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Harold Hongju Koh

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## Malcolm R. Wilkey: Jurist and Scholar

When Malcolm Richard Wilkey, United States Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, retired from active service last December, he left behind him a firmly established reputation as the foremost student of international law gracing the federal bench. Even before he donned judicial robes in March 1970, Judge Wilkey had enjoyed a remarkably rich and varied career in international law, splitting twenty-two years of lawyering almost evenly among private practice in Houston, government service as a United States Attorney and Assistant Attorney General in the Department of Justice, and the General Counsel's Office of the Kennecott Copper Corporation. In these pre-judicial incarnations, Judge Wilkey represented the United States at the 1959 United Nations Conference on Judicial Remedies Against Abuse of Administrative Authority, served as Reporter to the Commission on International Rules of Judicial Procedure, and participated in the work of the Rule of Law and International Law Committees of the Association of the Bar of the City of New York.

It was during his nearly fifteen years of active service as a federal judge, however, that Judge Wilkey most dramatically shaped the development of that restlessly evolving body of jurisprudence now styled the "foreign relations law of the United States." In a stream of exhaustive and scholarly opinions, which surveyed such diverse topics as conflicts of jurisdiction (or "extraterritoriality"), the law of executive agreements, the act of state doctrine, the immunity of international organizations, and the application of the doctrine of *forum non conveniens* in transnational litigation, Judge Wilkey tackled and illuminated some of the most vexing international law

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\*Associate Professor, Yale Law School. Professor Koh served as Judge Wilkey's law clerk in 1980-81.

issues of our time.<sup>1</sup> In those opinions, Judge Wilkey guided the bench, bar, and academia to a fuller understanding of how international legal principles properly apply to public and private litigation before United States courts. Judge Wilkey's unusual influence on this growing corpus of learning derived not only from the public airing of his analyses in the pages of the *Federal Reporter Second*, but also from their private airing in the halls of the American Law Institute, where he studiously attended the Board of Advisers of the *Restatement of the Law, Foreign Relations Law of the United States (Revised)*. As the only sitting judge advising that *Restatement*, Judge Wilkey offered the Reporters a unique perspective, for he not only opined on theory—how he believed his own judicial decisions best fit within the jigsaw puzzle of existing precedent—but also on practice—how “transnational adjudicators”<sup>2</sup> like himself were likely to apply the black-letter rules of that proposed text in future concrete cases.

As Judge Wilkey takes senior status, it seems particularly fitting that he should be honored in the pages of this journal. For decades a loyal member of the ABA Section of International Law and Practice, Judge Wilkey served as its Secretary in 1970 and as a member of the Section Council that in August 1966 approved THE INTERNATIONAL LAWYER'S birth. It is one measure of Judge Wilkey's enduring commitment to the work of this journal that more than sixteen years—nearly the entire life of THE INTERNATIONAL LAWYER—separate the Judge's first contributions to it, as the author of an article in Volume 3 and as Corporate Affairs Editor of Volumes 3 and 4, from his most recent article in Volume 18.<sup>3</sup> While pondering what his next career should be, Senior Judge Wilkey has spent much of 1985 a a Fellow at Wolfson College, Cambridge University. It seems almost inevitable that the

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1. See, e.g., *Ramirez v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated and remanded for reconsideration in light of subsequent legislation*, 105 S. Ct. 2353 (1985) (act of state doctrine, political question doctrine, equitable discretion in enjoining U.S. military training activity on foreign soil); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (international conflict of antitrust jurisdiction and antisuit injunctions); *Collins v. Weinberger*, 707 F.2d 1518 (D.C. Cir. 1983) (relationship between regulation governing employment on U.S. overseas military bases and executive agreement); *Mendaro v. The World Bank*, 717 F.2d 610 (D.C. Cir. 1983) (immunity of international organization); *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981) (separate opinion) (extraterritorial application of U.S. environmental law to nuclear exports); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980) *cert. denied*, 454 U.S. 1128 (1981) (standard to be applied on *forum non conveniens* dismissal of transnational products liability suit); *FTC v. Compagnie De Saint Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (relevance of international law to extraterritorial service of agency subpoena).

2. The phrase is Judge Wilkey's. See Wilkey, *Transnational Adjudication: A View From the Bench*, 18 INT'L LAW. 541 (1984).

3. Compare Wilkey, *The Deep Sea: Its Potential Mineral Resources and Problems*, 3 INT'L LAW. 31 (1968), with Wilkey, *Transnational Litigation—Part II: Perspectives from the U.S. and Abroad: United States of America*, 18 INT'L LAW. 779 (1984).

Judge will use his nominal “retirement” to exercise his unretiring voice and untiring mind (not to mention his tireless word processor) to produce scholarship that will continue to provoke and educate the readers of this Journal.<sup>4</sup>

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4. [Editor's Note:] On November 8, 1985, Judge Wilkey was sworn in as United States Ambassador to Uruguay, following unanimous confirmation by the Senate.

