

THE HONORABLE ROBERT R. MERHIGE, JR.:  
A JUDGE AHEAD OF HIS TIME

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When one thinks about it, it is really quite incredible: a Brooklyn-born son of Lebanese and Irish immigrants with a distinct New York accent, standing well under six feet tall, attends a small North Carolina college on a basketball scholarship; serves with distinction in a bombing squadron in World War II; graduates from the University of Richmond School of Law (paying his way by serving as a night librarian); excels at the practice of law in a city (Richmond) not renowned for its receptivity to Yankees; wins election as president of the city's Bar; and upon being appointed to the federal bench, serves with distinction for thirty-one years, addressing some of the most controversial legal issues of his time with a skill, energy, and workhorse determination unknown to most mortals.<sup>1</sup>

During his time on the bench, of course, Judge Robert R. Merhige, Jr., ("The Judge" to his clerks and extended court family) came to enjoy considerable national renown, not only for being a progenitor of the Eastern District of Virginia's "rocket docket" and his expeditious resolution of cases when sitting on assignment,<sup>2</sup> but also for landmark litigation, including the antitrust case involving Westinghouse uranium price-fixing litigation, the Dalkon Shield settlement, and events such as the Wounded Knee

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1. See generally RONALD J. BACIGAL, *MAY IT PLEASE THE COURT: A BIOGRAPHY OF JUDGE ROBERT R. MERHIGE, JR.* (1992) (describing the life and accomplishments of Judge Merhige).

2. Unlike many colleagues on the bench who relished assignments in pleasure spots such as the Virgin Islands, Judge Merhige took all comers in need of help, including, during my clerkship, the Northern District of Iowa (Cedar Rapids in February!) and the Northern District of West Virginia (Martinsburg). For me, the judicial forays, which could last for weeks at a time, were especially enjoyable, as they allowed for extended time with the Judge (and of course with court reporter Gil Halasz and clerk of court Rob Walker) after hours.

uprising, Watergate, the Klan/Nazi-Communist Party violence in Greensboro, North Carolina, and the desegregation of Virginia's public schools.

Here, however, I would like to address a perhaps lesser-known and lower-profile aspect of the Judge's illustrious tenure on the bench: his criminal case docket. During his thirty-one years on the bench, Judge Merhige handled countless criminal matters. Using dispensed justice as a measure of the magnitude of his work, my instinct is that criminal cases, more than civil, constituted the lion's share of the Judge's direct human impact. Indeed, the Judge's frequent sitting-by-designation was often fueled by the need to redress massively backlogged federal criminal dockets. Moreover, it is often overlooked that the Judge, before his appointment to the federal bench by President Johnson in 1967, was regarded as one of Virginia's premier criminal defense lawyers, handling over two hundred homicide cases during his twenty-one years as a lawyer, with none of his clients receiving the death penalty.<sup>3</sup> He was, by dint of his extensive trial experience, known by counsel coming before him as a "lawyer's judge," sensitized to the demands, constraints, and strategies of trial lawyers. And he did his job with a wit and charm that kept lawyers on their toes and provided many with stories they would later recount with relish.<sup>4</sup>

The Judge's criminal cases encompassed a broad range of varied matters, including prison reform litigation and substantive law. In those realms, the Judge made significant jurisprudential contributions.<sup>5</sup> In preparing this essay, I spent considerable time

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3. BACIGAL, *supra* note 1, at 24.

4. I was on the receiving end of this on my first day on the job when one of the parties in a case asked in open court for a continuance. The Judge, without missing a beat, feigned ignorance about the term's definition and directed me to retrieve a Black's Law Dictionary. After I quickly located a copy in chambers, I returned to the courtroom to see a twinkle in the Judge's eye indicating that I had joined the ranks of prior neophyte clerks by being the target of one of his favorite jokes. *See also, e.g.*, Michael W. Smith, *Remembering Judge Merhige*, 40 U. RICH. L. REV. 29, 31 (2005) (recounting the story of a young lawyer appearing before the Judge, who "[r]ather than cut [the attorney] off, belittle him, or shatter his confidence . . . remarked: 'I know you think that I am missing your point, but for \$54,000 a year, you don't get John Marshall'").

5. *See, e.g.*, *United States v. Baird*, 29 F.3d 647, 654 (D.C. Cir. 1994) (citing *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) (Merhige, J., sitting by designation) (articulating influential standard regarding defense of official misstatement of the law)); *Giarratano v. Murray*, 668 F. Supp. 511, 517 (E.D. Va. 1986), *rev'd*, 836 F.2d 1421 (4th Cir.), *aff'd on reh'g*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989) (holding that the Commonwealth of Virginia must provide its death row inmates counsel in habeas corpus proceedings); *Landman v. Royster*, 333 F. Supp. 621, 647 (E.D. Va. 1971) (holding unconstitutional, on Eighth Amendment grounds, the treatment of inmates in a Virginia prison system). The Judge also presided over the criminal trial of Allied Chemical Corpo-

on Westlaw reviewing cases involving the Judge. Of course, the work of a federal trial judge overwhelmingly involves orders and memoranda that, despite being the grist and substance of justice dispensed, typically do not make their way into the published or reported oeuvre of the federal judiciary.

One particular case reported in Westlaw did, however, catch my attention. Although the Judge, when sitting by designation on an appellate court, often shied away from fracturing a panel otherwise consisting of resident judges or writing separately to make a point, *United States v. Kyllo*<sup>6</sup> was an exception. In *Kyllo*, federal agents, acting without a search warrant, used a thermal imager to scan the exterior of Kyllo's home, which revealed differential heat patterns that possibly indicated high intensity interior lights used to grow marijuana. The readings, along with other information secured by law enforcement, were used to obtain a search warrant of Kyllo's house, which revealed a marijuana growing operation.<sup>7</sup>

After some procedural wrangling, the trial court eventually backed the government's warrantless thermal scan, which presented the Judge's panel (also consisting of Judges Hawkins and Noonan) with a question of first impression in the Ninth Circuit: whether a thermal scan qualifies as a search under the Fourth Amendment, requiring a search warrant.<sup>8</sup> Applying the *Katz* two-part test,<sup>9</sup> Judge Merhige, writing for himself and Judge Noonan, concluded that Kyllo possessed "a subjective expectation of privacy that activities conducted within his home would be private."<sup>10</sup> In doing so, the Judge rejected the position of four other circuits that held that the scan simply revealed non-private "waste heat" emanating from the house.<sup>11</sup> With regard to the second part of the

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ration ("Allied") for the extensive environmental damage to the James River caused by its pesticide Kepone, resulting in what was then the largest criminal fine for water pollution ever assessed. The Judge, after imposing the maximum penalty, offered Allied a creative alternative to simple payment of the fine to the federal treasury: he allowed a reduction in the fine if Allied agreed to fund an \$8 million endowment to improve the environment. BACIGAL, *supra* note 1, at 116.

6. 140 F.3d 1249 (9th Cir. 1998), *withdrawn*, 184 F.3d 1059 (9th Cir. 1999).

7. *Id.* at 1251.

8. *Id.* at 1252.

9. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

10. *Kyllo*, 140 F.3d at 1253.

11. *Id.* The cases were: *United States v. Robinson*, 62 F.3d 1325, 1328–29 (11th Cir. 1995); *United States v. Ishmael*, 48 F.3d 850, 854, 857 (5th Cir.), *petition for reh'g denied*, 53 F.3d 1283 (5th Cir. 1995), *cert. denied*, 516 U.S. 818 (1995); *United States v. Myers*, 46 F.3d 668, 669–70 (7th Cir. 1995); *United States v. Pinson*, 24 F.3d 1056, 1058 (8th Cir. 1994). *But see* *United States v. Cusumano*, 67 F.3d 1497, 1502 (10th Cir. 1995), *vacated on*

*Katz* test, again rejecting the position of other circuits,<sup>12</sup> the Judge wrote that *Kyllo*'s subjective expectation of privacy was objectively reasonable because the imager revealed details "sufficiently 'intimate' to give rise to a Fourth Amendment violation."<sup>13</sup> Citing a prior Tenth Circuit decision on the question (later vacated on other grounds),<sup>14</sup> Judge Merhige concluded that:

It is not disputed whether the [imager] could reveal details such as intimate activities in a bedroom. . . . Even assuming that the [imager used], apparently a relatively unsophisticated thermal imager, is unable to reveal such intimate details, technology improves at a rapid pace, and much more powerful and sophisticated thermal imagers are being developed which are increasingly able to reveal the intimacies that we have heretofore trusted take place in private absent a valid search warrant legitimizing their observation.<sup>15</sup>

Moreover, even if the imager did not reveal intimate details such as sexual activity, the Judge reasoned that it could reveal a range of other activities such as the "use of showers and bathtubs, ovens, washers and dryers, and any other household appliance that emits heat. . . . Even the routine and trivial activities conducted in our homes are sufficiently 'intimate' as to give rise to Fourth Amendment violation if observed by law enforcement without a warrant."<sup>16</sup> Because use of the imager by law enforcement qualified as a search, the matter was remanded to determine whether other information, exclusive of the improperly obtained thermal images, established probable cause to issue a warrant.<sup>17</sup>

Judge Hawkins dissented, concluding that "the thermal imaging device employed . . . intruded into nothing," and urged the panel to "follow the lead of our sister circuits and hold that the use of thermal imaging technology does not constitute a search under contemporary Fourth Amendment standards."<sup>18</sup>

The government thereafter successfully petitioned for rehearing, Judge Merhige's opinion was withdrawn, and in its place came a decision reaching the opposite result, authored by Judge

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*other grounds*, 83 F.3d 1247 (10th Cir. 1996).

12. *Kyllo*, 140 F.3d at 1253–54 (citing *Robinson*, 62 F.3d at 1330; *Ishmael*, 48 F.3d at 855–56; *Myers*, 46 F.3d at 669–70; *Pinson*, 24 F.3d at 1059).

13. *Id.* at 1254.

14. *Id.* (citing *Cusumano*, 67 F.3d at 1504).

15. *Id.*

16. *Id.* at 1255.

17. *See id.*

18. *Id.* (Hawkins, J., dissenting).

Hawkins.<sup>19</sup> Siding with all other circuits that to that point had definitively resolved the question,<sup>20</sup> Judge Hawkins, writing for himself and Judge Brunetti<sup>21</sup> (Judge Noonan, siding with Judge Merhige's opinion in the earlier iteration, was on the new panel but dissented),<sup>22</sup> concluded that "[w]hatever the 'Star Wars' capabilities this technology may possess in the abstract, the thermal imaging device employed here intruded into nothing."<sup>23</sup>

Certiorari was thereafter successfully sought, and the Supreme Court ultimately reversed by a 5-4 vote.<sup>24</sup> In a clear vindication of Judge Merhige's original opinion, using strikingly similar language, Justice Scalia wrote for the majority that *Kyllo* possessed a reasonable expectation of privacy regarding "the interior of [his] home" because "[i]n the home, . . . all details are intimate details, because the entire area is held safe from prying government eyes."<sup>25</sup> Taking the "long view," similar to Judge Merhige, the *Kyllo* majority opinion expressed concern that citizens would otherwise be placed "at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."<sup>26</sup> The majority, however, closed by adding an additional requirement that the device in question must not be in "general public use" for Fourth Amendment privacy protection to attach,<sup>27</sup> a highly problematic standard justifiably condemned by the four-member dissenting opinion authored by Justice Stevens. As noted by the dissent, the protection "dissipates as soon as the relevant technology is 'in general public use' . . .," a standard that

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19. See *United States v. Kyllo*, 190 F.3d 1041, 1045 n.6 (9th Cir. 1999) (panel consisting of Hawkins, Noonan, and Brunetti, J.J.) ("We note that a previously filed disposition of this appeal was withdrawn.")

20. As noted above, the Tenth Circuit in *United States v. Cusumano*, 67 F.3d 1497 (10th Cir. 1995), concluded that use of a thermal imager constituted a search, but the decision was vacated on rehearing en banc on another basis without reaching the question. See *United States v. Cusumano*, 83 F.3d 1247 (10th Cir. 1996) (en banc).

21. See *Kyllo*, 190 F.3d at 1043 n.1 ("Judge Brunetti has been drawn to replace the Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, in this case.")

22. See *id.* at 1047 (Noonan, J., dissenting).

23. *Id.* at 1046.

24. *Kyllo v. United States*, 533 U.S. 27, 41 (2001).

25. *Id.* at 34, 37. With characteristically colorful language, Justice Scalia offered that the thermal imager "might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate' . . ." *Id.* at 38.

26. *Id.* at 35–36, 40.

27. *Id.* at 40.

“is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.”<sup>28</sup> Indeed, today, *Kyllo* likely would come out differently because of the widespread public use of thermal imaging devices.<sup>29</sup>

If only the Supreme Court had left well enough alone and followed Judge Merhige’s simpler and more constrained view. That the Judge should opine in such enlightened fashion on a matter involving technological advancement is a rich irony: I recall many times when he expressed frustration and wonder at not being able to operate devices (a deficiency I share). The larger point, however, is that the Judge in *Kyllo*, as he did so many other times in his illustrious career on the bench, sagely anticipated the future arc of justice. On critically important issues such as workers’ rights,<sup>30</sup> gender discrimination,<sup>31</sup> consensual homosexual sodomy,<sup>32</sup> as well as the difficulties presented by excess prosecutorial authority vis-à-vis plea bargaining<sup>33</sup> and the life-altering effect of collateral consequences,<sup>34</sup> he was a jurist ahead of his time. And for that, the nation’s jurisprudence—and the citizens that secure liberty and protection from it—are in Judge Merhige’s debt.

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28. *Id.* at 47 (Stevens, J., dissenting).

29. This is evidenced by a simple query of “thermal imaging device” on Amazon.com.

30. See *Cohen v. Chesterfield Cty. Sch. Bd.*, 326 F. Supp. 1159 (E.D. Va. 1971) (holding unconstitutional a Chesterfield County school policy prohibiting teachers from working past their fifth month of pregnancy).

31. See *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367 (E.D. Va. 1974) (holding that an employer’s practice of excluding sickness and accident benefits from pregnancy related disabilities was unlawful sex discrimination).

32. *Doe v. Commonwealth’s Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975) (Merhige, J., dissenting) (disagreeing with the majority opinion’s view that a statute making sodomy a crime was constitutional).

33. See *National College of Criminal Defense Lawyers Holds First Institute*, 14 CRIM. L. REP. (BNA) 2001, 2326 (1973) (citing the Honorable Robert R. Merhige, Jr.) (“[M]any federal charges are multiplied for bargaining purposes. For instance . . . one bad social security check can lead to 10 federal counts.”).

34. See *Marston v. Oliver*, 324 F. Supp. 691 (E.D. Va. 1971), *rev’d*, 485 F.2d 705 (4th Cir. 1973).