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In Memoriam Philip B. Kurland

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I speak today for myself but also in a representative capacity—for my family, particularly my father, and if I may be so bold for many of us who grew up in the 1950s and '60s in the Hyde Park/Kenwood neighborhood that Phil and his family were so much a part of.

My father and Phil had a special bond and a wonderful friendship for many years, ending in their sharing offices next to one another in Harper over the last nearly twenty years. That friendship began forty-four years ago in a phone call that both my father and Phil liked to recount. I think it may have improved in the telling over the years. The definitive version was given by Phil at the reception in 1975 for my father upon his leaving the University to become Attorney General.

Phil gave this account:

It was 23 years ago that the telephone in my north side apartment rang and the voice at the other end said: "Is this Phil Kurland?" I replied that it was. Whereupon the voice said: "How do I know?" I told the voice that it would have to take my word for it. It was then that the voice identified itself as Edward Levi. I didn't believe him either. But it was a

† Judge, United States District Court for the Eastern District of California. These remarks were given at a memorial for Philip Kurland on May 4, 1996.

consequence of this mutual expression of trust, that Edward came to work for me.¹

That relationship of trust and loyalty never faltered and ripened over the years. I remember many of the places and occasions in which it ripened.

Phil and Mary Jane were frequent guests at last-minute Sunday family dinners. They did not have children yet, and they treated John and me as if we were theirs. Mary Jane gave back rubs and Phil smiled. He was very open in his affection for my parents. There were ABA meetings in Miami with walks down the street with ice cream cones in hand. And there were summers in Door County and at the Broadmoor in Colorado Springs.

I have a strong image of Phil during this period of his life, walking to the Law School down Woodlawn Avenue with Harry Kalven or sitting in some colleague's living room in a small gathering of friends and family, with a look of contentment, the smiling Buddha, usually with a pipe and, later, for a brief time, a mustache.

Evidently all of the many faculty children were not too overwhelming, because Phil and Mary Jane decided to have their own family. Phil was very proud of his fair ladies, as he would call them. These were probably the most photographed children in Hyde Park, because Phil was an avid and very good photographer.

The pieces of Phil's life all came together in a happy whole. He loved his family, his house on Woodlawn, his work, his students, and his colleagues. He was a complete person, the man for all seasons that he so much admired in others.

Phil was not a person of tepid tastes. He relished the things that he liked and he detested the things that he did not. He hated air travel by Boeing 747, and wrote in one of his Philippics to the newspapers that the 747 was an "abominable imposition on air travelers." He was against the proposed Chicago World's Fair, mandatory retirement, and hypocrites of any stripe. We always knew where he stood.

As much as Phil disliked a bad hotel, he enjoyed a good one. In the summer of 1976 I was studying in London when I received a frantic telephone call from Mary Jane. The Kurlands were not at all happy in their Paris hotel. Could I please find them a good hotel in London? I found them rooms in the Grosvenor House, which they adored, and for this deed, I think I was forever in

¹ *A Celebration of Kate and Edward Levi* 3-4 (Chicago 1975).

Phil's good graces. We spent much time together that summer, taking high tea at their hotel and traveling to Oxford for lunch with John Sparrow, the Master of All Souls, for whom Phil had an affectionate regard. Phil later wrote to me that this time in England was one of the high points in the life of his family. When I became a judge in 1990 he marked the occasion by sending me a much enlarged photograph he had taken that summer of one of the dragons on the Thames embankment outside of the Inns of Court.

Phil loved the serenity of a summer evening and his photographs of Door County sunsets are hung in many a study in Hyde Park and the North side.

But surely Phil was most happy in a social setting with family or with colleagues or students. He liked young people and was interested in their opinions and developing careers. He was a genial host. He preferred a small group with lively talk. And it was in these settings that his learning and wit would radiate.

Examples of Phil's conversational wit abound. We each have our own recollection of it. As the Supreme Court term would come to an end, Phil would pronounce the Constitution safe for another summer. He characterized the 1972 election as presenting a choice between "a knave and a fool and he would rather have a knave." Phil would deliver these sometimes sharp comments in his own way, usually beginning in a growl and ending in an infectious, sometimes sheepish, smile, as we caught the full drift of his humor. Often Mary Jane would punctuate the occasion with an outburst of laughter or a remonstrance, exactly the garland of praise that Phil sought.

In his speeches Phil was a master of phrasing and the ironic aphorism. And Phil's wide ranging reading, from Shakespeare to Frankfurter to Rumpole of the Old Bailey, provided him with a large storehouse of apt quotation which he would cleverly turn to his own purpose.

Speaking of judicial biography, Phil said:

Ralph Waldo Emerson is reported to have written in his History that: "There is properly no history; only biography." . . . Certainly as to American judges other than Justices of the Supreme Court, he might well have said: there is no biography, only history.²

² Philip B. Kurland, *Judicial Biography: History, Myth, Literature, Fiction, Potpourri* 3 (speech presented at conference on judicial biography at New York University Law School, May 5, 1995) (on file with U Chi L Rev).

Taking affectionate aim at his colleagues and the Supreme Court in a 1986 talk to entering law students, Phil elaborated on Justice Jackson's comment that the Supreme Court is not final because infallible but infallible because final. Phil warned the students that faculty members were just as infallible. But this was not of much concern, he said, because "There is always a second and third infallible faculty opinion to be found." And, Phil advised,

the key to establishment of an infallible argument has been most fully developed by the Supreme Court of the United States: it is to embed the conclusion in the premise. It is always easier to get from here to here than to get from here to there.³

Phil liked to use his wit to take the high and mighty to the woodshed. In his preface to his book *Watergate and the Constitution*, Phil wrote that his tone was frequently

I admit, acerbic, ironic, sardonic, iconoclastic, for which I offer no apologies, because I think this tone appropriate to the subject matter. And, as La Rochefoucauld would have it: "No one merits praise for his kindness if he does not have the strength to be mean."⁴

There was a sardonic side to Phil certainly but more, much more, was his kindness and enduring loyalty.

He had his heroes like Justices Frankfurter and Jackson, Judges Learned Hand and Jerome Frank. I helped him one summer in his work on the Jackson papers, a huge mass of primary source material that had taken over the Kurlands' basement. Phil was chagrined that he had not produced the biography of Jackson that he had intended, and I think that this may have been one of his real regrets. In his talk on *Judicial Biography*, Phil quoted Chesterton: "Literature is a luxury, fiction is a necessity." Phil then said: "One trouble with much judicial biography has been too much necessity and too little luxury. And I would tell you that the grapes of one who can afford . . . neither necessity nor luxury are very sour indeed."⁵

³ Philip B. Kurland, *Ave Atque Vale* 5-6 (speech presented at First Year Students' Dinner at The University of Chicago Law School, Sept 30, 1986) (on file with U Chi L Rev).

⁴ Philip B. Kurland, *Watergate and the Constitution* ix (Chicago 1978).

⁵ Kurland, *Judicial Biography* at 25 (cited in note 2).

But Justices Jackson and Frankfurter have nothing to complain of. Few have had as capable or admiring an expositor as Phil.

In many of his writings Phil would come back to the words and influence of these men who had touched him both intellectually and personally. He saw himself in a tradition of skeptical liberalism beginning with Holmes. In a lecture on Robert Jackson and Civil Rights, Phil said that

neither my subject, Mr. Justice Jackson, nor I, properly can be called an adherent of the faith. We belong rather to the liberal tradition, a tradition that earned the first Lord Halifax the opprobrious sobriquet, "The Trimmer." For the liberal tradition is, indeed, a tradition born in doubt rather than faith, and maintained by skepticism rather than by belief.⁶

It is ironic that Phil would refer to himself as a "trimmer" because that is the one thing he was not. He was uncompromising in his standards, which he applied to himself as rigorously as to others. And he was always honest and true to himself. Had history unfolded just a little bit differently, Phil could well have been on the Supreme Court and, at some points in his career, he would have liked this very much. But he expressed his views without political motivation, and he never courted favor or played it safe. He stood up for what he believed in, including this University when it came under attack in the 1960s.

In thinking about Phil these last two weeks, I have been struck by how vivid and vital he was. He was a Ministry of All the Talents unto himself. He was a talented editor, teacher, mentor, writer, friend, father and husband. Yet he was a private person, a gentleman of the old school, and he valued this quality of privacy which he saw vanishing from the modern world. He wrote that "Those concerned with Learned Hand's sacredness of the individual are a rapidly diminishing number. So, too, are those capable of feeling shame, or embarrassment, or guilt, or fear, which are so often the consequence of invasion of privacy."⁷

I think it would not be an intrusion on Phil's sense of privacy for me to say how happy he was these past few years with Allie. Indeed, he was so open about it that he had no reasonable expect-

⁶ Philip B. Kurland, *Justice Robert H. Jackson—Impact on Civil Rights and Civil Liberties*, 1977 U Ill Law F 551, 552.

⁷ Philip B. Kurland, *The Private I: Some Reflections on Privacy and the Constitution* 35 (Chicago 1976).

tation of privacy. He wrote, among other things, of his enjoyment in Allie's summer home in New Hampshire where, he said, "I had the difficult chore of deciding each day whether I would recline on the open porch on the South or the screened porch on the North. The vistas are equally beautiful."⁸ It was good for him and Allie, and for all of us who loved him, to see the deep happiness he had achieved once again.

I think that Phil would appreciate, in closing, a quotation from Holmes that for me captures the spirit of Phil's work. In addressing his fiftieth class reunion in 1911, Justice Holmes said that

the best service that we can do for our country and for ourselves [is to] see so far as one may and to feel the great forces that are behind every detail . . . to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised.⁹

God bless you, Phil.

⁸ Kurland, *Judicial Biography* at 1 (cited in note 2).

⁹ Quoted in Irving Dilliard, *Introduction to Learned Hand, The Spirit of Liberty* v (Chicago 1977).