



NORTH CAROLINA LAW REVIEW

Volume 73 | Number 1

Article 3

11-1-1994

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Recommended Citation

Sam J. Ervin III, Francis D. Murnaghan Jr. & John D. Butzner Jr., *Judge James Dickson Phillips: A Tribute*, 73 N.C. L. REV. 1 (1994).
Available at: <http://scholarship.law.unc.edu/nclr/vol73/iss1/3>

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A TRIBUTE: JUDGE JAMES DICKSON PHILLIPS, JR.

James Dickson Phillips, Jr.—former Dean of the School of Law and distinguished jurist on the United States Court of Appeals for the Fourth Circuit since 1978—recently elected to join the ranks of the Fourth Circuit’s senior judges. The editors of the North Carolina Law Review are pleased to help three of Judge Phillips’s colleagues pay tribute to a man whose contributions to the School of Law and the federal judiciary have been immeasurable.

SAM J. ERVIN, III*

I am honored to be able to join my colleagues, Judges Murnaghan and Butzner, in paying tribute to our good friend, J. Dickson Phillips, Jr.

Judge Phillips was appointed to the United States Court of Appeals for the Fourth Circuit by President Carter on August 11, 1978, filling a vacancy created by the death of another North Carolinian, Judge J. Braxton Craven, Jr. Judge Phillips served on this court with distinction as an active judge until he elected to take senior status effective July 31, 1994, a total of almost sixteen years. He will, I am confident, continue to sit with the court on a regular basis in his new capacity as often as he is needed.

When I came on the court in May 1980, Judge Phillips was one of the first Fourth Circuit judges to welcome me and to offer his assistance. I gratefully accepted his offer and I have continually sought and relied upon his wise counsel and sound judgment since that time.

To understand fully the value of Judge Phillips’s services to this court, one must reflect upon his varied professional career. Born and raised in Laurinburg, he entered military service during World War II and fought in a number of battles, including the Battle of the Bulge. He helped to lift the German siege of Bastogne.

Upon completion of his active military service and following his graduation from law school at Chapel Hill, he actively practiced law in Laurinburg and Fayetteville for approximately fifteen years. Among his partners were former Governor and United States Senator Terry Sanford and Donald McCoy, who still heads one of the leading firms in eastern North Carolina. I know from conversations with Judge

* Chief Judge, United States Court of Appeals for the Fourth Circuit.

Phillips and other judges and lawyers that he was a small-town lawyer in every good sense of the term. He was engaged in both civil and criminal law, representing both rich and poor clients (primarily, I suspect, the latter), as well as unpopular defendants and causes—in short, almost anyone and everyone who sought his aid and advice.

During his private practice—and throughout his life—Judge Phillips has been a keen observer of human nature. He understands the strengths and weaknesses of our society and of his fellow human beings. The insights he has developed and the actual experiences he has had enable him to bring a needed realism to his work as a judge, and to evaluate accurately the likely motives of both litigants and lawyers.

A career change led Judge Phillips to the University of North Carolina at Chapel Hill, where he began to teach at the School of Law. Ultimately, he became the dean of that institution. He recruited a large number of outstanding faculty members for the law school, led a fund-raising campaign which made possible the construction of the present physical plant, and guided that institution to new heights of excellence as a nationally recognized and acclaimed law school. He subsequently turned the office of dean over to Robert G. Byrd, but continued his teaching duties. As both dean and professor, he trained and influenced for good thousands of young lawyers, many of whom are current members of the North Carolina Bar. Those who studied under him revered him not only as a teacher but also as a friend and wise counselor. Until very recently, Judge Phillips continued to share his legal knowledge with others by teaching a course at the Duke University Law School.

On May 22, 1977, the untimely death of another distinguished North Carolina jurist, J. Braxton Craven, Jr., created a vacancy on the United States Court of Appeals for the Fourth Circuit. A merit selection panel interviewed a substantial number of prospective nominees and selected the five best qualified persons for the position. Among those recommended in addition to Judge Phillips were a highly regarded federal district court judge, a very able trial lawyer, and two other outstanding legal educators. Upon the recommendation of Senator Robert B. Morgan, President Carter named Judge Phillips to the post, and he was quickly confirmed by the Senate. He began his new duties on August 11, 1978.

In describing Judge Phillips's career on the Fourth Circuit, one must note his vast legal knowledge, his hard work, his common sense, his good judgment, and his humanity. He constantly reminds his fellow judges that our first responsibility is to render prompt, sound, and fair decisions in the cases that come before us. His written opinions

for the court are characterized by clarity and precision, and reflect the care with which they are crafted. He is unfailing in explaining the reasons for the results he reaches, and he has a talent for fitting each decision into the spectrum of previously decided cases. He reveres precedent and follows it when he believes that he is required to do so. He does not, however, hesitate to “plow new legal ground” when the court confronts unfamiliar fields of law. His comments and suggestions to his colleagues about their opinions carry great weight because of the universal respect in which he is held by his fellow judges. This is true in part because he does not ever claim that he is right and that they are wrong; rather, he is a kind and diffident critic, recognizing the importance of disagreeing without being disagreeable.

It is impossible to discuss—much less detail—the significant opinions Judge Phillips has authored for the court during his more than fifteen years on the bench. The most noteworthy have involved First Amendment issues, civil rights, federal jurisdiction and civil procedure (one of his specialties), criminal procedure, voting rights, education of the handicapped, limits on conspiracy, double jeopardy, and other subjects too numerous to mention. He is an ardent defender of the Bill of Rights, and a protector of the individual against the excesses of authority at all levels of society. He seeks to ensure that all those who seek justice in our national courts not only see their cases promptly decided, but understand why the court ruled as it did.

Judge Phillips’s active participation in oral argument has added clarity and color to the court’s proceedings. A former law student of Judge Phillips was once arguing a civil case before a three-judge panel, on which Judge Phillips sat. The lawyer made an egregious misstatement of some procedural rule of law. Realizing that he must have said something wrong, the lawyer then said, “Judge Phillips taught me all I know about procedure.” From the bench Judge Phillips immediately responded, “I deny it.”

Judge Phillips has not hidden his light under the Fourth Circuit’s bushel. Every chief judge of this circuit has called on Judge Phillips to assume roles of administrative responsibility. He has willingly led or participated in studies of judicial conference membership, ways to improve internal court procedures, and planning of conference programs, to mention only a few. He also has been a contributing member of several committees of the Judicial Conference of the United States (the national governing body for the federal court system), including the vital committee on the rules of civil procedure, which has just completed a major overhaul of those important rules.

Every judge is privileged to have three law clerks work beside him or her each year. From personal observation, I can testify that Judge Phillips provides each clerk with a liberal legal education, instruction in the ways of the world, sage advice about career opportunities, support and encouragement when things look dark, and a lasting friendship. Those young men and women are indeed fortunate to have had him as a teacher, and they would be the first to say so.

I can also attest that Judge Phillips has given of himself to his family, his church, his community, his friends (of which I am proud to be one), and in earlier years before he was constrained by judicial codes of conduct, to his political party. He has been and is what a law professor of mine once described as a "dues-paying member of society."

I am delighted to participate in this tribute to James Dickson Phillips, Jr., who is, without question, one of the most outstanding appellate court jurists that North Carolina has ever produced.

FRANCIS D. MURNAGHAN, JR.**

It should be borne in mind that I was the first appointee to the Fourth Circuit to follow Judge J. Dickson Phillips, Jr. That means that I have had ample, indeed abundant, time to value and appreciate the strength of his services, both as a prompt and devoted attender to business and, more importantly, as an imaginative and inspiring member of the judiciary. In fact, as Gerald Gunther has recently said of Judge Learned Hand, while he "rarely suffered from hero worship, his admiration, even idolatry, of Holmes was extreme, expressed in both public and private, a veneration that exceeded even the esteem he felt for his Harvard professors."¹ The same comparison relates to my feeling for Judge J. Dickson Phillips, Jr., and to my feeling for my own Harvard professors.² Judge Phillips, like Oliver Wendell Holmes, has been "the epitome of what a judge should be,' a continuous object of 'affection,' 'a dear friend, a wise guide and the example of all that I most cherish.'"³ Judge Hand made that statement after only nine years as a federal judge, while I have been in close contact with Judge Phillips for over fifteen years, so I proudly assert that the comparison is one that waxes stronger with every passing day.

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1. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 162 (1994).

2. My own distinguished professors included Zechariah Chafee, Paul Freund, Milton Katz, and Warren Abner Seavey, to name only a few.

3. See GUNTHER, *supra* note 1, at 162.

In short, Judge Phillips has displayed all the qualities and competence one hopes to find in a first-class judge.

JOHN D. BUTZNER, JR.***

In August 1978, James Dickson Phillips, Jr., brought to our court a scholar's appreciation and understanding of the law and the principles that unite its diverse subject matter. When he joined the court, it consisted of seven active and three senior judges. Eight of its members had been district judges. But as Judge Phillips has demonstrated, lack of prior judicial experience is no impediment to exceptional service on an appellate court. All members of the court had been successful lawyers, and some had served in federal, state, or municipal government. Some had taught as adjunct professors of law, but none had the academic, scholarly approach to jurisprudence that Judge Phillips contributes to the law of this circuit and, through the influence of his opinions, to the law expounded by other courts throughout the land. He has written on nearly every subject that finds its way to a federal appellate court, as well as on legislative reapportionment, with which most judges never have to cope.

His opinions, though incisive, are rich enough to provide sound precedent. When one's research leads to a Phillips opinion, one can rely with confidence on his mastery of the issues. His opinions are marked by creative energy; one can sense the enthusiasm with which he approaches a difficult problem. A good judge can fairly decide even the most difficult case. But it takes a superior one, such as Judge Phillips, to weave the law and facts into a fabric that both fairly decides the instant case and provides a helpful rationale and standards for future cases.

It soon became apparent to Judge Phillips's colleagues that years on the faculty of a great law school and in the general practice of law had honed his knowledge. Wit and charm leaven his views. To serve on a panel with Judge Phillips is a pleasure. In most postargument conferences, a panel readily agrees—at least tentatively—on the disposition of an appeal. But when differences arise, Judge Phillips listens respectfully to the views of others. He presents his own ideas comprehensively and forcefully, but without rancor. He infrequently dissents because, more often than not, his views prevail. His dissents are crafted to explain his views about the preferable outcome of the appeal. Though he has not attained the ideal of never mentioning the

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majority, he realizes that the embattled forces are the litigants and that the majority is not the enemy. No vituperative or condescending language mars his writing.

Judge Phillips's attitude at oral argument draws the best from counsel. He does not treat the bench as a platform for disputing what counsel say. But if the argument becomes fuzzy, a few of his well-directed questions or observations nudge it toward the proper focus.

Judge Phillips's knowledge of procedure was put to good use when the Chief Justice appointed him to serve for five years on the Judicial Council's Advisory Committee on Civil Rules. The quality of his opinions prompted his appointment to the Board of Editors of the Federal Judicial Center Writing Manual. In short, Judge Phillips happily combines the characteristics of a judge's judge and a lawyer's judge.

As friends and law clerks can attest, Judge Phillips and his charming, capable wife, Jean, are delightful host and hostess. There is, however, another aspect of Dick Phillips's life that is not so well known to his colleagues. He is a former member of the North Carolina Wildlife Resources Commission. From boyhood he has loved the beaches and marshes of eastern North Carolina. He understands the flight of the shore birds and what it foretells. He knows the track of the ponderous sea turtle, which lumbers ashore to deposit eggs and then returns to the deep. He can spot a slough that helps a surf fisherman take advantage of the tide. He enjoys running a small boat, propelled by an outboard motor, into the open sea beyond the barrier islands in search—usually successfully—of bluefish or mackerel. But if perchance the ocean yields no fish, he can give a fisherman's classic reason. Jean, a naturalist in her own right and oftentimes the boat's first mate, understands.

The *North Carolina Law Review* rightly honors a wise and compassionate judge, James Dickson Phillips.