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# A DIALOGUE WITH JUDGE PHILLIPS

SEPTEMBER 20, 2013, THE CAROLINA INN

*On September 20, 2013, the University of North Carolina School of Law hosted the United States Court of Appeals for the Fourth Circuit in Chapel Hill, North Carolina. After the judges heard arguments and spent time with students, the day's events concluded with a reception honoring former law school Dean and Judge J. Dickson Phillips at the Carolina Inn. The following is a transcript of this event, in which judicial colleagues, former law clerks, and Judge Phillips himself reflected on his distinguished career of service.\**

## INTRODUCTION BY DEAN JOHN CHARLES "JACK" BOGER

**Dean Boger:** Good afternoon to all of you and welcome. This is a very distinguished audience that has gathered in this beautiful, venerable, Old Well room here in the Carolina Inn on this special afternoon. I'm Jack Boger. I'm privileged to be the Dean of the University of North Carolina at this time. Welcome, first of all, to the three judges of the United States Court of Appeals for the Fourth Circuit, for which Chief Judge J. Harvie Wilkinson, Judge Robert King, Judge James Wynn, who sat this morning in Van-Hecke—he had a call, heard cases. Welcome to the other clerks, marshals, and other court personnel. Welcome to the other, the many other, distinguished judges and magistrates of the United States Court of Appeals, the United States district courts, justices of North Carolina Supreme Court, North Carolina Court of Appeals. It's about as fancy a gathering I think as I've ever seen. Welcome to the lawyers and their significant others, some of whom have previously served, indeed many of whom have previously served as federal law clerks to today's most special guest. Welcome to Carolina Law alumni, many of whom were classmates, or faculty colleagues, or students like me, or alumni, or special friends of our very special guest. And finally, let me turn and welcome that guest, J. Dickson Phillips Jr., and his family. Judge Phillips: native of Laurinburg, North Carolina; Phi Beta Kappa graduate and baseball king captain at Davidson College; rifle platoon

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\* This transcript has been lightly edited for the sake of clarity.

leader in the 513<sup>th</sup> Paratroop Regiment, World War II; honors graduate of UNC Law School; member of the *North Carolina Law Review* board; faculty member at the Institute of Government; member of the North Carolina bar and private practice for eleven years; law partner with Terry Sanford and with Richard Wiggins, who is here today; faculty member at UNC School of Law; Dean of UNC School of Law from 1964 for ten years until 1974; judge for the Court of Appeals for the Fourth Circuit from 1978 to 1994; recipient of this University's highest faculty honor, the Thomas Jefferson award; recipient of the North Carolina Board Law Bar Association Judge John J. Parker award; and on and on and on. Now plainly, in Aristotle's terms, honoring Judge Phillips is the final cause, the goal, the purpose, that's brought us all here today. But there is also an efficient cause under Aristotle's terminology, the agent bringing about the movement that takes place. And to do that, I will pay tribute to Judge Jim Wynn who approached me four or five months ago in his characteristically mild, almost timid, fashion to share a subtle hint: "Dean, why haven't you let the Fourth Circuit sit at Carolina Law School? Every other law school's doing it. You really need to do it." And then after that gentle sort of thought, "Dean, you ought to be honoring your great former dean and Judge Phillips." And so sensing in these gentle remarks some sense of direction, we gladly undertook the organization of this event. And my thanks principally to Catherine Pierce and Jackie Carlock who worked to make it happen, worked tirelessly to make it happen. So here we are, and happily gathered. We're within three days of Judge Phillips' ninety-first birthday, which I believe is Monday, September 23rd. What we plan is what we've already done principally, an informal gathering, a time for all of you to meet, see each other, pay your respects to the judge. But we are lawyers and so we're drawn to words and to a little bit of program. And Judge Wynn will momentarily be offering his joint welcome to you. Then one of Judge Phillips' many former clerks, Professor Tom Kelly of UNC Law School, will offer a few words of tribute and reflection on behalf of that whole cadre of clerks. Then, a special treat. Judge Wilkinson will interview Judge Phillips, the two of them in colloquy. Judge King will be invited then to say a word, and finally I'll have the pleasure of unveiling for the first time in public, a portrait done of Judge Phillips that will one day hang in the courthouse of the United States Court of Appeals in Richmond. So that's our program. Judge Wynn, the floor is yours.

REMARKS BY JUDGE JAMES A. WYNN, JR. & PROFESSOR THOMAS  
A. KELLEY, III

**Judge Wynn:** Thank you Dean Boger, you are too modest in your comments, and I should say I just broached the subject, and you took the ball and ran with it, and I thank you for doing it. I want to thank everyone for being a part of this, and I particularly want to thank my Chief Judge. I saw him back there. Chief Judge Traxler here, and several members of my court who are here, Judge Duncan, Judge Diaz, I think I saw Judge Traxler, who else is here? Anybody else? Well, and I want you to know the other judges would've very well been here. This was a court week and during a court week in Richmond, it's very intense and a lot of work and so at the end of the Friday when we finish, it is very difficult, particularly for the judges from Virginia and Maryland to make it here, but they all expressed the desire, Judge Phillips, to be here and to honor you, and I want you to know that the court dearly loves you and appreciates the history and what you mean to this court. And in particular I do want to thank my colleagues, Judge Wilkinson and Judge King, for being a part of the panel today. Judge Phillips particularly had asked for Judge Wilkinson because they had served together. Judge Wilkinson has been there, I think, since the court started. Maybe not. He is institutional on our court and really gives rise to so much of the reason this court is called one of the most, what I believe, the most collegial court in the country. Judge Phillips can verify that through the years, and I can tell you that notwithstanding what you may see in the opinions you see, sometimes we can get a bit caustic in our language—a little—sometimes it seems as though we're not that friendly, but I promise you that it is just on paper, that in person this is really a wonderful court to be on, and I'm so grateful to be a part of it. I want to also say, Dean you may not know this, this is Judge Phillips' birthday week but it's also Judge Wilkinson's birthday week coming up too, so we have two birthday boys on the stage here about to be it. Thank you so much. I see so many of my colleagues from the state courts here, the state court of appeals, the state supreme court here, Bob Edmunds, and others, Bob Hunter back there, Beach Bob they call him, there's my friend Eddie Green for life, and I wish, I shouldn't of started calling these names, Judge Britt, because when I do that you're going to say, "Why did you call my name Jim Wynn? I'm running for election." But thank you so much for this opportunity, thank you for honoring the judge who preceded me in this seat whom I hold so much, so much revere for the work he's

done, and for this cause, and for his writings, and his work and what he stands for, and North Carolina. I leave you with this one last revelation which will come out, and the dean may have mentioned it, the *North Carolina Law Review* has graciously agreed in its North Carolina edition to have a special edition featuring Judge Phillips . . . . I thank you very much.

**Professor Kelley:** I have prepared remarks. Hello, my name is Tom Kelley. I clerked for Judge Phillips in 1991-92, back when his chambers were above the old post office in Durham. I'm very happy to be with you today to honor Judge Phillips and to say a few words on behalf of his clerks. There are about fifty or sixty—I should know the exact number but I don't—there are about fifty or sixty of us out there in the world and we run the gamut from lowly professors—there are a few of them in this room—to law school deans—I know of at least one in the room. To big firm partners and small firm partners and corporate CEOs—there's one of those in the room too—and pretty much everything in between. And in fact, why don't we all, if you're a Phillips clerk, why don't you raise your hand so people know who you are. There are quite a number of us here. That's great to see. So we got to stop clapping because I have some material to get through. In the few minutes I've been allotted, I'm going to tell a few stories about the judge that may shed some light on the experience that we had clerking and also might reveal something about him. Before launching in, apologies to the clerks who have been coming to our regular luncheons here in Chapel Hill because about every month we get together, usually at the Carolina, well always, at the Carolina Club, across campus. Very nice times. You've probably, the people who've been coming to those, have probably heard most of these stories before, so sorry about that. So, my first story. This had to do, it took place only a month into my clerkship, and it had to do with my co-clerk Kevin Hanes. He's not here today so I can say whatever I want about him. Kevin was somewhat of a perfectionist, especially when it came to the written word. Judge Phillips—as is true of many judges—Judge Phillips permitted his clerks to produce first drafts of opinions. There was always a fierce competition in chambers to try and see, I'm sure this is true of other years as well, to try and see how much of your original wording could get through to the final draft, and because neither of my other co-clerks are here I will tell you that I pretty much always won. So, on Kevin's first opportunity to draft an opinion he labored for what seemed like days, it seemed like weeks, over the first paragraph. He polished that paragraph until it shone.

He showed it to me, and I'm telling you, it really was beautiful. So finally Kevin worked up the courage to walk into the judge's office to show him the paragraph. The judge put on his horn-rimmed reading glasses, glanced at the paper, and after about ten seconds said, "I don't see where we have jurisdiction to hear this case." So all of Kevin's labor was for naught. Kevin, he was crushed by this, but we learned a couple of important lesson from his experience. First, we were reminded that Judge Phillips was an old procedure professor so that don't ignore procedure—that was one important lesson. Second, he was way smarter and more knowledgeable than we were, and he really didn't need our help. With that second point in mind, the fact that the clerks were just slowing him down much of the time, one of us worked up the nerve during lunch, and this is, we ate lunch pretty much every day either in chambers or we'd go out to lunch together, so we worked up the nerve during lunch one day to ask him why he even bothered having clerks. He responded that it was our appetites. At first we were pleased because we thought he was referring to our boundless curiosity and our intellectual energy, but that's not what he meant. He meant that we were young enough that we still liked to eat hearty meals. "People my,"—I can't really do a Judge Phillips imitation but I'm going to try—"People my age are always pushing vegetables around on their plates complaining about their weights or their cholesterol. I like having people around who love nothing more than to tuck into a big bowl of chili or a plate of Carolina barbeque." And by the way, when Judge Phillips says Carolina barbeque, anyone who knows him knows that what he means is eastern Carolina barbecue. So anyway, that served the mystery of why Judge Phillips continued to hire law clerks or that that solved the mystery. As the year progressed we learned about the judge's common sense approach to jurisprudence. He was far from what today would be called a judicial activist. He had a great reverence for precedent but his jurisprudence was always informed by the common sense that he developed growing up in Laurinburg, North Carolina right down on the South Carolina border. One of his common sense declarations arose in the context of a Fourth Amendment case that I was working on where some sheriffs in a rural county had been accused of misconduct. Judge Phillips said something to the effect of "Well now, you've always got to remember that law enforcement officials are forced to make decisions in real time and we can't penalize them for sometimes getting it wrong. On the other hand, you take a man off the factory floor"—I might quote this incorrectly but—"You take the man off the factory floor, you strap a gun to his hip and tell him to

keep the peace, you're gonna have to keep an eye on him." So there it was, truly a common sense working definition of the Fourth Amendment and qualified immunity. Would that all the law were that simple. And there were many more like that during the year. Now, occasionally, the earthy common sense approach would be taken to what some people might consider an extreme. One Friday in Richmond there was an oral argument concerning a man who lived next to a federal park and who was convicted of trespass because his dog kept getting caught by rangers on the federal park property. So there was a very impressive young government lawyer who is making his presentation when one of one of the judges on the panel who was not, to my recollection, it was not Judge Phillips, I don't remember who it was, but he said "Counsel, what kind of dog are we talking about?" And the young man, this lawyer who was so polished and so good, he was completely flummoxed. And he started rifling through his papers looking for an answer to the judge's question, and he simply didn't have it. He was kind of decomposing right there in the courtroom so Judge Phillips, wanting to help him out, which is typical of Judge Phillips, offered that it was likely a hound dog. Then a colloquy ensued among the three judges and I can only approximate because I don't really know anything about dogs or hunting. "Do you mean a blood hound?" "Could be but no, I'm guessing it was a blue tick hound." "Blue tick? Yeah you're probably right. It probably was a blue tick." And I don't know whose accent I'm doing there but it was, "What do you think that old boy," and when they called him, when they referred to the old boy, they were talking about the man who they obviously assumed was a poacher who just hadn't been caught, so, "What do you think that old boy was going after? Raccoons? Possum?" "No, deer, I expect." And so on it went. So, it was amazing to me that Judge Phillips and his two Fourth Circuit colleagues were knowledgeable about hound dogs and hunting, all three of them. And it was perhaps even more amazing that throughout this discussion, which went on for a surprisingly long time, that there was perfect decorum. One might even say majesty in the Fourth Circuit courtroom as they as they went through this. Alright, well I'm getting to the end but I have a couple more brief stories to tell. Sometime in the middle of the year, the clerks solved another mystery about the judge and it had to do about the fact that during oral argument it sometimes appeared that he was sleeping. Now I'm gonna tell you right up front he was not. We found that out. We discovered that and I'll tell you how we knew. What we discovered is that this is just the way the judge looked when he was kind of working

his way through a knotty problem. I'll actually give you a demonstration. So the way we figured it out is that we had submitted bench memos to him before oral arguments and once we, a few months into the clerkship, we had some idea of what we were supposed to be doing, we would sometimes tell him that in our opinion, the whole argument relied on whether a particular lawyer could justify or refute a particular point. And we'd sit over on the side during oral arguments, sometimes wondering whether or not the judge was asleep, but what we realized is that as soon as that lawyer got to that point that we had pointed out—that point that we had asked him to be on the lookout for—we would sit on the side. He'd sit looking up with his eyes closed, and he would do this—as soon as it got to that point—he'd go [demonstrates Judge's actions]. He'd look over at us with a little twinkle and a nod. Okay, I could go on but I've used more than my allotted time. Buy me a drink sometime, and I'll tell you about the “carny man” case, which twenty years later, I still maintain I was right about. The judge had no sympathy for the “carny man” and none for me either. I close by saying that I love my job as a law professor at Carolina law, and I'm not just saying that because my dean is sitting right in front of me. I really do love my job, but clerking for Judge Phillips was the most satisfying year of my career, and I expect that's true for many of us. So, thank you. That concludes my remarks.

A DIALOGUE BETWEEN CHIEF JUDGE J. HARVIE WILKINSON AND  
JUDGE DICKSON PHILLIPS

**Judge Wilkinson:** I'd like to welcome everybody to this really wonderful, heartwarming occasion where we're going to honor what in my—not only my, but by general consensus—was one of the really great Fourth Circuit judges. One of the true giants of our circuit and even more so, one of America's leading citizens, one of North Carolina's leading citizens. Just a very special person in every respect. And we often hear the phrase of “someone is a lawyer's lawyer.” People talk about Judge Phillips, they talk about him as a judge's judge. And what they mean by that is that Judge Phillips conducted and deported himself in a way that we'd all like to but sometimes fall a little bit short. And so Dickson and I are going to have a nice conversation, and we're certainly going to touch on the deanship and his years on the court, and one of the things that was difficult in preparing for this occasion is that Judge Phillips has done so much and has contributed to the life of his community and his state in so



many different capacities that it would be impossible to cover everything. I want to touch on some things that were meaningful to me about Dickson, and I hope it will be so for you. When I came on the court, Fourth Circuit, I was twenty to twenty-five years junior to everybody and every other judge, and I remember greatly respecting and being a little bit in awe of a body of judges who'd gone through the Great Depression and many of who had fought in World War II. And one of the things that I thought, when people thought that the World War II generation was the greatest generation, I think that's absolutely true. I don't think there's any exaggeration about it. And Dickson is, you know, fought in the Battle of the Bulge and for years afterwards he remembered—he was a company commander I think, a young lieutenant—and for years afterwards, Dickson didn't ever forget the people that were his comrades-in-arms. And he would always have reunions with them as often as he could and I remember Dickson particularly talking about his first sergeant who was especially, who he was especially close to, and Dickson, I wonder if you would just talk a little bit about the Battle of the Bulge and some of the men who fought with you, including that first sergeant that you were so close to not only at that time but remained close to for many years afterwards. For someone like me, knowing you had that experience just meant the world to hear you talk about it.

**Judge Phillips:** Well, let me commence what I'm going to say on that topic by saying very briefly what I'll elaborate on a little later. This is a marvelous gathering for me and I'm deeply appreciative of your presence. I look forward to seeing and talking to those of you I haven't had a chance to do that up till now. It's a blessed occasion for me and I'm deeply appreciative. The Battle of the Bulge is a pretty large subject. I'll brief it by just giving at least a recollection to all of you that know this much about it I'm sure. But, it needs to be said if anybody's going to talk about any of the incidentals. The Battle of the Bulge was of course Hitler's last real effort and one that came surprisingly close to success to drive a wedge through the Allied Armies, which by then was almost to the borders of Germany, or just back in Luxembourg and Belgium, just behind the Rhine River. And the other most memorable thing about it was of course was the weather. It was the, there's a book out and I've just read it, and the title of it is *The Longest Winter*,<sup>1</sup> and it's about the winter of the Battle of the Bulge. It was the worst scientifically gauged weather in

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1. See generally ALEX KERSHAW, *THE LONGEST WINTER* (2005).

fifty years in northern Europe, and it was practically impassible with snow and ice throughout the battle period. Our unit was one of the three airborne divisions in Europe at the time, 101st and 82nd, and our division 17th. In the Battle of the Bulge, there is a line of troops, which is an indication of how near the bottom of the barrel we had to get to encounter Hitler. Fortunately, for all of us sitting here, a major reason I suppose that we're all sitting here today, it turned out right in the end due to a superb fighting quality of the army of that day and a considerable amount of luck along the way, which is indispensable, and we prevailed in it, of course. Soon thereafter we moved up to the German border moving to the east and our unit, the 17th Airborne, along with the British 6th Airborne division, which jumped in Normandy, made a drop across the Rhine River and took off from there, cleared the landing zones, and began to move eastward into the heart of Germany and waited by the Airborne, the British Airborne people. I was wounded on that drive, fortunately got through it alright and very fortunate indeed looking through that episode, more fortunate than any way I can explain, to be here tonight, and I am indebted of what better outcome than to be sitting here forty years later with this group of dear friends who have come here to to honor me and I am deeply appreciative of that.

**Judge Wilkinson:** Dickson, there was a story, I don't know if it's correct or not, but your friend Larry Walker at the University of Virginia . . . said at one point that your intelligence officer had said "All clear! All clear!" over a particular hill and so with this intelligence that everything was clear, you went up to the crest of the hill and there were four German Panzer tanks bearing down on you, which isn't exactly all clear. What did you do?

**Judge Phillips:** Foolishly, probably swore out and tried to get on their flanks and armed with bazookas and luckily, they were much imperiled by and impeded by the snow on the ground as we were walking, and we survived that little episode, and it's just another example of the vagaries of combat. It's a high-risk endeavor, and we survived that one. I didn't get to my first sergeant, which I was asked to do. I take the occasion to do it simply to emphasize a critical fact about the armed forces: the value, the incredible value, of the deep friendships that form within the combat unit. It's indescribable, and its depth has a particular quality to it that can't be replicated in any other friendship relationship. This first sergeant was a tough Michigander. His name was Dean Swen, which is Danish I think. He

was a great soldier and a great leader of the country, which is in fact what he was. He survived. We had some tough times together but we maintained our friendship after the war. He was in Buchanan, Michigan and I was in Laurinburg, North Carolina—poles apart culturally and every other way—but our friendship survived until his death about 10 years ago. Great fellow, wonderful soldier, and all of you would've admired him and be as fond of him as I was. Great fellow, typical good American soldier, Dean C. Swen.

**Judge Wilkinson:** That's a wonderful story, Dick, and I'd like, if I can, to talk just a little bit about your deanship at Chapel Hill because of the affection that so many of us in this room have for you during that time and for the institution. When I remember talking to you about the deanship, I don't know what you found to be your greatest challenges but you always used to refer to the "care and feeding" of young faculty, and you brought along so many faculty members under your wing who became real national academic stars. But what did you mean by that phrase, the "care and feeding" of young faculty members as dean?

**Judge Phillips:** Well the comment, I remember having made it in the driveway of my house in Chapel Hill with a friend who asked me very politely one time, what was my major problem with the deanship. I guess I'd been in for a short time and I said spontaneously, "the care and feeding of Dan B. Dobbs." I individualized it because he was a classic example, absolutely brilliant, a little bit of a curmudgeon, wanted to have his way and was entitled to it most times. The great legal scholar put out one of the tort case books and was taken from us, recruited away, because the care and feeding had not been up to snuff. That was my major problem, in my ten years as dean, was trying to find enough money, not to recruit faculty as much as to hold truly invaluable ones of whom there were several. Dan B. Dobbs of storied fame was one of them. Laurens Walker is another. Dan was lured away by an offer he couldn't turn down, Arizona of all places, but a good law school. It was able and had more wherewithal to take care of the care and feeding of Dan B. Dobbs at that time in his life. Laurens Walker was probably our other great young faculty member, and Virginia was able to improve his care and feeding level, so that was a problem, and it was nobody's fault. We were just at that time, economically, those two places had to be a little more well-heeled.

**Judge Wilkinson:** Dickson, you were dean at a particularly tumultuous time and on the life of campuses across the United States because you were dean in the late sixties when campus unrest over the Vietnam War was at its height, and your friend Laurens Walker tells about a meeting in which some of the students wanted to shut down classes and shut down the university and the like. And so there was a meeting in an auditorium or something and one of the students got up, you were on the stage, one of the students got up and said, "What are you doing to stop the war in Vietnam?" And the way Laurens told it was, you know, "You've got to do something. You're just sitting there." And the way Laurens told it is that you stood up and you took a letter out of your breast pocket and said, normally your communications with your senator and your God were your private business, but you wanted to read this letter that you had written to one of your senators, and you had written it a number of weeks once before this meeting was convened in which you laid out the case against the Vietnam War—you had a special perspective because of your own experience in combat, why it was a mistake to have gotten into it and why it was a mistake to continue with it. And Lawrence said the whole meeting, which had come loaded for bear, suddenly was defused. What was it like to be dean at a time when campus unrest was at such a fever pitch and law students were facing the end of their deferments and the possibility of the draft? What were those times like?

**Judge Phillips:** Well, they of course were tough on the students and rubbed off on the faculty and administration. Secondarily, the students were in turmoil that attended the prosecution of the Vietnam enterprise, and it had a bad effect on the morale of the campus at the time, and there was some showdowns that finally were resolved and luckily, wiser heads in the end, students and administration, prevailed when there was talk of shutting down class.

**Judge Wilkinson:** Which you held class.

**Judge Phillips:** Yeah, yeah, no capitulation as I can recall was, all of this was done to calm the multitude. It would have been a complete failure of dereliction of duty to listen to it, but you had, on the other hand, not to get too heavy handed in trying to calm these young people down. It was an honest conviction on their part. They were not draft evaders so you had to walk a tight line between being too permissive of wild schemes to close the war down by closing classes in

Chapel Hill and other such remedies and at the same time staying steady to continue to do the job that was before us, which was not to fight the Vietnam War but was to try to turn out as good a crowd of lawyers to serve the population as we could. But it was a tough time.

**Judge Wilkinson:** I can only imagine. And so many campuses, the campus leadership, fell off one end or the other. It was either too heavy handed or too capitulated, and all of the accounts of your deanship were that you struck a wonderful sense of balance between maintaining the educational mission of the institution, and at the same time understanding the real depth of conviction that motivated those that were opposed to the war, and, as people say, the university was lucky to have you during that, during that period. And then in 1978, Dick, you came on the court and I know you and I kind of think the Fourth Circuit is really, really special. What do you think makes the Fourth Circuit a special court? You've contributed so much to it, but why do people say the Fourth Circuit is special?

**Judge Phillips:** Well, I think it's inevitable that anyone asking that question is going to take a long chance with the proprieties of the matter and lay it as I do to the culture out of which almost all the members out of that court came. Thinking back on it, I think that I saw at that time in the deportment of the colleagues on the court the same brand of gentility and special concerns of the honoring of the virgin opinions without getting into some sort of titanic fit, and I think that's what served this court. It's dangerous to put it in these terms, but I can't get around it. The greater southern boys and a few girls and raised in the culture that all of you who share it will understand what I'm trying to say, but with great care, about the special quality of gentility and comradeship—collegial respect—that many of them were raised with just as a part of living in Brunswick County, Newport News, anywhere in Louisiana and Mississippi, is something there. And it dominated the relationships that I saw, lived with, participated in, and serviced on the Fourth Circuit. It was truly a collegial body based on personal friendship and respect.

**Judge Wilkinson:** When I first came on the court I was told, you gently suggested to me, that I not call Judge Russell by his first name.

**Judge Phillips:** That's what they told me in Laurinburg.

**Judge Wilkinson:** And he had been an assistant Secretary of State, had met with Roosevelt and Churchill before I was born, and I wasn't going to be suggestive. It might be best if I didn't just walk up and say, "Hey, how you doing Donald?" And so I've always called Judge Hanesworth, "Judge Hanesworth," and Judge Russell, "Judge Russell" for the entirety of my service on the Fourth Circuit. I was going to wait for them to tell me to call them by their first name, and they never did.

**Judge Phillips:** That's a part of it too.

**Judge Wilkinson:** And so at the time I said, well this is a little bit unusual to be calling a colleague Judge. And then I began to appreciate that very fact—that I just wasn't on that immediately intimate or familiar basis was one of things I loved about the Fourth Circuit. Dickson, just your presence has contributed so much to this special quality that you alluded to, and we have this wonderful tradition that everybody in this room knows at the conclusion of an oral argument. We go in and shake hands with everybody else to indicate that there's nothing personal of what was likely to be a very hot bench and robust exchange. And I thought it was such a nice gesture and collegial gesture that I worked with some of my colleagues across the country to see if I could get them to adopt it, and there must be some other court in the country that wanted to do this, and I never made any headway and I couldn't get any judge to do it. And I said, "Why doesn't your court as a whole want to adopt this Fourth Circuit practice of coming down and shaking hands with the lawyers who have put so much of themselves into this case and they care so much about it?" And the response I got from Ed Becker, who is a wonderful judge on the Third Circuit, then said, "Jay I'm up for doing it but my colleagues refuse to do it because they say all this shaking hands is just gonna do nothing but spread germs." What do you do? Dickson, there's one thing I wanted to ask you about, which might be of interest to this audience. When I came on the court, I don't know if you remember this, but you took me aside and you'd had an academic background and I'd taught at the University of Virginia for years so I'd had an academic background and you said to me, "Jay, I think two academics on a court may be one academic too many," and I knew who the extraneous one was. And then you said, "But we're just gonna have to make the best of it." I always felt like I had this special bond with you because of our academic backgrounds and do you think, looking back on it, that academics do have a place

on the courts of appeals? That we have something to contribute, or are we too theoretical and impractical for the business of appellate judging, or do academics have something special to contribute to a court of appeals?

**Judge Phillips:** I think the answer I give is simplistic and academic and certainly the case that special training in academics that judges bring to court is a vital part of the court's business, and they do bring, deservedly and I think in actuality, a special quality of intellect and absorption of doctrine that is of value to the court. I wouldn't want a court completely composed of academics. But I think a little leaven is valuable and needed and I certainly think that was the case on the Fourth Circuit, the only one I really know anything about.

**Judge Wilkinson:** Judge Wynn's investiture was just a great Fourth Circuit proceeding. You gave the most wonderful chronology and discussion of some of the North Carolina judges on the Fourth Circuit and one that you and I were particularly close to was Judge Sam Ervin, and I don't know whether Betty Ervin's here tonight or not but—Betty my goodness, there you are, bless you—let's give Betty Ervin a hand. We held some summer sessions in Wilmington and had some barbeque in the evening at a place called Figure Eight, and we would take all kinds of baseball trips in the summer, Dickson and Sam and I and our wives. And we'd go to Cincinnati and Chicago and hit the museums in the day and then baseball games in the evening, but given just how much Sam meant to you and me, could you just give us a few words about Sam and what kind of a person he was, because he's one of the great North Carolinians too.

**Judge Phillips:** It's hard to exaggerate his influence for good on that court, and wherever he was, he was a lovely person, lovely in the appropriate, in the masculine context, and in the effeminate. He was lovely, he was a lovely person. Smart as a whip but not given to braggadocio or showing off. Solid as a rock and a dear, dear friend thorough all the years of our service together. From the great tradition, the name Sam Ervin is enshrined in the history of this state indelibly. The two Sams shone the light on the state, and we were blessed to have his company as a friend and as a colleague, as a legal colleague. He was a great lawyer, not a show-off though.

**Judge Wilkinson:** One of his favorite expressions was, “We all need to learn to disagree agreeably,” and he was a wonderful person and the fact that I don’t think he ever took anything personally is a wonderful quality in a circuit judge. It was on these baseball trips that we took to Wrigley Field and Comiskey Park and to Sam’s Three River Stadium because Sam was a great Cincinnati Reds fan, and it was on these baseball trips that I began to learn about just what an incredible person Judge Phillips was. I just have one or two little quick stories. We would be standing in the hotel waiting for an elevator and you know, if you’re on a tall hotel and you’re on the twelfth floor you can get pretty annoyed at elevators because they can take a long time to arrive. Then, when they do they’re full. So we were standing—Dickson and I—standing, and the elevator arrived. But we’d been standing there a good long time and right before the elevator cab arrived, about six or seven other people came and they clearly came after the point that we did so the elevator door opens and I could see what was happening. These six or seven were going to try, can you believe it, to get in front of us and get in that cab. We were going to have to wait another five minutes and I was prepared to throw a polite elbow to keep my place in line. It was my place. I had been waiting, and I did, and I got into that elevator cab, and I thought Dickson would be mowing along right behind me, and he sat back and he just had a twinkle in his eye and let those six people through. Now let me tell you something. That’s a gentleman. That is a gentleman. There’s another little thing, a story at Wrigley Field. We were sitting in our seats, and there was a fellow right in front of us. I’m not sure if you remember this but he had a few too many to drink, Dickson. And he was standing up and he was blocking our view of the play, and I turned to Dickson and I said, “Dickson, I can’t see what’s going on on the field. This guy’s standing and he’s loud and everything,” and I said, “I think I’m gonna ask this gentlemen if he would mind sitting down.” Dickson said, “Jay, I’d kind of leave that situation alone if I were you.” Well, I went ahead and I said “Sir, would you kindly mind,” I tried to be very polite about it, “Would you kindly mind sitting down so that this gentlemen and I could see the game?” And he turned around, he put his hands on his hips, and said, “Yeah if I don’t sit down what are you prepared to do about it?” And I said, “Nothing. Absolutely nothing.” And from that moment on, I knew it was advisable to listen to Judge Phillips’ counseling. So, we had some good times, we did, and I remember them fondly. Dickson, you’ve always been such a builder of bridges and such a seeker of consensus, and I’m a little bit dismayed by the degree of



polarization that has affected so much of American life and the hostility that seems to exist between different political parties and people of different persuasions, and you have always represented in your years on the court the search for common ground and the value of listening, but what do we, it may be too big a thing, but what do we, what is it, what can we do to lessen the tension and the hostility that the Americans seem to feel for one another? Sometimes we seem to forget we're members of the same country and have the country's best interest at heart, but what can we do to just change this terribly toxic atmosphere that's prevailing in this country?

**Judge Phillips:** That's a tall order. It's probably an unmanageable problem, I'm afraid. What gets me about it, the quality of it is, and I have pronounced two or three times given the opportunity of, even when not given the opportunity, to point out that as far as I can read the history of this country, we have now reached the nadir, the bottom of the degree of collegiality, common cause. We've got a degree of personal vicious animosity at work in a way that I think is never afflicted, how our operations, legislative operations, executive, there've been hard words spoken, but there's an element of viciousness, personal villain, at work driving what's now tearing us apart a little bit that, I think, is a thing that needs addressing. And I don't know any way to address it except in public outrage through correspondence and now we're given the opportunity to make that point: that we're eating ourselves out with this degree of animosity, personal venom, in our differences. I'm sure there've been harsh words spoken, as harsh as any, but I don't believe any time in our history we've had the amount of sheer villain, personal villain, underlying what serves as civil disagreement on political points.

**Judge Wilkinson:** When I was listening to your law clerk here just a while ago I was thinking, you know, was there some reason for hoping? And I do find hope in these young law clerks of ours and so many of your law clerks are here today, and when I see these fine young people that graduate from our law schools and the way they comport themselves I really think that I know that if they got into positions of influence, they would do it differently. And the law clerks in my chambers often have the deepest differences of opinion and yet here, members of the younger generation that are discussing these differences in the most civil terms and the most gracious terms and the most considerate terms, and I think, you know, this is not without its hopeful side. I just see these young law clerks as representing the

best of upcoming generations. You know, my hope is that that they'll learn from people like you when they get in positions of responsibility and authority. They have to go about it a little differently and looking at the state of the legal profession, Dickson, today it's a tough time to be a young lawyer because the job market is tough and contracting and students are facing heavy debt. The hours for young associates are often grueling, and yet, you know, I don't know anybody that loves the law as much as you. You always have. You have just loved the law and I think to myself, you know, Dickson would've gone into the law even with with all of these adverse circumstances and I wonder, as someone who has lived the law and loves the law with every fiber of your being, what advice you might give to a young lawyer who is just starting out on this long professional climb. Is there anything you would tell that young lawyer who had just graduated from law school and any particular piece of advice you would want to give that young person?

**Judge Phillips:** Well, on the recent theme of the political situation, I think one piece of advice that ought to be given is absolutely to keep out of the whole makeup any degree of animosity, villain, anger in dealings within any profession. That's about the limit of what young lawyers have, a special ability to do, have an influence within the profession that he's serving. And surely one thing that is repeated to the political and to the legal scene is the avoidance of attitudes driven by the express and personal venom and viciousness. There's no place for it and young lawyers ought to be anxious to set examples as good colleagues and fair colleagues within the profession.

**Judge Wilkinson:** And withstanding all these tribulations it remains, the law, really remains a great and grand profession, does it not?

**Judge Phillips:** Yes, it certainly does. None better.

