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Tribute to Judge Merhige

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TRIBUTE TO JUDGE MERHIGE

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I. INTRODUCTION

I clerked for Judge Merhige in 1981–82. That year, the Judge embarked on something he had been considering for some time. He decided to have one law clerk and to use his other clerk spot to hire Jay Coulter, a former U.S. Marshal, to be his bailiff. Jay was a dear man and a delightful, dedicated officemate. With one law clerk and a full caseload, my stint as a law clerk was the hardest year of my professional life, but also the most rewarding.

All of what I observed and learned during my year was enjoyed and certainly can be commented upon by anyone who had the privilege of serving the Judge—or serving the court, as he called it—as his law clerk. I came to the court in the Judge's fifteenth year on the bench. By then, he had long been a legend, having already issued many of his milestone rulings: ordering in 1970 the University of Virginia to admit women; invalidating in 1971 a Chesterfield County school policy that teachers could not work past their fifth month of pregnancy; deciding forty-two school desegregation cases in 1970–72; ruling that General Electric Company must provide maternity leave benefits to its pregnant employees; presiding over trials of Native Americans accused of crimes at Wounded Knee, South Dakota, in 1976; fining Allied Chemical Corporation in 1976 a record $13.2 million for Kepone pollution; and resolving the Westinghouse uranium contract litigation in 1979. We did not know it at the time, but his career on the bench was not yet even at the half-way mark my clerkship year.

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In 1981, the federal courthouse in Richmond housed the post office, the Fourth Circuit, and the District Court Clerk and chambers and courtrooms for Judge Merhige and Judge D. Dortch Warriner. There were U.S. Marshals patrolling the courtrooms, but no other security measures. You came in the front, went to the elevator to the third floor, and walked directly into the Judge's offices. It was a marvelous work setting—a beautiful, dark wood panel historic courtroom, with the Judge's chambers overlooking the State Capitol and grounds. Sitting in front of the Judge's gas log fire, talking with him about the summary judgment standard or how lucky we both were to be part of the noble profession of the law, while the snow fell over the Capitol, was an unforgettable treasure.

II. JUDGE MERHIGE'S JUDICIAL TEMPERAMENT

Much has been said of the Judge's work ethic. "There should be no dark courtrooms" on any work day, he regularly said. He scheduled trials every day during the week, often double or triple booking different trials and hearings for the same day and time. Because he was a master at finding the strengths and weaknesses in each party's case very quickly and in pointing them out to the parties, many cases settled, and we usually won his docket gamble. On several occasions, however, he ran two trials simultaneously, doing voir dire in his courtroom, giving those lawyers a recess, darting over to the visiting judge's courtroom to begin jury selection there, and then going back and forth to push both cases along. He tended to his docket nearly 365 days a year. He expected his clerks to be at work by 7:30 each morning. Even when I arrived earlier, the Judge was always there, having made coffee for the office, greeting me with a hearty "Good afternoon!"

Judge Merhige had an unusually intuitive feel for the law. He had an eerie ability to divine rapidly what the law was, or what it should be, even before we researched existing precedents, and to see far down the road to assess the impact of a particular ruling. Each day I summarized for him the factual and legal issues involved in the matters set for hearing or trial that day or the following day. He usually leaped ahead of me to what the correct result would be, remembering an existing ruling and telling me where to find it, or predicting accurately what the law was on

some issue he had never faced. The Judge wrote many opinions himself in long hand, using a government-issue black felt pen on a yellow legal pad. He also relied on his clerks to write drafts of orders and opinions. Because we had no word processors, I gave him my own handwritten drafts to read and review. His secretary typed nothing until it was nearly finished.

The Judge's inner sense also gave him a keen capacity for understanding the needs, abilities, and strengths and weaknesses of people of disparate backgrounds, education levels, and economic conditions. Despite his stature, he identified with persons from all walks of life and treated each with respect. They somehow identified with him: court staff, janitorial staff, witnesses, criminal defendants, famous lawyers, young lawyers beginning their careers, judges, jurors, and others who crossed his path. He engendered in people an intense sense of dedication to him, especially among those of us who had the opportunity to work with him every day. No person and no task was beneath him. He frequently grabbed the phone when it rang before any of us could reach it, answering with a cheerful "judge's office." Many times the caller was a lawyer demanding an audience with Judge Merhige or some other action by the court, who did not realize he was speaking directly with the Judge. He took calls and visits from the downtrodden, whose utilities had been disconnected, for example, or who were suffering from other burdens. He usually found a way to help them.

The Judge saw his role as one of serving the court and all those who came through it. He went to great lengths to render service to those who attempted to invoke the Court's power to provide a remedy. Our year saw the mass exodus of refugees from Cuba in the "freedom flotilla" of small boats crossing to Florida. One day we received a petition, hand written in Spanish, from a person being held in a federal prison in our jurisdiction. With the help of a Fourth Circuit assistant librarian, we translated the pleading, which told the story of a man who had been imprisoned in Cuba for taking a loaf of bread from a truck to feed his children. The Judge's instincts told him the story was true. He entered an order directing the U.S. Attorney to show cause why the person should continue to be held. Within days, the government had released the man to family members already living in the United States. It was a sterling example of the breadth of his power and the proper use of it.

The Judge's desire to serve, work ethic, uncanny knack for seeing the proper result, and a sharp, quick mind combined to form a remarkable jurist. He had the other qualities needed in a judge as well. He was decisive ("sometimes wrong, but never in doubt," he would say). He ruled promptly on objections, requests, and motions and moved things along. He ran his courtroom with crisp efficiency. He was demanding and a taskmaster, but never cruel. I learned from him always to stand when addressing a court ("I cannot hear you," he would say to a lawyer who spoke to him while seated), and never to interrupt a judge, stray from the lectern, place a briefcase on the court's table, bring in a newspaper, or talk while a witness is being sworn. He knew when lawyers or parties were avoiding the key question or fact and suffered no obfuscation. He intimidated lawyers without being terrifying, yet often showed his wit and sense of humor. When lawyers or witnesses would stop speaking as the clock on his courtroom wall chimed the hour, he would gesture to it and sigh, "some days that is the only break we get." He would point to the bright sport coats worn by his faithful court reporter, Gil Halasz, and refer to him as his "band leader." When a lawyer would dare to interrupt him, he would hold up his hand and say, "only at 5 Kanawha Road," meaning that he only allowed his family to do that. We heard those comments and others like them many times, but somehow every time they were funny.

The Judge was caring and nurturing to persons who needed training or experience to master their tasks. He was particularly sensitive to the emotions and development of young lawyers. He would sit patiently as a nervous new lawyer, making his or her first argument before him, tediously went through a written presentation, and when it finally ended would thank the lawyer for a "helpful" argument. On my very first day on the job, the two departing clerks invited me to sit alone at the law clerk's table during the middle of a late afternoon hearing, assuring me that before the hearing ended they would be back and would handle the duties of announcing the adjournment of the court and banging the session over. There was a script of several sentences that I would later learn was read to open court and a different one to adjourn, both of which had been in use for ages. Of course the clerks had no intention of returning to help me, and I sat in horror as the hearing wound down and they were nowhere to be seen. The Judge finished the matter and turned to me with the direction to "adjourn the court." I had no idea what to say, as I

stood up, and all eyes in the courtroom fell upon me. I blurted "This court shall stand adjourned!" and slammed the gavel on the table. With a twinkle in his eye, the Judge looked to me, and then to the startled lawyers at the tables, and asked: "Is that the way we do things around here?" He quickly added: "I guess it is now." It was his way of being in on the joke on the new guy, but at the same time reassuring me that everything would be alright.

Judge Merhige's expectations of the lawyers who appeared before him escalated with his estimation of your abilities and potential. He was most exacting of those he felt would handle his hard questioning and schedule. When I returned to Richmond in 1986 after four years of practice in Houston, I regularly appeared before Judge Merhige in hearings and trials, standing at the lectern where I had watched many others perform, and observing the formalities of the courtroom in which I had once roamed freely. I found each of these sessions to be a constant struggle not to disappoint him and to show him that his faith in me had not been misplaced. I could tell when he seemed pleased that I had done my best and felt the hurt he seemed to feel when my performance was substandard.

III. THE DALKON SHIELD LITIGATION

In late 1989, I began serving as outside counsel to the Dalkon Shield Claimants Trust, the $2.23 billion facility created in the A. H. Robins bankruptcy to process the 400,000 claims arising from the Dalkon Shield intrauterine device. In that role, I had almost-weekly hearings with Judge Merhige, and often Bankruptcy Judge Blackwell N. Shelley, and reported to the Judge in chambers on the progress of Trust matters frequently. It was a rare experience that the Judge himself had helped make possible, for he was involved in suggesting to the Trustees to engage me and my then partner, Michael Smith, as counsel to the Trust.

The Sixth Amendment and Restated Plan of Reorganization of the A. H. Robins Company approved by Judge Merhige and Judge Shelley in *In re A.H. Robins Co.*,[1] capped a long struggle by

1. 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

Judges Merhige and Shelley, the lawyers for the A.H. Robins Co., its commercial creditors, the personal injury claimants who had used the Dalkon Shield intrauterine device, the company's shareholders and employees, and many other affected parties to devise a solution to the staggering potential Dalkon Shield liability that had driven the company into a Chapter 11 reorganization proceeding on August 21, 1985. With the outline of a claims administration procedure hashed out by the parties and approved by the Courts in the "Claims Resolution Facility" ("the CRF") attached as Exhibit C to the Plan, and funding assured by the $2.255 billion provided by the American Home Products Corporation for its acquisition of the Robins assets, the lawyers and parties rejoiced over what was promised to be the "global peace" secured by the end to litigation and the transfer of Dalkon Shield-related liability from Robins to the Dalkon Shield Claimants Trust, the entity created under the Plan to receive the $2.255 billion corpus and dispose of the nearly 400,000 personal injury claims noted by claimants during the course of the bankruptcy proceeding. When all appeals were concluded with the affirmance of the Plan and the Claimants Trust was fully funded on December 15, 1989, the collective sigh of relief resulting from this milestone was quite deserved.

In reality, the Plan was not the end of the Dalkon Shield problem. Implementing the claims process within the contours negotiated by the parties and approved by the courts in the Plan and its accompanying CRF would demand tremendous energy, creativity, and perseverance by Judge Merhige and Judge Shelley, who had witnessed and facilitated its creation, judges of the Court of Appeals for the Fourth Circuit, the Trust and its Trustees, employees, and lawyers, and the nearly countless claimants and their counsel involved in this massive enterprise. Some twelve years after their approval of the Plan, the Trust closed, after distributing over $2.96 billion—more than its original funding—to Dalkon Shield claimants.

From the beginning of the Robins bankruptcy until his retirement, Judge Merhige led the parties through the multiple issues and obstacles presented by the size and complexity of the undertaking. The success of the Plan is a tribute to his ingenuity, energy, and foresight, without which the story certainly would have proceeded far differently.

In the course of the implementation of the Robins Plan, Judge Merhige presided over countless hearings, received reports from the Trust's director and counsel on the progress of the three trusts created to handle all Dalkon-related claims almost daily, and issued over 150 opinions on various issues of interpreting the Plan and review of the Trustees' actions on claims. He often found himself operating in uncharted waters, creating law on issues that affected thousands of claims and would be used in other mass tort settings. As he did throughout his career on the bench, he strove to follow the law and reach results that best served the parties' interests, both near-term and for the future, regardless of the public perception of his actions. In this space, I can provide only one example of a bold step he took to enhance the recovery of Dalkon Shield claimants.

Section G.14 of the CRF in the Robins Plan provided that if the Trust had funds remaining after satisfying or providing for the initial payments on eligible claims, it was to distribute this residual to claimants who had been previously paid, on a pro rata basis. In 1995, as the Trust approached its first pro rata distribution of additional funds, Judge Merhige entered an order disallowing attorneys fees of claimants counsel in excess of ten percent of the pro rata distribution.[2] The Judge exercised his inherent power to limit attorneys fees to a reasonable amount and concluded that more than ten percent fees on these additional payments, after the attorneys had received their full fees from the claimants' original awards, would be unreasonable. The ruling, which prompted outrage from many claimants' counsel and resulted in protracted proceedings on challenges to the limit, meant that far more of the over $1.5 billion distributed as pro rata payments went to the Trust's beneficiaries. The precedent is used often in these mass claims settings to regulate permissible fees.

IV. CONCLUSION

In Federalist No. 78, Alexander Hamilton made the case for an independent federal judiciary comprised of individuals with life tenure, "as the citadel of the public justice and the public secu-

2. *See* In re A.H. Robins Co., 182 B.R. 128 (E.D. Va. 1995), *aff'd*, 86 F.3d 364 (4th Cir. 1996), *cert. denied*, 519 U.S. 993 (1996).

rity."[3] As one ground for this permanence of the position, he wrote:

> It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.[4]

Judge Merhige embodied the traits that Hamilton sought in our federal judges. He was among the men and women of the requisite integrity and the requisite knowledge who can serve as the "faithful guardians" of the Constitution and of individual liberty. He served that role with utility and dignity until his retirement from the bench in 1998. Until his passing, he served the role as mentor, leader, and paternal figure to all of us whom he included in his extended law clerk family. Not a day goes by without me thinking of him in some way.

3. THE FEDERALIST NO. 78 (Alexander Hamilton).
4. *Id.*