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IN TRIBUTE: JUDGE J. HARVIE WILKINSON III

On the occasion of Judge J. Harvie Wilkinson's fortieth year on the bench, these Essays honor his contributions to the U.S. Court of Appeals for the Fourth Circuit, to American law, and to the lives of his clerks and colleagues.

FOREWORD

ESSAYS

VIRGINIA LAW REVIEW ONLINE

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FOREWORD

JAY WILKINSON AS TEACHER

*John C. Jeffries, Jr.**

Before he became editor of the *Norfolk Virginian-Pilot*, and before he served as Deputy Assistant Attorney General of the United States, and before he was appointed to the United States Court of Appeals for the Fourth Circuit, and before he became a late-blooming romance novelist, Jay Wilkinson was a teacher—and a good one. On a faculty that took pride in its teaching, Jay stood out. Students once rated their teachers on the same scale as their own grades, which were then publicly posted. Jay got an A+. You couldn't do any better.

Popular teachers are often showmen. Jay was no slouch, as in the Criminal Procedure class when he taught *Miranda v. Arizona*. Jay began to complain of the heat in the classroom and, to the growing consternation of the students, took off his jacket, then tie, then shirt, to reveal the "famous cases" tee shirt of *Miranda*, which encapsulated the Supreme Court's advice for custodial interrogation: (1) call a lawyer; (2) STFU. The class roared.

Showmanship, however, was not Jay's long suit. His real gifts were gifts of substance, not display. He was consistently open-minded and respectful of student views, even on topics where he held firm opinions. Students who took Jay's seminar on equal protection debated the explosive topic of affirmative action, but learned only years later, when

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he published *From Brown to Bakke*,[1] that he himself had strong views on the matter. So meticulously did Jay guard against overbearing that students often could not discern his position and never felt pressured to agree. Not many of today's teachers achieve that dispassionate inclusiveness in the classroom. Too few even try.

Jay's greatest strength was enthusiasm—enthusiasm for the subject and for his students. He saw teaching not as a task to be discharged but as an opportunity to be enjoyed. He showed his students that he *liked* learning about law and that they could too. He stirred their imaginations and drew everyone in, not just the best students or those already committed to the field but *all* those who sat in his classroom. He was inclusive personally as well as intellectually, and his students returned that affection.

Over the many stages of Jay's long career, he has exhibited prodigious abilities and talents. Yet those early years in the classroom may show Jay as his truest self. What those years reveal is not so much intelligence or intellect—though he had those in abundance—as character. And that has not changed. The modesty, civility, empathy, and respect that Jay showed law students in the 1970s remain today, as always, hallmarks of the man.

[1] J. Harvie Wilkinson III, From *Brown* to *Bakke*: The Supreme Court and School Integration: 1954–1978 (1979).

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ESSAY

JUDGE WILKINSON'S FIRST AMENDMENT: SAFEGUARDING THE DEMOCRATIC PROCESS

*Dan Richardson & Leslie Kendrick**

INTRODUCTION

It is hard to imagine an area of constitutional law that has changed more in Judge Wilkinson's time on the bench than the First Amendment. When Judge Wilkinson joined the U.S. Court of Appeals for the Fourth Circuit in August 1984, the Supreme Court was years away from deciding the signature campaign finance decisions, such as *Citizens United v. Federal Election Commission* and *McCutcheon v. Federal Election Commission*, that are now so important to the political process.[1] Concepts now central to First Amendment law, such as content discrimination and the public

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Dean and Arnold H. Leon Professor of Law, University of Virginia School of Law. Law Clerk to the Honorable J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit, 2006–2007. We are grateful to Caroline Morris for her excellent research assistance and to Cameron Beach for her insightful edits.

[1] See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity"); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 227 (2014) (holding that aggregate limits on campaign contributions are unconstitutional).

forum doctrine, were still in their infancy.[2] And no one could foresee the Internet Age or the difficulties of applying the First Amendment's protections to new media.[3]

The ensuing decades have brought considerable change. In some areas—such as political speech and religious exercise—the First Amendment may now have more teeth than it did at any point in our Nation's history.[4] In others, such as the protections afforded to public employees while on the job, the law has moved in the other direction.[5] Whatever the direction, on innumerable fronts, First Amendment doctrine has evolved considerably over the last forty years.

Judge Wilkinson has left an indelible mark on that legal evolution. By our count, Judge Wilkinson has authored more than sixty decisions addressing the First Amendment.[6] More than anything else, those opinions demonstrate the rigor and ability of the judge who wrote them: they carefully parse the Supreme Court's guidance (no easy task in First Amendment law), apply it to complicated and nuanced facts, and explain the panel's reasoning in a way that is both illuminating and instructive. But Judge Wilkinson's opinions also serve as a window through which to examine the shift in First Amendment jurisprudence.

In many respects, the decisions authored by Judge Wilkinson across the last four decades previewed the more robust First Amendment doctrine that was to come. His decisions are often skeptical of the government's asserted interests in regulating private speech, particularly

[2] See, e.g., Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983).

[3] See, e.g., Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046–47 (2021) (articulating a three-factor test for identifying off-campus speech in case involving student speech on a social media platform).

[4] See generally Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (suspending employee for leading students in prayer on football field violated employee's right to free exercise of religion); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (requiring shop owner to sell wedding cakes to same-sex couples violated the Free Exercise Clause); *Citizens United*, 558 U.S. 310 (invalidating restrictions on corporate political expenditures); *McCutcheon*, 572 U.S. 185 (invalidating aggregate limits on political contributions).

[5] See Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[6] His opinions have spanned various areas of First Amendment doctrine. See generally Columbia Union Coll. v. Oliver, 254 F.3d 496 (4th Cir. 2001) (public funding to religious schools); Nat'l Fed'n of the Blind v. Fed. Trade Comm'n, 420 F.3d 331 (4th Cir. 2005) (regulation of telemarketing practices); Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016) (rights of public employees).

when those regulations are aimed at core political expression. At the same time, however, Judge Wilkinson's jurisprudence also reflects a distinct understanding of the First Amendment. Rather than viewing each First Amendment question solely as the product of a doctrinal test or historical inquiry, Judge Wilkinson consistently approaches these cases with an eye toward the role of the First Amendment in a democratic society. Accordingly, his decisions are mindful of the ways in which the First Amendment can both empower the democratic process by safeguarding the expression of unpopular views and frustrate that process by invalidating democratically enacted laws.[7]

These two features—skepticism of government regulation and emphasis on the democratic process—define Judge Wilkinson's approach to the First Amendment. And by examining his jurisprudence with both features in mind, it is possible to understand where First Amendment doctrine has come and where it may be going.

Given the breadth of Judge Wilkinson's First Amendment decisions, there are dozens of areas that could be examined at length. This Essay focuses on three: the rights of journalists, campaign finance regulation, and free association and the political process.

I. THE RIGHTS OF JOURNALISTS

Journalists occupy a strange place in our constitutional system. The Press Clause of the First Amendment suggests that the press enjoys special constitutional protections,[8] but the Supreme Court has struggled over the years to articulate exactly what those are. Indeed, a great deal of Supreme Court doctrine overlooks the Press Clause in favor of the Speech Clause and treats the press like any other speaker. At the same time, a free press is vital to the democratic process, and the press faces some challenges different from those typically encountered by other speakers.

To navigate this conundrum, courts have developed a body of law that strikes a balance. On the one hand, reporters do not enjoy an absolute

[7] See, e.g., Lund v. Rowan County, 863 F.3d 268, 281–82 (4th Cir. 2017) (en banc); see also *Nat'l Fed'n of the Blind*, 420 F.3d at 340 ("In short, the judicial branch and the democratic branches of our government are hardly compelled to work at cross-purposes. And the democratic process is not compelled to leave families prey to unwanted solicitations and hang-ups at all hours and against their wishes.").

[8] U.S. Const. amend. I.

privilege from testifying in court,[9] nor do courts employ special standards when analyzing regulations that target their speech.[10] On the other hand, courts have consistently recognized that attempts to "disrupt a reporter's relationship with his news sources" would run afoul of the First Amendment and are often skeptical of "prior restraints" on speech that would limit journalists' ability to report the news.[11] Unsurprisingly, this framework has been difficult to apply, and has divided many courts (including the Fourth Circuit).[12]

Judge Wilkinson has authored three opinions that involve the First Amendment rights of journalists. Those decisions demonstrate two key features of his First Amendment jurisprudence: a willingness to hold the government's feet to the fire when the freedom of speech is at stake, and an understanding of the First Amendment that is firmly rooted in the democratic process.

In the first case, *In re Shain*, the Fourth Circuit affirmed a district court order holding four journalists in contempt for refusing to testify in the criminal prosecution of a South Carolina legislator.[13] To the majority, the case concerned only an "incidental burden on the freedom of the press" because the reporters had not shown that they were the targets of government harassment.[14] Judge Wilkinson concurred only in the judgment, objecting to the majority's suggestion "that the interest of the newsgatherer amounts to no more than an interest in remaining free from state harassment."[15] He expressly grounded his opinion in the unique role that journalists play in American political discourse, and particularly their rseponsibility for unearthing acts of misconduct that may ultimately result in criminal prosecution:

> In an attempt to achieve vindication or to turn public opinion in their favor, those suspected of wrongdoing will often seek to get out their side of the story through the media. Denials of misconduct, honest and otherwise, will be commonplace. In routinely reporting such denials,

[9] See Christina Koningisor & Lyrissa Lidsky, First Amendment Disequilibrium, 110 Va. L. Rev. 1, 4 (2024).

[10] See Sonja R. West, Awakening the Press Clause, 58 UCLA L. Rev. 1025, 1028 (2011).

[11] See Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[12] See, e.g., United States v. Sterling, 724 F.3d 482, 487–88 (4th Cir. 2013).

[13] 978 F.2d 850, 851 (4th Cir. 1992).

[14] Id. at 852.

[15] Id. at 854 (Wilkinson, J., concurring).

> the press acts in its own way to protect the presumption of innocence. Now, however, every reporter who reports a putative defendant's false exculpatory statement is a potential witness at trial. . . . I am troubled by any rule which says that a reporter's exclusive "scoop" of a public figure's version of events makes that same reporter uniquely vulnerable to a government subpoena. The values served by an independent press will be diminished if reporters covering a case are routinely dragged into its midst.[16]

To Judge Wilkinson, an effective prosecution in one case may come at the expense of future prosecutions, and the First Amendment plays an important role in balancing the tradeoffs.

The second case, *Rossignol v. Voorhaar*, involved a concerted effort by a local sheriff's department to suppress the views of a critical newspaper.[17] The facts of the case were extraordinary: On the day of a local election in 1998, several deputies in St. Mary's County drove around town and bought up all of the printed copies of the local paper, which reported that the sheriff's political ally had been convicted of rape more than twenty years prior.[18] After the sheriff's deputies successfully executed the scheme, the newspaper publisher sued them for violating, among other things, his First Amendment rights.[19] The district court dismissed the publisher's case, finding that the officers were not acting under color of state law at the time they carried out the scheme.[20]

Judge Wilkinson authored a unanimous opinion reversing that result.[21] In doing so, he explained that, by targeting core political speech, the "defendants did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart."[22] He rejected the defendants' claim that the First Amendment was not implicated simply because they bought each of the newspapers they seized. According to Judge Wilkinson, "[t]he First Amendment is about more than a publisher's right to cover his costs. Indeed, it protects *both* a speaker's

[16] Id. at 855.
[17] 316 F.3d 516, 517 (4th Cir. 2003).
[18] Id. at 519–21.
[19] Id. at 521.
[20] Id. at 522–23.
[21] Id. at 519.
[22] Id. at 522.

right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas."[23]

The third case, *Hatfill v. New York Times Co.*, involved the intersection of the First Amendment and defamation. In the wake of the September 11 attacks, the *New York Times* published a series of articles suggesting that a particular individual was the target of an investigation into attempts to send anthrax through the mail.[24] When that individual sued the paper for defamation, a divided panel of the Fourth Circuit allowed the claim to proceed, and the full court refused to hear the case en banc.[25]

Judge Wilkinson dissented from the denial of rehearing en banc, noting that "[t]he consequences of this decision for the First Amendment run deep."[26] As he saw it, the panel majority took too much comfort in the procedural posture of the case, which reached the court on a motion to dismiss, explaining that, "[e]ven if liability is defeated down the road, the damage [to newspaper defendants] has been done."[27] He concluded his opinion with a powerful commentary on the importance of journalists to preserving First Amendment freedoms: "It is tempting, I recognize, to view the press's assertions of its freedoms as something of a self-interested wail. But before succumbing too fully to this impulse, we might ask who else will do the job of calling bureaucratic judgments to account."[28]

In each of these cases, there were narrow doctrinal grounds that would have allowed the government or other plaintiffs to prevail: The reporters compelled to provide testimony in *Shain* had not shown that they were the victims of harassment;[29] the newspaperman harried by the local sheriff's department in *Rossignol* admitted that the cops had paid for their newspapers;[30] and the New York Times could always press their First Amendment claim later in the case after facing remand in *Hatfill*.[31] Many of Judge Wilkinson's colleagues relied on those facts to avoid engaging with the larger principles at stake. But to Judge Wilkinson, the values of

[23] Id.
[24] 427 F.3d 253, 254 (4th Cir. 2005) (mem.) (Wilkinson, J., dissenting from denial of rehearing en banc).
[25] Id. at 253–54.
[26] Id. at 258.
[27] Id. at 255.
[28] Id. at 259.
[29] 978 F.2d 850, 853 (4th Cir. 1992).
[30] 316 F.3d 516, 520–21 (4th Cir. 2003).
[31] 416 F.3d 320, 324 (4th Cir. 2005).

the First Amendment—and the importance of journalists to safeguarding those values—demanded something more.

II. CAMPAIGN FINANCE REGULATION

In recent years, the Supreme Court has decided a number of cases that sharply limit regulations aimed at the political process. Some of these decisions have involved campaign finance, where the Court has repeatedly set clear rules to strike down limits on both campaign contributions and political expenditures.[32] When Judge Wilkinson joined the bench, the Supreme Court's guidance to lower courts was much more equivocal. And in navigating the more flexible and fact-intensive standards of that time, Judge Wilkinson's decisions routinely looked to the values underlying the First Amendment to chart the proper course.

One such decision, *North Carolina Right to Life, Inc. v. Bartlett* (*NCRL*), involved a challenge to North Carolina's election laws, which, among other things, set a cap on corporate political expenditures and prohibited lobbyists from donating to political campaigns.[33] At the time the case reached the Fourth Circuit, the Supreme Court permitted states to limit corporate expenditures for political purposes on the ground that corporate spending could distort the relationship between "expenditures in favor of a position and the popularity of that position with the public at large"[34]—a principle known as the "antidistortion rationale."[35] Based on that guidance, North Carolina had banned political expenditures for *all* corporations—regardless of whether the corporation was for-profit or not.

Judge Wilkinson authored an opinion striking down North Carolina's restriction. At the outset, he explained that, because the government's anti-distortion interest was not "omnipresent," it would need to demonstrate why that interest was served by a law banning both for-profit and nonprofit political expenditures.[36] He then applied that rigorous standard to the particular facts, holding that North Carolina's law was overbroad because the record showed that "nonprofits . . . present[ed] a

[32] See, e.g., McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 227 (2014).
[33] 168 F.3d 705, 709 (4th Cir. 1999).
[34] Id. at 713.
[35] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 348 (2010).
[36] *NCRL*, 168 F.3d at 713–14.

minimal risk of distorting the political process."[37] Although Judge Wilkinson decided the case within the prevailing doctrinal framework on that time, his decision was a harbinger of things to come: By requiring the government to justify its law with precision—rather than falling back on a highly general anti-distortion interest that would afford the government a blank check to regulate corporate speech—the court struck down a regulation limiting corporate political expenditures, more than a decade before the Supreme Court overruled the anti-distortion principle altogether in *Citizens United*.[38] And it did so by carefully parsing nonprofits' engagement with democratic elections.

When assessing North Carolina's ban on political contributions by lobbyists, however, Judge Wilkinson's opinion in *NCRL* was not so quick to embrace the plaintiffs' expansive theory of the First Amendment. Writing for the majority, Judge Wilkinson accepted that North Carolina's lobbyist ban triggered strict scrutiny.[39] But he reasoned that North Carolina had satisfied that demanding standard because of the risk that political contributions by lobbyists would lead to both actual and perceived corruption by the citizens of the state.[40] In assessing those risks, Judge Wilkinson once again homed in on the realities of modern politics, writing that "[w]hile lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line."[41] Based on those realities, he concluded that "[s]tate governments need not await the onset of scandal before taking action."[42] In reaching that result, Judge Wilkinson also rejected the plaintiffs' argument that the government's only interest in regulating political contributions was to prevent "corruption or appearance of corruption that results from large contributions by individuals."[43] According to Judge Wilkinson, corruption, "either petty or

[37] Id. at 714; see also id. (rejecting the state's argument that nonprofit corporations implicated the anti-distortion principle so long as they accepted contributions from for-profit corporations).

[38] 558 U.S. at 365–66 (overruling Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990)).

[39] *NCRL*, 168 F.3d at 715.

[40] Id.

[41] Id. at 716.

[42] Id.

[43] Id. at 715.

massive . . . distorts both the concept of popular sovereignty and the theory of representative government."[44]

In *NCRL*, we see how a focus on democratic principles cuts through attempts at doctrinal rigidity. To Judge Wilkinson, the state had no right to limit the contributions of a nonprofit—even though corporate contributions could be regulated under then-prevailing law—because the plaintiff posed no threat of distorting the democratic process. At the same time, the state was not powerless to respond to the real-world threats posed by lobbyist corruption, even though others were not held to the same standard.

III. POLITICAL PARTIES, FREE ASSOCIATION, AND REGULATION OF THE POLITICAL PROCESS

The Supreme Court has also actively scrutinized government actions that may interfere with the rights of organizations participating in the political process.[45] In this area, too, Judge Wilkinson has demonstrated his characteristic interest in the relationship between the First Amendment and democratic principles. And he has done so in two high-profile cases involving attempts by his home state of Virginia to regulate the activities of political parties: *Miller v. Brown* and *6th District Congressional Committee v. Alcorn.*

For many years, Virginia had a system whereby certain incumbent elected officials could decide the method for choosing the party's nominee to their own seats. Under that regime, political parties in Virginia were free to choose between primaries, caucuses, or conventions—but it was up the incumbents to make that selection.[46] The Fourth Circuit first confronted Virginia's incumbent-selection system in 2007, when a partisan committee challenged that system under the First Amendment, arguing that it infringed on the freedom of association.[47]

At the time, a majority of the Fourth Circuit in *Miller v. Brown* avoided the difficult question altogether, holding only that the Republican incumbent's selection of an open primary violated the First Amendment

[44] Id.

[45] See, e.g., Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021); Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 1316 (2024).

[46] See Miller v. Cunningham, 512 F.3d 98, 100 (4th Cir. 2007), *reh'g en banc denied sub nom.* Miller v. Brown, 503 F.3d 360 (4th Cir. 2007) (mem.) (Wilkinson, J., dissenting from denial of rehearing en banc).

[47] Miller v. Brown, 503 F.3d 360, 363 (4th Cir. 2007).

on the specific facts of the case because the Republican political committee for the incumbent's district disagreed with his decision to hold a primary.[48] Judge Wilkinson disagreed with that decision. In his dissent from the full court's decision not to rehear the case en banc, he explained that a broader holding was necessary because Virginia's law "facially discriminates in favor of incumbents, shutting down the political process and violating the most essential requirements of equal protection."[49] And to Judge Wilkinson, the harm that the incumbent-selection system imposed on the democratic process did not arise solely because the party committee happened to disagree with the incumbent. Instead, the "burden on the party's associative rights" arose because the scheme placed in the hands of a single individual the power to bind the entire political party—even though the political party's "multi-faceted goals . . . are not necessarily best achieved by maximizing a particular individual's re-electability."[50]

Judge Wilkinson revisited Virginia's incumbent-selection system more than a decade later in *Alcorn*. This time, he authored an opinion holding that the law was facially invalid under the First Amendment.[51] In writing for the Court, Judge Wilkinson first explained the role of the courts in resolving the tension between the First Amendment rights of political parties and the important role of the states in "'structuring and monitoring the election process, including' nominee selection."[52] He then concluded that Virginia's incumbent-selection system—wherein "the wishes of a party's adherents [are] . . . subordinated wholesale to the wishes of a single individual whose self-interest is self-evident"—places a "severe burden" on the rights of political parties.[53] Finally, his opinion rejected Virginia's argument that it had a compelling interest in favoring incumbents over other members of a political party—particularly in a political environment where "[i]ncumbents . . . are already blessed with myriad de facto advantages in the electoral arena."[54]

Like in *NCRL*, Judge Wilkinson's decision in *Alcorn* demonstrated a willingness to challenge the government's asserted rationales for

[48] Id. at 369–71.
[49] *Cunningham*, 512 F.3d at 101.
[50] Id. at 105.
[51] 6th Dist. Cong. Comm. v. Alcorn, 913 F.3d 393, 398 (4th Cir. 2019).
[52] Id. at 402 (quoting Cal. Democratic Party v. Jones, 530 U.S. 567, 572 (2000)).
[53] Id. at 404 (internal quotation omitted).
[54] Id. at 404–05.

regulating the political process. And once again, Judge Wilkinson explained his decision by focusing on the values served by the First Amendment and the actual, on-the-ground realities of American politics. Virginia's incumbent-selection system was not unconstitutional because it differed from other statutes upheld by the Supreme Court; it was unconstitutional because of the real-world incentives of incumbent politicians and the important differences between those incentives and the interests of the broader political party.

CONCLUSION

In these cases and many others, Judge Wilkinson has been a thoughtful and distinctive voice on matters of First Amendment freedoms. He sees the ultimate issues at stake and turns a skeptical eye toward fact-bound details that might stymie constitutional scrutiny of the government's laws and actions. Even when he agrees with his judicial colleagues on the ultimate disposition of a case, Judge Wilkinson gives independent voice to the underlying principles of free speech, press freedom, and democratic representation.[55]

It is perhaps no accident that Judge Wilkinson is the only judge within his Fourth Circuit cohort to have both run for political office and worked as a newspaper editor. In 1970, Judge Wilkinson ran as the Republican Party nominee for a House of Representatives seat in Virginia.[56] And in 1978, he left his post as an associate professor of law at the University of Virginia to become the editorial page editor of the *Norfolk Virginian-Pilot*—a position he held until he joined the U.S. Department of Justice in 1982.[57] Whether his views of the First Amendment were shaped by these experiences—or whether, instead, the same principles that drew him to the press and politics as a young adult later informed his views of free speech as a judge—is impossible to say. No matter the specific relationship, however, it is clear that Judge Wilkinson's entire career embodies a special commitment to the First Amendment. Our law, and our society, are the better for it.

[55] See, e.g., In re Shain, 978 F.2d 850, 854 (4th Cir. 1992) (Wilkinson, J., concurring).

[56] 9 News Web Team, Prospective Supreme Court Justice Nominee: James Harvie Wilkinson III, 9 News (Sept. 29, 2005, 12:41 AM), https://www.9news.com/article/news/local/politics/prospective-supreme-court-justice-nominee-james-harvie-wilkinson-iii/73-344701051 [https://perma.cc/H3H2-ET2Z].

[57] Id.

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THE JUDGE

*Judge Daniel A. Bress**

In his fortieth year on the federal bench, it is altogether appropriate to recognize the faithful service of J. Harvie Wilkinson III. I clerked for Judge Wilkinson from 2005 to 2006. I graduated from law school and was working in his chambers a week later. Perhaps I had no business being there, but there I was. What I could not know then, but know now, is that my first day in that clerkship would mark a turning point in my life and career, made possible by a good man's wisdom, example, and generosity. We hear it said in the legal profession, of a most respected attorney, that he is a "lawyer's lawyer." Judge Wilkinson is a judge's judge, an embodiment of that role. His forty-year service as a circuit judge is cause for considering his judicial character and place in American law.

How does one even begin to evaluate a judicial career like this? There are hundreds of opinions to work through—majorities, dissents, and concurrences—covering nearly every topic in our vast legal landscape. There are the books and articles Judge Wilkinson has written and the speeches he has delivered, many of which confronted the most vital issues of the time. We would need to consider Judge Wilkinson's seven-year service as Chief Judge of the Fourth Circuit and his work in many other administrative capacities. There are his relationships with colleagues, some of blessed memory, whose genuine friendship with the Judge in a

* Circuit Judge, U.S. Court of Appeals for the Ninth Circuit. Law Clerk to the Honorable J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit, 2005–2006.

factious world inspired us to believe that fellowship across differences was a worthy endeavor. There is the hallmark Virginia gentility and graciousness that comes through in every Judge Wilkinson writing, and indeed, in every conversation. And there are the many law clerks whose lives Judge Wilkinson touched as he trained and then guided them in the early stages of their careers and beyond. The task of evaluating Judge Wilkinson's contributions is frankly overwhelming.

Sometimes lost in the discussion of a judge, however, is the actual day-to-day work, much of it unheralded and done in private. I wish to focus some on the Judge from that perspective, based on my own personal observations from working for him, reading his writings, and knowing him for twenty years.

What was immediately apparent to me when I began clerking for Judge Wilkinson was that this was a person who was most naturally at home in the medium of law. This was not someone doing a job, but one who was fulfilling a great passion. In the Bay Area, where I live, there was a well-known food and wine critic named Narsai David. When Narsai David spoke on the radio or wrote restaurant reviews, he did so with such pleasure that you could practically taste the divine meal he was lovingly describing.

The Judge is the same way about law. He lives and breathes law. He loves thinking about it, writing about it, and talking about it. And it does not matter what that "it" is. The Judge would often say during my clerkship how much he loved bankruptcy and employee benefit cases. This comment was offered with no irony whatsoever. Never once in my year clerking for him, or in what now must be hundreds of hours of conversations that have taken place over the last twenty years, did I ever detect in Judge Wilkinson anything other than complete and total fascination with the work of the law. That most common affliction among judges—decisional fatigue—is simply unknown to him.

I recently re-read some of the opinions that Judge Wilkinson wrote during my year clerking for him. It was quite remarkable how these cases that I had not thought about for nearly two decades immediately came right back to me. Did the Navy violate the environmental laws when it sought to build a practice landing strip for fighter jets near a migratory waterfowl preserve, and was the district court's injunction of the Navy too broad?[1] Did the City of Newport News violate Title VII when it failed

[1] See Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 180–81 (4th Cir. 2005).

to promote a female firefighter to a captain position, allegedly because of her sex?[2] Did the trial court deny a criminal defendant a fair trial through its allegedly aggressive questioning of witnesses and frequent interruption of a defense lawyer's cross-examinations?[3]

The questions Judge Wilkinson considered that year were both big and small. But I recall vividly how diligent he was in resolving all of them, how deeply he cared about them, and how engaged he was in thinking about them. A judge takes on the problems of others; they are now his problems to deal with. Judge Wilkinson practically welcomed these problems into his life, as though he were inviting a weary traveler into his home for a rest.

Now, when I read the opinions from that year, I am transported back in time to the beginning of my life as a lawyer. There is the Judge in his office, probing the issues in a case with the purpling Shenandoah Mountains visible through the windows off in the distance. There I am at lunch with the Judge and my co-clerks at the Subway sandwich shop (why did we eat there every day???), debating the parties' arguments. In these years, the clerks would take a three-mile run with the Judge every day. There we are, on a brilliant fall morning or mired in the deep humidity of a Charlottesville summer, enjoying each other's company on the local high school track, talking a little sports, and then returning in conversation, as we nearly always did, to the cases that the Judge had to decide. The matters that year varied in importance, as they always do. But they loom so large in my mind because in my infancy as a lawyer, as I was beginning to form my own judgments about law, I was observing a master craftsman at work.

What the Judge brought to these cases, and the many thousands he has considered in his career, is not just a towering intellect, but a deeply sophisticated understanding of the architecture of legal decision-making, and, within it, the role of the courts in our system of government. The Judge understands legal disputes in their fullest dimensions. He has the remarkable ability to think both conceptually and structurally about an area of law, and then to operationalize legal principles into legal reasoning that resolves the dispute and provides guidance for future ones. He seeks to bring order to law. And for forty years, from the cases that made the front page of the newspaper to those most technical and arcane, the Judge

[2] See Hux v. City of Newport News, 451 F.3d 311, 312 (4th Cir. 2006).
[3] See United States v. Smith, 452 F.3d 323, 328 (4th Cir. 2006).

challenged himself to leave the law in a more coherent place than he found it. Each case was an opportunity to meditate on how the law could achieve its most important objectives. Each case was an opportunity to refine our government of laws, that most American of ideals.

I recognize there is an abstract quality to this. But perhaps it becomes clearer if one understands the role of the federal courts of appeal. The Supreme Court is typically deciding between fifty and sixty cases a year. The courts of appeal decide thousands. They evaluate issues before the Supreme Court weighs in on them, and then carry out Supreme Court decisions when issued. But for various reasons, there are many cases—and many types of cases—that will never reach the Supreme Court. It is therefore up to the courts of appeal to do so many things: to take the first crack, to lay down some structure, to draw lines, to plot data points of precedent, to grind it out. If one reads a Wilkinson opinion, and certainly if one reads a good lot of them, as I have, you will see the highest form of this work. And if one multiplies that by the four decades the Judge has spent doing it, you find an entire corpus devoted to situating areas of law in first principles and legal traditions, rationalizing them, and then making them work on the ground.

Perhaps some of this will resonate in excerpts from the three cases from my clerkship year that I mentioned earlier. Here is how Judge Wilkinson for the court summed up why the Navy violated the National Environmental Policy Act (NEPA) in failing to take the required "hard look" at its airfield project, but why the district court's injunction was overbroad:

> Our holding in this case rests upon two important separation of powers principles. First, Executive decisionmaking must fully comply with the environmental policy mandate that Congress has expressed through NEPA, particularly where the Executive's proposed action may affect an area that Congress has specially protected as a National Wildlife Refuge. Second, the judiciary must take care not to usurp decisionmaking authority that properly belongs to the Executive or unduly hamper the Executive's ability to act within its constitutionally assigned sphere of control.
>
> The Navy's failure to take a hard look at the environmental effects of its proposed [project] violated the first of these principles. The

> second-guessing of the Navy in matters of military readiness and the overly broad grant of injunctive relief violated the second.[4]

Here is how Judge Wilkinson for the court summed up why the female firefighter was not improperly denied a promotion for a discriminatory reason:

> We are sensitive to the fact that Hux was one of the first females to seek advancement in a Fire Department populated predominately by men. We certainly agree that firefighting skills are not confined to a single gender. But this proposition does not mean that the decisions in this case were improperly motivated or driven by anything other than the needs of Newport News for an effective firefighting service. In enacting Title VII, Congress sought to eliminate unlawful discrimination in the employment setting, but it did not endeavor to force employers to undergo the burdens of trial whenever a plaintiff proffered simply *any* response to an employer's non-discriminatory justifications. The City has offered overwhelming evidence that the successful candidates presented stronger credentials for the position plaintiff sought. In making and defending its decision, the City was entitled to focus on the applicants' qualifications taken as a whole—a judgment not rendered pretextual by the fact that one among many factors is allegedly in dispute.[5]

And here is how Judge Wilkinson for the court explained why a trial judge did not violate a defendant's due process rights when questioning witnesses at trial:

> It is neither possible nor desirable for district judges to sit back and observe trials as nonchalant spectators, as judicial participation is frequently necessary to ensure that uncertainty sown during testimony does not culminate in jury room confusion. This obligation is not, of course, without its limits. Trial judges are not backstop counsel, entitled to step in whenever a point may be more eloquently delivered or a tactical misstep avoided. But it remains their prerogative to make certain that matters are clearly presented to the jury.
>
> . . . .

[4] *Nat'l Audubon Soc'y*, 422 F.3d at 207.
[5] *Hux*, 451 F.3d at 319.

> In this case, we conclude that the trial court's conduct revealed no bias and crossed no line. It represented the judge's permissible attempt to cabin and control a two-week trial that featured numerous witnesses, extensive amounts of evidence, and, even on appeal, an eight-volume joint appendix totaling well over 2600 pages. The inability of cold transcripts to replicate the human dynamics of a trial suggests caution in the review of judicial interference claims. It should thus come as no surprise that we apply a measure of deference to the judgments of those to whom, after all, the conduct of trial has been textually entrusted. While the record may at times suggest the advisability of greater restraint, it is in no way indicative of bias or other conduct that deprived defendants of their right to a fair trial.[6]

I have picked these examples nearly at random. One could find Wilkinsonian passages like these in most any Judge Wilkinson opinion. But I have purposefully not picked passages from any "blockbuster" case because what Judge Wilkinson has demonstrated through his life's labors is that the true mark of a great judge lies not in the result of any one momentous decision, but in a total engagement with law across all areas. Judge Wilkinson loved the big cases, but he was Judge Wilkinson in every case. I see in the perhaps more everyday cases I have chosen not just the Judge's sense of style but his philosophy of appellate judging, in which the goal of the opinion is to orient the result within a set of legal principles and practical considerations, which in turn produces doctrine that can be reliably applied in future cases. Through that, our greatest of goals—treating like cases alike, and thereby treating all people equally—can be most confidently achieved. The Judge grasped this in the deepest sense, and he then did something about it, brick by brick.

In his judicial writings, we also see the Judge's keen understanding that law is a system of tradeoffs that prioritizes different values at different times, most often through the will of the people and their elected representatives. We observe often in Wilkinson opinions a discussion of competing interests, of balances struck, of the dangers of courts straying too far from their proper role, of the risks of extremes. Pervading his thinking is the humble recognition that judges are servants of the law, not its masters. As the Judge once wrote, judges

[6] *Smith*, 452 F.3d at 332–33 (citations omitted).

> rightly make our contribution to upholding order and protecting liberty, but if we as judges properly expect the citizens of this country to abide by laws they do not like, might they not expect us in return to uphold laws that we may on some personal or policy level find distasteful?[7]

Yet the Judge also instinctively understood that the rule of law depends on how coherently judges can articulate the reasons for the decisions they make. That, of course, requires a great deal of technique—of which Judge Wilkinson is generously blessed. To us clerks, Judge Wilkinson would instill in us that we had to explain "the why." Among Judge Wilkinson's greatest legacies is the exquisite analytical construction of his judicial writings, which drill to bedrock so that a more intelligible system of law can emerge.

This does not mean one must agree with Judge Wilkinson on every point, or even on his approach. But it is to say that as much as any of the greatest appellate judges in the history of our country, Judge Wilkinson over time has honed a way of thinking about American law that transposed principles of constitutional, statutory, and common law into bases for the reasoned resolution of individual disputes. He created, in other words, a jurisprudence distinctly his own. It is one based on his studious understanding of American legal values, informed by principles of judicial restraint and a deep insight into how legal reasoning intersects with legal process to form rules that can profoundly affect human behavior. With the greatest of hopes for the country he loves, the Judge has given us a way of thinking about law.

But to be effective, this thinking had to be reduced to writing. Perhaps unusually, the Judge did not use a computer. When I started the clerkship, I wondered whether this would prove to be some kind of liability, a drag on chambers efficiency. It was quite the opposite. It fits his method of deliberation rather perfectly. It frees him to think before writing, to consider how a point will sound before committing to it on paper. As the Judge would miraculously dictate entire paragraphs of perfect prose that we clerks furiously struggled to scribble down, we were exposed to the inner symphony of a great legal mind.

A judicial opinion is an unusual form of writing because it seeks to do a great many things at once. It is intended not only to be read, but to be used. It opines yet binds—it is law. It resolves an issue for the parties,

[7] J. Harvie Wilkinson III, The Lost Arts of Judicial Restraint, 16 Green Bag 2d 51, 54 (2012).

sometimes a very complex one, but in most instances, it is preferable that anyone should be able to understand it, including non-lawyers. And in a very real sense, a judicial opinion should instill public confidence in the decision-making process itself.

Judge Wilkinson harnesses the power of the written decision. And he understands that the legitimacy of that decision depends upon placing concepts into words that people will comprehend and respect, for the very reason that they are grounded in law. He not only understood all of this, he executed on it. We should rightly regard Judge Wilkinson, as I do, as one of the finest legal expositors of our time. The writing is not just skillful but indeed beautiful. The great legacy of Judge Wilkinson as a judge is not simply the depth of his thinking and his enormous output, but his remarkable abilities as a communicator and evangelist of the law.

Through it all, Judge Wilkinson also demonstrated a most important virtue: judicial courage. He did not believe judges should manufacture controversy, least of all for their own self-promotional reasons. But nor did he believe that judges could duck the hard issues. What should be said is that when called to decide, Judge Wilkinson has heeded the call. And over forty years, his number was called many a time. On matters of affirmative action, abortion, national security, and religious liberty, to name only a few, the Judge met each challenging case with his best answer. Dealing with issues like these can wear a person down. Judge Wilkinson showed me that the best judges draw strength from cases such as these, when they are tested in the most public of ways.

Years ago, when I was clerking for him, the Judge and I attended a historical society dinner in Richmond celebrating Chief Justice John Marshall. Each guest was given a wine glass bearing the silhouette of the Great Chief Justice. I did not want to take mine home, but the Judge insisted that I might want it. It became something of a running joke between us. For years afterward, I would let the Judge know, after a hard day's work, when I was getting a little use out of that glass. Now seems as good a time as any to raise it in honor of a great judge and American who has given everything of himself to our common calling.

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ESSAY

PRUDENCE, ROLE MORALITY, AND RESTRAINT: JUDGE WILKINSON ON THE SEPARATION OF POWERS

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INTRODUCTION

Caution in reviewing the actions of the legislative and executive branches has been a hallmark of the jurisprudence of Judge J. Harvie Wilkinson III. The Constitution "at most gives judges specific authority to redress violations of specific provisions," Judge Wilkinson writes in his book *Cosmic Constitutional Theory*.[1] But even when doing so, "courts must exercise great caution before injecting themselves into the vortex of varied political questions," for "[i]t is often far preferable to allow the political institutions under our Constitution to struggle among themselves, with each bringing to bear the respective arsenal of powers the Framers accorded them."[2] Three related features of the Judge's jurisprudence stand out in his work on the separation of powers: prudence, role morality, and restraint.

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[1] J. Harvie Wilkinson III, Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance 78 (2012).

[2] Id. at 78–79.

I. PRUDENCE

Judge Wilkinson is a prudent man. He spends wisely, eats healthfully, and drives responsibly. For most of his career, he has run three miles a day (often, famously, with his much younger clerks huffing and puffing alongside). He scours draft opinions for "banana peels," a term he uses for imprecise language that could have unintended effects. And in separation of powers cases, Judge Wilkinson regularly demonstrates prudence in the legal sense of identifying and guarding against potential untoward or second-order consequences of judicial review.

Many decisions exemplify this trait. Take *Tiffany v. United States*, one of Judge Wilkinson's early national security opinions. One afternoon in 1983, Henry Tiffany, who was a lawyer and licensed pilot, flew from the Bahamas toward Norfolk, Virginia, in a twin-engine propeller plane with six passengers on board.[3] Tiffany neglected to activate his flight plan and failed to make a required customs stop in Florida, which caused him to enter an air-defense zone off the East Coast as an unknown and possibly hostile aircraft.[4] The U.S. military sent two fighter jets to make a visual assessment.[5] Sadly, seconds after the military called off the intercept upon learning from civilian authorities that the aircraft was friendly, one of the fighter jets clipped Tiffany's plane with its wing, sending the plane crashing into the Atlantic Ocean.[6] Tiffany and all six passengers died.[7] Tiffany's widow sued the federal government for negligence under the Death on the High Seas Act, and the government (remarkably, if we may say so) countersued Tiffany's estate for damage to its fighter jet, which had returned safely to base.[8] The district court sided with Tiffany's estate, awarding his widow some $1.3 million.[9]

Judge Wilkinson wrote a unanimous panel opinion reversing the judgment.[10] "Separation of powers is 'a doctrine to which the courts must adhere even in the absence of an explicit statutory command,'" he declared.[11] And where "prudential considerations counsel against judicial

[3] 931 F.2d 271, 272 (4th Cir. 1991).
[4] Id. at 272–74.
[5] Id. at 274.
[6] Id.
[7] Id. at 274–75.
[8] Id. at 275.
[9] Id.
[10] Id. at 272.
[11] Id. at 276 (quoting Canadian Transp. Co. v. United States, 663 F.2d 1081, 1086 (D.C. Cir. 1980)).

intervention," a court should decline to adjudicate the case.[12] Here, the Judge asserted, judicial meddling in military affairs could trigger a cascade of harmful consequences—including "seriously handicap[ping] efficient government operations"[13] and creating "a risk-averse defense system" through which an undetected aircraft "might one day visit a different sort of disaster, as lamentable in its own way as this one."[14] Accordingly, the opinion instructed, "[o]f the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense."[15]

In *Wu Tien Li-Shou v. United States*, another widow sued the United States for accidentally killing her husband—this time when forces aboard a U.S. Navy ship attacked a fishing vessel where pirates had held him hostage for more than a year.[16] Writing for a unanimous panel that the political question doctrine rendered the matter nonjusticiable, Judge Wilkinson again focused on the potential dangers of adjudicating such suits. Proceeding with the case, the Judge said, would have "afford[ed] military personnel a reason and incentive to question orders—namely, to head off tort liability or at least the burdens of litigation that come with being sued."[17]

In *McMellon v. United States*, the plaintiffs sued over a jet ski accident at a government-owned dam.[18] Judge Wilkinson wrote separately to argue that refusing to read a robust discretionary function exception into statutes providing for tort liability against federal entities would "debilitate the executive branch" by subjecting the United States to potential damages for everything from "enforc[ing] immigration law" to "intercept[ing] narcotics-smuggling" to "protect[ing the nation's] airspace from hostile, incoming aircraft" to "safeguard[ing] its harbors from biological agents in container cargo."[19] Invoking "classic separation-of-powers concerns," Judge Wilkinson asserted that dangers like these produced a clear "need for judicial forbearance in the face of policy-laden decisions made by the coordinate branches of our government."[20]

[12] Id. (quoting Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring)).
[13] Id. (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)).
[14] Id. at 282.
[15] Id. at 277.
[16] 777 F.3d 175, 178–79 (4th Cir. 2015).
[17] Id. at 181.
[18] 387 F.3d 329, 331 (4th Cir. 2004) (en banc).
[19] Id. at 350–51 (Wilkinson, J., concurring).
[20] Id. at 351.

In *United States v. Hamidullin*, a Taliban-affiliated fighter captured in Afghanistan invoked a U.S. Army regulation to challenge the district court's jurisdiction over his criminal trial.[21] The court rejected the challenge, and in a concurrence, Judge Wilkinson wrote to emphasize what he called the "folly," "hazard," and "far-reaching consequences" of the defendant's argument.[22] Case-by-case determinations of prisoner-of-war status by different military panels would "result in the disparate treatment of similarly situated detainees" and "hamstring our country in its ability to approach armed conflicts in a unified fashion."[23] Such determinations would also, the Judge argued, "undermine the consistent practice of both the United States and its allies to uniformly treat Taliban fighters as insurgents" and "threaten to elevate every band of terrorists around the world to near nation-state status."[24]

For a final example, the Judge warned against what he saw as the sweeping effects of accepting an expansive theory of standing in *Friends for Ferrell Parkway, LLC v. Stasko*.[25] After the U.S. Fish and Wildlife Service proposed buying and preserving a tract of land, a group of nearby residents claimed as a concrete injury the "destruction of their opportunities" to lobby for a highway and to further develop their condominium community.[26] While acknowledging that some opportunity-related injuries may suffice for standing, the Judge pointed to what he called the "absurd consequences" of plaintiffs' push to include "the mere threatened loss of a remote opportunity."[27] Were courts to accept such theories, he said, "[a] child would then be injured in fact by the prospect of NASA's shutting down its space program because she would no longer have the chance to become an astronaut."[28] To rule in the plaintiffs' favor on this theory "would transform standing doctrine and threaten the core democratic values that it serves," he asserted.[29]

[21] 888 F.3d 62, 65, 69 (4th Cir. 2018).
[22] Id. at 77–78 (Wilkinson, J., concurring).
[23] Id. at 78.
[24] Id.
[25] 282 F.3d 315, 325 (4th Cir. 2002).
[26] Id. at 324.
[27] Id. at 325.
[28] Id.
[29] Id.

II. ROLE MORALITY

Judge Wilkinson's judicial prudence derives from a commitment to what he views as federal judges' proper place in our constitutional structure. Judges, in contrast to members of Congress and the president, are not elected by the citizenry. Nor are they expert in matters considered by the bureaucracies they review, as many executive officials are. To Judge Wilkinson, special characteristics of the judicial process and judges' relative paucity of factual knowledge inform principled and practical limits on judicial authority.

Consider *Al Shimari v. CACI International, Inc.*, a case involving tort suits against military contractors for allegedly torturing prisoners in a war zone, including at Abu Ghraib prison in Iraq.[30] Judge Wilkinson dissented from the court's dismissal of the contractors' interlocutory appeals, which would allow the suits to move forward. When it comes to "how intelligence is best obtained," Judge Wilkinson wrote, "a tort suit is probably the very worst forum in which that issue can or should be resolved."[31] For "[t]he judges and juries who review those matters cannot fairly be expected to possess a background in the utility of different forms of military intelligence, and to ask them to decide such sensitive, delicate, and complicated questions is, in a word, unrealistic."[32] "None of this is to say," the Judge cautioned, "that military contractors are without fault or that abuses should ever go unremedied."[33] The point, he said, was instead "that something as mischievous as the placement of tort law in military calculations should be approved by some body capable of appreciating the consequences of its action and constitutionally entrusted with the task"—like politically accountable executive and legislative decisionmakers.[34]

Hamdi v. Rumsfeld was similar.[35] In turning aside a habeas petition filed on behalf of an American citizen held as an enemy combatant for taking up arms alongside the Taliban, the joint majority opinion—which Judge Wilkinson wrote with Judges Wilkins and Traxler—stated that "[t]hrough their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas

[30] 679 F.3d 205, 209 (4th Cir. 2012).
[31] Id. at 239 (Wilkinson, J., dissenting).
[32] Id.
[33] Id.
[34] Id. at 239–40; see also id. at 238.
[35] 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

conflict in a way that the judiciary simply is not."[36] Thus, the opinion continued, "[t]he Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them."[37]

Judge Wilkinson expressed similar sentiments in his lengthy partial concurrence and partial dissent in *al-Marri v. Pucciarelli*, another case challenging the military detention of an enemy combatant.[38] In addition to issuing "a call for prudence," Judge Wilkinson wrote that "Separation of Powers does not mean Hostility of Powers."[39] Instead, he said, "[i]t is the obligation of each branch to check the excesses of another, but each branch is equally obliged not to forsake its own limitations in thwarting another's legitimate role."[40] The detention here was "a product of executive action" that was "legislatively sanctioned," the Judge argued, and it reflected "the core understanding of our constitutional system that at the end of the day, when momentous questions of life and death are at stake, this nation places its deepest bets upon democracy."[41] Accordingly, he concluded, "the people's safety must reside and rest with those who have the people's sanction."[42]

The same theme comes through in *Sesay v. United States*, which affirmed an application of the doctrine of consular nonreviewability—the idea that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[43] Writing for a unanimous panel, the Judge reasoned that "[t]he primacy of the political branches over immigration policy is a function of the separation of powers"—and that "judicial deference is required where executive officials . . . possess expertise in matters falling outside judicial competency, including local conditions in foreign countries, diplomatic relationships and protocols,

[36] Id. at 463.
[37] Id.
[38] 534 F.3d 213, 216 (4th Cir. 2008) (en banc), *vacated sub nom.* al-Marri v. Spagone, 555 U.S. 1220 (2009).
[39] Id. at 293, 340 (Wilkinson, J., concurring in part and dissenting in part).
[40] Id. at 340.
[41] Id. at 341.
[42] Id.
[43] 984 F.3d 312, 315–16 (4th Cir. 2021) (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)).

and national security needs."[44] Judge Wilkinson therefore warned that "to thrust courts into [assessments] that Congress has suitably situated amongst the executive's duties would mark no small change in our own role."[45]

There is a term for an externally defined but internally driven understanding of one's responsibilities within a larger social structure: role morality.[46] People often think that role morality expands the range of permissible conduct for members of certain professions relative to the general population.[47] But it can also do the opposite, constraining what is permissible in a professional capacity compared with what may be preferable in a personal capacity.[48] As Justice Scalia put it: "If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag. But I am not king."[49] Instead, Scalia was saying, judges are duty-bound to follow the law where it leads them, and that may require protecting actions they otherwise find abhorrent.

Judge Wilkinson has consistently pressed the point that judges are not omnipotent but are instead circumscribed by their specific place in our constitutional system.[50] In a standing case, for instance, he said the purpose of the doctrine was to "ensure[] that 'we act *as judges*, and do not engage in policymaking properly left to elected representatives.'"[51] In reviewing a request for political asylum from persecution, the Judge likewise "reject[ed] a significant role for the courts" because of their "lack

[44] Id.

[45] Id. at 316.

[46] Darrell Miller explains that "[r]ole morality is a broad field of politics and ethics." Darrell A.H. Miller, Historical Analogy and the Role Morality of Reason-Giving, 73 Duke L.J. Online 233, 236 n.12 (2024). But despite indeterminacy around the edges, "it's widely recognized that occupants of different roles—professor, doctor, parent, mentor—adhere to distinct norms and comply to distinct moral obligations." Id.

[47] For a classic example arguing that "[i]t is easy to get one's hands dirty in politics and it is often right to do so," see Michael Walzer, Political Action: The Problem of Dirty Hands, 2 Phil. & Pub. Affs. 160, 174 (1973).

[48] See Neil S. Siegel, After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress, 107 Geo. L.J. 109, 118 (2018) (explaining that efforts to define judicial role morality "emphasiz[e] constraining conceptions of a judge's institutional role").

[49] Scott Bomboy, Justice Scalia Rails Against Flag-Burning "Weirdoes," Nat'l Const. Ctr.: Const. Daily Blog (Nov. 12, 2015), https://constitutioncenter.org/blog/justice-antonin-scalia-rails-again-about-flag-burning-weirdoes [https://perma.cc/K9UT-HBGX].

[50] Other scholars have addressed this same point. See Siegel, supra note 48, at 118 (describing how judicial role morality is "linked to the perceived place of judges in the constitutional scheme").

[51] Ansley v. Warren, 861 F.3d 512, 517 (4th Cir. 2017) (quoting Hollingsworth v. Perry, 570 U.S. 693, 700 (2013)).

[of] expertise" in navigating "the intimate connection between immigration decisions and foreign policy."[52] A more involved role, he said, would "transform the political asylum process from a method of individual sanctuary left largely to the political branches into a vehicle for foreign policy debates in the courts."[53] Judge Wilkinson also emphasized the expertise of the legislative and executive branches in an opinion about border searches. These bodies "have a critical role to play in defining the standards" for such searches, he argued, "and they are much better equipped than we are to appreciate both the privacy interests at stake and the magnitude of the practical risks involved."[54] Thus, he concluded, "[t]he infirmity of a constitutional rule in the unique context of a border search" was "clear."[55] For establishing such a rule would "claim[] for courts the sole prerogative to set standards in an area where legislative inquiry would be invaluable and where the executive maintains a strong sovereign interest."[56]

Gibson v. Goldston provides an especially on-the-nose example of the Judge expounding his view of the judicial role.[57] A woman sought a contempt order against her ex-husband for failing to turn over various pieces of personal property in accordance with their divorce settlement.[58] In the middle of a hearing on the matter, the family court judge ordered the parties to meet her at the ex-husband's house, where she oversaw a search for the disputed items and directed the ex-wife to take several of them.[59] The ex-husband sued for multiple constitutional violations, and Judge Wilkinson wrote for a unanimous panel denying the family court judge's assertion of absolute judicial immunity from monetary damages.[60] The bar to reject such immunity is high.[61] But Judge Wilkinson had little trouble holding that the conduct in this case overcame it because "the

[52] M.A. v. INS, 899 F.2d 304, 313 (4th Cir. 1990).

[53] Id.

[54] United States v. Kolsuz, 890 F.3d 133, 148 (4th Cir. 2018) (Wilkinson, J., concurring in the judgment).

[55] Id.

[56] Id.

[57] 85 F.4th 218 (2023).

[58] Id. at 220–21.

[59] Id. at 221.

[60] Id. at 220, 222.

[61] See Mireles v. Waco, 502 U.S. 9, 11–12 (1991) (stating that "the immunity is overcome in only two sets of circumstances," such that "a judge is not immune from liability for nonjudicial actions" or "for actions, though judicial in nature, taken in the complete absence of all jurisdiction").

judge clearly exceeded the most common understandings of the proper judicial role."[62]

"The Constitution establishes a basic division of labor, distributing the tasks of governance among three branches," he explained.[63] The power of each "is circumscribed," and "[t]he judiciary is no exception."[64] The court's ruling that "[s]earches, seizures, and their supervision are classic law enforcement functions reserved for the executive branch" highlights a relatively bright-line approach to the allocation of authority[65]—one that often disempowers the Judge's own branch relative to the others. But Judge Wilkinson saw this comparative disadvantage as a constitutional feature, not a bug. For "while a greater merger of judicial and executive functions might be more efficient," he explained, "the separation of powers" stands as an important and "intentional" bulwark "against tyranny."[66]

III. RESTRAINT

Those who know Judge Wilkinson's work will not be surprised about where this discussion of the prudence and role morality that define his separation of powers opinions is leading: to the philosophy of judicial restraint for which he is perhaps best known. To Judge Wilkinson, judicial restraint entails the counter-majoritarian judiciary deferring to the will of the more politically accountable branches—sometimes by declining to invalidate legislative and executive actions on the merits and sometimes by declining to entertain challenges to such actions in the first place. To quote the Judge quoting the Justice for whom he clerked: "The public confidence essential to the [judiciary] and the vitality critical to the [representative branches] may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches."[67]

Cosmic Constitutional Theory—which argues against all-encompassing, "promiscuous" approaches to judicial review[68]—

[62] *Gibson*, 85 F.4th at 223.
[63] Id. at 224.
[64] Id.
[65] Id. at 225.
[66] Id. at 226.
[67] Ansley v. Warren, 861 F.3d 512, 517 (4th Cir. 2017) (alterations in original) (quoting United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).
[68] Wilkinson, supra note 1, at 107.

culminates in a plea for judicial restraint.[69] "[J]udicial restraint," the Judge contends, "is a bedrock principle of America's founding," one that rests on "the premise of republican governance that authority be guided by more than mere appetite, the corollary being that those less fettered by such formal restraints as periodic elections must feel more constrained to hold themselves in check."[70] By occasioning more frequent and intense incursions on democratic decisions, Judge Wilkinson argues, cosmic constitutional ideas "threaten to fracture the American social compact in the most elemental way."[71] And while judicial restraint inheres in our constitutional structure, he continues, the credo also represents "an inner sense that judges must come to recognize as the essence of their calling."[72] From prudence and role morality emerges the Judge's restraint philosophy.

Judge Wilkinson displays this philosophy not only in cases about individual rights,[73] but also—and perhaps even more so—in cases about structural constitutional law. In a *Columbia Law Review* essay, the Judge argued that "[t]he most compelling lessons of the Structural Constitution pertain to the place of the federal courts in relation to Congress, the executive branch, and the various states."[74] The restraint embodied in the "proportionate place of the federal bench in relation to the democratic branches," he continued, "requires that federal courts not assume lawmaking powers" but instead demonstrate "respect for the workings and products of democracy."[75] As the Judge put the point in an essay praising judicial restraint, such "[i]nstitutional self-discipline is essential to the health of a democratic system."[76]

Illustrative cases are aplenty. In rejecting a Commerce Clause challenge (which he viewed as presenting separation of powers questions at least as much as federalism questions), Judge Wilkinson said that

[69] See id. at 104–16.
[70] Id. at 105.
[71] Id. at 107.
[72] Id. at 105.
[73] For a quite recent example, see *Bianchi v. Brown*, in which the Judge appealed to "the fundamental principle of judicial restraint" in writing for the en banc court to reject a facial challenge to Maryland's military-style assault weapons ban. 111 F.4th 438, 452 (4th Cir. 2024) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008)).
[74] J. Harvie Wilkinson III, Our Structural Constitution, 104 Colum. L. Rev. 1687, 1687 (2004).
[75] Id. at 1695, 1709.
[76] J. Harvie Wilkinson III, The Lost Arts of Judicial Restraint, 16 Green Bag 2d 51, 52 (2012).

"[j]udicial restraint is a long and honored tradition"[77]—and that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."[78] Indeed, the Judge stressed that "[t]he substantial element of political judgment in Commerce Clause matters leaves our institutional capacity more in doubt than when we decide cases, for instance, under the Bill of Rights."[79] In a different Commerce Clause case (which the Supreme Court affirmed in *United States v. Morrison*[80]), Judge Wilkinson agreed with the en banc majority that a statutory provision was unconstitutional.[81] But he wrote separately to encourage "judicial restraint" in less clear cases.[82] He cautioned against what he called the "activist legacy" of "prior eras" and emphasized the "maxims of prudence and restraint" to ensure that statutes not "topple like falling dominos."[83]

For examples from administrative law, in rejecting an arbitrary-and-capricious challenge, Judge Wilkinson stated that invalidating the immigration-related "public-charge rule" would have "visit[ed] palpable harm upon the Constitution's structure and the circumscribed function of the federal courts that document prescribes"—and would have "entail[ed] the disregard of the plain text of a duly enacted statute, all in an area where the Constitution commands 'special judicial deference' to the political branches."[84] And in rejecting a nondelegation challenge, the Judge quoted Justice Scalia for the observation that "it is small wonder that [courts] have almost never felt qualified to second-guess Congress regarding the

[77] Gibbs v. Babbitt, 214 F.3d 483, 490 (4th Cir. 2000); see also id. ("We must enforce the structural limits of Our Federalism, but we must also defer to the political judgments of Congress, recognizing that the 'Commerce Clause represents a broad grant of federal authority.'" (quoting Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 830 (4th Cir. 1999) (en banc) (Wilkinson, C.J., concurring), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000))).

[78] Id. (quoting *Morrison*, 529 U.S. at 607).

[79] Id. (quoting United States v. Lopez, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring)).

[80] *Morrison*, 529 U.S. at 598, 602.

[81] *Brzonkala*, 169 F.3d at 889–90 (Wilkinson, C.J., concurring).

[82] Id. at 890.

[83] Id. at 890, 897.

[84] CASA de Md., Inc. v. Trump, 971 F.3d 220, 229 (4th Cir.) (quoting Fiallo v. Bell, 430 U.S. 787, 793 (1977)), *reh'g granted*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021).

permissible degree of policy judgment that can be left to those executing or applying the law."[85]

Judge Wilkinson was unequivocal about his commitment to judicial restraint—and his consternation about its perceived abandonment—in his dissent in the Emoluments Clause challenge *In re Trump*.[86] By allowing a case seeking an injunction against the then-sitting president to proceed, Judge Wilkinson argued, the majority risked losing "that distinct and noble character of non-partisanship and self-restraint, which our forebears on the bench worked mightily to build and which our judicial generation has no right to disassemble."[87] He "fear[ed] . . . for the future of the courts, where the absence of restraint is so evidently incompatible with the dictates of the law."[88] For "solving political differences . . . through litigation rather than through legislation and elections" represents "a profoundly anti-democratic development," he contended—especially in the context of this particular suit, which he predicted "w[ould] diminish the respect to which courts are entitled when they carry out the essential functions that our cherished Constitution has assigned them."[89]

Belying a simplistic understanding of judicial restraint, Judge Wilkinson's opinions do not always call for the judiciary to stay its hand.[90] The throughline is that the Judge consistently focuses on what he perceives as the judiciary's constitutionally limited place in relation to the more democratically accountable branches. In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, for example, Judge Wilkinson wrote for the en banc court in granting environmental organizations standing to pursue a Clean Water Act citizen suit.[91] Quoting the Supreme Court for the proposition that "the law of Article III standing is built on a single basic idea—the idea of separation of powers,"[92] Judge Wilkinson emphasized that "[c]ourts must avoid infringing this principle either by

[85] Kerpen v. Metro. Wash. Airports Auth., 907 F.3d 152, 162–63 (4th Cir. 2018) (alteration in original) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

[86] 958 F.3d 274 (4th Cir. 2020) (Wilkinson, J., dissenting), *cert. granted, judgment vacated sub nom.* Trump v. District of Columbia, 141 S. Ct. 1262 (2021).

[87] Id. at 292.

[88] Id.

[89] Id. at 293.

[90] See Wilkinson, supra note 1, at 109 (stating that "restraint is not an all-or-nothing matter" and that "where law commands intervention, it would transgress our oath to do otherwise").

[91] 204 F.3d 149, 151 (4th Cir. 2000) (en banc).

[92] Id. at 164 (alteration omitted) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

reaching beyond jurisdictional limitations to decide abstract questions or by refusing to decide concrete cases that Congress wants adjudicated."[93]

The same is true for opinions adopting narrow constructions of statutory text, which may seem to weaken the legislature vis-à-vis the judiciary. To the contrary, Judge Wilkinson has contended that in some contexts, honoring lawmakers' objectives requires reading statutes narrowly. In *Ward v. Dixie National Life Insurance Co.*, for instance, the Judge scoffed at the notion that applying the presumption against retroactivity to state legislation represented "a stark assertion of judicial supremacy."[94] This presumption provides "a means of giving effect to legislative intent," Judge Wilkinson insisted, for "legislatures generally intend statutes to apply prospectively only."[95]

CONCLUSION

Not everyone agrees with Judge Wilkinson's views on the separation of powers in every case. *Hamdi* was vacated by the Supreme Court. Some of the opinions discussed above were dissents. Colleagues have voiced opposition to Judge Wilkinson's approach in particular disputes, and scholars have raised fair questions about what could guide actual instances of judicial review in the absence of a broader constitutional theory.

Judicial restraint, moreover, has fallen out of favor in many conservative circles. But the Judge foresaw as much—and, invoking a Burkean sense of institutionalism,[96] has steadfastly reminded his fellow judges of formal and functional constraints on their offices. Jurists of later vintage and of various ideologies can look to Judge Wilkinson's writings as consistent counsel that "[t]he legitimacy of judicial power is rarely self-evident"—and that "[t]he level of public comfort is rightly higher with technicians than with dreamers on the bench."[97]

In any event, disagreements do not detract from the difference the Judge's work has made in the separation of powers space. Judge Wilkinson has devoted four decades of his admirable career to articulating, applying, and advocating a deep and genuine vision of

[93] Id.
[94] 595 F.3d 164, 175 (4th Cir. 2010).
[95] Id. at 172.
[96] See Wilkinson, supra note 76, at 52.
[97] J. Harvie Wilkinson III, The Role of Reason in the Rule of Law, 56 U. Chi. L. Rev. 779, 780, 784 (1989).

federal courts' limited responsibilities in our broader system of government—and of how he believes federal judges should help uphold that constitutional structure through prudence, role morality, and restraint.

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ESSAY

LEARNING TO DISAGREE AGREEABLY

*Allison Orr Larsen**

When I clerked for Judge Wilkinson in 2004, the most frequent guest in his Richmond chambers was Judge M. Blane Michael, a judge on the Fourth Circuit who we lost too soon and who was one of Judge Wilkinson's closest friends. Judge Michael was appointed by President Bill Clinton, and Judge Wilkinson was appointed by President Ronald Reagan; the two men did not always see the law the same way, to say the least. I recall witnessing a stark juxtaposition in which they would disagree on the bench in the morning and then change from judicial robes to running clothes to jog around Monument Avenue together that same afternoon. Judge Michael would walk into the Wilkinson chambers casually—like an old friend who is invited to use the back door—and then gently tease Judge Wilkinson about his running apparel (particularly the socks the Judge wore on his hands to protect them from the cold). I also recall Judge Wilkinson greeting his friend with a warm smile and a genuine embrace before they started their afternoon jog.

Civility gets a bad rap these days. Technological change has ushered in an era of echo chambers and divided media, resulting in isolated teams

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who reinforce mutually-held beliefs and vilify their enemies.[1] In a political environment like that—what Judge Wilkinson once called a "poison tangle"—the idea that we should attempt to bridge ideological divides seems naive at best and elitist at worst.[2]

But the most important lesson I learned from Judge Wilkinson—out of many important lessons—is the one brought home to me by witnessing his friendship with Judge Michael: the law works only when lawyers learn to "disagree agreeably."[3] This is a phrase the Judge taught me—and he always attributed to people from whom he learned it—but for me it encapsulates the Judge in every way.[4] It is easy to talk about being collegial in the abstract, but Judge Wilkinson practices what he preaches.

In this brief Essay, on the occasion of celebrating a man who shaped my career and life in many significant ways, I will attempt to articulate (1) what the Judge actually meant by the phrase disagreeing agreeably, (2) why the concept is uniquely important to the legal profession, and (3) why it so desperately needs to be rediscovered by future generations of lawyers.

1. "Being true to oneself should not mean being untrue to someone else."[5]

The Judge wrote the above words in a tribute to Justice Ruth Bader Ginsburg, a woman who is often lauded for not only being a champion of

[1] See Jaime E. Settle, Frenemies: How Social Media Polarizes America 34, 72 (2018).

[2] For elaboration on the latter criticism, see Leila Fadel, In These Divided Times, Is Civility Under Seige?, NPR (Mar. 12, 2019, 5:49 PM), https://www.npr.org/2019/03/12/702011061/in-these-divided-times-is-civility-under-siege [https://perma.cc/5ZKW-ZNHW] ("Civility has been about making sure that the status quo, the hierarchy of the status quo at the moment, which means racial inequality, gender inequality, class inequality, stays permanent.") (quoting Professor Lynn Itagaki). For the "poison tangle" quote, see email from Judge Wilkinson to Allison Larsen (Apr. 21, 2022) (on file with author).

[3] As mentioned above, Judge Wilkinson always attributed this phrase to others, but I learned it from—and associate it with—him. It is now a widely used phrase and was made popular by people as varied as Justice Ruth Bader Ginsburg and President Lyndon B. Johnson. See, e.g., Dahlia Lithwick, Mourning the Way RBG Calmly Approached Opposition, Slate (Sept. 25, 2020, 5:37 PM), https://slate.com/news-and-politics/2020/09/mourning-rbg-calm-fury-injustice.html [https://perma.cc/6JRS-A3SN]; see also Tom Wicker, The Johnson Way With Congress, N. Y. Times Mag., Mar. 8, 1964, at 9.

[4] As other law clerks will understand, I can't help but refer to Judge Wilkinson as "the Judge"—now a term of endearment—and so I will continue to use that phrase to refer to him in this Essay.

[5] J. Harvie Wilkinson III, RBG Has a New Stamp? We Had Our Differences, but I'll Honor Her by Using It, Wash. Post (Sept. 6, 2023, 6:15 AM), https://www.washingtonpost.com/opini

her vision of the law, but also doing so in a way that left room for friendship with those who disagreed. Sometimes we call this concept "collegiality." When I talk about collegiality in my classroom, I suspect I sound very outdated to modern law students. The concept of collegiality or civility has been widely misunderstood as championing the view that we should stifle disagreement, "go along to get along," and cement the status quo. But that is not at all what disagreeing agreeably means.

So, what does it mean?

To disagree agreeably one must commit to creating a culture in which repeat players both act in good faith and give each other the benefit of the doubt. Judge Wilkinson models this behavior for himself and for those around him on a daily basis. He not only hires law clerks with different ideological stripes—*not* the trend these days—but he then creates space for them to nurture lasting friendships with each other (on the running track, over lunch, at dinners and happy hours in Richmond).

In scheduling dinners with other judges in Richmond, Judge Wilkinson does not just pick from "his team," but he makes a concerted effort to dine with colleagues appointed by presidents of both political parties . . . and he often brings his law clerks with him. This not only makes for a more enjoyable workday (which it does), but it also ensures that people who may not come from the same corners of the world see the humanity in each other. The Judge always avoided "case talk" at these meals with colleagues, choosing instead to ask about his colleagues' children, their hobbies, and shared personal experiences.

It is a deliberate choice—and not just a social one. The Judge knows that in his profession disagreement is inevitable and the temptation is high to see one's legal adversary as a caricature or a villain. The Judge fights that human tendency by committing himself to learning about his colleagues as multidimensional, and thus worth listening to and learning from in the future.

Relatedly, in order to disagree agreeably, we must recognize (in Judge Wilkinson's words) "the difference between disagreement on substance and fraying the very understandings by which we operate."[6] Process

ons/2023/09/06/ruth-bader-ginsburg-stamp-honor-harvie-wilkinson/ [https://perma.cc/G9EM-JTAS].

[6] J. Harvie Wilkinson III, Bipartisan Approval Lends a Sense of Balance to the Judiciary, Wash. Post (Nov. 24, 2013, 7:52 PM), https://www.washingtonpost.com/opinions/bipartisan-approval-lends-a-sense-of-balance-to-the-judiciary/2013/11/24/cc63de6a-53bc-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/WD92-JEK6].

matters. Tone matters. Norms matter. To demonstrate that one sees the humanity and good faith in colleagues, one must honor the norms and traditions that bind one another together in the first place.

Ultimately, this takes a commitment to creating a safe space for disagreement to happen in a principled manner. In the words of Judge Pamela Harris, another Fourth Circuit colleague who admires Judge Wilkinson greatly even though they do not always see the world in the same way, collegiality means "'leaning in' to making decisions in active engagement with your colleagues: Knowing each other; really listening to and respecting each other's views; being willing to be persuaded and also to persuade, to be part of that dialogue."[7] Disagreeing agreeably, in other words, simply can't happen without important background work to create the conditions necessary for people to trust, respect, and listen to each other. Judge Wilkinson's commitment to that essential work is paramount.

2. "[F]or better and for worse, law and lawyers are central to America. And law is, after all, a profession of reason."[8]

Learning to disagree agreeably is too often characterized as a kindergarten benchmark: "plays well with others." But Judge Wilkinson knows the stakes are much higher than that, and they are particularly acute in his chosen field. The Judge has always emphasized that lawyers have great power, and consequently great responsibility, in our democracy. It is true that many of our country's leaders are and have been lawyers, but that is not just what the Judge means when he says "law and lawyers are central to America."

The currency of law is reason, not raw power. And lawyers are trained to speak to each other in a certain way—to persuade, not to shout. I am not naive enough to believe (and neither is the Judge) that reason explains all legal decisions or that all lawyers practice this art of persuasion equally faithfully. But the failings of the profession ought not define it. Now that I take part in the training of young lawyers, I understand more what unites them. All lawyers have been through a specific sort of education—one that marks them with the ability to take apart a puzzle methodically, to

[7] Harry T. Edwards, Collegial Decision-Making in the US Courts of Appeals, in Collective Judging, *in* Collective Judging in Comparative Perspective 57, 76 (Birke Häcker & Wolfgang Ernst eds., 2020) (quoting Judge Pamela Harris).

[8] J. Harvie Wilkinson III, Building a Legal Culture of Affection, 99 Nw. L. Rev. 1235, 1236 (2005).

analyze it from all sides, and then to communicate the nuance in a way that can reach a broader audience. This is a superpower.

Indeed, the Judge has always stressed that the commitment to solving problems through legal analysis—to giving reasons as opposed to just ruling by brute force—is precious and essential to American democracy. In his words:

> Our country, I fear, will not heal unless the legal profession does so first. If this sounds vain, it reflects only a recognition that, for better and for worse, law and lawyers are central to America. And law is, after all, a profession of reason. Reason, by its nature, is a temperate and calming force. A culture of affection in the most reasoned of all professions should not be out of reach.[9]

Anyone who has seen Judge Wilkinson ask penetrating questions from the bench knows that by emphasizing the "calm force of reason," he does not mean lawyers should be meek or timid. On the contrary, the calm force of reason comes with great power to influence and ultimately get one's way.

But the Judge also emphasizes that with this power also comes great responsibility, and it is a responsibility to listen as well as to persuade. In the same essay about the importance of affection to the legal profession the Judge explained, "Animosities do more than divert and consume energies. They make it more difficult to listen, to be open to the argument that may warrant an adjustment of one's view. More fundamentally, personal antagonisms profoundly impede the search for common ground."[10]

3. "[N]o society can function without the prospect of consensus and reconciliation that a culture of affection alone can achieve."[11]

Common ground is an interesting concept in and of itself. In a tribute to his mentor, Justice Powell, Judge Wilkinson described Justice Powell's style as using the "soft voice of persuasion" to "contribut[e] to consensus both within our body politic and our legal culture."[12]

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[9] Id.
[10] Id.
[11] Id.
[12] J. Harvie Wilkinson III, The Powellian Virtues in A Polarized Age, 49 Wash. & Lee L. Rev. 271, 272 (1992).

It is a characteristically thought-provoking turn of phrase: that the law's leaders should "contribute to consensus." Even when he wrote these words in the early 1990s, Judge Wilkinson anticipated criticism. So often retreating to common ground is seen as a sign of weakness—fleeing from a fight or from one's independent convictions. But in the Judge's own words (in a speech given at the University of Virginia School of Law): "Since when does independence . . . mean that we stop listening and learning . . . ?"[13] What the judge knows is that looking for common ground is actually a symbol of intellectual strength. It demonstrates humility, wisdom, maturity, and an ability to evolve.

But even more importantly, without common ground, what do we have left?

Judge Wilkinson artfully explained why Justice Powell was always looking for consensus:

> It has been customary to speak of our "social fabric" and "our sense of community"—in fact, such expressions have become almost a cliché. But a fabric is made of interwoven strands, and our legal culture today is in danger of unravelling. There has never been a time when the legal profession was in greater need of Lewis Powells. There is a temptation now to think of hostility as the norm and of civility as a bygone thing.[14]

Banishing civility to an age of the past, the Judge taught me, is the most dangerous thing we can do if we want to keep the "interwoven strands" of our community intact. In a country as varied as the United States, disagreement is inevitable. Hot tempers are unavoidable. And indeed, sometimes political courage means fighting for what is right with all you've got. In those moments it is difficult—but essential—to follow advice the Judge once gave me personally: "I often have to remind myself that those with whom I differ approach the law with the same sense of conviction and dedication as I hope I do."[15] The lesson is not to lose the conviction and dedication, but to deploy them in a way that leaves room for peace.

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[13] Excerpts from the speech Judge Wilkinson gave on April 14, 2004, upon receiving the Thomas Jefferson Foundation Medal in Law. See Mary Wood, Legal Profession's Breakdown in Camaraderie Could Send Wrong Message to Public, Wilkinson Says, Univ. of Va. Sch. of L. (Apr. 19, 2004), https://www.law.virginia.edu/news/200404/legal-professions-breakdown-camaraderie-could-send-wrong-message-public-wilkinson-says [https://perma.cc/LZT2-5C5E].

[14] Wilkinson, supra note 12, at 273.

[15] Email from Judge Wilkinson to Allison Larsen (Apr. 22, 2002) (on file with author).

Ultimately, I suppose the big question is: What is the end game if we vilify each other and retreat to our respective corners? Is that the world we want for ourselves and our children? I will be forever grateful for the biggest lesson that the Judge taught me: after the tangle, sometimes you just have to put those socks on your hands and go out and exercise with your fellow man.