 310, 321 (6th Cir. 1965)).

⁷⁰ Id.

⁷¹ Id. at 40-41.

to the plaintiffs by the end of the day. In the view of many white Richmonders, Merhige had done his worst and was now adding insult to injury by requiring the losers to pay costs to the victors. The worst, however, was yet to come.

On January 10, 1972, Merhige issued a 181-page opinion ordering consolidation of the Richmond, Henrico and Chesterfield school systems.⁷² The Richmond Times-Dispatch called the lengthy opinion "a nauseating mixture of vacuous sociological theories."⁷³ For others, Merhige's opinion was an examination of the effects of racial discrimination, the embarrassing history of Virginia's massive resistance era, and a fulfillment of the promise of *Brown v. Board of Education*. In time, the opinion has come to be seen as neither a philosophical treatise on the evils of racial discrimination, nor an outpouring of moral indignation. Rather, the opinion reflects the man — practical, patriotic, legalistic.

Merhige's patriotic and legalistic side caused him dutifully to follow the Supreme Court's mandate "to take whatever steps might be necessary to convert to a unitary (school) system in which racial discrimination would be eliminated root and branch."⁷⁴ His practical bent led him to examine the root causes of segregation in Richmond.

Eight years after President Lyndon Johnson had declared a "war on poverty," Merhige presented a depressing picture of the cycle of poverty in which Richmond's blacks had been trapped by racial discrimination. He noted that inferior segregated schools limited the educational achievements of blacks, and that even in the absence of employment discrimination, this deficient education depressed potential earning power and restricted choice of employment. This in turn narrowed the range of housing options, and confined poor blacks to low-cost central city sites, near public transportation and low-skilled jobs. The poor housing areas locked the children into attending inferior schools, thus perpetuating the cycle of poverty for the next generation.⁷⁵ For Merhige, "The present is simply a cul-

⁷² *Bradley*, 338 F. Supp. 67 (E.D. Va. 1971).

⁷³ Richmond-Times Dispatch, Jan. 11, 1972, at A14, col 1. See also No Place to Hide, Time, Jan. 24, 1972, at 38.

⁷⁴ *Bradley*, 338 F. Supp. at 101 (citing *Green v. School Bd.*, 391 U.S. 430 (1968)).

⁷⁵ *Id.* at 85.

mination of the past and, unless action is taken, a prophecy for the future."⁷⁶

Merhige believes that the logic of his findings was clear: "I found — and this really upset people — that the cycle of poverty and the policy of containing blacks within urban ghettos were the products of past wrongs by educational authorities of the State." The massive resistance movement and the protracted litigation in the *Bradley* case itself portrayed "[t]he sordid history of Virginia's and Richmond's attempts to circumvent, defeat and nullify" all attempts at integration.⁷⁷ "Each move in the agonizingly slow process of desegregation [had] been taken unwillingly and under coercion."⁷⁸

In light of these past practices, Merhige concluded that the State's insistence upon separate attendance districts within the metropolitan community reflected the desire of state and local officials to maintain as great a degree of segregation as possible. He expressed incredulity that any school administrator could plead ignorance of the effects of past discrimination. State and local officials had been bombarded with surveys, reports, and recommendations regarding the magnitude of the problem and the depth of the discrimination. "Informed of the consequences of past discrimination," wrote Merhige, "they knowingly renewed or entrenched it. [I]t was action taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially certain. Under such conditions the action was unquestionably willful."⁷⁹ In the absence of nonracial reasons for adhering to political subdivision boundaries as school attendance limits, Merhige concluded that the State's insistence on using such boundaries had to be predicated on its known racial effects.

For Merhige, the case record established the *fact* of past and present discrimination. From this fact could be inferred the *intent* to discriminate in the future. White flight was possible only so long as white schools were maintained in the politically separate counties. Merhige observed that "the power to temper the marked racial identifiability of the three school systems exists, and it has gone un-

⁷⁶ Id. at 115.

⁷⁷ *Bradley*, 462 F.2d 1058, 1075 (4th Cir. 1973) (J. Winter, dissenting).

⁷⁸ *Bradley*, 338 F. Supp. at 103.

⁷⁹ Id. at 113 (quoting *Keyes v. School Dist. Number One*, 303 F. Supp. 279, 286 (D. Colo. 1969)).

used.”⁸⁰ Once Merhige satisfied himself as to the factual situation and the discriminatory intent of the educational authorities, all that remained was to determine whether any legal principles barred the *remedy* of consolidation.

The *Bradley* defendants invoked the banner of States’ Rights and the sanctity of political boundaries as a bar to consolidation. This argument, however, was seriously weakened by Virginia’s own history of discarding political boundaries during the massive resistance era. In 1956, the General Assembly had created the State Pupil Placement Board and authorized that agency to enroll and place every school age child in the state independent of local school authorities.⁸¹ The General Assembly had also authorized the Governor to divest local school boards of all authority over integrated schools.⁸² The state tuition grant system had funded the transfer of white children across school district lines to attend school in other districts which remained segregated.⁸³ The State School Board had even paid for the transportation of students to other states in segregated groups.⁸⁴ For Merhige, such practices “demonstrate[d] as a matter of historical fact the insubstantiality of any argument that strong state concerns support[ed] [the maintenance of school district boundaries] as barriers to the achievement of integration.”⁸⁵

History aside, a large portion of school operating funds were received from the state.⁸⁶ The curriculums, school textbooks, minimum teachers’ salaries and many other school procedures were governed by state law. Merhige reached the inescapable conclusion that public schools are primarily administered on a state-wide basis. Thus, local school boundaries could be adjusted to achieve a community-wide solution to the problems of segregation.

Merhige felt compelled to institute a metropolitan community-wide solution to Richmond’s segregated schools, for effective inte-

⁸⁰ *Id.* at 85.

⁸¹ *Id.* at 138.

⁸² *Id.* at 140. When 17 black students were assigned by the Norfolk School Board to six formerly all-white schools, the Governor of Virginia closed the six schools, and sent in the state police to enforce the closing.

⁸³ *Id.* at 94-95.

⁸⁴ *Id.* at 83. Sam Tucker ruefully recalls that he had to “bootleg” his education in the District of Columbia. Tucker interview, *supra* note 7.

⁸⁵ *Bradley*, 338 F. Supp. at 84.

⁸⁶ *Id.* at 118-19.

gration was not possible within the existing school division bounds. Richmond had lost 39 percent of its white students in the previous two years, so there were few whites left with whom to integrate. The evidence demonstrated to Merhige that racial disparities “were so great that the only remedy promising of immediate success — not to speak of stable solutions — involve[d] crossing” existing school district lines.⁸⁷

Merhige’s decision removed the final barrier to integration; the affluent white suburbs were now open for integration with urban blacks. The Richmond community was ripe for violence, but Merhige refused to back down or offer any excuses. In a nationally televised CBS interview he defended his decision to order integration while permitting his eleven year old son, Mark, to attend an exclusive private academy: “When I’m on the bench I’m a judge, and when I’m at home I’m just a father. Mark attends a private school because that’s where I think he can get the best education and I make no apologies for it.” Merhige acknowledged his resentment over the numerous death threats and harassing phone calls which “upset my wife and child. My little boy, I think, suffers more than anybody. He doesn’t go off the property without a marshall, nor does Mrs. Merhige.” Lest anyone mistake his concern as a plea for mercy, Merhige coolly stared into the television camera and announced, “I want you to understand that we are not afraid. I only hope they (the callers) would understand, whoever they are, that it’s not going to change one single thing, whether it’s me or any other judge.”

In light of the explosive situation, the Fourth Circuit Court of Appeals took extraordinary steps to placate the aroused community. The Fourth Circuit held a “pre-trial” meeting of the parties and attorneys — an unusual, if not unprecedented step. At the meeting the Court issued an immediate stay of Merhige’s order, agreed to hear the case *en banc*, advanced the case on the docket, dispensed with the rule requiring printed briefs, and agreed to hear oral arguments within two months of Merhige’s decision. Clearly the consolidation case was not to be treated as a normal case.

The most extraordinary maneuver was the Fourth Circuit’s sub-

⁸⁷ *Id.* at 100.

sequent decision to issue a press statement pointing out that Merhige had acted courageously in doing what he felt was compelled by law. Merhige still fumes at this maneuver: "Since when do appellate courts issue press releases saying what a nice guy the trial judge is?"

Nice guy or not, the Fourth Circuit reversed Merhige by a vote of five to one.⁸⁸ The court rested its decision on a repudiation of Merhige's factual findings and a reinterpretation of the legal principles he applied.

Through his factual findings, Merhige had established that officials of Richmond, Henrico, Chesterfield, and the Commonwealth of Virginia had by their actions directly contributed to the continuing existence of a segregated school system in the metropolitan area. The fact that the development and growth of a segregated situation came slowly and surreptitiously rather than by legislative pronouncement made the situation no less evil. Merhige's legal conclusion had been that desegregation could not be subordinated to political boundaries. Virginia was required to rid itself of segregation and could not "escape its constitutional obligations by relinquishing or delegating to local authorities the authority to discriminate."⁸⁹ The school boundary lines were hardly inviolate; they were creations of the state itself and, like water or sewer districts, could be altered to form other districts.⁹⁰

The Fourth Circuit first attacked Merhige's finding that there had been invidious intent to discriminate, noting that the county and school boundary lines had been in existence for over one hundred years. Neither party had argued that invidious intent to discriminate had motivated the creation of these boundaries, nor had there been any evidence that either past or present adherence to existing boundary lines indicated a purpose to perpetuate discrimination in the public schools.⁹¹ The court acknowledged the existence of segregated housing in Richmond, but refused to follow Merhige in attributing that condition to segregated schools:

We think that the root causes of the concentration of blacks in the

⁸⁸ *Bradley v. School Bd.*, 462 F.2d 1058 (4th Cir. 1973).

⁸⁹ *Bradley*, 338 F. Supp. at 102.

⁹⁰ *Id.* at 103.

⁹¹ *Bradley*, 462 F.2d at 1064.

inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of Richmond . . . Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend . . . A school case, like a vehicle, can carry only a limited amount of baggage.⁹³

The circuit court found that each of the three previously segregated school districts had been desegregated,⁹³ and that each unitary district could now be maintained without constitutional violation.⁹⁴ The continuation of the three individual systems did not impair a federally protected right, because there is no right to racial balance within a single school district, only the right to attend a unitary school system.⁹⁵ Once Merhige had removed state-imposed segregation from the Richmond city school district, further court intervention in the absence of invidious state action was neither necessary nor justifiable. Merhige was reversed because he had erred in his finding of government intent to discriminate, and erred in his legal conclusion that the Constitution required racial balance.

The true basis for the reversal may have been the budgeting and financial problems of implementing consolidation, problems which the Fourth Circuit said "boggle the mind".⁹⁶ In Virginia, school boards cannot levy taxes or appropriate funds, and thus they must look to city council or the county commissioners for support and approval. A consolidated school district would have had to deal with three politically distinct bodies — the Richmond City Council and the county commissioners of Henrico and Chesterfield Counties — each of which had a separate power base.⁹⁷ The obvious fear was that white suburbanites would not appropriate funds to pay for black city schools.⁹⁸

Merhige could garner only one supporter on the Fourth Circuit.

⁹³ Id. at 1066.

⁹⁴ Id. at 1067.

⁹⁵ Id. at 1069.

⁹⁶ Id. (relying on the holding in *Swann v. Board of Educ.*, 402 U.S. 1, 24 (1971).

⁹⁷ Id. at 1068.

⁹⁸ Id.

⁹⁹ Although these administrative considerations were significant, the Fourth Circuit conceded that state political subdivisions could not be used to circumvent the equal protection right of blacks to attend non-segregated schools. Id. at 1068-69.

In his dissent, Judge Winter began by noting that in an earlier case the majority had approved the dismantling of larger school districts into smaller districts which would be more segregated.⁹⁹ Thus, their decision in *Bradley* to prevent consolidation of smaller segregated districts to create a larger integrated district was predictable.¹⁰⁰

Judge Winter also objected to the majority's categorization of Merhige's order as a plan for racial balance. Winter agreed with Merhige that consolidation had been ordered "to weed out the effects of past discriminatory practices, especially as they were permitted to proliferate by Virginia's long-deferred compliance with *Brown v. Board of Education*."¹⁰¹ Winter also agreed with Merhige that the operation of the fourteenth amendment could not depend on how a state elects to subdivide itself, and that the obligation to dismantle the dual school system exists regardless of political subdivisions.¹⁰²

Before the Supreme Court, Merhige's decision was permanently relegated to legal limbo where he could be neither vindicated nor chastised. As a former chairman of the Richmond School Board, Justice Lewis F. Powell, Jr. declined to participate in the case. The remaining Justices split four to four, which meant that the Fourth Circuit's reversal was left in effect.¹⁰³

Subsequent cases such as *Milliken v. Bradley*¹⁰⁴ have made it appear likely that Merhige would have stood reversed if Justice Powell had not disqualified himself. In *Milliken*, a federal district judge in Detroit had agreed with Merhige that "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights."¹⁰⁵ The only distinction between the Richmond and Detroit cases was that Judge Stephen Roth of Detroit did not order elimination of school lines. Instead he ordered that students be bussed across school lines in order to integrate the

⁹⁹ *Bradley*, 462 F.2d at 1071 & n.1. Judge Winter was referring to *Wright v. Council of Emporia*, 442 F.2d 570 (4th Cir. 1971). The Supreme Court subsequently reversed the Fourth Circuit, and upheld Merhige's finding that the dismantling plan was impermissible. *Emporia*, 407 U.S. 451 (1972).

¹⁰⁰ *Bradley*, 462 F.2d at 1071.

¹⁰¹ *Id.* at 1079.

¹⁰² *Id.* at 1078.

¹⁰³ *School Bd. v. State Bd. of Educ.*, 412 U.S. 92 (1973).

¹⁰⁴ 418 U.S. 717 (1974).

¹⁰⁵ *Milliken*, 484 F.2d 215, 244 (5th Cir. 1973).

city and county schools.

Chief Justice Burger, echoing his dissent in the *Emporia* case, wrote the majority opinion reversing Judge Roth.¹⁰⁶ It was clear that Judge Roth and Judge Merhige had pushed the Supreme Court further than it was willing to go. The Court's response to these lower-court decisions was perhaps prophesied by an 19th century case which stated: "[T]here must be some stage, in the progress of his elevation when [the black man] takes the rank of a mere citizen, and ceases to be the special favorite of the laws. . . ."¹⁰⁷

Because of the Supreme Court's continuing vacillation over reverse discrimination, racial hiring quotas, and affirmative action, a final verdict has not been rendered on the special status of blacks.¹⁰⁸ Merhige remains noncommittal when reflecting upon the consolidation decision. He will not express an opinion as to whether the Richmond metropolitan area is in better or worse condition because of the *Bradley* case. Pragmatically, he observes that there would have been less busing if consolidation had been approved. "I know the price of busing was high," he concedes, "but I don't think there is any price too high to reach a society where everyone is viewed the way God intended, the way the Constitution intended. Viewed and treated equally."

About one year after the consolidation case, Merhige received a call from one of the Fourth Circuit judges who had voted to reverse him in *Bradley*. The judge had taken an evening walk through Richmond and told Merhige, "Bob, I think you were right. Richmond is turning into a poor black city. Maybe we were wrong in reversing you." Merhige replied, "I *know* you were wrong. We, the American people, haven't always been so smart in our selection of political and judicial leaders. But God is forgiving and has a special view of America. If He didn't, we have messed it up so badly that we would be in terrible shape. I believe that whatever happened, it happened for the best."

Merhige still remembers the *Bradley* case as one of those fortuitous occurrences when the law and a judge's personal views coin-

¹⁰⁶ *Milliken*, 418 U.S. at 721 (Powell, J., joining in the majority opinion).

¹⁰⁷ *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

¹⁰⁸ See, e.g., *Wygant v. Board of Educ.*, 106 S.Ct. 1842 (1986), for a recent instance in which a badly-divided Court struggled with this politically sensitive question.

cide. Judges must often apply a law they do not agree with, but the weight of decision rests easier when the judge can believe that he is serving justice as well as applying the formal law. Merhige acknowledges that a lot of hatred was directed at him because of it, yet he reaffirms today his statements from the bench when the case was decided:

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.