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*Gerhard Casper*†

Phil and I got to our offices at the Law School most mornings at about 7:30. Phil, displaced Brooklynite that he was, would first turn to *The New York Times*. Throughout my life, beginning in 1966, whenever something truly exasperated me, I turned to Phil. Thus, no sooner had I read the *Times* obituary of Phil with the headline “Philip B. Kurland, 74, Scholar Who Ruled on Nixon Tapes,” I went to his office. He was there, the most sedentary person I have known, sitting in the chair from which he could survey the Midway and the buildings beyond. “What is it now, Casper?” he asked. In the age of well nigh universal first names we followed the ironic habit of showing affection by frequently addressing one another by our last names. “Kurland, how can it be that *The New York Times* considers your comments on Nixon and Bork as the most memorable things you ever said?” Phil, who had already read his obituary and clearly had been both bemused and amused, responded the same way he had done many times before: “Remember, Casper, it doesn’t matter what they say about you, as long as they talk about you.”

Since under the cover of irony and nonchalance that he so frequently displayed, Phil was a deeply serious and often emotional person, his response actually meant: “They need to take notice of you and you need to be true to yourself.” And Phil was true to himself and paid no attention to the world if he thought what he was doing was right. He preached to those of us who were deans of the Law School that “a thick skin is not inconsistent with a sensitive mind.” And his understanding of the human condition was sufficiently pessimistic for him to take a dim view of the notion of linear progress. As Phil said in concluding a talk to the University of Chicago Law School alumni at an American Law Institute meeting in Washington in May of 1992, at which I was present: “[L]et me close as I ended all my meetings with Gerhard Casper as we solemnly wasted a morning or afternoon

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† President, Stanford University. These remarks were given at a memorial for Philip Kurland on May 4, 1996.

hour solving the world's problems: 'Cheer up! Things will get worse!'"

Phil was not a "politically correct" person, which was the main reason the press and colleagues had such a hard time finding a label for him: "conservative" and "liberal" were categories into which he simply did not fit. Nor did Phil bother to endear himself to his colleagues, sometimes not even to his friends—as those know who were privileged to be his friends. At times he became angry with those among us who held office at the university about matters of university governance. He did appreciate that the obligations of office did not leave to the officeholder the same freedom of decision that was available to Phil as a faculty member and such moments of conflict did not impair warm feelings of friendship. However, intense moments they were nonetheless.

It was not that Phil was a man of many strongly held "can't helps." His favorite literary form was the essay and he was fond of quoting Felix Frankfurter saying "the essay is tentative, reflective, suggestive, contradictory and incomplete. It mirrors the perversities and complexities of life."

To him, most contemporary legal scholarship tried to do too much and, as little as he could stand cant, could he endure the certainty that flows from big doctrinal schemes. His impatience did not flow from knowing everything better but from being wary of those who think that they know everything better. In his last years, he expressed his distress over what he thought was the disappearance of the common law system from the United States. He was much disenchanted with what you might call an "anything goes" approach. Steve Stigler recently reminded me of a famous Quadrangle Club roundtable display of Phil's quick and cutting wit. George Stigler, at lunch, began a sentence by opining "No lawyer would . . ." Whereupon Phil interrupted him impatiently, saying: "Stop right there. There is no way you can finish that sentence!"

Phil has been my friend for most of my adult life, and he played an exceedingly important role in it. He and Mary Jane were close friends also to Regina and Hanna. Regina and I left Germany in 1964 and came to Chicago in 1966. We were immigrants and recent ones for that. While being of foreign background has never been a big deal at the University of Chicago, Phil was second to none in considering my ethnicity, my legal

education, my accent as completely irrelevant to the life of the university and to legal scholarship with one telling exception.

When I arrived in Chicago, primarily to teach comparative law, he said to me: "Gerhard, do not just do comparative law. You have to be engaged in a major field of American law because otherwise your colleagues will find it difficult to take you seriously as they will lack the expertise to evaluate your work." I immediately went to Dean Neal: he was a good sport about it and gave me Constitutional Law I to teach and my life has not been the same ever since. I think that was the only time that Phil concerned himself explicitly with my background. Otherwise, he had no inhibition to recommend this, at the time not even naturalized, professor to congressional committees as an expert witness on the Constitution, and eventually he asked me to join him as editor of the *Supreme Court Review*. Phil firmly believed that no university can thrive unless each member can speak and will be listened to without regards to labels and stereotypes.

Come to think of it, he did indulge ethnic disparagement in one setting—at the symphony where Regina and I had seats a few rows in front of the Rothschilds who frequently invited Phil and Mary Jane. Phil seemed to hold Regina and me collectively responsible for Anton Bruckner—a composer for whom Solti displayed a strong liking. And while it was rather unfair to call us to account for Bruckner, it reflected Phil's, let us say, somewhat narrow range in musical taste. A year or so after Regina and I had left Chicago, he wrote me spontaneously about a Beethoven concert at Symphony Hall. I quote: "It proved again, to me, that a repertoire confined to Beethoven, Mozart, and Brahms, varying only the interpreters and, therefore, the interpretations, would satisfy all my musical hunger."

As I suggested, Phil cared deeply about universities and in the late 1960s and early '70s he was ready to leave the academy, not just Chicago. He was deeply disturbed, for instance, by what was happening at Stanford in 1970. He thought too many faculty and students did not share his notions of the mission of the university, his aspirations for standards of academic excellence, his concept for the reasons for academic freedom and the uses to which that freedom can properly be put. The only university mission (Phil wrote "I use the phrase with pride") he would recognize was the search for knowledge and its dissemination and the sole means of discourse within the university must be reason—"the utilization of force as means of persuasion is anathema." And he

was, of course, right but also a bit too unwilling to acknowledge flaws within the academy.

While in the end, due to the valiant efforts of Phil Neal and Edward Levi, he did not leave, in 1973 Phil became the William R. Kenan, Jr., Professor in the College and, for some years, reduced his presence in the Law School (with the much cherished Mrs. Scott providing continuity).

The new teaching assignment was most congenial. It meant the pursuit of law as one of the humanities, an intellectual pursuit that, as he said, "can lead to a much wider, and deeper understanding of the world."

Few constitutional scholars of this century have as consistently as Phil Kurland thought about and worried about the Constitution as a complex system that cannot be reduced to one of its components. Majority rule, separation of powers within the national government, the system of checks and balances, federalism, the Bill of Rights, and last but not least, the independence of the judiciary he has never viewed as separate topics that can be treated in isolation, but as the Framers' interdependent devices for the restraint of brute power, however disguised, within the American democracy.

Phil did not only seek a deeper understanding of the world but he also enjoyed being part of it as a lawyer. Apart from his clerkships with Jerome Frank and Felix Frankfurter, probably nothing gave him greater pleasure than the seven years he spent as chief consultant to the Senate Judiciary Committee's Subcommittee on Separation of Powers that was chaired by Senator Ervin. He became very fond of Sam Ervin and liked to shock the rest of us who thought of that development as somewhat strange. He was also fond of quoting a warning that the Senator had given him when Phil took on his new Washington responsibilities. I quote: "Most people around here think that the greatest danger to the United States is communism, when in fact it is stupidity." This was the kind of pithy dictum that Phil himself delighted in.

About Phil Kurland Senator Ervin said in the Senate on September 28, 1971: "Incidentally, I cannot refrain from stating my conviction that Philip Kurland possesses the qualifications [for greatness in a Supreme Court Justice] described by him through quotations from Judge Learned Hand and Justice Felix Frankfurter, and that he would go down in history as an outstanding Supreme Court Justice if any President possessed the wisdom to

nominate him for such a post." While Phil's name was often bandied about in the newspapers when there was a Supreme Court vacancy, in the end, just like in the case of Learned Hand, we have had no president wise enough to nominate him.

The Kurlands frequently came to our apartment for my birthday at Christmas. In 1990, he wrote: "We shan't be able to call on you on your birthday. We are going to Vermont to visit with the three ladies." Julie, Martha, and Ellen, Phil often, as you know, referred to you and your mother as "My Fair Ladies," he dedicated books to you with that printed inscription, as he dedicated to each of you one of the volumes of the *Supreme Court Review* from 1964 to 1966. And, of course, you were present in his office through your photos and through his talking about you. You were indeed a dear family to him and of inestimable importance when he got discouraged about the world. That he left that pessimism behind in the last years of his life under Allie's influence and love has given great joy to his friends.

Tomorrow, exactly a year ago, Phil gave what turned out to be the last of the many talks he delivered throughout his professional life. It was at a conference about judicial biography in New York. In it, he quoted Felix Frankfurter about the Bible's admonition "to praise famous men." I quote Phil quoting Frankfurter: The Biblical phrase is

not an exhortation for a gesture of pietistic generosity, the placing of verbal flowers on the graves of famous men. It is for our sake that we are to praise them for, as Ecclesiasticus added, they have given us an 'inheritance.' We commune with them to enlighten our understanding of the significance of life, to refine our faculties as assayers of values, to fortify our will in pursuing worthy ends.

Phil, you have made it easy for us to praise you because you did leave a rich inheritance. All of us thank you.

