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*The Law Review respectfully dedicates this issue to Judge Malcolm Richard Wilkey on the occasion of his retirement from the United States Court of Appeals for the District of Columbia Circuit.*

## Remarks Made at the Farewell Reception to Judge Wilkey, March 15, 1985

*Warren E. Burger\**

Malcolm Wilkey and I have been friends and colleagues for longer than either one of us wants to mention. I will confess he was the United States attorney in Houston when we first got acquainted. And then, to jump to a much later period, he moved to occupy my seat on the United States Court of Appeals for the District of Columbia Circuit. And that depresses me a little bit, because it was said at the time, when he came to the Court of Appeals and I moved to my present position, that improved the quality of both places. Parenthetically, since only one of my colleagues is here tonight, I dared mention that, and no dissents will be allowed.

Our honoree has had a really great career in public service, beginning down in Houston after he had been in private practice, then as United States attorney, then assistant attorney general in two different assignments, the Criminal Division and the Office of Legal Counsel, then off in the private sector. When he tired of making filthy lucre, he returned to public service on the United States Court of Appeals. I have now concluded, having found out about his new program, that he's wiser than I ever thought he was (and I always thought he was very wise), for on his own he has taken a sabbatical. I'm not sure how long it will last. But as you know, he is going to the source of the common

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\* Chief Justice, United States Supreme Court. On November 8, 1985, Chief Justice Burger swore Judge Wilkey in as United States Ambassador to Uruguay in the East Conference Room of the Supreme Court Building. This was the fourth time the Chief Justice had sworn Judge Wilkey in to a government post. Previously, the Chief Justice had sworn Judge Wilkey in as assistant attorney general of the Office of Legal Counsel, as a member of the bar of the District of Columbia Circuit, and as a judge on the United States Court of Appeals for the District of Columbia Circuit.

law for about a year at Cambridge, England, and then, if that hasn't spoiled Malcolm for judicial work, he will return and go back sitting as a Senior Circuit Judge. I hope, Malcolm, you will not confine your service to the Fifth Circuit. I hope you will be available for assignments in other places. I assure you that, for my part, it is a personal pleasure to participate in this kind of a tribute to an old friend and a very fine and able colleague.

*Spottswood W. Robinson, III\**

Memory takes me back almost fifteen years to when Malcolm was about to take his seat on the court. As you can imagine, there was at that time the usual buzzing and a good deal of speculation as to just what kind of judge he would turn out to be. But we peeked at his track record and it looked promising. He had graduated from the Harvard Law School. He had been a United States Attorney and an Assistant United States Attorney General. He had engaged in the private practice of law, and at the moment previous to his ascension to the bench he was General Counsel for one of the larger corporations in the country. So we all thought the prognosis was very bright.

It took relatively little of the ensuing fifteen years for us to realize that our expectation was indeed a reality. Malcolm was a fine judge from the very beginning. He worked very hard like the rest of us. He was always prepared. I remember Malcolm, time and again when we sat together on the bench, with his briefs all marked up with a colored pencil and spread out before him, posing his always penetrating questions to counsel arguing the case.

What those of you who may sometimes have been in the courtroom did not see, however, was the aftermath in the conference room. Malcolm was firm in his positions and he advocated them strongly, but he always exhibited what I think is one of the finest qualities a judge can have. No matter how fiercely he may have argued a point, if you could convince him that another result was correct, he would change his mind and join in it. I do not need to tell you about his opinions because you already know about his keen analysis and his painstaking explanation of legal propositions. I always gave Malcolm very high marks for those elaborate, thorough, and voluminous footnotes he put in.

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\* Chief Judge, United States Court of Appeals for the District of Columbia Circuit.

Well, over these fifteen years, that is the way it was. He made many, many well-known contributions to the work of the court. But there is also another side to his membership on the court that perhaps you do not know about. A good deal of administration has to go into the operations of the court in order to keep it as up-to-date and efficient as possible. Over all the years Malcolm has been with us, he has accepted, without any protest, assignment on most of our important committees of judges. He has been innovative. He has from time to time made valuable suggestions to the court, which we have adopted in our effort to meet the demands of this age.

It just so happens that as Malcolm reaches the zenith of his career on the court he decides to take a brief respite. I know that I speak for my colleagues on the court when I say to you that he will be sorely missed. His contributions, I have said, are many. The mark he leaves on the court is both indelible and profound.

Malcolm's tenure on the court coincided with a period of very remarkable change. In 1970, when he came to us, our court had jurisdiction of a mix of District of Columbia and federal cases. Today, as you know, with one minor exception, we are an entirely federal tribunal. Additionally, the court has grown; our complement of judges was nine when Malcolm arrived but is twelve today.

Our caseload also has changed. Malcolm remembers as well as I do how it was when we sat in those early days. Ordinarily, we would have calendared for argument one criminal case, one civil appeal, and one agency case. But those days have long since disappeared. Every time we ascend the bench now there will be four cases, and it is likely that three or all four will be administrative agency cases. Today, as the members of the bar present well know, about seventy-five percent of the effort of the court goes into cases in that area, and any lawyer who has ever been in our courtroom will tell you that they are the most difficult type of case in which one can become involved. But Malcolm responded tremendously to all of this, and thus far we have survived.

What about the future? I remember the day Malcolm walked into my office and told me about his plans. Frankly, I was concerned for a long time that perhaps Malcolm might not come back, but then I began to recall that we had worked very closely together on the court and to realize just what that meant.

You do not brush aside friendships of that nature—friendships that have endured for fifteen years. I thought, too, about the high tradition in the federal judiciary to continue to contribute as long as you can. So it was not surprising to me that Malcolm said, as the Chief Justice announced earlier tonight, that indeed he will be back.

As we approach the eve of his departure for his excursion into academia, we look forward to the day he returns. I would rather think of this event, Malcolm, not as an adjournment of the case, but as only a brief recess. To change the metaphor, we do not ring down the curtain on his judicial career; all we will do is take an intermission. He has many useful years ahead of him. Don't let the gray hair mislead you; he is still young. He is younger than I am, so I can assure you that he is not old. We will be waiting for the day he comes home, and we hope he will find it possible to share some of his time with the District of Columbia Circuit. His place on the court will always be there.

### *Rex E. Lee\**

One of my favorite pastimes is to reflect back on the circumstances under which I first met the famous people that I know. All three of them. One of the famous people that I know is Malcolm Wilkey, and it just so happens that the other two are also here this evening. I first met Malcolm through some of the pages of volume 487 of the 2nd series of the *Federal Reporter*.<sup>1</sup> It happened about nine years ago as I was preparing for oral argument in what I still consider to be the most important case that came out of the Civil Division, probably in history, but certainly during the two years of the [Edward] Levi Administration [at the United States Department of Justice]. It was pending before the United States Court of Appeals for the District of Columbia Circuit, and the name of the case was *United States v. AT&T*.<sup>2</sup>

As is customary with most lawyers preparing for oral argument, I read a lot of opinions. But one of them stood out. It was

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\* George Sutherland Professor of Law, Brigham Young University, and Partner, Sidley & Austin, Washington, D.C. Professor Lee was Solicitor General of the United States at the time these remarks were given.

1. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

2. *United States v. American Tel. & Tel. Co.*, 551 F.2d 384 (D.C. Cir. 1976).

a dissent by Judge Wilkey, and as I read the words of that dissent I concluded that though I had never met the author, he and I saw many things out of the same eyes. I also concluded that here was a guy I wanted to meet.

Malcolm Wilkey is a man for whom both principles and people are important, and he has contributed much to each of them. Let me review first some of his contributions to legal principles. Now I'll tell you that the surest test of a principled judge is the extent to which he agrees with the positions that I have taken as a lawyer on behalf of my clients. And measured by that standard, Malcolm Wilkey ranks very high indeed. (Parenthetically, if any of the rest of you judges who are here this evening are interested in what your grade is, I'll be glad to tell you.) Malcolm's contribution to American jurisprudence in *Nixon v. Sirica*, which was so helpful to us in *United States v. AT&T*, was only the beginning in that respect. (Incidentally, we won the *AT&T* case before a very interesting panel. It consisted of the late Harold Leventhal, Spottwood Robinson, and Malcolm Wilkey.)

Beyond separation of powers and judicial deference to presidential decisions, there are other instances in which Malcolm Wilkey's opinions have furthered my career. And beyond my role as an advocate in particular cases, I saw from the fruit of his pen one with whom I rather consistently agreed. His exhaustive opinion, for example, in the *FERC* case<sup>3</sup> was one of the principal authorities on which we later relied in the *Chadha* case.<sup>4</sup> And over the past two terms we have relied frequently on his writings concerning the exclusionary rule in cases like *Illinois v. Gates*,<sup>5</sup> *Leon v. United States*,<sup>6</sup> and others.

Incidentally, I referred to his scholarly opinion in the *FERC* case as being "exhaustive". That's almost an understatement. I understand that I am not Judge Wilkey's only admirer. Both the West Publishing Company and the manufacturers of commercial ink are also great fans of brother Malcolm.

As important as Malcolm's contributions to legal principles

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3. *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983).

4. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (declaring the legislative veto unconstitutional).

5. 462 U.S. 213 (1983) (abandoning *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969)).

6. 105 S. Ct. 52 (1984) (finding good faith exception to fourth amendment exclusionary rule).

have been, what he has done for *people*, in addition to providing them with sound law, is probably even more important. Over the past four or five years, Janet and I have grown to know and admire Malcolm and Emma, through their involvement with BYU Law School, and also through their charitable work. The "charitable work" to which I refer consists of their periodic efforts over the last four years to provide adequate food and entertainment for a deserving solicitor general and his beautiful but impoverished wife.

Similarly, I've been asked a couple of times whether Malcolm and Emma have any children. My response on those occasions has been that they have. I have gone on to explain that the number of their children exceeds the combined output of Maureen and [Judge Antonin] Nino Scalia [of the United States Court of Appeals for the District of Columbia Circuit] and Janet and Rex Lee.<sup>7</sup> Now that is an attention-getter. But it's also not very far from the truth. As anyone who has opened his eyes to what has been happening here this evening can immediately detect, the relationship that my friend Malcolm and, in her own special way, Emma have developed and maintained with his law clerks approaches the love, concern, and devotion that exists between many parents and their children. There is nothing feigned about it. It is real.

Malcolm is one who genuinely cares about people, about their aspirations, their problems, their fears, and their thoughts. Fortunately for all of us here this evening, he does not limit the expenditure of those precious resources to those who have served as his law clerks, but extends them generally to *all* of his friends. And as one who feels lucky to count himself among that select group, I express appreciation on behalf of all of us. I offer our best wishes to Malcolm and Emma as they enter this next and most important phase of their lives.

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7. Editor's Note: Together, the Scalia and Lee families boast 16 children.

*Carl L. Shipley\**

I'm glad to be here. I called Harold Koh this afternoon, after I got back to town, and said, "Harold, what's on the agenda tonight? What's the program?" He said, "Well, Chief Justice Burger's going to give us the heavy stuff and Chief Judge Robinson will pile on the encomia and Solicitor General Lee will probably lay out some pretty deep thinking material. So why don't you give us the other Wilkey? A little bit about him." And then Harold asks, "Well, is there another Wilkey?" And he says, "If there is, I'd like to hear about it. I understand that you and he have been friends since Harvard Law School—twice as long as I've been alive, more or less. As Lyndon Johnson would put it, 'Give it to us with the bark off.'"

Well, as I was listening to my predecessor speakers, I was interested in Chief Justice Burger's allusions to the commencement of Malcolm's career somewhere around the time he was United States attorney. But I'd like to clue all of you in—it really didn't start there. Indeed, Malcolm's early life didn't suggest that he would ever do anything in the law, much less in the judiciary. I bet few of you know that Malcolm was once a used car salesman in a small coal town in Kentucky. And notwithstanding the solicitor general's references to one of those *Nixon v. Somebody* cases, I guess I don't know whether Malcolm had ads or circulars out saying, "Would you buy a used car from this man?" But frankly Malcolm didn't do too well in the used car business. So he gave up that career and went to Harvard College. He got very high marks, which caused people to think that he would go into an academic career, but then he had *another* career change. Malcolm joined the army, became a lieutenant colonel, lived the soft life on a couple of generals' staffs, then something happened, and he wound up in the Ardennes Forest. It wasn't too long after that that he gave up *that* career. He came back to Harvard Law School where he did very well and raised a lot of people's hopes, and where I first knew him.

Other law school classmates went off to the great frontiers in New York to work in the big Wall Street law firms. But not Malcolm. Instead, he barged off to Houston, Texas, with a law firm led by Jack Binion and some others, and he stayed there for a number of years. Along the way, he made his first connection

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\* Partner, Shipley, Smoak, Henry & Holdgreiwe, Washington, D.C.



with federal service as the special assistant to the attorney general, where he handled draft-dodger cases or something like that. Then he changed from that career, left private practice, became an assistant United States attorney, abandoned *that* career, and became United States attorney in Houston. Malcolm then came to Washington for *another* career change as assistant attorney general in charge of the Criminal Division. Not long after, there was yet another career change to assistant attorney general, Office of Legal Counsel. And after awhile there, another career change—to New York with Kennecott Copper where he spent a number of years. And finally he came to the United States Court of Appeals for the District of Columbia Circuit.

So here we are now having yet another party to celebrate another career change. Malcolm's going to be a lecturer at Cambridge University to try to drum his wise thoughts into the heads of British youth. So I think you can see the pattern. The fellow is just an inveterate job jumper. As a matter of fact, I don't think the fellow can hold a job.

But I'm not going to knock Malcolm. I've been asked to say something about how the private bar views Judge Wilkey. And that reminds me of a story. A couple of the local lawyers one day were saying, "You know, there's a great mystery about this Judge Wilkey. This guy writes these long opinions, like those Solicitor General Lee and Judge Robinson referred to, many of them full of footnotes. But then he writes some real short ones. They don't have much to say." And my lawyer friends said, "They're all carefully thought out, very carefully structured, superb opinions, but what do you suppose is going on in his head that causes some of his opinions to be short, some to be long, some to be thin, and some to be thick?"

Well, let me let you in on a secret. There is another Wilkey, Malcolm's wife Emma, bless her heart. And now and then she goes to visit her mother down in Argentina. When she's gone for several weeks, it's a long trek, so she stuffs the refrigerator with frozen foods and puts in the raw materials to concoct meals. And then she takes Malcolm and says, "Malcolm, let me explain. These white things are 'eggs.' You knock them on the edge of the table and you put them in this thing called a 'pan.' And these things are 'bacon,' and the other ones are 'bread.' And you turn on this device we call a 'stove' this way."

Well, she leaves town and the frozen foods go and then Malcolm begins to get thin. And he starts to get a haunted look. So

this explains the phenomenon those lawyers were talking about. The fact is, nobody can write long opinions on an empty stomach. So the other side of the picture is that this fellow Wilkey, for all his accomplishments, just can't learn to cook.

Now a couple of lawyers were talking the other day about Malcolm's being so thoughtful. And you know, he does give this impression that he's thinking very deeply. When you read his opinions, they are very carefully structured and full of all kinds of deep thinking and careful weighing of the "to-wits" and the "whereases" and the "fine-tuned balance between private interests and public interests" and so on. And this one fellow says to the other, "You know, Judge Wilkey reminds me a lot of Jack Benny." For the younger law clerks of Malcolm's who don't remember, Jack Benny used to do great skits on his radio show. And one of his skits involved a robber who comes up to Jack, puts a gun in his ear and says, "Your money or your life." And Benny says nothing. The robber says, "Didn't you hear me? I'm a robber. I'm liable to shoot you. So, gimme your money! It's your money or your life! Why don't you say something?" And Benny says, "I'm thinking." And that's exactly how it is with Malcolm—when he looks mysterious, he's really just thinking.

And that reminds me of another story. One day a couple of lawyers were arguing a case down in Malcolm's court. Malcolm was on the bench with his colleagues. I don't remember whether Chief Judge Robinson was in this case or not. But one of the lawyers was a great admirer of Judge Wilkey and the other one wasn't. And the one who wasn't had written a very meticulous brief, just like Judge Wilkey's opinion, full of footnotes, full of italics. And he was making what he thought was a dazzling argument and getting along pretty well, when he looked up at one point and leaned over to his colleague and says, "By God, I think Judge Wilkey's fallen asleep!" And the other one, equally outraged, says, "He's not asleep. He's just thinking with his eyes shut!"

So for all of you members of the private bar, that's the other side of Judge Wilkey. You've heard all the good things about him. The fact is, over the years he's been a wonderful friend. Seriously, Malcolm, I'd like to join all of your admirers and say that my wife Nancy and I, your long-time friends, are unabashedly in awe of all the great things you've done. We congratulate you on your retirement from active service. We know

you'll make a great contribution to Cambridge. And we wish you and Emma the happiest times in the years to come.

*Malcolm Richard Wilkey*

Without any protocol, I shall simply address you as friends—and what friends! I am absolutely stunned by your tributes here tonight, particularly stunned by these totally unexpected and tremendously imaginative gifts. I never dreamed of being honored by having an issue of a law review of a great law school like Brigham Young University dedicated to my feeble works over my public career. That so many wonderful and distinguished friends would contribute their efforts to making such an honor possible is a very touching thing for Emma and me indeed. I might have thought about a gift of the picture of our court, but I never would have anticipated that the picture of the court would be flanked by headlines from the cases in which I have participated over the past fifteen years. I can recognize them all, and to see the work of our court—my colleagues who are pictured there—reflected in this way is a tremendous remembrance which we will treasure for all time.

I am equally at a loss for words in regard to the comments I have heard about myself as I am about the gifts. After hearing these remarks about someone I remotely recognize as myself, it does seem it must be an obituary. So I feel a bit like Tom Sawyer and Huck Finn, who crept into the balcony of the church to hear their funeral preached after everyone believed them drowned in the Mississippi.

But after pinching myself I find I'm still alive, so what I'm tempted to do is emulate that great old Spanish bullfighter, El Gallo, Hemingway's friend. You recall that after that wonderful summer in Spain in the early 1920's, Hemingway gave us *The Sun Also Rises* and *Death in the Afternoon*, in which he describes El Gallo's retirement. After the first series of tremendous ovations in every city in Spain and the triumphal marches around each bullring to the blaring rhythm of the paso doble, all heralding the retirement and "final season" of El Gallo, the Old Gypsy enjoyed it so much he returned next season and "retired" again. All in all, El Gallo fought *four* "final seasons" and said goodbye to the plaudits of his friends four times. It was great

fun for El Gallo, this party has been tremendous fun for us, so you may see us again.

Many of you have asked what we are planning to do in this life after the judgeship. Our plans for the next year are well set, and after that there are so many choices and alternative paths that at the moment we would not know for certain which and where. As the years on the bench rolled on, it became clear that one of the better features was the option to step aside and do what one felt like doing when the magic day arrived.

I am not sure that the gratitude of republics is to be preferred to the gratitude of princes—Machiavelli thought by a narrow margin it was—but in this respect our republic seems to have done it right—at least that is my perspective after twenty-seven years of public service.

Of course, there have been some offers to return to the private sector. At the moment I would be torn between an Amway distributorship and going back into the used car business, to which my friend Carl Shipley referred. Lucrative as these offers might be, we shall probably wind up doing something different.

One thing I shall feel freer to do is to speak out on some much-needed reforms in government. I have never believed that a nonelected judiciary was ever created to make policy in an elective democracy. As an active judge, I have always felt a reluctance, either on or off the bench, to propose such obviously sensible measures as a court-martial jurisdiction for the civil service. Just think of it! It would take only one firing squad to alter the whole quality of performance by your public servants! The GSA would have found it possible to make the elevators in our courthouse work these past fifteen years.

To organize this gathering here tonight has obviously meant a tremendous amount of effort on the part of many of our friends. Emma and I are profoundly grateful to Carrie, who I know has carried the administrative workload on this as she has on so many things for the past fifteen years; we're grateful to the law clerks such as Al Lauber, Harold Koh, Roger Clegg, David Johnson, Mike Mosman, Steve Marzen and Phil Kinkaid, and a few of our friends such as Cari Matthews who have been principally responsible for putting this lovely affair together, and to the Chief Justice who "gave the invocation" and who actually invited us all here. We shall always remember, with the greatest affection, you wonderful friends who honored us tonight by your presence.

