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THE FOURTH CIRCUIT AND ITS FUTURE

J. HARVIE WILKINSON III*

It is a real pleasure to be in South Carolina on the occasion of this symposium on the Fourth Circuit Court of Appeals. I have enjoyed so much sitting with my friend and colleague Chief Judge William Traxler for many years. All of us on the court think he is going to be a great chief judge. I thought Judge Traxler and I shared the distinction of being the two most avid baseball fans on the Fourth Circuit. But Judge Traxler left me in the dust when he introduced Justice Stevens at the most recent conference of circuit judges in Washington and made reference to the fact that the Justice was present at Babe Ruth's famous home-run shot at Wrigley Field.

It would be an error on my part not to comment on the remarkable contributions that South Carolina has made to the Fourth Circuit Court of Appeals. Our beloved former Chief Judge, Karen Williams, exemplifies the warmth, grace, and hospitality for which her state is renowned. We are so fortunate—indeed blessed—to have had such a fine person as our colleague and chief. I had been friends with Judge Dennis Shedd long before his ascension to the circuit. He is a boon companion and a dedicated public servant in every way. We are fortunate to have a jurist of his high caliber and collegial instincts on our bench. Judge Clyde Hamilton has continued to offer in senior status the same sterling service that he provided in so many years as an active judge. His help has been indispensable to us. And I should also express my regret that former Chief Judge Billy Wilkins and Judge Robert Chapman no longer sit with the court. Their presence distinguished us, and their absence is very much our loss.

As different as they are, these fine South Carolinians share a love of the law, a practical knowledge of life, and an abiding devotion to their home state. They have added so much to the circuit over the years, and I wish to take this opportunity to thank them.

There is even a judge or two from outside South Carolina here tonight. I noticed that our most distinguished Fourth Circuit colleague, Judge Robert King, has travelled from West Virginia to South Carolina to commit heresy. He wants you to believe that there are actually two Charlestons in the United States. Perhaps we can compromise on the proposition that there are two Charlestons in the Fourth Circuit, and we are mighty lucky to have such splendid cities as part of our jurisdiction. Also, I want to welcome my dear friend Judge Karen Henderson, who did serve for four years as a district judge right here in Columbia and went on to become a highly respected judge on the District of Columbia Circuit. Welcome, Karen, and we all know that you are a great South Carolinian at heart.

I notice that some of my friends from the district court are here. The debate persists over whether district or circuit judges have the harder job. Most of us on

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the circuit would probably say the district judges do. Many a great surgeon will tell you that internists are the indispensable providers in our health care system. Similarly, the federal judiciary rests on the shoulders of district, magistrate, and bankruptcy judges. It is they, more than anyone else, who determine the quality of justice in the Fourth Circuit. Many circuit judges have had the chastening experience of hearing Walter Hoffman, Bob Merhige, or South Carolina's own Ross Anderson tell us how easy we have it. And it's true that great trial judges, many of which sit in our circuit, make the work of the appellate court much less difficult.

As the senior active judge on the Fourth Circuit, I am supposed to possess something of an institutional memory. Of course, no one wants to possess too much of an institutional memory, or people begin to think you're long in the tooth. So no, I was not at the Grove Park Inn in Asheville when Chief Judge John J. Parker opened the nation's first judicial conference, and I did not argue before the legendary panel of Parker, Soper, and Dobie. At mid-century, you did not have to wait until the morning of argument to learn the identity of your panel, because the Fourth Circuit consisted of only three judges, rather than the presently authorized fifteen.

I do, however, have enough of an institutional memory to remember the strict sense of Southern protocol that greeted me upon my arrival on the bench in 1984. The tone was set then by those two great South Carolinians, Judges Donald Russell and Clement Haynsworth. You quickly learned that Judge Russell liked to be the last one on the elevator, did not welcome excessive questioning from the bench on Friday mornings, and that someone of my juniority never, ever addressed the eminences of the court by their first names. I made the mistake of doing so once, but only once. I was taken politely aside by Judge Chapman, who reminded me that Judge Russell was an Assistant Secretary of State before I was born.

It was suggested that I offer a few thoughts on what the Fourth Circuit Court of Appeals represents. This is a formidable and perhaps an impossible undertaking. No one judge can truly hope to speak for the court. Each of us may have a slightly different view about the circuit. I do think, however, that we all believe that courts are not just fungible entities. One circuit is not identical to another. It is true that we don't have a Fourth Circuit song or bird or flower, but that doesn't mean the Fourth Circuit isn't a very special place. Indeed, I venture to say that every judge on the court—and I hope many of those who appear before the court—believe that the Fourth Circuit is unique.

I do think all of my colleagues would agree that the Fourth Circuit is a court of uncommon courtesy. This is not just a matter of representing the South and mid-Atlantic regions where courtesy is a characteristic of the bar and the people. It is not just a matter of being the only circuit in the country whose judges come down from the bench after every argument to shake hands with counsel. (I tried to get other circuits to adopt the practice, but I was told it ran the risk of spreading germs. Given all the talk of flu pandemics, that may not be such a far-fetched thought, but I think the Fourth Circuit judges will continue to shake

hands regardless and may have hand sanitizer up there on the bench with the water.) But I know I speak for my colleagues when I say that the internal environment in the Fourth Circuit is every bit as courteous as external appearances would lead one to believe.

Civility is not something to be taken for granted. Lots of people pay lip service to it. As easy as it is to talk about the importance of courteous relations in the abstract, it is a very hard thing to practice when you have deeply divergent views on a matter of law and the going gets really tough. But good judicial manners make for a much better court. For one thing, it facilitates the search for common ground and the need to make the kind of accommodations that are necessary in any collegial body. Congress placed us in panels of three for a reason—namely, that we are supposed to listen as well as talk and to extend to our colleagues the hand of trust and the benefit of the doubt. I honestly think the public is better served by a civil dialogue among judges than by a “my way or the highway” approach. As I say, however, it doesn’t come easily, and it is something we have to work on every day. I wish to salute my colleagues, however, for the atmosphere that, despite honest differences of opinion, prevails on our court.

The Fourth Circuit is also a court of uncommon efficiency. It may seem superficially that courtesy and efficiency do not go together. Collegiality is one of those warm and fuzzy words, while efficiency by contrast is cold and businesslike. But there is no contradiction. In fact, an efficient court can facilitate courtesy, because judges and staff alike feel happiest when they are on top of things, and I dare say litigants feel happier still.

It is important to be conscientious, but it is likewise important that we be prompt. In this regard, I should emphasize that oral argument is essential in every difficult or doubtful case, but it adds unnecessary expense and delay to the system to drag attorneys to Richmond in cases whose outcome is not in doubt. We are in an age when judicial resources are not limitless, and appellate courts must set priorities in allocating those resources to cases whose complexity and importance to countless numbers of citizens require that judges have reflective, not just reactive, time. So when a case is scheduled for argument in the Fourth Circuit, it’s because argument really can make a difference, not because judges and lawyers wish to go through the motions. Challenging cases can be civil or criminal; they can involve commercial transactions or the scope of civil rights and liberties. Whatever their areas of expertise, attorneys will, I think, appreciate an appellate system that sets priorities without sacrificing the sense that every case matters immensely to those involved in it.

The Fourth Circuit tries to look at things from the attorneys’ and the litigants’ point of view. I know attorneys get tired of calls from clients wondering when, if ever, the court is going to hand down its decision. I also know how I feel when I am on the outside of a bureaucracy looking in. There is nothing more frustrating than to be a motorist dealing with the DMV, or a taxpayer dealing with the IRS, or a patient dealing with a doctor’s office or hospital, facing the runaround and the prospect of endless delay. So the Fourth

Circuit tries to be sensitive to the fact that many people do not wish to spend their lives in litigation, despite the fact that it is our stock in trade.

And in our search for customer satisfaction, the clerk's office, headed by Pat Connor, is of inestimable assistance. In fact, the Fourth Circuit has for years been the most efficient circuit in the country, as measured by the time between the filing of a notice of an appeal and the final resolution of a case. As to both courtesy and responsiveness, our staff in the clerk's office, the circuit executive's office, the library, and the office of staff counsel, deserve enormous credit. Those good folks come in contact with litigants far more often than the judges do, and the feedback we get as to their performance is extraordinarily favorable.

To date, I have not touched upon matters of legal substance. Where substance is involved, commentators routinely call ours a conservative court, and it is often not meant as a compliment. Well fair enough, but it is worth pondering in legal terms just what that label means. I would like to think it means we take the raw materials of law seriously. By that, I mean (1) that such things as statutory text and structure matter; (2) that such things as burdens of proof and standards of review make a big difference; and (3) that a sense of modesty and restraint should guide the judicial function.

A sense of respect for the representative branches of government, for the place of the states in our federal system, and for the efforts of our fellow citizens to do those jobs society has assigned them is essential in a judge. There is no excuse for judges to look down their Olympian noses at elected officials who do the difficult and essential work of democracy. It is appropriate also for federal judges to give fellow Americans a presumption of good sense and good faith. Most often, though not always, they are trying just as hard as we are to get it right.

It is this respect for the role of others in society that is paramount—each person has a hard-earned expertise and fund of experience that others lack. That's what makes a society tick. Judges were not cut out to be school superintendents or military commanders or corporate managers, and we ought not to try. Our mandate is limited to enforcing the law, and that is quite a different thing from possessing, much less flaunting, superior wisdom. So when someone calls me judge, it conveys to me not only what I am, but also what I am not.

There is a great temptation today to view the objective features of law as masks or facades, designed to disguise the fact that judges are bound and determined to reach some preferred result. Well, if people wish to view the process that skeptically, they have every right to do so. But it is not what I observe on the Fourth Circuit day after day. Every one of us comes to each case with a desire to apply the law to the best of our ability, and every one of us reaches results that we might prefer not to reach if we could have our druthers or if we were legislators empowered to voice our preferences as to policy.

It is an humbling thing really to bear the weight of the knowledge that society has entrusted the law to your care. And those of us on the Fourth Circuit treat the law not just respectfully but reverentially, as representing something

much larger than ourselves. This sense that law is something beyond the self is what we live with every day. It is law that accounts for the free and stable communities we have, and to trifle with such a treasure is quite beyond comprehension. So if being conservative means being part of a court of law, rather than a council of wise men and women, well then I gladly accept the designation.

Now there has been much talk about the vacancies on the Fourth Circuit. With five vacancies on our fifteen-member court, people of all persuasions are quick to say that change is on the way. To some, this may be a good and long-awaited development. For others, it may be cause for sadness and dismay. But whatever the perspective, people seem united in the belief that a transformation of some sort awaits us.

Well, perhaps. But my own view is a sunny one. I look forward to many more years of service. And I look at the coming years as a unique opportunity for our court. To be honest, I am often disappointed when I survey just how hostile and partisan American public life has become and how people seem more intent on inflicting punishment on opponents than on finding common ground. The terrorists of 9/11 made no distinction between Republicans and Democrats, or liberals and conservatives. So why should we overplay such distinctions among ourselves? This instinct of endless retribution is not one that our nation in this rapidly changing and increasingly dangerous world can afford.

So I wonder if the Fourth Circuit of the future will be part of the poisonous polarizing trend, or whether in some small but still meaningful way, we can set an example of dialogue and accommodation that serves the public and the profession and our region well. Judges in coming years will face matters of stunning complexity and life-or-death import. We will deal with a docket whose variety and volatility are almost unimaginable, and where any one subject, were it to be raised, would likely spoil the dinner party. And the question is how shall we deal with our differences. Some differences cannot in the end be bridged, but many can, and the question is whether we shall give it a try. I do not know the answer. I cannot say with assurance which way it will go. A court can divide into warring camps that resemble nothing so much as party caucuses, or we can act as judges with the law and the public good foremost in mind. We have the chance at least to do something really special on this court. Our heritage affords those of us on the Fourth Circuit the opportunity to make a small but distinctive gift of conciliation to a country that has seen too little of the same.

I have been a judge and professor and journalist for a good part of my life. Each of those professions enjoys a substantial measure of independence, whether by way of the First Amendment or life tenure. Each profession is also expected to remain somewhat aloof and detached from the partisan struggles and affiliations that define so much of our democratic life. We talk much of judicial detachment, and that detachment is good and necessary if we are to perform the indispensable tasks of protecting liberty and checking the excesses that inevitably attend the quest for affluence and power in any polity.

But it bears remembrance that we judges are in every sense members of that society whose leaders we hold accountable through law. Though we sit on an elevated bench, we are not above society. Though we wear black robes, we share the virtues and foibles of the plainest dressed citizens to the fullest degree. Even more than judges, we are Americans, and it is that simple fact that we need bear always in mind. That humility—that we are part of, not apart from, the whole of America—lies at the heart of judicial restraint. That belief—that no profession or calling has the sole window into wisdom—is essential to the application of the law.

The life my country has made possible for me, my family, my friends and fellow citizens is more than I can return in gratitude or hope to repay. But one way to return thanks is through a life of service. And service on this magnificent court—the Fourth Circuit Court of Appeals—has been beyond what I had ever hoped or truly deserved. I have never met a finer or more dedicated group of people than those who serve on this court. This court and these my colleagues have left me with an abiding faith in America and its institutions—a belief that there is an essential goodness to this country that will transcend the divisions of this moment and carry the day.