

Fall 1990

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Recommended Citation

Ronald J. Bacigal, *The Theory and Practice of Defending Judges Against Unjust Criticism*, 23 Conn. L. Rev. 99 (1990).

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THE THEORY AND PRACTICE OF DEFENDING JUDGES AGAINST UNJUST CRITICISM

*Ronald J. Bacigal**

The effectiveness of the administration of justice depends in a large measure on public confidence. The reporting of inaccurate or unjust criticism of judges, courts, or our system of justice by the news media erodes public confidence and weakens the administration of justice. It is vital that nonlitigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial. . . .

Therefore, cooperation of lawyers and bar associations is necessary to successfully meet inaccurate or unjust criticism of judges and courts.

—American Bar Association¹

HAVING set forth the above premise and conclusion, the American Bar Association Subcommittee on Unjust Criticism of the Bench promulgated a model program for bar associations to follow when countering inaccurate or unjust criticism of judges. This article presents no quarrel with the model program but instead seeks to relate the model to an empirical account of how it might operate in practice. It must be remembered that the acid test of a theoretical model is not whether the theory is “true” in a purely academic sense but whether the model is useful in describing the “real world.”² In order to test the validity of the American Bar Association (“ABA”) model, this article presents a “real world” account of an incident involving a prominent judge subjected to public attack by government prosecutors, a famous newspaper columnist and a powerful United States Senator. The efforts

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1. ABA SUBCOMMITTEE ON UNJUST CRITICISM OF THE BENCH AND COURTS & COMMUNITY COMMITTEE JAD LAWYERS CONFERENCE, UNJUST CRITICISM OF JUDGES (1986) [hereinafter UNJUST CRITICISM].

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

of bar associations to defend the judge disclose the extent to which the ABA model program can become a successful plan of operation.

INTRODUCTION

When Judge Robert R. Merhige, Jr. assumed the office of federal district judge for the Eastern District of Virginia in August of 1967, no one could foresee the turbulence that would engulf his life on the bench. Judge Merhige's judicial career prompted one commentator to cite him as the prototype of the modern activist judge.³ According to another commentator, Merhige is "an activist who moves cases in and out of his court like a drillmaster and who, if he is criticized at all, is faulted for too readily exercising the considerable power of his judgeship."⁴

Judge Merhige's form of judicial activism has stirred controversy and attracted criticism from the very inception of his judicial career. Two weeks after his appointment to the bench, Merhige was faced with government efforts to silence militant black leader H. Rap Brown. Soon thereafter the judge confronted numerous civil rights and antiwar issues, gaining some immediate notoriety as the first federal judge to declare that the conflict in Vietnam was a war within the meaning of the Constitution. These early cases were merely a prelude to a twenty-year judicial career replete with landmark and controversial cases that attracted media attention. In his most controversial decision, Merhige split the United States Supreme Court in a four-to-four vote on the issue of the judiciary's power to adjust political boundaries in order to achieve racial integration.⁵ At the time of the school busing controversy, the judge's guesthouse was burned, his dog was shot, and his wife and son left the country after numerous death threats. Merhige himself faced projected impeachment proceedings and threats of a searching investigation into his background.

Most recently, Judge Merhige stirred considerable controversy when he presided over one of the major cases of this century, the bankruptcy proceedings of the A.H. Robins Pharmaceutical Company, man-

3. Macaulay, *An Empirical View of Contract*, 1985 Wis. L. Rev. 465, 471 & n.28 (citing Matter of Westinghouse Elec. Corp., 517 F. Supp. 440 (E.D. Va. 1981) (Merhige, J.)).

4. J. STEWART, *THE PARTNERS* 168 (1983).

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

ufacturer of the Dalkon Shield.⁶ At the initiation of the bankruptcy proceedings, Merhige faced motions to recuse himself for having volunteered his admiration for the founder of the Robins company and for unfavorable characterizations of plaintiffs' counsel.⁷ At the conclusion of the Robins bankruptcy proceeding, Merhige was involved in a highly publicized dispute with claimants' counsel and with the court-appointed trustees of the Dalkon Shield settlement trust fund. The press headlined allegations that "the record is building toward a charge of violation of judicial ethics,"⁸ but no publicity was given to the Court of Appeals' finding that the charges were unfounded and that Judge Merhige had manifested exemplary fairness.⁹

As can be seen from the above summary, Judge Merhige's stormy career has given him extensive experience with handling personal and public criticism. In general, he recommends that judges develop a "tough skin" and follow the ABA model program's suggestion to simply ignore criticism.¹⁰ He recognizes, however, that extensive public criticism can undermine the citizenry's confidence in the judiciary. Faced with unrestricted condemnation by public figures or the media, a judge is largely defenseless and must trust to the responsibility of the bar to restore public confidence in the judiciary.¹¹ This article, excerpted from a forthcoming biography of Judge Merhige, addresses the most serious attack on his judicial integrity and the response of the bar in defending the judge against criticism.

THE TRIAL RECORD

Smith W. Bagley, the heir to the R.J. Reynolds tobacco fortune, was indicted in North Carolina on charges of an illegal stock manipula-

6. See, e.g. R. BACIGAL, *THE LIMITS OF LITIGATION: THE DALCON SHIELD CONTROVERSY* (1990); Couric, *The A.H. Robins Saga*, 72 A.B.A. J. 56 (July 1986).

7. See *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987). In turn, another federal judge referred to Judge Merhige as an "S.O.B." Lutz, *Interview with Robert R. Merhige, Jr.*, 12 LITIGATION 10, 12 (Summer 1986).

8. Richmond Times-Dispatch, Dec. 8, 1988, § C, at 1, cols. 1-2.

9. *In re A.H. Robins Co.*, 880 F.2d 769 (4th Cir. 1989).

10. "Generally, it is undesirable for a judge to answer criticism of her or his own actions appearing in the news media. This policy has developed to insure the dignity of the administration of justice, to prevent interference with pending litigation, and to reaffirm the commitment to an independent judiciary, a judiciary dedicated to decisionmaking based on the facts and law as presented." UNJUST CRITICISM, *supra* note 1, at 1.

11. The ABA model recommends "that judges should generally not respond to criticism and that the bar, both state and local, should respond to inaccurate or unjust criticism of judges and courts." *Id.* at 2.

tion scheme. While the case did not attract national attention, it was a *cause célèbre* to many small investors who lost their life savings and pension funds when Bagley's company declared bankruptcy. These angry investors descended upon the federal courthouse in Greensboro, North Carolina, during the pretrial stages of the case. The community's strong feelings about the situation increased when the federal judges in Greensboro disqualified themselves from presiding over the case. Judge Merhige, of Richmond, Virginia, was then assigned to take charge of the trial.¹²

Concern over the local community uproar led Bagley's attorneys to move for dismissal of the charges or a change of venue because of excessive adverse publicity. The difficult task of selecting an impartial jury in Greensboro was rendered moot when the government prosecutors first opposed then joined in the defense request to move the trial to Richmond. The prosecutors' hesitancy and reversal of position proved to be a chronic problem during the course of the trial. The prosecution team was comprised of two attorneys with limited trial experience, assisted by an official from the federal Securities and Exchange Commission who had never tried a jury case. Counsel's inexperience contributed to the discord in the courtroom and ultimately led to charges that Judge Merhige had conducted the trial with an antigovernment bias.

The charges of bias centered around Merhige's overbearing activism in pushing trial counsel to move the proceedings along rapidly. Although the attorneys initially had projected the Bagley trial to last four to six weeks, it was concluded within eight days. The judge pressured the parties to increase the pace of their presentation while openly expressing impatience with the inexperienced government prosecutors. When counsel complained that getting straight answers from a witness was like pulling teeth, the judge retorted, "Why didn't you take up dentistry, or something?" When counsel volunteered to "think about it," Judge Merhige backed off slightly: "You are a good lawyer, but it would have made my life easier." Informed that counsel "wanted to make it interesting," the judge murmured, "You have managed."¹³ At

12. An attorney who participated in one of Judge Merhige's more celebrated cases speculated as to the reasons for the judge's assignment to so many prominent cases.

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.

Interview with Lewis Pitts, private counsel, in Greensboro, N.C. (Sept. 1986).

13. Report of the Special Committee of the Bar Association of the City of Richmond, Re:

another point in the trial, a prosecutor interrupted testimony with a tentative: "I *think* I want to object to that." Judge Merhige was incredulous: "You don't know?"¹⁴

Although Judge Merhige is often labeled as an "activist judge," every trial judge must make a fundamental decision whether he will play an aggressive or quiescent role in the trial proceedings. On the one hand, the exercise of judicial restraint reflects a commitment to allowing the adversary process to bear the entire burden of presenting the equities of the case. The justification for a more active judicial role, however, is the fear that distortions arising from the commitments of the adversaries will produce inequities in the proceedings. By failing to take action, the judge may become the abetting instrument of injustice.¹⁵

Whatever a judge's jurisprudential bent regarding judicial restraint or activism, the judge's professional experiences before ascending the bench will also influence his conduct during the trial. As is the case with many trial-lawyers-turned-judges, Judge Merhige is more prone to play an animated role in the proceedings. He displays little patience with incompetent cross-examination and will "take over" the questioning in order to clear up an ambiguous factual situation. He admonishes himself, however, that even when he is better qualified than counsel to try the case, every judge must recognize when it is time to "shut up."¹⁶

In the Bagley case, at least at times, Judge Merhige appeared to disregard his own admonition. When the prosecutor asked a witness, "Did there come a time that you left the hospital?" the judge broke in: "I was frightened to death that perhaps she was still there. . . . If you keep this up you may have me there."¹⁷ Throughout the trial, Judge Merhige employed his quick wit and his acid tongue to goad the attorneys, although he subsequently consoled counsel: "Don't feel too badly [about the hospital question]. I once asked a witness if he would look at

Judge's Conduct of Trial in *United States v. Smith W. Bagley et al.*, app. F at 2 (Dec. 12, 1979) [hereinafter *Richmond Bar Report*].

14. *Id.*, app. F at 24.

15. See Breitel, *Ethical Problems in the Performance of the Judicial Function*, in CONFERENCE ON JUDICIAL ETHICS 65 (U. Chicago 1964).

16. Unless otherwise noted, all quotations of the Honorable Judge Merhige are from interviews conducted by the author in Richmond, Virginia, throughout 1985-87 [hereinafter "Merhige Interviews"].

17. *Richmond Bar Report*, *supra* note 13, app. F at 25.

the jury and tell them how far the car traveled after it came to rest."¹⁸

While the judge was intemperate in his remarks to the inexperienced prosecutors, he was evenhanded in his brusqueness with all attorneys in the case. When a defense counsel spoke while reposing in his chair, Judge Merhige interrupted: "I can't hear you unless you are on your feet." The attorney apologized: "A habit from North Carolina. I am sorry. We are not allowed to stand there; we have to stand here." Merhige was not forgiving: "It is easy. You coordinate your tongue and your legs."¹⁹

THE ATTACK UPON THE JUDGE

The chastised lawyers could not openly confront the judge during the course of the trial, but when the prosecutors were given an opportunity to strike back at Judge Merhige, they took their reprisals with a vengeance. After the jury acquitted the defendant Bagley of all charges, the United States Department of Justice demanded an explanation from the prosecutors. (Such explanations are required only when an acquittal is contrary to the Department's expectations for a successful conviction.) The besieged prosecutors laid all of the blame upon Judge Merhige in a nine-page letter summarizing the failed prosecution:

[N]otwithstanding minor factors which may have contributed to the not guilty verdict in the *Bagley* case, the conduct of the trial judge ultimately ensured its outcome. The anti-government bias was manifested by Judge Merhige in virtually every phase of the trial. This bias was most clearly reflected in the court's intemperate comments and outrageous jury instructions. At times, the courtroom took on a circus-like atmosphere. . . .

In overview, the *Bagley* trial takes on the quality of a "set up." Individual incidents which at the time had the appearance of mere intemperance laid the foundation for jury instructions which had the effect of a direction to the jury to acquit. Only at the time of jury instructions did certain of the judge's exclusionary rulings, unsolicited witness cross-examinations and verbal explosions make sense. An appreciation of the futility of the prosecution once it reached Judge Merhige's

18. *Id.*, app. F at 26.

19. *Id.*, app. F at 23.

hands can only be achieved by gaining an awareness of certain pre-trial matters, and most particularly the court's rulings on motions to dismiss the indictment. . . .

While the significance of these motions may simply lie in defense counsel's skilled advocacy, when viewed in light of later events, they suggest that the defense team recognized an all too friendly forum at the outset. . . .

During the trial itself the government was subjected to numerous on- and off-the-record diatribes by Judge Merhige. For example, . . . Merhige was provoked to state out of the jury's presence that the government was on a witch hunt and prosecution of the case shocked him. The judge's views that the government had failed after a week of trial to produce a "scintilla" of evidence as to a conspiracy were repeatedly articulated to the jury. . . .

Throughout the course of the trial the judge displayed a more than merely solicitous attitude toward the jury. He personally served the panel with coffee and donuts on a daily basis and arranged on at least one occasion for them to lunch at his private club. The foreman of the jury was quoted in local tableaux as stating the jury had not wanted to let the judge down by its verdict. Judge Merhige is a man of great personal charisma and charm. In this context, the jury stood on the edge of its seat listening to the "law," when given in the instructions. I concluded from my observation of the nodding heads in the jury box that at the close of all arguments at least the defendants Bagley and Gilley had been convicted, if not all five of the defendants; when the jury instructions were given, these same heads were shaking in near disbelief. . . .

The judge's instructions were tantamount to a directed verdict. Only a thorough reading of these instructions fully reveals the not guilty bias through their juxtaposition of phrases, concepts and gratuitous comments. The government was never given a chance to present its view of the case as at no time during the trial was the indictment read to the jury. . . .

The judge took every element of proof, such as the encouragement to buy stock and the making and guaranteeing of loans for stock purchases, and stated these acts were not unlawful. Incredibly, he stated that it was not unlawful to com-

pel, intimidate or pressure employees to buy stock for the purpose of supporting the price of the stock or to engage in buying for the purpose of raising the price of the stock. This was the heart of the case. . . .

Once Count Two [of the indictment] was effectively emasculated, the entire case, practically speaking, was lost. . . . Finally, the judge stated that the jury could not convict the defendants for their mere failure to disclose information but that an affirmative false statement was necessary. These instructions fail to bear the remotest resemblance to the law²⁰

The prosecutors' damning letter was leaked to the *Washington Post*, which ran a feature story on Judge Merhige's "outrageous" legal behavior during trial. United States Senator Orrin G. Hatch argued on the floor of Congress that "no prosecutors would make these criticisms without great consideration and serious reflection."²¹ Senator Hatch offered the prosecutors' letter and the *Post* article for insertion into the *Congressional Record* while urging the Justice Department to conduct a prompt and thorough investigation of Judge Merhige.²² One of Hatch's aides warned that although the Senate Judiciary Committee could not take direct action against a federal judge, "it can hold hearings and raise a stink."²³

The next day, Senator Hatch continued his attack from the floor of Congress. In preparation for possible Senate action, the Senator placed a chronology of events surrounding the Bagley trial into the *Congressional Record* and informed Senate members that Bagley was one of the early financial and political supporters of a grateful President Jimmy Carter. Senator Hatch alleged that while the Bagley case was being prepared, one of the government prosecutors was called to the Carter White House to discuss a possible promotion. The other prosecutor was allegedly approached by representatives of the R.J. Reynolds Corporation, who suggested the possibility of a high-paying corporate position. The Senator insinuated that the Carter administration had attempted to stall the trial while eventually arranging to have the case heard before Judge Merhige, whom Hatch described as "the political protégé of Smith Bagley's first cousin, the late J. Sargeant

20. 125 CONG. REC. 30,751-53 (1979) (footnotes omitted).

21. *Id.* at 30,751.

22. *Id.*

23. Richmond Times-Dispatch, Nov. 7, 1979, § B, at 1, cols. 5-6.

Reynolds, former lieutenant governor of Virginia."²⁴ Judge Merhige thus became the unwitting focus of a political battle between the Carter administration and Senator Hatch.

The attacks upon Judge Merhige mounted when newspaper columnist Jack Anderson detailed the judge's close relations with the Reynolds family.²⁵ Anderson erroneously reported that Bagley had arranged J. Sargeant Reynolds's funeral and had personally selected Judge Merhige as a pallbearer. At the height of the public controversy, Judge Merhige drew some solace from an appellate judge, who telephoned to comment: "Welcome to the club. I see Jack Anderson has charged that you allowed personal considerations to influence your decision making."²⁶ Judge Merhige feebly responded, "It's honored company, but it's not a club I wanted to get into."²⁷ The appellate judge laughingly observed that the price for a free press²⁸ includes the judiciary's willingness to suffer such attacks.²⁹

The Justice Department also called Judge Merhige to apologize for leaking the prosecutors' letter to the press and to ask if the judge had any response to the letter. Judge Merhige refused all public comment while privately bemoaning the fact that a judge cannot ethically defend himself.³⁰ "As a man, I would have relished the opportunity to refute my accusers," he explains. "But as a judge, any response on my part might have detracted from the fact that the defendants were found not guilty by a jury. It would have been unfair to the defendants for me to say anything which, in light of the existing atmosphere, might have

24. *Id.*

25. Anderson, *Judge Incenses Bagley Prosecutors*, *Washington Post*, Nov. 6, 1979, § B, at 15, cols. 4-6; Anderson, *Judge Had Ties to Defendant Bagley*, *Washington Post*, Nov. 5, 1979, § B, at 13, cols. 4-6.

26. Merhige Interviews, *supra* note 16.

27. *Id.*

28. The ABA model is accompanied by the following statement of policy: "Implementation of this plan is selective. To avoid infringing on the freedom of press, this plan is designed to effect a response to criticism of the judiciary and courts that is serious as well as inaccurate or unjustified criticism." UNJUST CRITICISM, *supra* note 1, at 1-2.

29. Merhige Interviews, *supra* note 16.

30. *Id.*

The risk is apparent that a response by a judge to criticism of her or his own actions may be perceived by the community as "self-serving" and/or as a "defensive" position which fails for lack of credibility. Also, since there invariably is more at stake than an individual judge's ego or feelings, the bar should recognize the negative reflection on the dignity of the administration of justice if a judge should make an intemperate or emotional response to such criticism.

UNJUST CRITICISM, *supra* note 1, at 1.

been interpreted as casting doubt on the defendants' innocence."³¹

Given Judge Merhige's activist nature and his preference for candid debate, it was especially difficult for him to maintain an Olympian distance from the controversy raging around him. He was deeply hurt by the attacks upon his integrity, and his close friends remember this period as the judge's lowest point. They observed that "he took this much harder than all the criticism over school busing. This one hit him on a personal level."³²

To Judge Merhige, the most disparaging charge was the claim that the trial took on a "circus-like atmosphere." "Can you imagine *my* courtroom being a circus?" he asks. "They made me sound like a real jackass when they said I was shuffling around personally serving coffee and donuts to the jury."³³ Ironically, this lack of dignity was attributed to a man who sometimes muses that the American bar should return to the English practice of wearing formal wigs in the courtroom.

As matters stood at this point, a one-sided and perhaps politically motivated attack upon Merhige constituted the only public record of the events surrounding the Bagley trial. A "complete" picture of the proceedings would emerge only when the bar launched its own investigation.

THE BAR'S DEFENSE OF THE JUDGE

As the attacks on Judge Merhige's integrity mounted, his personal friends could offer only private support, but his legal allies rose to his defense. Six days after the first public attack upon the judge,³⁴ the president of the Richmond Bar Association appointed a committee of three of the city's most prominent lawyers to try to clear the judge's name. The Bar Association president dismissed the prosecutors' letter as a flimsy attempt by "a couple of disgruntled lawyers who lost their case and are trying to make an excuse."³⁵ He also noted that Senator Hatch had never appeared before Judge Merhige and that the Senator had not read the record of the case that gave rise to the charges. The

31. Merhige Interviews, *supra* note 16.

32. Interview with Lewis T. Booker, private counsel, Hunton & Williams, in Richmond, Va. (Aug. 5, 1986).

33. Merhige Interviews, *supra* note 16.

34. "To be effective, the response must be prompt, but accurate. If at all possible, the response should be made within 24-48 hours of publication of the criticism or report, especially keeping in mind the deadline(s) of the news media that reported the original criticism." UNJUST CRITICISM, *supra* note 1, at 5.

35. Richmond Times-Dispatch, Nov. 9, 1979, § B, at 4, col. 6.

Richmond Bar Association president explained that he felt compelled to establish the committee because "the judge cannot properly respond and therefore stands defenseless to such unwarranted attacks."³⁶

When the investigatory committee convened, it gave Judge Merhige a strong endorsement even before beginning its investigation. "We have not always agreed with his decisions," announced the three committee members, who frequently appeared in Judge Merhige's court, "but we have never seen the slightest suggestion of judicial impropriety or personal favoritism toward any litigant."³⁷ The blue-ribbon committee then took prompt action to clear the judge's name. Within a month of its formation, the committee returned a 133-page report that rebutted each allegation raised by the prosecution. The report was considerably more extensive than that of other groups that normally investigate judges' behavior, such as judicial disciplinary panels, or appellate courts. Mindful of their confessed "profound respect for Judge Merhige,"³⁸ the committee members sought to avoid claims of favoritism by compiling a sentence-by-sentence examination of the accusations, along with excerpts from the trial transcript. When announcing its findings, the committee encouraged all concerned citizens to read the factual report and draw their own conclusions.³⁹

The committee's report divided the prosecutors' charges into six categories, the first of which addressed allegations that "the courtroom took on a circus-like atmosphere" and that the prosecutors were subjected to "a maniacal trial schedule."⁴⁰ The committee rebutted the former allegation by noting Judge Merhige's insistence upon proper courtroom decorum at all times. The judge's law clerk was interviewed

36. *Id.*, § B, at 1, col. 7, at 4, col. 5.

Because of the restraints placed on judges both by tradition and by the Code of Judicial Conduct, and the ethical obligations imposed by the Code of Professional Responsibility for lawyers, it is recommended that our state and local bar associations adopt a policy and program to provide appropriate responses to inaccurate or unjust criticism of judges and courts.

UNJUST CRITICISM, *supra* note 1, at 2.

37. Richmond Times-Dispatch, Nov. 9, 1979, § B, at 1, col. 7. The ABA model suggests that a typical response to media criticism of the judiciary include the following language: "We may frequently disagree with the decisions and actions of public officials, including judges, and the federal and state constitutions protect our right to express that disagreement." UNJUST CRITICISM, *supra* note 1, at 5.

38. Richmond Bar Report, *supra* note 13, at 2.

39. "The designee or committee chairperson should promptly investigate the underlying facts, discussing them to the extent possible with other committee members and the judge involved, and then promptly prepare and release the response." UNJUST CRITICISM, *supra* note 1, at 3.

40. 125 CONG. REC. 30,751-53 (1979).

and confirmed that the court's strict rules of protocol were followed and that the trial was conducted in an orderly fashion.

The committee regarded the allegedly maniacal trial schedule as a manifestation of Judge Merhige's industriousness, a quality which was known to all lawyers in advance. The judge had opened the trial proceedings by advising counsel: "Well, start at 9:30 on the first day. Then, gentlemen, plan early days, you know. We will try to put in a ten or twelve-hour day. It won't take us any six weeks to try this case."⁴¹ When counsel raised questions about the courtroom hours required to handle 63 witnesses and 615 documents of some 1,800 pages, the following exchange occurred:

The Court: We are going to work 10 hours a day minimum. . . .

Counsel: Will we work on Saturdays?

The Court: We certainly will.

Counsel: And Sundays?

The Court: Right after mass. . . .⁴²

The second category of charges of judicial impropriety related to allegations that the judge gave improper instructions on the law to the jury. However, the committee report found that several of these instructions had been given at the request of the prosecutors. In other instances, the prosecutors were said to have "distorted" the instructions in their complaint to the Justice Department.

The third and fourth categories of charges consisted of accusations that Judge Merhige made erroneous legal rulings during the trial. The committee of knowledgeable trial attorneys concluded that the rulings were proper and that it was the prosecutors, not the court, who apparently misunderstood the legal issue involved. It was noted that even the raw numbers supported Judge Merhige's impartiality. The bar committee found that 161 miscellaneous defense objections were overruled, while 140 were sustained. For the prosecution, 14 objections were overruled, while 7 were upheld.⁴³

Another focus of the bar committee report related to claims that Judge Merhige made the prosecutors look inept with his "intemperate" comments critical of the government's case. The record revealed, however, that the judge's most critical remarks were delivered out of the

41. Richmond Bar Report, *supra* note 13, app. B at 8.

42. *Id.*

43. *Id.*, app. E at 18.

hearing of the jury. Judge Merhige's caustic comments were also balanced by attempts to assist the inexperienced prosecutors. At one point in the trial proceedings, a prosecutor became visibly distressed about the problems of calling witnesses out of sequence. The judge offered reassurance:

The Court: You take it easy now. Be cool and calm.

Counsel: I will try, your honor. I am doing my best.

The Court: I know you are. You are doing very well.⁴⁴

After the same attorney again apologized for problems with the order of witnesses, Judge Merhige volunteered, "I have days like that. I know your problem. I used to practice law."⁴⁵

When the jury was present in the courtroom, the judge's participation in the case consisted of questioning the witnesses, a clearly permissible practice for federal judges.⁴⁶ The committee report did concede that "it would be accurate to characterize Judge Merhige as an active, rather than a passive, participant in a trial. The extent to which he injects himself into witness examination, however, depends on the lawyer's skill in extracting the witness' testimony. . . . When it became necessary, . . . Judge Merhige asked questions of the witnesses in order to clarify and expedite the testimony."⁴⁷

The final category of charges concerned allegations that the judge was "too close" to the jury. The claim that Judge Merhige personally served the jury coffee and donuts was dismissed as a pure fabrication. While the judge arranged to have food and drink available to the jury, at no time did the judge serve as a waiter. His general solicitude toward juries was seen by the bar committee as an admirable quality and a reflection of "his firm belief that justice is best served when jurors are comfortable and alert."⁴⁸ The prosecutors' final charge against Judge Merhige was the type of attack that most people would welcome. The prosecution alleged that "Judge Merhige is a man of great personal charisma and charm. . . . [T]he jury stood on the edge of its seat listening to [his instructions]." Not surprisingly, the bar committee observed that "[i]t is difficult to see how anyone could allege that this fact prejudices any party to a case. If a jury is attentive as a result,

44. *Id.*, app. F at 6.

45. *Id.*

46. *Id.*, app. F at 46.

47. *Id.*

48. *Id.*, app. G at 1.

surely this is in the interest of justice."⁴⁹

After addressing the allegations line by line, the committee offered its overall assessment of the judge's trial performance:

[W]e have reached the unanimous conclusion that Judge Merhige handled the case in a fair and even-handed manner throughout. He showed no bias against the Government and in many instances went beyond his normal function to assist the prosecutors. . . . Indeed, our review of the entire record persuades us that this trial was as fair and as error-free as it is humanly possible to make a trial.

The short of the matter is that Judge Merhige, in our view, tried this case with exceptional fairness and correctness.⁵⁰

The committee's unqualified defense of Judge Merhige did not satisfy Senator Hatch. He called for a continuing congressional investigation while questioning both the impartiality of the committee and the limited scope of its inquiry. The Senator insisted that "it would be extremely difficult to get an objective report from any committee of lawyers that must practice before Judge Merhige's court."⁵¹ Senator Hatch pointed to one member of the bar committee who worked for the law firm that previously represented Bagley's investment company. The committee member in turn denied any conflict of interest but conceded that such an accusation was not unexpected. "'And it was for that very reason,'" he explained, "'that we didn't summarize the transcript [of the trial] or our conclusions' in the 133-page report. 'We laid out the transcript for anyone to see and draw their [sic] own conclusions.'"⁵²

Senator Hatch, however, refused to budge from his call for a congressional investigation: "Even if this Richmond Bar Association Committee report is completely proper and circumspect, it should not be permitted to stand as the final word."⁵³ A Senate aide explained that Senator Hatch's interest in the matter was rooted in his days in private practice in Utah, when the Senator encountered a federal judge notorious for his undisciplined administration of justice. Because of that experience, Senator Hatch had become a self-appointed critic of federal

49. *Id.*, app. G at 5.

50. *Id.*, app. G at 4-5.

51. Richmond Times-Dispatch, Dec. 21, 1979, § A, at 1, col. 8, at 8, col. 1.

52. *Id.*, § A, at 8, col. 3. "The response should be a concise, accurate, 'to the point' statement, devoid of emotional, inflammatory or subjective language." UNJUST CRITICISM, *supra* note 1, at 5.

53. Richmond Times-Dispatch, Dec. 21, 1979, § A, at 1, col. 8, at 8, col. 4.

judges, particularly those whose conduct on the bench appears questionable.⁵⁴ The Senator justified his insistence on further investigation by revealing that he had received information from various sources both supporting and detracting from the original allegations. He maintained that his "concern in this entire matter is the American public's perception that the federal courts are once again involved in questionable activity,"⁵⁵ and he vowed to continue the fight until all doubt was removed.

Senator Hatch never publicly rescinded any of his statements regarding Judge Merhige, but the matter was quietly dropped after a face-to-face meeting between Senator Hatch, the bar committee, and Virginia Senators Harry F. Byrd, Jr. and John W. Warner. At the meeting, the committee's defense of Judge Merhige was supported by Senator Warner, who had studied the committee report in detail and agreed that Judge Merhige had been done a great disservice. "Warner made as effective and eloquent an argument as I have ever heard," recalls one committee member. "Hatch could not refute any of it. Senator Hatch would not agree to a retraction of his attacks upon Judge Merhige, but he did mumble something about considering it further, and that's the last we ever heard of the matter."⁵⁶

Senator Hatch ultimately relented in the face of Senator Warner's advocacy and in light of the growing support for Judge Merhige. In addition to the report of the Richmond Bar Association committee, the Young Lawyers' Section of the American Bar Association and the Richmond chapter of the Federal Bar Association examined the allegations and eventually cleared the judge.⁵⁷ The National Association of Criminal Defense Lawyers not only supported Judge Merhige but went on to recommend disciplinary action against the prosecutors who made the charges.⁵⁸ The North Carolina state bar then moved to censure the prosecutors for violations of a state rule which provides that "a lawyer shall not knowingly make false accusations against a judge."⁵⁹ A Greensboro attorney expressed the bar's concern succinctly: "Judge

54. *Id.*

55. *Id.*

56. Interview with Lewis T. Booker, *supra* note 32.

57. Richmond Newsleader, Dec. 24, 1979, at 2, col. 3. The ABA model suggests that bar officials "[c]oordinate state and local bar association programs to broaden the base of the response. In some cases, it may be appropriate for both the state bar and the local bar to respond. In other cases, only one or the other should respond." UNJUST CRITICISM, *supra* note 1, at 2.

58. Richmond Times-Dispatch, Mar. 1, 1980, § B, at 4, col. 4.

59. Richmond Newsleader, Dec. 24, 1979, at 15, col. 6.

Merhige is held in very high esteem in this area. No one has ever heard even the slightest attack on him. And they don't like this attack."⁶⁰

Trial attorneys from across the country came forward to add their support and to express a consensus that Judge Merhige "enjoys a national reputation that is beyond reproach."⁶¹ Finally, the United States Department of Justice apologized to the judge and disciplined the prosecutors who had filed the charges.⁶² As the *Richmond Times-Dispatch* noted, "United States District Judge Robert R. Merhige, Jr. may be one of the most defended judges ever to be attacked."⁶³ The newspaper recounted the many defenders of Merhige and noted that such investigations of judicial conduct, "while rare in most cases, are becoming commonplace for Merhige."⁶⁴

POSTSCRIPT

As the public furor over the Bagley trial receded, Judge Merhige appeared at a luncheon meeting of the Richmond Bar Association. The audience gave him a standing ovation, then repeated the ovation for the three bar committee members who had investigated the charges against the judge. A speaker at the luncheon praised the committee's work and pointed out that the members of the committee were three of the ablest and highest-paid lawyers in Virginia. The speaker concluded his praise by noting that "if this Bar Association were to be sent a bill for the services rendered [by the committee], \$100,000 would be the minimum." Judge Merhige was moved by the show of support and told the audience, "I've already expressed to the committee my deep, sincere appreciation. But you're sure not going to get the \$100,000, I can tell you that. . . . I don't want to belittle the report, but I didn't think it was that good."⁶⁵

Aside from such humorous remarks, Judge Merhige has never publicly responded to the attacks on his handling of the Bagley trial. Privately, he acknowledges his gratitude for the bar's efforts to clear his name in public. "Under our system," he explains, "a judge is powerless to respond to political attacks, and I am thankful that the Bar is

60. *Richmond Times-Dispatch*, Dec. 23, 1979, § A, at 1, col. 4, at 2, col. 5.

61. *Id.*, § A, at 2, col. 4.

62. *Richmond Times-Dispatch*, May 24, 1980, § B, at 1, col. 1.

63. *Richmond Times-Dispatch*, Dec. 23, 1979, § A, at 1, col. 4.

64. *Id.*, § A, at 2, col. 3.

65. *Richmond Times-Dispatch*, March 21, 1980, § B, at 7, cols. 4, 8.

willing to assume the burden on behalf of a judge."⁶⁶

The Richmond Bar Association's defense of Judge Merhige pre-dates, but complies with, significant aspects of the procedures suggested in the ABA's Model Program for dealing with unjust criticism of judges. The specific procedures utilized in defense of Judge Merhige supplement the model program by demonstrating the type of exhaustive public examination of charges that a bar association may choose to undertake. This particular case also discloses an aspect of such investigations that is not addressed by the ABA's model program - the bar's decision to enter into private negotiations with a powerful political figure who initiated the public criticism. It may be that the ABA's model program should be amended to include this possible avenue of redress, or it may be adequate to simply cite this case history as precedent to be followed in appropriate situations.

66. Merhige Interviews, *supra* note 16.