

PERSONAL REFLECTIONS ON THE HONORABLE
ROBERT R. MERHIGE, JR.: A JUDGE, MENTOR, AND
FRIEND

*Mary Kelly Tate **

Twenty-six years—half my lifetime—have passed since I joined Judge Merhige’s court family as his law clerk. I attempt here to sketch my personal impressions, distilling what to me was most remarkable about Robert R. Merhige, Jr. Perhaps unsurprisingly, this dynamic man turned legendary judge—a man I revered from the moment I met him—is more vivid to me now than he was to my younger self.

Mercurial, energetic, and benevolently despotic, Judge Merhige was a man of extraordinary decency who cherished his vocation and the law. He was a World War II veteran and an accomplished, wickedly talented trial attorney tapped by President Lyndon B. Johnson for the federal judiciary in 1967. As a Lebanese-Irish Northeasterner, he was understandably proud of making good in the famously clubby, genteel Richmond of the 1940s, 1950s, and 1960s. As a judge, he treated his court personnel and law clerks with great affection and caring watchfulness.

Although clerking affords a high degree of access to a judge in the ordinary course, I was fortunate to get a larger dose than is typical. I traveled with the Judge to New York City while he sat in the Brooklyn courthouse clearing its back-logged docket. It is a commonplace that traveling together often affords special insights into people, and it was no different with the Judge. I spent a total of eight weeks—three separate trips—on the Brooklyn assignment. Gil, the Judge’s court reporter, and I spent all day with him on those splendidly up-close trips.

And by all day, I mean *all day*. The Judge believed in togetherness when it came to his courtly entourage. We met in front of our

* Founding Director, Institute for Actual Innocence. Public Defender, 1999–2001; Solo Practitioner, 1995–1999; Hunton & Williams, 1992–1995; Clerk to Judge Merhige, 1991–1992; J.D., 1991, University of Virginia; B.A., 1987, University of Kansas.

next-door hotels (his was one step above mine in the amenities department) on East 50th Street in Manhattan at 7:00 AM, where a federal marshal picked us up to ferry us to the borough. After completing the day's tasks, we journeyed back to Manhattan where, from the first day onward, the Judge would say to me, "Okay, see you in ten minutes." I would hurriedly change and rush over to the Judge and Gil's suite, in the comfort of which we would drink martinis until leaving for dinner no earlier than 8:00 PM. We did this every single night. This seventy-six-year-old man was tireless. He woke early every morning, the martinis or late hour of the preceding night be damned, brimming with excitement for the day ahead, scanning the city street impatiently while waiting for the unfailingly on-time federal marshal to arrive. That excitement streamed out of his eyes, and his walk crackled with it too.

The Brooklyn assignment was well-suited for Judge Merhige, as he was one of the progenitors of the spectacularly efficient "Rocket Docket," known nationally for its swift and orderly dispensation of justice. It was a guilty pleasure to watch the most sophisticated, hard-driving, self-confident lawyers become slack-jawed when they first experienced the judicial command that the Judge would exert over the pace and tempo of their litigation strategies. I remember in particular a blue-stocking law firm partner of gray hair and sartorial splendor telling the Judge he had fifty witnesses, and the Judge telling him, with a steely stare, to pick five. For about thirty seconds, the unsuspecting lawyer thought the Judge was kidding.

Reflecting about my time with Judge Merhige in New York and Richmond, what comes to me now is his singular interest in people's stories, his pragmatism, and his sense of personal loyalty to those he considered friends. These are the predominant traits that I experienced at his side. As a matter of history and with regard to how he faced the crucible of deciding the momentous controversies before him, courage is the trait that comes into the sharpest relief. That, however, is for a different piece, not this personal remembrance.

First, his love of stories. I am quite certain he offered me a clerkship for the primary reason that I came with a story in hand—the story of my ill-fated journey from Charlottesville to Richmond for my interview with him. En route to the Judge's historic, regally beautiful chambers, the 1978 Skylark I had borrowed from my law professor had caught on fire, leaving me stranded twenty minutes outside downtown Richmond.

This travel misadventure delighted the Judge and took up the lion's share of our time together during the interview, which I mistakenly thought was going to be about the law. He did not ask me a single legal question, nor did he make any inquiries into my academic credentials, which bordered somewhere between humdrum and good. It seems more than likely that the narrative hook that the fire provided overcame the competitive advantages other candidates had over me and satisfied the Judge's ever-present interest in the backgrounds and experiences—the stories—of people's lives.

No matter who the Judge was dealing with, the story that surrounded that person was his key focus. Pre-sentence reports, docket day banter with lawyers, exchanges with clerk office personnel, placing an order with a waiter—these were all opportunities the Judge took to try to discover a truth about a person and their story. He had an uncanny ability to incorporate the story to put the person at ease or to subtly discomfit the person. The latter he did sparingly and for noble purposes, such as when he sensed an untruth or spotted unfair jockeying.

His respect for the experiences of the individuals around him made him a thoughtful and kind judge. Kindness is not often talked about when delineating what is needed in a judicial temperament. But kindness he had in spades. I never witnessed him be mean from the bench to anyone. Firm, yes. Intense and hard-driving, undoubtedly. But never unkind. He was meticulous in treating everyone with the dignity owed each and every person.

As is widely known, Judge Merhige's judicial career was marked by an epic engagement with the most searing controversies. He presided over the highest profile litigation of his epoch—school desegregation in the City of Richmond, protests at Wounded Knee, Watergate, and gender discrimination at the University of Virginia, among others. He saw the human condition in a sympathetic way. This allowed him to weigh competing equities with both humility and doggedness. It also compelled him to protect the rule of law as a force to stabilize the darker byproducts of democracy's imperfect reckoning with human frailties.

Although his judicial portfolio was marked by decades of decisions of huge historical import, it was the case right before Judge Merhige that always had his greatest focus. As a judge, he lived not in the haze of a glorious past, but rather in the thick of the present moment. Like anyone who loves stories and history, he was a keen observer of human detail and motivation. The Judge was

not afraid to remind everyone that every case before him, be it criminal or a complex tort case, at base was about people. He returned to this simple reminder again and again.

Notwithstanding the fact that his rulings often simultaneously spurred criticism and praise, I believe he made those rulings with an earnest and deeply felt commitment to the rule of law. He loved the story of America—its imperfect confrontation with its original sin of slavery, its decisive role in conquering fascism, its ever-renewing stream of immigrant hopefuls, and its gloriously independent federal judiciary. At both the personal and professional level, he touched these four pillars of the American story. Even though the American story is a contested one, my time with the Judge convinces me that these four storylines were the ones he felt were most important.

By all reasonable measures, Judge Merhige sought to be guided and limited by the law's guardrails, be that the United States Constitution, state laws, or federal statutes. He saw himself as operating within a grand, majestic democratic system. Yes, he had a healthy self-regard, but, at base, he was an institutionalist who loved his country.

A second characteristic that comes to mind when reflecting on the Judge is that he was a pragmatic man, thinker, and judge. In addition to being a natural story-teller (hence his exquisite success as a trial attorney) and a tremendous respecter of the stories that made up other people's lives, Judge Merhige navigated the power conferred upon him with an instinct for problem-solving. He was by nature open to solutions and compromises. He possessed a willingness to find new pathways to intractable disagreements, yet he also knew pragmatism's limits. When those limits hit, he would set a fair playing field for the battle to be joined.

An example of this pragmatism occurred during an early lunch I had with him. He was not one to dine out much during the workday. He often said he ate to live, not the reverse. I cannot remember the reason I had this precious opportunity with him, but it was early in my clerkship when I was still in the thrall of the University of Virginia School of Law's strongly theoretical lens. I inquired what brought him to conclude that the law compelled the University of Virginia to admit women, thinking I would hear a complex explanation around the doctrine of the equal protection clause. Instead, he looked up from his soup and said, "It wasn't fair." This is not to say that he did not respect doctrinal intricacies or rigorous

legal reasoning, both of which he excelled at and utilized. It does, however, reveal the mind of a man whose bent is toward the pragmatic.

Third and finally, he bestowed great affection upon those in his midst. As for his loyalty and kindness to friends and those he called family, the examples of such run in the thousands. People who knew the Judge well often trade such stories with each other. The Judge loved taking action to show concern or affection. I remember being laid up with a terrible cold living in a duplex when an Article III judge tapped on my door with a smile on his face and a serving of Brunswick Stew in his hand. He also cherished the framed photographs of every clerk who had served him during his long tenure, which hung on the walls of his chambers. By the time I was with the Judge, visitors were met with fifty or so pictures of fresh-faced law clerks stacked one on top of the other. It was quite a sight and made the biggest visual statement of his chambers other than his gorgeous desk and fireplace. Those framed pictures announced to the world how much the Judge loved his clerks and where they stood in his heart.

There are times when a person finds his perfect destiny. Judge Merhige found his. Being witness to that destiny was one of the greatest privileges of my life. Yet when I recall those days, it is not the law, the cases, or the legendary record that fill my mind. Instead, my heart is moved in remembering a man lit with love for his country, his court, his family, and his friends. In the end, it was the love the Judge showed which burned the brightest.