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A photograph in the foyer of the Office of Legal Counsel of the Department of Justice shows an intense, alert thirty-nine-year-old man alone on the telephone in a motel room in Little Rock, Arkansas. A *New York Times* report features the same photograph and leads with an understated paragraph describing the man and the emotions depicted in the picture: "Malcolm Richard Wilkey, a Southern attorney with a hankering for perfection, faces perhaps his most trying moments this week."[1]

That photograph freezes an instant in one of those thankfully rare but excruciating passages in history when time slows down and normal activity is suspended as we await the outcome of events that will indelibly affect the future. We can see on the face in the photograph the drama of the testing of a nation and its people. It is a picture of tension and awsome responsibility. Assistant Attorney General Wilkey had been sent by President Eisenhower and Attorney General William P. Rogers to head the national government's response to a governor determined to close the public schools rather than accept desegregation. On another level, it is a picture of a nation at a turning point. Malcolm Wilkey's handling of this crisis would help determine whether the United States would move forward to eliminate a sad, painful, and ignoble chapter in its history, or slip back, perhaps irretrievably, into the tragic cycle of racial strife, inequality, and unfulfilled promises.

The school board of Little Rock, Arkansas had sought more time to desegregate its schools. A unamimous Supreme Court firmly rejected further delay. Governor Orval Faubus reacted by closing the schools. "I feel I am right in what I have done and the people support me . . . . I don't think there is any law

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1. N.Y. Times, Sept. 15, 1958, at 13, col. 2.

under which the Federal Government can stop me."[2] The diffuse attention of the nation resolved into focus on Little Rock when the president decided to confront the defiance that carried a threat to the Constitution as real, if not as violent, as the guns at Fort Sumter ninety-seven years earlier.

We know, of course, that the crisis was resolved peaceably and lawfully. The fight against racial injustice did not end, but a memorable step was taken and a potential disaster averted. The schools were reopened to all citizens, and neither the nation nor the South would ever be the same. Those old enough to remember the frightening spectacle of local police arrayed against federal marshals and a governor standing between small children and a public school will never forget the emotions we experienced then.

I did not meet Malcolm Wilkey until nearly twenty-three years later when I was appointed to the position he held during those tumultuous September days in Little Rock in 1958. Now that I know him, I can begin to understand how he was able to handle such an explosive situation with such poise, aplomb, and self-effacing confidence. Nonetheless, I remain awed by the task he faced then. We should be grateful that it was Malcolm Wilkey rather than someone else who was sent to Little Rock in September of 1958. Someone lesser might have been unable to avoid either violence or an act of provocation that would have made impossible the Constitution's peaceful victory over defiance. In either case the consequences would surely have been a national tragedy.

The assistant attorney general for the Office of Legal Counsel (OLC), in addition to performing such extraordinary functions as at Little Rock, more often acts as the attorney general's legal alter ego. He drafts the attorney general's legal opinions, approves executive orders before their submission to the president, formulates the executive branch's position on constitutional and other complex legal issues, resolves interagency legal disputes, and otherwise helps the attorney general discharge his responsibilities as the nation's principal legal adviser. The position has been held by such notables as Supreme Court Justice William H. Rehnquist; Antonin Scalia, Judge Wilkey's former colleague on the United States Court of Appeals for the District of Columbia Circuit; former Attorney General and now IBM

2. N.Y. Times, Sept. 14, 1958, at 56, col. 2.

General Counsel Nicholas deB. Katzenbach; Cornell Law School Dean Roger Cramton; and former Solicitor General J. Lee Rankin. Malcolm Wilkey held the job during a remarkably eventful year before being persuaded by the attorney general to head up the Justice Department's Criminal Division.

The job description of the assistant attorney general for OLC fails to capture the qualities the holder of that office is expected to bring to the assignment. While most other government officials have substantive programmatic responsibilities, the chief responsibility of the head of OLC is the preservation of the Constitution and the rule of law within an administration. Under frequently severe and diverse political pressures, that person must insist on clear and unwavering commitment to legal requirements, however inconvenient they may be in a particular case. If a popular but legally questionable course must be resisted because of legal standards, the head of OLC is sometimes the first, and almost always the last, line of resistance. The assistant attorney general for OLC is, more often than not, cast in the role of judge rather than advocate, with only the force of persuasion behind his decisions and no life tenure to protect him from the pressures which attend to decision making in the crucible of Washington politics. Even when the head of OLC comes closest to being the advocate—when the presidency and the powers of the executive branch must be defended—the president or his subordinates may be so anxious to accomplish a major political or policy objective that they overlook technical legal impediments. Often the head of OLC is a solitary voice when everyone around him, including those for whom he works, have powerful reasons for overriding or ignoring his judgment. It is a telling commentary on the job that the assistant attorney general for OLC is often referred to as the legal conscience of the executive branch.

Malcolm Wilkey might have been the quintessential assistant attorney general for OLC. One colleague described him as having "a mind like a steel trap," and as a "perfectionist, in the better sense of the term."[3] Malcolm Wilkey described his commitment to perfection as follows: "Nobody reaches it, but that's the only standard. Nobody is expected to reach it, but we try."[4]

OLC has survived as an institution not only because its

3. N.Y. Times, Sept. 15, 1958, at 13, col. 2.

4. N.Y. Times, Sept. 15, 1958, at 13, col. 3.

head and staff do an excellent job of dealing with the routine grist of the executive branch's legal mill. There is that grist, as a trip through OLC files for 1958 (or any other year) will attest. Rather, OLC survives because there comes a time in any administration when the needs for first-rate lawyering and the courage of the lawyers' convictions become so great that advocacy must take a back seat to the rule of law. Malcolm Wilkey's year in the OLC was no exception. Indeed, it reminds us that the most significant legal issues of our time—issues of fundamental legal equality among our citizens, and the issues regarding relationships between the branches of the federal government and between that government and the states—constantly surface and resurface, and each time they do, they demand the best of people like Malcolm Wilkey.

Within a month of Malcolm Wilkey's February 1958 confirmation by the Senate, his boss, Attorney General William P. Rogers, testified unequivocally against bills introduced in Congress to strip the Supreme Court of jurisdiction over broad classes of cases, including cases involving individual constitutional rights. Apparently not satisfied with standing in the way of this particular congressional train on its decennial run through Washington, the attorney general that same month presented an equally unequivocal defense of the executive's constitutional power to withhold from congressional committees testimony and deliberative documents generated by executive branch officials. As so often is the case, this defense of executive privilege came at the very time when assertion of the principle was made infinitely more difficult by the existence of a scandal involving a high government official and a congressional inquiry into that official's conduct. The result was advocacy of the executive position and a firm statement that the privilege would not be asserted to conceal wrongdoing by government officials. OLC files put Malcolm Wilkey's fingerprints on both of these major confrontations.

To top off a typical month, Malcolm Wilkey and the attorney general also tackled the thorny issue of presidential disability. They prepared a plan to deal with that problem because Congress would not act on a constitutional amendment on the subject that had been requested by President Eisenhower. As is so often the case, the plan was attacked by members of Congress and a former president as being illegal. The ultimate goal of OLC in this and other complex matters is to utilize the constitu-

tional machinery available in a sensible manner to achieve the desired goal.

Perhaps Malcolm Wilkey's fondest memory is of the long hours spent bringing the territory of Alaska to statehood. On the other hand, maybe there are no specific problems he solved that would stand out today from the many others because his time in OLC was a continuous round of challenges, each one met and overcome. One such challenge was the constant threat of legislative incursions on the powers of the presidency. How fitting then that twenty-five years later he wrote the opinion of the United States Court of Appeals for the District of Columbia Circuit in a legislative veto case that sounded the death knell for more than two hundred statutory provisions that compromised those powers.[5] During Judge Wilkey's tenure, OLC was a staunch opponent of the legislative veto. This was part of his legacy, which was very much alive when I started at OLC. It lives on, and is unlikely to fade in our lifetimes.

5. 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).