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NEW YORK UNIVERSITY SCHOOL OF LAW –  
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)  
Oral History of Distinguished American Judges

HON. J. HARVIE WILKINSON III  
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT  
An Interview  
with  
Leslie Kendrick, University of  
Virginia School of Law

December 5, 2019

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[START RECORDING]

00:00:14 PROFESSOR LESLIE KENDRICK: Hello. I'm Leslie Kendrick, the vice dean at the University of Virginia School of Law, and I could not be more delighted to be here today to interview Judge J. Harvie Wilkinson III, my former boss and a judge on the Court of Appeals for the Fourth Circuit. We're here today to take his oral history for the Institute of Judicial Administration at NYU School of Law. Judge, thank you so much for being here. I could not be more excited to talk with you today.

JUDGE J. HARVIE WILKINSON III: Well, I'm delighted  
00:00:43 to be here too, Leslie. It's great, always great to see you and I want to thank New York University and IJA for this wonderful opportunity. IJA has been so helpful in educating judges and in educating the public about what judging is all about, and it's great to participate in a program put on by such a quality institution, and it's also wonderful to be with you. You were a great clerk, and since that, since that time, I've only heard the most terrific things about you as a teacher and a scholar and an  
00:01:30 administrator, and none of it surprises me. It just makes me very, very proud, so it's always great to see you and have a chance to chat.

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PROF. KENDRICK: Well, thank you so much Judge.

00:01:47 That means so much to me and I'm just so thankful to  
be here with you, and we're going to start all the  
way back at the very beginning if that is okay with  
you.

JUDGE WILKINSON: Sure is.

PROF. KENDRICK: Okay, so you grew up in Virginia.  
You live in Virginia, here in Charlottesville where  
we both live. You went to law school in Virginia.  
Your chambers are here. You sit on the Fourth  
Circuit. You're so closely associated with Virginia  
that I think a lot of people would be surprised to  
learn  
00:02:11 where you were born. Where was that?

JUDGE WILKINSON: Well, I was born in New York, and  
I'm a Virginian through and through, but I was born  
in Brooklyn, and my father was a major in the Army  
Finance Corps during World War II, and a tremendous  
amount of the financing of the allied effort was done  
out of New York. So, he was up there, and he would  
tell me things about New York when, apparently we  
lived fairly near Gracie Mansion<sup>1</sup> and he would walk  
on his way to work and pass Mayor Fiorella LaGuardia,

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<sup>1</sup> [Gracie Mansion](#) has been the official residence of New York City's mayor since 1942.

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00:02:56     who he said was a very nice man and got to know him  
and would say, hi solider, hi soldier, and so. But my  
father never wanted to make New York a permanent  
residence because he had grown up in Virginia and had  
the same identification with Virginia that I did, and

00:03:18     so he had this idea that he had to get me back to  
Virginia before I turned two years old, and we would,  
he says he would tell Momma, "If we could just get  
Jay back to Virginia before he turns two, then he  
will be a full-fledged Virginian. So, in 1946, they  
made it, and I arrived back in Virginia before the  
age of two, and my love for the state is apparent,  
and I feel lucky, indeed, to be born here, but I'm  
also proud to have, I mean, to have lived here, but  
I'm also proud to have been born in New York. I  
mean, it is

00:04:04     absolutely one of the great cities of the world, and  
I'm impressed anew by it every time I go there.

PROF. KENDRICK: So, you did end up growing up in  
Richmond, and tell us a little bit about your parents  
and about your family's background.

JUDGE WILKINSON: Well, it was very formal, to say  
the least, and I think a lot of people would maybe  
not relate to how formal it was. I mean, I always  
addressed my father as "Father." I didn't just call

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him dad. I always said, you know, "Yes,  
00:04:45 sir" or "Yes, ma'am." I didn't just say, "Okay" when  
I was a child. No, I mean, my father, I mentioned,  
he came to breakfast on Saturday morning with a coat  
and tie and he wore his bank pin on the lapel of his  
pajamas. He was, he was a company man, and it was  
00:05:16 all very formal. When we sat down to dinner, the  
worst sin you could commit was using your salad fork  
on the entrée. You were supposed to use salad forks  
just for salads, and you know, I didn't want to goof  
up on that. So, Mother and Father had this very  
devoted marriage. They were very different people.  
My mother's parents and grandparents were all dairy  
farmers, and they loved getting out with cows and  
milking cows and, you know, they would talk about  
that at length, and my father was a Richmond  
00:06:12 banker, and had grown up in Richmond, and he was very  
much in the Richmond business world, so you have  
these two very different people in this completely  
devoted and wonderful marriage. And funny trips were  
when we would go sometimes to Culpeper, Virginia,  
which was the site of my mother's dairy farming  
parents and everything, and when dad got out with the  
cows and on the dairy farms, he didn't know what to  
do with himself. He was, he was completely at a

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loss, and you had these good folks in Culpeper  
00:06:57 thinking what did my mother ever do marrying someone  
who knew so little about dairy farming. Everything  
had to be explained to dad from pasteurization on  
through. But, you know, despite the differences,  
they couldn't have been more in love, and the thing  
about

00:07:21 a formal background is, it's not cruel in any way.  
It's not too stern. Their love and affection for me  
broke through. Yes, there were rules to be observed,  
but the rules were not a barrier to showing affection  
for my brother and me. So, I think we had the best  
of both worlds, but most people wouldn't really  
recognize just how many rules there were and how  
strict things were. They wouldn't recognize that  
today.

PROF. KENDRICK: That's very different from how my  
00:07:58 kids behave, that's for sure, that's for sure.

JUDGE WILKINSON: And my own children, too. I could,  
they wouldn't stand for being brought up the way I  
was brought up.

PROF. KENDRICK: I just have to ask, how did your  
parents meet?

JUDGE WILKINSON: They met when my father was a bank  
vice president and he was in his early thirties and

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he was not married, and all of a sudden, my mother came in and applied for a job as his, as his  
00:08:26 secretary, and he asked her some questions about, how fast do you type? And she said, I don't do much typing, you know? And he said, you're hired, because to him, she was so beautiful and he just, you know, knew he wanted to see more of her, and so we can put  
00:08:53 it gently. Her secretarial skills were overlooked for the time being. That's how they got together.

PROF. KENDRICK: And you have one brother?

JUDGE WILKINSON: I have one brother, Louis, who is four years younger than me.

PROF. KENDRICK: And when you all grew up, this was the Jim Crow South. Richmond was segregated and you came of age really during the age of massive  
resistance and the beginning of the Civil Rights Movement. How did that affect you at the time? How  
00:09:24 much did you realize about it at the time, and how do you think that's informed your perspective?

JUDGE WILKINSON: Well, I didn't really realize what I should have at the time, but when you're, when you're a youngster growing up, before you're 10 and even in your early teens, you just accept the world that's presented to you and you accept the world that's given to you, and so I didn't really question

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very much, and, but as I grew older, I began to see that some things were very, very wrong. I mean, 00:10:04 separate but equal<sup>2</sup> was, I mean, the separate was bad enough, and nothing was ever equal, and you know, you just would think back to some things and say that was really wrong, and one little thing was, I thought, was the whole idea of water fountains where 00:10:27 African Americans had one and whites had another. More often than not the black water fountain didn't work. You know, no water came out of it. You've seen water fountains break down, so the natural thing to do would be well, you know, go wherever you can get water, but they still, even so, they couldn't drink from the white water fountain. Now, how bad is that? And, as I grew older, I played tennis and I played at the Country Club of Virginia, and I thought, well you know, they have the nicest tennis courts. They must have 00:11:12 the best players. And across town, Arthur Ashe was playing tennis, but those of us who grew up in this privileged country club in Virginia, we had no idea that one of the best tennis players in the world was

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<sup>2</sup> "Separate but equal" was a doctrine according to which racial segregation was constitutionally permitted. It was famously invoked in [Plessy v. Ferguson](#) to uphold a Louisiana law that mandated separate railway cars for Black and white people. 163 U.S. 537 (1896). *Plessy* was overturned by [Brown v. Board of Education](#), 347 U.S. 483 (1954).

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in our home town. That's how, you know, wrong segregation was, and that's how rigid it was, and that's how totally separate it was, and I, to this day, one of my great regrets was that I never hit a single tennis ball with Arthur Ashe, and he would have, he's a very generous man, and he would have

00:11:54 been happy to have, you know, hit a few tennis balls with a plunker like me. And I didn't. But society was such that it didn't permit it, and there were other things. We had a wonderful cleaning lady by the name of Annie McCray, and one, one time, I came

00:12:27 to her and I said, Annie, would you get this shirt for me. I've got to go out to a party at night, and she said, "Jay, why do you address me as Annie? Why can't you call me Mrs. McCray? Because you call all your parents' friends Mrs. McCray." I didn't know, I'd never thought about it. And young children in the segregated South, we referred to African Americans by their first name, and then you referred to whites by Mr. and Mrs. I mean, it's stuff all around that was just wrong. And as I thought back on

00:13:18 it, I kept sort of uncovering these things that were not apparent to me at the time. So, the dilemma that I have faced is, how do I reconcile and keep this tension in mind of a very happy childhood, very

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wonderful parents, very wonderful people in Richmond, Virginia that I knew they were great patriots and their word was their bond and they were capable of great generosity and kindness, with a wonderful work ethic were, they were just good human beings, and so, all of my life, I had tried to live

00:14:15 with this tension between the wrongs of racially separate society and the fact that my childhood was happy and many of the people would just do unsolicited acts of kindness, not just to me, but to all kinds of people, and so, I guess I just have to

00:14:39 hold those in balance, and I cannot excuse the wrongs of my boyhood, but neither can I just bring myself to totally condemn it. I don't think that, I would never turn my back on my parents. I would never say that the South wasn't without its considerable virtues or that my home didn't have much happiness and decency about it. And, so you don't, there may be lots of things that people find wanting in their background, but you don't lightly turn your back on the only home you know and the only

00:15:32 background you have and the only region where you were brought up, and so you recognize the terrible wrong that lay at the very core of it, and yet, does that lead you at a wholesale, to a wholesale

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condemnation? I don't think so. I try to balance what was right and what was very wrong, and sometimes it's hard.

PROF. KENDRICK: As you got older, you went to boarding school at the Lawrenceville School and you've written about a formative experience you had there. Would you like to tell us a little bit about that?

JUDGE WILKINSON: Yeah. Well, the Lawrenceville School, both St. Christopher's and Lawrenceville where I went were just wonderful places. I remember St. Christopher's, I had an Ancient History teacher by the name of Mr. Brenser, and he's one of the best teachers I ever had. He loved the ancient world, and he made the Greeks and the Romans come alive. He told us about Roman architecture and Greek architecture Doric columns and Corinthian columns and the beginning shoots of Democracy in Athens and the rivalry between Athens and Sparta, and the greatness of Rome and the rule of law and also the cruelty of Rome, which would take prisoners that it captured on the Roman frontier and make them enslaved persons and gladiators when they came back to Rome. And he would talk about the inventiveness of the Romans and emperors as different as Hadrian and Marcus Aurelius,

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and it came alive, and what he, what he said about history was, you know, stuck with me still, which is, the age of Pericles in Greece, it may have taken place in 450 B.C., but just because it took place so long ago, it doesn't mean that we have our right, a right to look down our noses at Ancient Greece or

00:17:59 Ancient Rome. Just how much he, he made me realize just how much those ancient civilizations have to teach us about ourselves today. And then I went from St. Christopher's to, as you mentioned, to the Lawrenceville School, and I remember in

00:18:19 Lawrenceville, N.J. I was completely taken aback when my father took me to look at it, because to this day, Lawrenceville has a campus, as a prep school, that's really nicer than that of many different colleges, and it's extraordinarily beautiful, and they have, it's not an, it's not an impersonal environment because it's broken up into circle houses, which are little cottages where we, where we all stayed, and there's an interesting theory of education at Lawrenceville, which I really

00:19:04 appreciated, and that is, they have these Harkness Tables. We didn't just sit in rows in front of the teacher, where the teacher was up here on a pedestal and the students were sitting down, facing

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the teachers. All of the classroom tables were oval, and the, so the teacher was at the same level with the students, and so the class just became very conversational, rather than, you know, a matter of dictatorial or didactics. And so I've always loved that about Lawrenceville, but, you know, we all made mistakes, and I've made, and I've sure made my share of them. I was the editor of the school newspaper at Lawrenceville. It was the very early 1960s, and Lawrenceville was segregated, and I should have written, and I wrote editorials on everything under the sun, and I should have written an editorial saying it is long past the time when we need to become a more diverse and integrated institution. And I didn't do that, and I, I don't know why I didn't do that, but there were lots of, lots of excuses. The headmaster might have said, you know, don't cause trouble, let us, let us do this in our own way. And then people back in Richmond, Virginia would have heard, and said, what are you trying to do? So it was just, you know, it was a lack of courage on my part, and I've since regretted it and thought about it and sometimes you miss an opportunity that doesn't come around again. I've tried to make up for it in many different ways, but

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you know, just sometimes you make bad mistakes and I was just silent when I should have spoken up and that's not a good thing to be silent in the face of a significant injustice, when you should have spoken up. It just was, was too bad, but no one to blame but myself.

00:21:42 PROF. KENDRICK: You went to college then, at Yale, in the mid-sixties. You graduated in 1967, and in your book, *All Falling Faiths*,<sup>3</sup> you talk about that experience. And you talk about both that experience you had and your experience as in some

00:21:56 ways emblematic of that time period. Could you tell us a bit about that?

JUDGE WILKINSON: Sure. In a nutshell, the experience that you speak about, it was, it became all about politics, and the question I have tried to address in *All Falling Faiths*, my memoir, was why it's great to have some of college be about politics, but in the 1960s, everything was seen through the lens of politics, and to just come to the point, college should be

00:22:44 more fun than the 1960s made of it. And, I dropped out of the glee club when I had a passable voice

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<sup>3</sup> J. Harvie Wilkinson III, *All Falling Faiths: Reflections on the Promise and Failure of the 1960s* (2019).

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and they needed first tenors, and I tried out for the tennis team, and I made the tennis team. I dropped out of that so that I could devote more of my time to political debate and the rest, and I didn't spend the time at the fraternity that I maybe would have liked to have. And I didn't spend an amount of time reading, you know, the great classics in my English classes, which I will, I won't have the time to again. And so, adding it all up, what I missed in class and what I missed with the glee club and the tennis team, I gained a lot from just being in these political debates and debating Vietnam and civil rights issues, this and that, but it occurred to me that college was, should have been more fun than it was for a great many of us in the 1960s. You know, you're never going to have another time when you have time to do these things, and where you're shed of so many responsibilities, and so I regret that. I, I just should have kicked back a little more and, and not be part of the politically charged environment, and I think it's, one of the problems is being at this highly politicized and polarized environment that I experienced in college in the 1960s is contributing to this highly

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politicized and polarized environment that we're experiencing as a country today, and I honestly think that there would be more bipartisanship and we would have a sort of softer national mood if, among other things, college in the sixties had been more about, hey, it's not wrong to enjoy yourself. I don't mean a drunken binge on Saturday evening.

I mean just being part of a glee club or part of a sports team or whatever. And I gave those things up

00:25:26 for this highly charged, engaged environment, and I wonder if some of it hasn't spilled over to the fact that we just draw into our separate camps and behind our separate battle lines today.

PROF. KENDRICK: I wonder about the, the time  
00:25:45 period of the sixties and what your generation, the Baby Boomer generation was dealing with at the time. Do you think it's, do you think with the Vietnam War and people facing the draft and with the Civil Rights Movement where it was at the time, do you think it was really possible for people to step back and join the glee club at the time?

Do you think maybe there were good reasons that things were as politicized as they were at the time?  
JUDGE WILKINSON: Yes. I think that it, it was  
00:26:17 pervasive, but I still think it's, it's possible to

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step back from a highly politicized arena and just understand what life is all about, and that you have to take time to smell the roses. For example, even as highly politicized as we are today and as badly divided as we are today, you know, there are no do-overs in life. You only have one life to live and you need to enjoy the beautiful things that life has to offer, it doesn't matter how politicized or whatever the world around you is. I think, that's what I try to remind myself, all the time, that you know, family and friends and grandchildren and recreation. Those things, those things matter, so if it's something I learned from those years at Yale, it's, you know, smell the roses, although roses really don't have much of a pungent smell, but yeah. I think it would be, it would be possible.

00:27:04  
00:27:29

PROF. KENDRICK: After college, you joined the Army. Where were you stationed, and what was your role there?

JUDGE WILKINSON: Well, I was stationed at Fort Knox most of the time. I was in the Army Reserve, to make it, make it clear, I was never in, I never went to Vietnam. I was never in any kind of, never under fire of any, of any sort, but it was a bit of, a five or six-month tour of duty, which I spent at

00:28:09

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Fort Knox, and my, my specialty and my, my position really was that of a personnel specialist, but being a personnel specialist, that's really a very exaggerated term for what I was doing. I was a filing clerk. That's pretty much what I was doing. I was, you know, buffing the barracks sometimes, and it was just qualification to be a personnel specialist, and that was, you had to be able to type 18 words a minute, and then you would qualify

00:29:09 to be a personnel specialist. Well hey, that, to put it mildly, Leslie, that's not a high bar, and it was something that even I, I could clear but the thing about the, those years in the Army, there were so many of us in the Reserves, you know, who

00:29:32 didn't wish to fight in, in Vietnam, and now, I've made clear at the time and even more so afterwards that the Vietnam War was a tragedy for many, many, many different reasons. One was it created enormous class divisions in our society because by and large, people with college and graduate degrees, we were able to avoid the draft and going to Vietnam and we were able to find, if you worked hard enough, you could do that. There were deferments granted to married persons and first, initially to people who

00:30:33 had college degrees, before the lottery was put in,

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but the truth of the matter is, that people who had lesser wealth, lesser connections, who had lesser educational opportunities, were high school graduates, they served to a disproportionate extent, and those of us who had more privileged backgrounds did not serve to that same extent. So these class divisions which were created there and in the 1960s in many different ways, the way we wrongly looked down at hard hats and all the rest, it was, was,

00:31:19 there was an inexcusable heartiness of it. But, in our defense, I would, I have to say that the Vietnam War was one of the greatest tragedies in this country's history. Now, 58,000 of my generation died, and there's always something unkind about

00:31:50 casualty figures. You talk about World War I, 2 million Germans and one million and a half Frenchmen and a million British soldiers died in World War I, and 58,000 died, Americans died in Vietnam. That doesn't even include the number of Vietnamese. We round these figures off. They have lots of zeros at the end, and that in itself, it is so impersonal, because each single digit, if it was 58,127, then you would get a greater sense of the individual life, but by saying, you know, having all these casualty figures in zero, zero, zero, it, it lumps

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00:32:52 people together when death is a very individual thing. And, of those members, my contemporaries who did serve, and they should be honored for it, it was a, it was a terrible loss. These were people that I played soccer with, and these were people that I went on a double date with, and these were people that I would go get a late night hamburger with, and they were dead, at, what is it? 20 to 22? And there was never any sense of a clear

00:33:38 mission, of why we were over there strategically, or tactically, whether we were pursuing the right ways of winning the war. It, it was terrible, and it's really hard to have somebody that you went to college with and were best buddies with and somebody

00:34:00 that you went to high school with and knowing, you know, at 22, they, they are no longer. It is just a tragedy of the, of the first order. It hasn't turned me into a pacifist. I'm a believer in peace through strength. I think Reagan and Eisenhower were great presidents in that regard, but we have to recognize that the strength is very, very important to preserve the peace, but the peace is very important, too. You want a strong military, but it's peace through strength that you hope to achieve, and you know, this is part of the 1960s that created a

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00:34:50     bitterness from which the country hasn't fully recovered. That, that is part of the tragedy of the 1960s is that there's a residue of bitterness in all kinds of ways that is with us, is with us still. People in positions of leadership, they can do wonderful and right things, the way Franklin Roosevelt and Abraham Lincoln did, or they can make grave miscalculations.

PROF. KENDRICK: In this time period that was so  
00:35:26     volatile, you were making your way and making choices about what you would do with the rest of your life, and one thing that I see in your career is that you've made some bold and unconventional choices that have given you a unique set of experiences, and I see

00:35:40     some of these in these early years right after college. So, shortly after college, you published your first book, *Harry Byrd and the Changing Face of Virginia Politics: 1945-1966*,<sup>4</sup> which is still highly regarded as an insightful account of the Byrd machine in Virginia, and then after the Army, you started in law school, but during law school, you took a leave to run for Congress, and I'm curious about how you decided to do the things that you did, and if you

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<sup>4</sup> J. Harvie Wilkinson III, *Harry Byrd and the Changing Face of Virginia Politics: 1945-1966* (1984).

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thought, were you thinking that yours was going to be a life of politics?

00:36:14 JUDGE WILKINSON: I, I did them because I thought I would like to do them, and I enjoy writing and I, as the run for Congress is concerned, I was 25 years old and it was probably a rash thing in which to do. I, it was, I was running against, I got the Republican nomination, and I was running against a three-term incumbent conservative Democrat. Back then, the Republicans were the more progressive party. So, I was running against this fellow, David Satterfield, and he ran these ads against me which were just devastating and he said, "Send Satterfield back to Congress and Wilkinson back to law school." Well, you know, that landed with a devastating effect, and so I lost by a sizable margin, and then I remember after losing the race, I ran into a television cameraman who asked me, he said, what lesson do you draw from the election, and I said well, I think I've received a mandate. And the good cameraman looked back and was startled, and he said, "A mandate?" And I said, a mandate to return to law school, and back I went. But it was a wonderful experience really, because you learn just, when you run for Congress and run in politics, you learn just what a little bubble

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that you've been in and the, it allows you to learn more about your community than you almost could in any other way, and I would be spending Sunday morning, for example, at an African American church, because black political life was centered and organized around the churches in those days, and to a considerable extent, it still is. And then I would go to a, it would be always a very nice luncheon or bake sale or something afterwards, and I was able to talk with members of those church communities and the African American community to a greater extent than I would have been able to also, and then, but then Saturday night, you are giving a talk to Lee Davis Country Club. It was out in Highland Springs, and it, and they're good people, but they didn't, the two worlds, they didn't have any inkling, really of what was going on in the other, and so you want politics to be a bridge, and, but you realize that that's, at least back in 1970 when I ran, it's very difficult to be a bridge, because even if there's no segregation in law, apart from the workplace, there's an enormous degree of racial separation in terms of social life and recreational life and church life and others, and you know, politics is one of the ways in which we should get people together to talk to each other

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more. You know, there's some good in everybody and everybody has something to contribute. If we can get  
00:40:47 people talking more, we're going to have a better society. It's just that simple.

PROF. KENDRICK: If you had won that race, do you think you ever would have gone back to law school?

JUDGE WILKINSON: I would have, but it would have been perhaps in night school. I would have, I wanted a law degree, but I would have missed so much. I would have missed the wonderful education I got at the

University of Virginia Law School, and I would have  
00:41:17 missed the wonderful clerkship I had with Justice Powell, so I think it's probably a good thing that the voters, in their wisdom told me, you know, not yet; chill out. So I really had some wonderful

experiences that I wouldn't have had if I had won  
00:41:41 the race for Congress, and it's led me to believe that, you know, when one door closes, a lot of the reason is so that another door will open, and it's always a way in which I've been able to try to deal with disappointment, and that is, well, I remember what happened in my race for Congress. It just opened doors to something new. And I've always, when I've been disappointed or felt rejected, that was, I

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was always - - well there's some door opening  
somewhere that I've got to take advantage of, but  
that doesn't make losing easy, I must say. I felt  
I'd really put

00:42:29 myself on the line, and I'd visited all kind of  
people, made all kinds of speeches, run all kinds of  
ads and I was rejected and there, it was a hard thing  
at any age, but particularly at 25 because when you  
lose a political race, you feel a very personal sense  
of rejection, and it's hard to take. You can tell  
yourself, well, it's nothing personal. It, it's just  
politics, but it's tough.

PROF. KENDRICK: So, as you mentioned in the end,  
00:43:06 you did return to UVA Law School, our shared alma  
mater, and I'd love to hear how your experiences  
there influenced your approach to the law, your  
approach to judging?

JUDGE WILKINSON: Well, it gave me this wonderful  
00:43:22 view of the law that I hadn't had beforehand, and  
that is that law is, this is something I just would  
come upon in class, that law is probably one of the  
great conserving forces in our society, that is  
preserves, it conserves, but at the same time, it's  
one of the great reformist impulses in our society,  
and I thought, I said, you know, this is for me. I

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love the dynamic of the law, that the law can accommodate change, but it accommodates change at the same time that it realizes the values of tradition and precedent and everything. So, it's this balance  
00:44:17 between conservation and reform that is so exciting to me, and the University of Virginia brought that out in many different ways, and I also learned something else, and that is that the teachers were available to students, and you could go by and actually have a conversation. That was a little bit more difficult at Yale, where you would have a teacher that would lecture to 350 people and I couldn't just walk in to the professor's office and  
00:45:01 say, hey, I want to talk about what my next career step should be or I want to go over something you said in class, but I found that I could do that at the University of Virginia. It was a very personal form of education, even though it was graduate  
00:45:15 education and higher education. I'll always have a very soft, affectionate spot for that aspect of legal education that the University of Virginia afforded me.

PROF. KENDRICK: I'm so glad. And after law school,

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you clerked for Supreme Court Justice Lewis Powell.<sup>5</sup>

How well did you know Justice Powell before that experience?

JUDGE WILKINSON: Well, I knew him really well, and he, he was my brother's godfather, and he would come over every Sunday night and have dinner, Sunday  
00:45:49 dinner with my parents, so it, at first, I was not allowed in the room where Justice Powell and my father were talking, and then as I grew a little bit older, they said, okay, you can come into the room, but we sit on the armchairs and you sit on a foot stool. And what you're supposed to remember when you sit on that footstool is that children should be seen and not heard. Well, as time went on, the, the Justice and Dad got together, and said don't you  
00:46:35 think it's time that we let Jay talk a little bit, so eventually, after going through all these apprenticeships, I actually got a chance to, to talk, and put in my two bits worth of whatever it was and Justice Powell would respond and my father would  
00:46:57 respond, and so that was really neat, and when I graduated from Virginia and I applied for a

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<sup>5</sup> Appointed by President Richard Nixon, [Lewis Powell](#) was an associate justice of the Supreme Court of the United States from 1972-1987.

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clerkship, I interviewed with Justice Stewart<sup>6</sup> and Justice White,<sup>7</sup> and I would have been thrilled to clerk for either of them, but I heard these rumors that Justice Powell was considered as being one of a few people who could be easily confirmed, and so my heart would say, this would be beyond my wildest dreams if Justice Powell would be chosen for the Court and I could clerk for him, and then I turned on the television one night and I heard President Nixon say he was going to nominate Lewis Powell, and I just jumped through the ceiling. I was so happy. I didn't know that he was going to choose me because he may have thought that the personal relationship was too close, but you know, he did, and it sure was a formative experience in my, my life, to get to know him as a boss and a justice, as well as just someone who I was finally permitted to talk to on Sunday evening.

00:47:46

00:48:24 PROF. KENDRICK: So, you were one of his first clerks. Was it strange moving from that family friend relationship to a boss, you know, a judge clerk relationship?

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<sup>6</sup> Appointed by President Dwight Eisenhower, [Potter Stewart](#) was an associate justice of the Supreme Court of the United States from 1958-1981.

<sup>7</sup> Appointed by President John F. Kennedy, [Byron White](#) was an associate justice of the Supreme Court of the United States from 1962-1993.

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JUDGE WILKINSON: Yes, because you know, it  
00:48:39 was. But, no, I learned so, so much from him in that  
different kind of relationship that you mentioned  
than, than I could ever have learned in any other  
capacity, and I just came to appreciate certain  
things about Justice Powell. One is that he had this  
remarkable capacity for empathy, and he could have,  
he grew up in very privileged circumstances in  
Virginia, in Suffolk and Richmond and you wouldn't  
have thought that somebody who had had his upbringing  
was just a prime leader of the Richmond establishment  
and the, actually the legal profession  
00:49:39 nationwide would be able to empathize with people  
whose lives were so different from his own. I'm  
thinking of a case like Plyler v. Doe<sup>8</sup> where Justice  
Brennan<sup>9</sup> wrote the majority opinion. It was a 5-4  
decision and Justice Powell wrote a concurrence. It  
had to do with the question of whether undocumented  
children in Texas should receive, had a right to a  
public education, and  
Justice Powell voted and expressed his views that  
00:50:15 they did have that right, and it was very closely

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<sup>8</sup> [Plyler v. Doe, 457 US 202 \(1982\).](#)

<sup>9</sup> Appointed by President Dwight Eisenhower, [William Brennan](#) was an associate justice of the Supreme Court of the United States from 1956-1990.

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divided and he would, you know, he would talk about what they were up against and the fact that they were in circumstances that they had no control over and what education would mean to them even more than to, and he would talk about conditions in Texas. So, remarkable empathy and an understanding of people. He was a very humble man, and shortly after he retired, we sat together on the bench, and the first case we had was a very detailed social security disability case, and I said, my gosh, he's been dealing with the greatest question, the greatest questions in the land, you know? These gigantic legal issues. I feel a little bit embarrassed that, you know, here we are asking him to sit on this, you know, very fact-specific social security disability case, but he was right there with the rest of us, and he mastered the record and he knew everything about this petitioner and this claimant and what her medical conditions were, and I was really impressed with that. Here's a great man who thinks that no case is too good for him, and then the other thing I think I learned from him, Leslie, was just collegiality and how important that is, and he had this wonderful personal relationship with Potter

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00:52:02 Stewart and he and Sandra Day O'Connor<sup>10</sup> were great friends, and the Powell's and the O'Connor's were wonderful friends as couples because all four of them were fabulous ballroom dancers, and, but it wasn't just people in the center of the court that Justice

00:52:23 Powell reached out to and had good personal collegial relations with. He, you'd be surprised to know maybe that he and Justice William O. Douglas<sup>11</sup> got along very well, they had a really remarkable camaraderie. And Justice Powell, I mean, Justice Douglas would give Justice Powell some of his best opinion assignments, so I just, you know, you learn about collegiality, you learn about empathy, you learn about humility, all of these things, and you also learn about hard work because I was, I thought working six days a week would be quite fine, and I would take off Sunday and

00:53:18 I'd come back Monday morning and in the seat of my chair would be a pile of papers that Justice Powell had worked over Sunday with notes, and he would sometimes say while you were gone, but he didn't do that often because he didn't want to embarrass me.

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<sup>10</sup> Appointed by President Ronald Reagan, [Sandra Day O'Connor](#) was an associate justice of the Supreme Court of the United States from 1981-2006.

<sup>11</sup> Appointed by President Franklin D. Roosevelt, [William O. Douglas](#) was an associate justice of the Supreme Court of the United States from 1939-1975.

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But I knew if I took off Sunday, that there would be, in the seat of my chair, some edited memoranda or what have you. He was 24/7 in many ways and he taught me that there are no shortcuts in law to hard  
00:53:53 work. You just have to get down and really work at it. You can't skim the surface.

PROF. KENDRICK: Does your judicial approach differ from Justice Powell's in any way?

JUDGE WILKINSON: I'm sure, but I would just say,  
00:54:12 there's a large area of overlap, obviously. I suspect that he was like a case like Plyler or like Roe<sup>12</sup> that he would be more receptive to substantive due process arguments than I would, but those are questions of, those are small questions of degree and I, did I disagree with some of the votes he cast? Relatively few, but while I was up there working for him, there were some, a few votes that I would disagree with, and I'd come in, and I would, you know, he would tell me why he was doing something, and he said, "Now, Jay, I know that you disagree with  
00:55:13 me about this, and I expect you to give 100 percent when you agree with me and when you disagree with me, I expect you to give 120 percent." And that's a

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<sup>12</sup> [Roe v. Wade 410 US 113 \(1973\)](#).

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lesson that I tell my own clerks, and you know, he would, I think he was very willing, at least during those years, he was very accommodating person. We had a, there was one case that he had a 7-2 vote, and Justice Brennan walked into his office carrying a sheet of paper, and I was saying, uh oh. This is

00:55:58 trouble. He's going to come in and have the justice make a change that I'm not going to like, and so then after they had the conversation, Justice Powell called me into the office, and he said, "Jay, Justice Brennan has asked me to put in a little footnote."

00:56:21 And I said, "Could I see the footnote?" And it had all this about, you know, this is no longer a per se rule or it is going to hinge to some extent on the circumstances, and I said, "Justice Powell, please don't put in, please don't put in that footnote." I said, "This is going to cause no end of trouble," and his response was, "Well, Jay, at the end of the term, you're going to be heading on your way," and he said, "But I'm going to have to be dealing with Bill Brennan year after year after year, and you know, there are going to be times when I'm going to ask him

00:57:11 to put in a footnote and all the rest." So he would have a way of just, back then, of calming me down, and probably, he was ultimately the calmest jurist

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and the calmest justice that I know. Of all the years I was with him and everything, he didn't, I never once heard him raise his voice, and he would say, "Well, of course, Jay, you only ask a question from the bench when you don't know the answer."

Well, that's not the way a lot of people approach questions

00:57:57 from the bench. They want to extract, um, a concession or something. So, I, I think my temperament, I'm more engaged, I'm more likely to be, you know, very active of, from the bench or to be a little bit more aggressive, and he just had the

00:58:29 ultimate, most wonderful judicial temperament. I just, I just never saw him get upset, and that's having known him for many, many years. It's this almost preternatural calm, which is probably the ideal of what judicial temperament is supposed to be about. So, there are differences in style and occasional differences in substance, but what can you say about a man who's one of the greatest figures you've ever known.

PROF. KENDRICK: That's great. After you finished  
00:59:11 clerking for him, you went back to the University of Virginia to be a professor at the law school, and I'm sure there are many things that you could have done

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at that point, gone into private practice, gone into the government. Why did you choose teaching?

JUDGE WILKINSON: I just thought it would be wonderful to come into a class and have the privilege of being rejuvenated by constant influx of students, getting to know students, being able to help them, and the other thing is, it is such a privilege to

00:59:50 have a job where you can actually speak your convictions and say what you believe, and of course, you know, private practice is wonderful, and my gosh, the system would never work without it, but you're working on behalf of a client, and if you're in the

01:00:08 government, you're working on behalf of the, the government's position there and everything, but when you're teaching, it's the exhilaration of the freedom of it, that you can come in, and you have Socratic method to be sure, but you, you can say what you think without offending a client or without contradicting what the government's view is, and that was what attracted me to teaching. It's not that there was this, this sort of wonderful, just ability to say, this is what I believe. Come at me, to the students, if I'm wrong let me know, and then I'll come back and you

01:01:06 get in this wonderful dialogue, but I think the

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ultimate freedom in life is saying, "This is what I believe." If I'm wrong, let me know, and you may change my mind, but I'm telling you what I think, and not everybody really has the chance to do that, but teaching, you do have that chance. And then, there's nothing, and Leslie, you know this because you're such a wonderful teacher, but there's no feeling in the world like meeting a student 20, 30

01:01:42 years afterwards and they'll say to you, "I remember, I enjoyed your class and I remember when you said such and such." And I said, "No." And they said, "You did, and it's been such a help to me." Now there's just no feeling in the world like that. Now, there's no

01:02:04 feeling in the world like somebody losing interest in front of you and beginning to doze, so you get instant feedback as to how well you're doing, and then you get eventual feedback as to how well you've done, so it's a wonderful profession, really.

PROF. KENDRICK: I have to say that being at, now I'm at UVA, and I see your former students when they come back to reunions, and they do. They have vivid memories of your class and how much it meant to them, and it's wonderful to hear. It's really wonderful to hear.

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JUDGE WILKINSON: You're nice to say that. I think we had a good time of it, and I'm hopeful that we learned an awful lot, as well.

PROF. KENDRICK: Do you think that, that, that background you have as a law professor, do you think that informs your approach on the bench at all?

JUDGE WILKINSON: Oh, yeah. It gave me, with the classes that I've taught, it gave me a great running start. I was able to, you know, I taught Federal  
01:03:04 Courts and Criminal, the Criminal Process and Constitutional Law, and it was wonderful to have that kind of background, but what happened was, when I came on the bench, I realized that some of the most important courses were the courses I did not teach,  
01:03:25 and the courses that my colleague, my colleagues did teach. I would, you know, I would be engaged in a bankruptcy case or admiralty case or a securities fraud case or whatever, and I'd say, geez. I never taught that class, and I'm going to have to sort of learn from scratch and I should have realized that it was the courses that my colleagues taught that were hugely important. I taught mainly public sector courses, but courses dealing with the, with the private sector and as I say, bankruptcy and admiralty  
01:04:15 are really interesting subjects, and I felt like, you

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know, I wish, I could have gone back to law school and listened to the courses that my colleagues taught. It would have been good.

PROF. KENDRICK: After being on the faculty at UVA for several years, you made what I think is another unconventional decision. You made the decision to pause your academic career and become a journalist. You worked for the Virginian Pilot in Norfolk, and you served there as editorial page editor, as well as  
01:04:45 some other roles. What prompted you to do that?

JUDGE WILKINSON: It again comes back that freedom is being able to say what you think, and as an editorial writer, you get up in the morning and something'll hit you and say, boy this makes me really angry or  
01:05:02 this is something that's really good. You can go down and, and write about it and have the feeling that you are at least getting your views out there, so again, it comes back to this idea of freedom, which made me want to become a judge and become an editor and become a teacher. All of them have that consistent refrain of being able to voice my own views, and the wonderful thing about journalism is, it has the same value as politics that I can go and I can learn about a community, and I can, when I went  
01:05:45 down to Norfolk and Hampton Roads, that's a very

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vital and interesting community. I wanted to learn how a housing authority functioned, how a city council functioned, how a planning commission functioned. I was fascinated to learn about the Norfolk Naval Base. Norfolk, and San Diego have the two great naval bases. I wanted to learn how the Navy worked, and how the Navy dealt particularly with these long deployments where spouses were separated for six or seven months at a time and how the Navy was working

01:06:31 with that. I thought it was very fascinating to follow issues of the tensions between developers and environmentalists, which were very acute in a fast-growing area like Virginia Beach, how they dealt with that. Norfolk was in a revitalization of its

01:06:54 harbor place, along with Baltimore at the time. I thought that was going to be very interesting to learn about. I wanted to learn about how the newspaper business functioned. I was excited to be, as an editor, you get to be part of the cultural scene, and we were there at the founding of the Virginia Opera Association. So to me, it was just a chance to learn a little bit about everything. One day you're writing about the water crisis, and another, you're complimenting the local baseball team

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and I mean, what a, it was a great job.

01:07:36 PROF. KENDRICK: It sounds like it's a little similar to judging in that lots of different factual issues can come across your desk that you can do a deep dive into, and then you get to say what you think about then.

JUDGE WILKINSON: Yeah. I mean, you're right, and I think the point you raise is a good one because it's fun being a generalist, because if you just have an interest in, in everything that life has to serve up, that's kind of cool, and you know, you're absolutely right, Leslie, to draw the connection between journalism and judging, because I never know what kind of case I'm going to be faced with on a particular day. It could be a complicated tax

01:08:02 question, and then the next day, it could be a very complicated question of labor law, and then it could be a, a criminal appeal or what have you, or a, a very, very detailed question involving pension funds and how they're going to work out. I never know what's going to hit me and I, part of the interest is, it's just fun being a generalist, and it's fun going into work and just knowing there's the constant ability of, a constant possibility of a surprise.

PROF. KENDRICK: Another thing that you mention

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01:09:12 makes me think of something I wanted to ask you. I think of you as having very strong commitments to freedom of speech and valuing the ability to speak freely, and also as someone who will always look to help a reporter out. To call a reporter back is very sensitive to all of the roles the press plays and the importance of the press. I wondered if maybe your time in Norfolk had informed that, but it sounds as though partly you went to Norfolk because you already had those commitments.

01:09:42 JUDGE WILKINSON: Yeah, I think so. I think it was a question of what comes first, the chicken or the egg? And I think that they sort of preceded of my coming. Of course, I've always thought that the press played an absolutely vital role, just as a check on

01:10:04 governmental power. I've felt that from a very early age, and it is, people I know, they get annoyed about the, about the press, and they say, well, the, the press really is into everything and they know too much and they are just commenting on, on everything, and I just wish they would go away. From a very early age, I felt like, it's not that the press knows too much. It's that they, and we, know too little. I was just thinking the other day, we know so little about our government and to the extent that we know

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anything is because of press as our eyes  
01:10:58 and ears, and just to take one example, the  
Department of Agriculture, which is important in  
trying to nurture rural prosperity and safeguarding  
our food supply and distributing farm subsidies.  
This is just one department of the government, and  
all we know about the Department of Agriculture is  
the tip of the iceberg, because this one department  
employs more than 100,000 people. What are they up  
to? What are they doing? Much good, I'm sure. I  
01:11:38 think they're doing a lot of good, but there are  
probably some things that we could profitably learn  
about. I mean, the Department of Agriculture is  
overseeing and housing 29 different agencies. I'd  
like, don't we need to know about that? So all, when  
01:11:57 we think about, oh, the press is this kind of busy  
body and I wish they'd just, you know, shove off.  
No. I mean, we, we know too little. All we know of  
government is the tip of the iceberg, and I think  
it's very important to have the press looking into  
things, even though it carries with it a high degree  
of annoyance for those being looked into. There's a  
high degree of annoyance, but it is what it is, and  
it's a shame in one sense. Many of our fine local,  
metropolitan papers are experiencing financial

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01:12:49        straits, and they have had to close foreign bureaus,  
which is a shame, and they've had to close bureaus at  
the state capitals, which is a shame, and they have  
fewer beat reporters, and you know, the internet is  
to some extent a substitute for that. Good blogs can  
be, but the internet is full of opinion, and the  
great beat reporters, the people who covered city  
hall and the state legislature, they had wonderful  
sources that you can't replicate, and they were full  
of facts, and you know, journalism has to be a  
01:13:28        balance between opinion and fact, and it's the fact  
side of journalism that I worry about the financial  
difficulties of many of our local papers that have  
wonderful traditions of covering the state  
legislature and city, city hall. City hall needs  
01:13:51        watching and those great metropolitan and local  
newspapers did it, and many of them continue to do it  
but they're watchdogs, and the First Amendment  
intends for them to be.

PROF. KENDRICK: After you had spent some years at  
the Virginian Pilot, in 1982 you went into government  
service in the Civil Rights Division of the  
Department of Justice during the first Reagan  
administration. How did you decide to do that, and  
what was that like?

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JUDGE WILKINSON: Well, a lot of it was just, I  
01:14:28 really liked Ronald Reagan. What can I say? He was,  
his geniality and his sense of conviction just made  
me very excited, and I believed in what he was doing  
as a, in the Civil Rights Division in the sense that,  
he did not believe that transporting young school  
children long distances was the best way to provide  
them an education, and he believed in a view of law  
and a view of the 14th Amendment that would stress  
the things that united us and the commonalities as  
01:15:13 human beings and what we have in common and the fact  
that each of us have gifts and the fact that each of  
us is a human being with great dignity and something,  
something that is worthy of infinite respect and that  
was part of the President's program, and I was  
01:15:33 delighted to be a part of it. I'll say this about  
the, the Reagan Administration. There are times in  
service in government is just tremendously exciting,  
and one of those times, for a Democrat, would be the  
first 100 days of The New Deal. If I were a  
Democrat, and I'm neither as a judge, but if I were a  
Democrat, the time I would want to have been serving  
in government were the first 100 days of Franklin  
Roosevelt's administration. I can't imagine the sense  
of excitement that was going on with that brain trust

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that was around this incredibly compelling man, and I  
01:16:24 felt the same way about service in the Reagan  
administration, that probably the most exciting time  
for a Republican to serve in government was in the  
first two years of the Reagan administration because  
both the Reagan and the Roosevelt administration at  
their start were just innovative times when ideas  
were just bounced off and tried and all the rest and  
the promise of good governance was so high and Reagan  
was a, President Reagan was, I never knew him in any  
01:17:08 kind of close relationship at all, but he would walk  
into a room and he was just an incredible presence,  
and the, you even, before you even saw him, you knew  
he'd walked into a room because people would just  
look up and they would swarm, and he would, you know,  
01:17:34 he just, he just had something about him, and so did  
Franklin Roosevelt and so did, so did Theodore  
Roosevelt and they, you know, they just had a special  
quality, all the way back to George Washington. He  
was tall for his age, as Reagan was, and my sense is,  
when George Washington walked into a room, that  
people knew it, so it was exciting for me, and it's  
always a good thing to feel like you've helped out in  
the service of your government.

PROF. KENDRICK: And then, after DOJ, you returned

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01:18:20      briefly to the University of Virginia and taught on the faculty again, and in November of 1983, you were nominated by President Reagan for the Court of Appeals for the Fourth Circuit. Was that something you were expecting? What was that timeline like?

JUDGE WILKINSON: I was a bit surprised. I wanted to, I wanted the nomination in the worst, in a bad way. I was doing what I could to signal my interest, but I didn't expect to be nominated in, in my thirties, and they told me when I was nominated, when the first

01:18:57      numeral of your age begins with a three, expect trouble, because they know you're going to be there a long time, and so being nominated in my thirties was, I knew it was going to be a tough confirmation. I was not disappointed, but I was, I was very excited about

01:19:28      it, for some of the same reasons that my, being a newspaper editor or running for Congress was exciting to me, and I really believed in the court system, and I thought, here's, here's a chance to have a job that's intellectually very stimulating and challenging, but at the same time, I can do the public good and I can do other people good, and I can drive home at night feeling that I've really taken the concerns of people before me seriously and done them the best I could.

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01:20:10 PROF. KENDRICK: You mentioned the confirmation process. You went through that nomination and confirmation process, and you've been an observer of it for many years. You've had former clerks go through the process, and you in 2005 were interviewed by President George W. Bush on the occasion of Justice O'Connor's retirement when he was considering nominations to replace Justice O'Connor. What are your thoughts about the modern nomination and confirmation process, and do you have any suggestions that would improve that process?

01:20:38 JUDGE WILKINSON: Well, that's a good question, and I feel like as to the confirmation process, I feel I have sort of ambivalent feelings about it. On the one hand, this is the one shot that the political process gets at a would-be judge. And it's only right to expect the political process to really go at you hard, to look into your views, to look into your temperament, to make sure about your integrity, because this is the only chance that the political process has to size you up. Then you are, you've got life tenure, so I've never objected to the fact that the Senate and the presidency really, and the Senate does its, performs its role thoroughly. I think that is very, very important in keeping people on

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01:21:50 the bench. The hard part of the confirmation process, and the one that I wish could be mitigated is the effect that it, that it has on families. The, it's like watching my children play sports. It's harder to be in the stands than it is to be on the field, and I just think that the toll that the confirmation process takes on families is, is quite horrible, and so if you could maybe concentrate on just someone's views and not, you know, try to make it an exercise in character assassination, I think that would be a lot

01:22:51 better. You'd get more useful information and you wouldn't try to harm somebody in a way that can, can last for life. My desire is for a confirmation process that hones in to people's views and to what they think and to what their judicial temperament is

01:23:16 and not give them the idea that, you know, that you're coming at them like a lynch mob. That's not good, and it's not that, it's not that the blame lies all on this side or the blame lies all on that side. We have to give the idea of how is this impacting this nominee's family, and I know in my case, it was very hard on my mother, and she had to leave Virginia and go up to Squam Lake in New Hampshire where she would be with some friends and they wouldn't hear any

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radio broadcasts or television programs or read any  
01:24:03 articles or whatever and so she would be completely  
insulated from hearing anything because she was so  
upset. And, it didn't bother me, but it bothered me  
that it bothered her, and I think that children are  
bothered by this and spouses are bothered by this and  
we need to have some humanity at the same time that  
you go after the nominee hammer and tong on views of  
the law, without pre-judging a case. Also, it seems  
maybe going forward that maybe 60 votes to cut off a  
filibuster is a little high, but I thought,  
01:24:52 well maybe one of the things we want to do is show  
some bipartisan support for a judge, and if we could  
set the number at 55, maybe, rather than 60, then you  
would have to get four or five members of, or a few  
members of the opposing party and that, that's good.  
01:25:20 Just have it be a little bit more bipartisan would be  
a good idea. I mean, I'm very proud of the fact that  
some fine Democrats voted for me, and I've tried to  
reciprocate by being as non-partisan a judge as I  
could possibly be, but just more sensitivity to  
families and a little bit more bipartisanship by  
raising that number to 50 or 55.

PROF. KENDRICK: You've also mentioned your age. You  
were one of the youngest federal appeals court judges

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at the time you came onto the bench and that seems  
01:25:59 like it could be a double-edged sword. I'm sure it  
was a liability in going through the nomination  
process in certain quarters, but I imagine it has its  
advantages, too. What do you see as being the costs  
and benefits of being a relatively young judge when  
you start out?

JUDGE WILKINSON: Well, I was, when I came onto the  
bench, I was 20 years younger than the next youngest  
judge, and so it was sort of unusual in a way,  
because my experiences growing up were, my formative  
01:26:39 years were probably Vietnam and the Civil Rights  
Movement, and theirs were the Great Depression and  
World War II, so I was serving on a court with people  
who had fought in Okinawa and the Battle of the  
Bulge, and here I was in the Army Reserves, and so  
01:27:01 you know that, that's, those are different, and so I,  
it, but it leads you to believe, to really believe in  
the value of inter-generational friendships, that  
it's a wonderful thing to know judges who had first-  
hand experience with the Great Depression and with  
World War II, and it's a wonderful thing to know law  
clerks who can point me toward what is happening with  
contemporary culture. So, I'm a huge believer in  
inter-generational friendships. You know, it's great

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if you can have grandparents. You learn a lot from  
01:27:46 extended families, you know? And so those, that was a  
real plus. It was, I thought when I came on the  
bench, that everybody who was a member of the court  
addressed colleagues and the other members of the  
court by their first name, and so there were two very  
senior members of the court to whom I really was very  
close. One of them was Donald Russell and the other  
was Clement Haynsworth, and my first couple of  
dinners on the court, I, I addressed them as Donald  
and Clement, and after a dinner or two  
01:28:29 Judge Robert Chapman took me aside after dessert and  
said, "Jay you can call me Bob because I'm only 20  
years older than you are," but he said, "Judge, you  
call Donald Russell Judge Russell, and you call  
Clement Haynsworth Judge Haynsworth, and I don't  
01:28:53 care if we're the only court in the world that this  
tradition pertains to." He said, "I just want you to  
know something. Judge Russell was a United States  
senator when you were a toddler, and he was an  
Assistant Secretary of State during World War II  
before you were born. Now, do you want to call him  
Donald or do you want to call him Judge Russell?" I  
said, "Message delivered, message received." So, I  
called him Judge Russell and I think our relationship

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was enriched as a result.

01:29:37 PROF. KENDRICK: When did that change on the Fourth Circuit?

JUDGE WILKINSON: Oh, gosh, probably it never changed with respect to Judge Russell and it never changed with respect to Judge Haynsworth, that never changed. But it changed with me. I told the younger judge, "I want to be called Jay I don't want to stand on ceremony. You're my colleague." But it's hard for them for some reason. We're all colleagues. We've all got a commission. We're all equal. Please call me Jay. I think I'm going

01:30:11 to have to wring it out of them.

PROF. KENDRICK: When you first started out, you decided to stay here in Charlottesville and have your chambers in Charlottesville, and that's where we are today, but I assume you could have gone back to

01:30:24 Richmond or maybe elsewhere. Was it an easy decision to stay here, or did you think about going back to Richmond where you had grown up?

JUDGE WILKINSON: Well, I've had a, those are two places that mean a lot to me, and I had a great, a great childhood in Richmond, and my parents were there, so it was natural that I would think about going back there. But I love university communities

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and the wonderful thing about, Charlottesville is a really wonderful place which to live for all kinds of reasons. For me, I had taught at the law school, and I had many, many friends at the law school, and I didn't want to lose touch with them. And, the other thing about Charlottesville is I thought, I thought it would be a great place to raise kids because it was a little bit smaller. You, as a mother of three, I'm sure found it to be a great place to raise kids, too, and the other thing about Charlottesville is, it has the most wonderful, natural beauty. I love looking out of my window at the Blue Ridge Mountains, and it helps me keep things in perspective. You know, you get all wound up over this or that, and then you look out at the Blue Ridge, and it's a soft mountain chain. It's very different from the southwest where the mountains are sometimes, outside of Tucson, may be stand-alones, or different from the Rockies, which jut far into the sky. The Blue Ridge is softer, and I love looking at it from my window, and it just, it's calming, and I love that. The other thing I love is, Charlottesville combines great natural beauty with wonderful architectural beauty. You see Monticello and you see the lawn and the rotunda and all of the rest, and you, it's just, even

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Charlottesville brick has a wonderful red brick quality to it, but it's the natural beauty and the architectural beauty and the stimulation of a university town, and, and I thought it was a family-friendly place. So, that decided me, but it was hard. It was hard because my parents were in Richmond, and you know, I thought, I wanted them there. I wanted to be near them for many reasons, but having a babysitter was one of them. You've, you know about that.

PROF. KENDRICK: Absolutely. Absolutely. Many appellate judges take IJA's New Appellate Judges Seminar at NYU Law. Looking back, what did you do to prepare for the judicial role and is there anything you wish you had done?

JUDGE WILKINSON: Well, the IJA Appellate Judge's seminar is just the very best. That's the gold standard, and I've just had so many judges indicate to me how, what a useful experience it was and how they were sort of lost in the wilderness until they took the seminar, and that the seminar had oriented them and given them a degree of confidence and know-how that was, was not there when they first set foot on the appellate bench, so it's a very, very

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worthwhile thing to, to do. That applies after you have become a judge, and as I understand your question also, it was what do you do to prepare to  
01:34:39 become a judge, and that one's really hard because the chances of becoming a judge, they're, it's a long shot, and a lot of it just depends on luck and you, you know, there have to be five or six things that line up in order for the appointment to come through. You have to have a vacancy, first of all, and then there, the right administration has to be in, in office, and for every vacancy, there's 10 people who want it, and then there's the question of how well you may know the senators and the like, so about five  
01:35:32 or six stars have to run up or have to line up, and so you don't want to spend all your life preparing for something that, you know, may just fall through or may never come, not because you're unqualified or anything but just because the ball bounces the way  
01:35:54 the ball bounces, and I guess the only thing that I can say is, if you knew you were going to become a judge, what would you do to prepare? And, I would say that the, the best thing to do is to sample life in the full. Don't, don't pull punches because you think it will make you less confirmable and don't give up experiences because you think, well, if I did this

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experience, I would be in better position to get a  
judgeship. The main thing is, just, just to  
experience life in the full. I try to do that with  
01:36:42 government service and teaching and, and the  
newspaper business and running in politics, and the  
reason I say that is, that's the best preparation for  
becoming a judge because the judicial life is a  
little bit monastic, and the things that you don't  
think twice about doing, like fundraising or getting,  
getting involved in partisan politics are strictly  
off bounds for a judge, so you're under set of  
ethical restrictions and you have to be very  
conscious of appearances when you do this or that.  
You, you don't

01:37:27 want to make a scene if you can possibly help it, and  
the rest, and so, because once you become a judge,  
life becomes a little more circumscribed and little  
more monastic, it's worth the tradeoff in terms of  
job satisfactions, but you really want to take

01:37:48 advantage of life's opportunities before you become a  
judge because some of those may be off bounds once  
you become a judge, so drink fully of life.

PROF. KENDRICK: Are there parts of being a judge  
that nothing can prepare you for?

JUDGE WILKINSON: Yes, one part in particular, and

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that is the sense of responsibility for other people's lives. And the difference between legislative authority and judicial authority is massive. Legislators pass laws that affect thousands and thousands of people in mass. And, when you're a judge, the cases may well bear down on very few people, and when you're a legislator, you don't necessarily see everybody whose decisions you affect. As a judge, you're more likely to see the people whose lives you affect if you're a trial judge, and even as an appellate judge, you have a very, you have a much clearer idea of the people whom you're going to affect and how you're going to affect them, and you can, you can change the whole course of someone's life, you determine whether someone lives or dies, determine whether somebody spends five, 10, 15, 20 years in prison. You can place someone under a judgment or it involves financial obligations that it will take a long time to crawl out from under on and you also have to take into account not just the individual but the impact that it's going to have on the public welfare. You can't forever rule in favor of an individual if it's going to have an adverse effect on hundreds and hundreds of other people, but judging is very personal, compared to legislating,

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and the sense of responsibility really weighs on, on all of us, I think. It doesn't paralyze us, but you're always conscious about the fact, hey, this really affects peoples' lives, and when I was

01:40:33 teaching, as wonderful as it was, I wasn't, I was having an effect on peoples' lives, but it could be a little more indirect, and when I was running for Congress, even if I won, I'd be one of only one of 435, and as a newspaper editor, I was handing out all kinds of an advice, but as a judge, at the end of that railroad line is a judgment, and the judgment has to be obeyed, and that judgment can profoundly affect lives for good and evil and you're much more up close and personal with it. That's something that

01:41:16 I wasn't be, I wasn't prepared for, the weight with which that responsibility landed. You feel of, a real sense of responsibility for, for other people, and so I hadn't, I just hadn't prepared for the, the enormity of it, and I guess that's the, that's the

01:41:46 main thing. There were a lot of, a lot of other things, too, in terms of interactions with colleagues and interactions with clerks and this and that, but the main thing is just, this is serious.

PROF. KENDRICK: Who are some of your judicial role models?

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JUDGE WILKINSON: You know, it's very hard to just put one person on a pedestal, and I admire, I think I have different judicial role models for different things, or I rather admire some people for one particular trait. It's, you know, it's to whether somebody, embodies everything, I'm not sure, but like Justice Hugo Black,<sup>13</sup> somebody I remember just for the sheer resonance of his voice. His voice, he was a little too captivated by certitudes, but his voice just rang out over the hills and the hollers, and there was a resonance to it, and what his, what he wrote, and I've always admired him for that. I've admired Justice Robert Jackson<sup>14</sup> because he was one of the most elegant writers that I've, I've ever read. I mean, he's a beautiful stylist, so I admired that about him, and I admired, I admired William Rehnquist<sup>15</sup> because he was so brainy. He was just really, really smart and had an extraordinary recall, and I admire Justice Clarence Thomas<sup>16</sup> because he has such

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<sup>13</sup> Appointed by President Franklin Roosevelt, [Hugo Black](#) was an associate justice of the Supreme Court of the United States from 1937-1971.

<sup>14</sup> Appointed by President Franklin Roosevelt, [Robert Jackson](#) was an associate justice of the Supreme Court of the United States from 1941-1954.

<sup>15</sup> Appointed by President Richard Nixon, [William Rehnquist](#) was an associate justice of the Supreme Court of the United States from 1972-1986 and the Chief Justice from 1986-2005.

<sup>16</sup> Appointed by President George H.W. Bush, [Clarence Thomas](#) has served as an associate justice of the Supreme Court of the United States since 1991.

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magnanimity and generosity of spirit. He just has, there was a big bear hug about him. He was just so generous. And I admire Justice Scalia<sup>17</sup> because he's, he's a person of utter courage and did not allow criticism to derail him from what he thought was right. I didn't always agree with him, but I think he was, he was a very courageous judge. I admire Justice Brennan because of his warmth and, and expansiveness and he managed to learn the names of all of the, the  
01:44:33 clerks when we were clerking up there, not just in his own chambers, but in other chambers, and he'd walk by in the hall and Justice Brennan would say, "Hi, Jay How you doing?" My God, this is Justice William J. Brennan, and he knows my first name. With Justice Brennan, you have to admire his wonderful gregariousness and then on my own court, two South Carolinians I mentioned earlier, Judge Donald Russell and Judge Clement Haynsworth. They were just the ultimate embodiment of gentility and courtesy from  
01:45:22 the bench. They never tried to make an example of anyone or they never tried to embarrass anyone, and I always respected that about them, and I could go on,

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<sup>17</sup> Appointed by President Ronald Reagan, [Antonin Scalia](#) was an associate justice of the Supreme Court of the United States from 1986-2016.

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Judge Sam Ervin,<sup>18</sup> Judge Dickson Phillips,<sup>19</sup> and everything that, I admired pieces of everybody. You know, a

01:45:51 little piece of this one for this and a little piece of this one for that, and of course, there's Justice Powell who is, comes as close to an embodiment of what I think a, a judge should be, but it just, I guess, you know, judges just aren't cookie cutters and they're not run off an assembly line and you're gonna have judges that are different as night and day, and you'd say, hey, I like this one for this reason and this one for that reason, and that's the way I've gone about it.

01:46:30 PROF. KENDRICK: Are there non-lawyers who have shaped your approach to judging?

JUDGE WILKINSON: Yeah, I would say the non-lawyer who came as close to that are two people at the Virginian Pilot, Frank Batton and Perry Morgan and they were people of utter integrity. They really loved journalism, and they really believed in the role of the press and they really believed in the independence of the press and they really believed in

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<sup>18</sup> [Samuel James Ervin III](#) was a judge on the Court of Appeals for the Fourth Circuit.

<sup>19</sup> [James Dickson Phillips, Jr.](#) was a judge on the Court of Appeals for the Fourth Circuit.

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what we call in journalism is a separation of church  
01:47:10 and state, and that is that the editorial side of the  
business and the journalistic side, the reporters and  
editors enjoyed independence from the business side,  
in other words, and that's crucial to the integrity  
of journalism, because you don't want people, big  
01:47:31 advertisers being able to purchase favorable  
coverage, so within journalism, there's a separation  
of church and state, and Frank Batton and Perry  
Morgan really embodied that for me, and they had a  
big influence on me for that, for that very reason.  
And one of the things, as a newspaper editor, I would  
get a lot of criticism for what I did, and if you're  
worth your salt, you have to make people unhappy. If  
you're just writing editorials that make everybody  
happy, you're probably doing something wrong, but in  
order to  
01:48:15 do that, you have to have a publisher that's going to  
back you up, no matter what, unless you do something  
crazy, and I don't think Mr. Batton wanted to choke  
on his orange juice seven out of seven days, but if  
he did it occasionally, that's okay. He would always  
back me up, and sometimes, advertisers would come to  
me and say, you know, that Wilkinson is really  
running off the tracks and that's not fair what he's

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saying about us as a company or what have you, and he would always back me up, and sometimes lawyers, you know, people who are the objects of criticism, sometimes they would appear with their lawyer, would come in and talk to me about what I had written, and it was a not too veiled threat of a libel suit, and I told the publisher, I said, you know, we might get sued for this and I, and he said, that's okay. Don't back down. And you know, that's worth so much to a newspaper editor, because if you're always looking over your shoulder at the publisher, you're not going to be doing your job the way it should be done. In that regard, from the standpoint of a journalist, a decision like *New York Times v. Sullivan*<sup>20</sup> is absolutely crucial and to, *New York Times v. Sullivan* obviously gave journalists a great deal more latitude in what they can say about public officials and public figures and without that kind of latitude, if we were going to be facing a tort suit and possible punitive damages every time we were writing critically of some public official, we'd be, journalism and the newspaper business would be in very bad shape indeed. This is an example of a legal

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<sup>20</sup> [New York Times v. Sullivan](#), 376 U.S. 254 (1964).

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decision that's had an enormous impact, and I think people broadly would say that it's been a beneficial impact, as well.

01:50:46 PROF. KENDRICK: I've already mentioned two of your books, your book on the Byrd machine and your memoir *All Falling Faiths*. I'm getting ready to ask you about another book, but before I do, I just want to step back and note that you've written, I believe it's six different books and a large collection of law review

01:51:01 articles in addition to your full slate of, of judicial opinions and all of your responsibilities as a judge. So why do you do it and how do you do it? How do you write all of these things?

JUDGE WILKINSON: Well, you do it, Leslie, because you love doing it, and if you're doing something you love, that love supplies the energy and you know I'm unabashed about it. I love the law, and I love the intellectual challenge of it, and I love the good that it can accomplish for society and for  
01:51:41 individuals if judges take it the way I think we do in a very serious way. And so, because I love the law, and I really just love it, I can't wait to get into it. To me, the law has, it, there is nothing static or repetitive about it. I mean, the ability of

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law to throw up new wrinkles is extraordinary, and there's an aesthetic to it. It's almost as if you were a mathematician. There's a beauty to mathematics, and I was reading a book on Leonardo da Vinci and the beauty that he showed in plane geometry and these different structures and the way angles came together and lines came together and everything. Well, it's something similar the way lawyers, I think lawyers feel, when you get the different pieces of the case, like some vast jigsaw puzzle and you, you put it together. There's something, you know, about assembling it that is, that's aesthetically very pleasing, and then there's something about law and cases. Each case is a window in, into life. You know, you just open the curtains and you are automatically transported into a world that, where there, living people living out their lives and you read, you read about it and you understand a whole different side of life, and so the law carries you on a journey into countless individual lives, and that's fascinating for me, and I try to appreciate what people are struggling with and, and going through. And then there's a feeling about, if you get something straight by writing about it or deciding it, you've made a real contribution, I

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think and you've tried, you've done something good for other people, so it's unselfish in that way because you've tried to the degree that you can to follow the law and if you follow the law, you've done something good for individuals and society, and I, I just have

01:54:20 an unabashed enthusiasm for it. I love what I'm doing. I love the law, and it's that love of something, you know, it could be medicine or it could be architecture, or it could be any number of trades or professions. If you love it, and you follow your

01:54:44 heart, the energy will just come, and so, you make a career choice, you really want to follow your heart and you'll have so much chance, be so much better at it and have a chance at being a success, but you can't just go into something because it might please your peers or it's what your parents want you to do or something. You have to listen to your heart, and that's what I did with respect to being around the law, and I think it, it's just fascinating in the way that the law rewards close attention.

01:55:28 PROF. KENDRICK: In one of your more recent books, *Cosmic Constitutional Theory*,<sup>21</sup> you talk about a

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<sup>21</sup> J. Harvie Wilkinson III, *Cosmic Constitutional Theory: Why Americans are Losing their Inalienable Right to Self-Governance* (2012).

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number of different unified theories, unified approaches to constitutional law, and you levy criticisms against all of them, including living constitutionalism and originalism. What's your major critique of these unified theories?

JUDGE WILKINSON: Well, the problem I have with them is that they, they pretend to be very objective, and they're not. They're basically very subjective. And  
01:56:09 they're subjective in a way that encroaches upon the authority of other branches. They, they put, they catapult these theories catapult judges into places that they're not supposed to be. I'm an advocate of judicial restraint and not just charging into this and

01:56:33 that, and these, these theories are very risky in this sense. You take living constitutionalism, the idea that it's the judge's job to update constitutions and to bring the Constitution into accord with the times. Well, I, why isn't that the legislature's job? It's very dangerous to leave this broad, capacious, open-ended constitutional language such as exists, for example, with the due process clause and put it in the hands of people who have no

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electoral accountability and are given life  
01:57:25 tenure, so you have broad language combined with,  
with life tenure, and that's a very mischievous  
combination, or it can be unless you have a strong  
sense of self restraint. The problem with originalism  
is, the same problem that originalists have critiqued  
in the area of statutory interpretation with  
legislative history. There are all kinds of  
legislative sources to consult. Do you consult the  
Constitutional Convention? Do you consult the  
ratifying conventions? Which ratifying conventions do  
you consult? To what  
01:58:13 degree can you go back to the English common law and  
across the ocean? To what degree can you go past the  
founding event into the 19th century to draw on  
contemporaneous understandings? Just like living  
constitutionalism, for different reasons, originalism  
01:58:35 gives judges just broad latitude to, to become  
subjective and to enter fields where they have no  
business being, and the, the combination of the two  
has led to these closely divided decisions, 5-4, and  
some cases, where the conservatives sometimes end up  
where you think conservative policymakers would end  
up and liberals end up where you think liberal policy  
makers would end up and so where does that leave

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neutral principles of law that, that sometimes lead judges to unpredictable places because the law guides them there. But my problem with these theories is that as I say, they say, oh, we're so objective, and they're not. They're subjective, and they let judges loose on the land, and I just didn't, didn't particularly go for that.

PROF. KENDRICK: So these sorts of theories become an excuse that a judge can use to get to their preferred, their subjectively preferred outcome, and you would like to see more judicial restraint. What would that look like?

02:00:00 JUDGE WILKINSON: Well, it would be a respect of a legislative process and what it, what it produces, and I think that would be the main thing, but I think judicial restraint, one of the problems we have is there's no restraint, and the lack of restraint in the branch, different branches of our government. The executive branch is issuing the administrative state is going, becoming huge and sometimes, I think that agencies in the executive branches take liberties with statutes, and the presidency issues these executive orders that essentially are run-arounds around the authority of Congress, so we have an absence of restraint sometimes within the agencies

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and sometimes within the presidency and using their powers, and that's, that's too bad. And then I look at

02:01:09 Congress and they're spending unfathomable sums as we pile up deficit upon deficit upon deficit and so there's all too little restraint there, and then the judges are using these theories to get to where they want to go, and there's little enough restraint there. And so, you know, I say to myself, well, you know, going back to ancient history was part of the greatness of the Roman Republic was that there was a sense of sacrifice and a sense of restraint and a sense of, you know, that politics is not necessarily

02:01:55 a lifetime occupation, and I'll want to go and do what good I can. But, then when the Republic transitioned into the Roman Empire, a spirit of self-indulgence and decadence took hold and you don't want to see that kind of thing repeating itself

02:02:15 over and over again, and particularly within the United States, so I think that it is just a good thing generally for people in their public lives to exercise what you hope that they would exercise in their personal lives, which is a sense of self-discipline and a sense of, and a sense of restraint, so that's part of what is important about restraint,

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but why should judges exercise restraint? Apart from the fact that we have life tenure, we're not accountable to the, to the, to democratic elections.

02:03:02 And I think the reason why restraint is so important is that we have to remember the third branch of government, the judiciary is filled with the members of one profession only. We're all lawyers, and that's the only branch of government about which that is true, and so I ask myself, where are the carpenters? Where are the plumbers? Where are the teachers? Where are the doctors? Where are the nurses? Where are the service workers? Where are the real estate agents? Where are the stock brokers? They're not on the

02:03:44 judiciary, and as the members of one profession only, we need to realize that our perspective is limited because all of the diverse callings and professions that comprise America are nowhere represented in positions of judicial authority. Now, this may not

02:04:09 be a bad thing, but it surely is something to say, look, we're, we're just a small slice of society, and then I, I see these 5-4 decisions where, on profoundly intimate and moral and religious questions, we're coming down with these 5-4 rulings, and I wonder to myself, you know, is one person really making this kind of difference, and is a 5-4

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ruling allowing one person to essentially disenfranchise however millions of voters might have a different view or might want to express themselves

02:05:00 at the polls on that kind of, on that kind of question? And so, we need, I guess it's, this is, you know, you have, you want to have a certain modesty in all aspects of, of government and the best thing you can do is sort of know all the things you do not know and know all the things you have not experienced and just, you know, have a, have the wisdom to understand your limitations, because none of us is omnipotent or omniscient or whatever. We don't, we don't have any monopoly on knowledge or wisdom or anything like that

02:05:51 so my feeling of that restraint is it just is a certain amount of caution that I'd like to see us exercise. We owe that to the broad and diverse array of people that comprise the United States of America. There's a lot broader band there, and a lot more

02:06:12 diverse group than are sitting up there on the bench. It's, we have our job to do, and I think we do it well, and we're good at what we do, which is interpreting text and statutes and the rest, but we should stick a little bit more to those, those things which we can do rather than to those things we shouldn't do, and so the question I always ask myself

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is, not invariably, oh, what should I decide? It's, do I have any right to decide? Is this within my authority to decide? It's not, well what would I do? It's, what do I have the right to do? And so that's, that's what, get back to your question, that's what restraint would look like.

02:06:52 PROF. KENDRICK: It sounds like the counter-majoritarian nature of the judiciary sits heavily on you and that the limitations of any one judges or the profession's expertise also concerns you. I'm thinking about, I think it was Judge Learned Hand<sup>22</sup> who said, "Over every courthouse, it should say, consider that ye may be wrong."

02:07:27 JUDGE WILKINSON: Leslie, I really like that, and, and you know, I think there's another one. That Learned Hand was wonderful. He said something like, "The spirit of liberty is a spirit that is not too sure that it is right." And, and you have to

02:07:47 consider the possibility, and that's a perfect quote for it, is that you just may be wrong, and if you are wrong in a state legislature, the next state legislature can reverse you and do it. Legislatures modify laws all the time and states modify laws all

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<sup>22</sup> [Learned Hand](#) was a judge on the Court of Appeals for the Second Circuit.

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the time, but if you're wrong on a constitutional ruling, it's just frozen there into the constitution, and it can't be overturned other than by the rather clumsy process of appointing a new judge. So, we are deciding in a permanent way, whereas democracy  
02:08:31 decides in a tentative way, and you know, I like the democratic way of doing it because it's more evolutionary and it's more participatory, and it brings folks together.

PROF. KENDRICK: Your approach to judging has led you to be somewhat of an equal opportunity critic. You've criticized originalism, you've criticized living constitutionalism. You've pointed out the downside to constitutionalizing same-sex marriage and also the downsides to the Supreme Court's renewed,  
02:09:04 more robust interpretation of the, of the Second Amendment, and your more restrained approach has led you to point out difficulties and problems across maybe the judicial, the spectrum of other approaches. I think of you as somewhat of a judicial maverick in  
02:09:23 this regard. You have your way of doing things, and you're not afraid to say when others are wading into areas where you think judges ought not to go, no matter who they are, no matter what their philosophy is. Do you see yourself that way, and has that ever

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landed you in hot water?

JUDGE WILKINSON: Well, I guess it's landed me in hot water, but that's as it should be. We shouldn't be in a situation where we're above criticism. I mean, we hand down decisions that affect people in very intimate ways, in their, in their lives, and they ought to, they ought to, in fact, it's altogether healthy for them to say the judge is nuts, and we, they have to obey the ruling, but at the same time, they should say, you know, the judge just completely blew it. I think criticism, and very sharp, pointed criticism of judges is entirely fair and in fact is, is necessary. In terms of particular issues or whatever, I, you brought up the question of same sex marriage, and as a citizen, I think it's very much the right and proper thing to do to authorize same sex marriage. I say that just because, just for what my view as a single person is. I just believe if two people love one another and they want to make that kind of a commitment, they should have that opportunity and that seems to me to open for these individuals a path to a very fulfilling and constructive life. So as a matter of policy, I'm very much in favor of a right to same sex marriage, but that doesn't answer the whole question for me,

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because I do recognize that there are people who disagree with my view for reasons that I respect, for moral and philosophical and religious reasons and so people who disagree with me on, on that question, I tender them my respect. And the question I have to ask is does the law, which I'm obliged by oath to uphold, does the law give me the right to rule and dictate on this question? And I thought at the time that the law was too general and the Constitution covers some subjects, but it doesn't cover every subject. This was one subject that I didn't believe the Constitution assigned to judges. So, there's a question of feeling one way about an issue and then feeling another way about whether the law gave me the right to decide it. As to the matter of firearms regulation, I criticized Heller<sup>23</sup> at the time. I still have serious reservations about it. My problem was that it went overseas to get some of its sources and it went 100 years past the founding event to get others of its sources and it seemed to me a very questionable bit of history. The different sides of the case went to a draw. Mainly, because I'm an advocate of judicial restraint, I thought, okay,

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<sup>23</sup> [District of Columbia v. Heller, 554 U.S. 570 \(2008\)](#).

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there are two sides to this question. Some people think that access to firearms helps prevent crime. And others think that it, no, that easy access to firearms is one of the reasons why we have so much crime. So, why shouldn't people be able to resolve that democratically? Why is the Supreme Court stepping in and resolving this? For 200 years, there had been no right, Second Amendment right, individual

02:13:41 right found in the Constitution, because of great ambiguity about the Second Amendment in the sense that we don't understand whether it was directed at militias and a collective right on the part of militias or whether it was directed at an individual right to bear arms, and the Court decided that, and however many questions it's going to decide later that it was an individual right, for the first time after 200 years, in the name of originalism, of all things, and so, I couldn't understand why the

02:15:16 judiciary would not leave it in the hands of communities who are so deeply affected by these tragic events at, at malls and schools and other public places, it just tears your heart out to see parents and, and friends and classmates mourning

02:15:42 people who have been the victims of this kind of insane violence, and I think the communities whose,

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whose destinies are at stake should have the right to enact a policy that meets with general agreement as the best way to ensure the safety of school children and shoppers and restaurant patrons and many others, and I was very disappointed that the Court took it out of their hands, because if you, if you leave these questions in the hands of legislatures, they're not about to strip people of their right to own

02:16:31 firearms. There's a tremendous amount of public support, particularly in some states for very broad rights. In other states, maybe less so, but that's part of the way our democratic system works. Sometimes different states go different paths, but on, on both of these questions, I had my reservations, and they're legal reservations. They're not, they're recognizing two parts, and I have one definite point of view. Having said all that, I'm a lower court judge, and the Supreme Court has decided

02:17:16 that for me, and they have handed down Obergefell<sup>24</sup> and they've handed down Heller and there will be many cases that will be the sequel to those and the rule of law depends on my respecting the decisions no matter whether I, whether I disagree with them or

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<sup>24</sup> [Obergefell v. Hodges, 135 S. Ct. 2584 \(2015\).](#)

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02:17:38 not; it's irrelevant. What is relevant is that the Supreme Court has decided it, and as a lower court judge, I'm going to bend over backwards to faithfully apply it, and you know, I, I have my views. I stick to those views, but it's, the question was resolved well above my pay grade.

PROF. KENDRICK: Are there cases in all of, all of the years that you've been on the bench, are there cases that stand out to you?

JUDGE WILKINSON: You know, I try to say to myself,  
02:18:22 always say to myself no. And this is the reason. It, a case may be one in a thousand cases to us, but to the litigant that brings it, it's everything, a case is everything to them, and we shouldn't be saying, oh, well this one's more interesting than that one, or this one's more exciting or more high profile than that one. It's really, every single case means the world to the people that brought it, or they wouldn't have brought it or they wouldn't be defending it or wouldn't be, wouldn't be fighting about it, and I  
02:19:06 look at it, that, let's, let's suppose I'm going into a dentist's office or I'm going into a doctor's office, I don't want the dentist or the doctor saying, this is boring. I've seen a thousand of these things. Or this isn't a high profile case or

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whatever.

02:19:28 I want that dentist and that doctor focused on the case before them, and on the patient before them, and one, one patient is, one patient's problem is not more important or more interesting than another patient's problem, and one litigant's case isn't more or less interesting than another's. They're all important. They're all important, and if you're in public service, you try to recognize, look, I know how much this means to you. I can't guarantee you you're going to love the answer, but I know how

02:20:09 much it means to you. That's why I don't try to say one. I can't pick out one.

PROF. KENDRICK: You are such a wonderful judge to work for and you are really special in how caring and generous you are toward your clerks. In the room next door to where we are right now, you've got a whole wall that's now spilling over into another wall where you have photographs of all of your clerks, and the judge clerk relationship is such a special one.

What's your approach to hiring clerks, to managing clerks? How do

02:20:45 you do it?

JUDGE WILKINSON: Well, I really rely on professors in the law schools, many of whom are my former clerks,

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and they know the kind of person that I respect and  
the kind of person that I'm looking for and they  
02:21:11 will give me recommendations. They've given me good  
recommendations in the past. I've served, there's  
schools where I've had a great experience with  
clerks, and I tend to go back to those schools and I  
tend to go back to my professors and place a lot of  
trust in professors whom I know and professors who,  
and then, and in my former, my former law clerks  
themselves, and by and large, I think a telephone  
call may be more revelatory than a letter of  
recommendation, all of which seem to go sky high  
02:21:54 in praising who the applicant, who the applicant is.  
You know, it's, choosing clerks, sometimes I say I  
have, I can really, I can decide a case. Some of them  
are straightforward. What I have a really hard time  
with is choosing clerks, because there are so many  
good people. And especially after I've interviewed  
them, I don't want to have to say no because, you  
know, I don't like to hurt peoples' feelings on  
something like that, and I'm appreciative of having  
the chance  
to interview, but choosing clerks is probably one  
02:22:39 of the most important, if not, it's one of the most  
important things that I, that I do, and the reason is

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that clerks are family. At least that's the way I look at it. And they may not be sons and daughters, but you folks are, at a minimum, nieces and nephews.

02:23:02 You really are, and the way we keep in touch with people or with each other, as the years go by, and I guess one of the great things about this job is, you know, I've been on the bench a long time, and I have a chance to look back and see what my clerks have accomplished, and they can be in so many different areas. I'm proud of them first and foremost as being wonderful parents and wonderful spouses, wonderful sons and daughters, but I'm also proud of them being law school deans the way you are and I have a great

02:23:47 number who are judges and general counsel and managing partners and this or that. It doesn't really matter to me what my clerks go on to do as long as they love doing it and are contributing. I know Justice Frankfurter<sup>25</sup> always used to try to guide the lives of his clerks and the career path of his clerks after they left. I've never tried to do that. I tried to say, okay, if you want me to be a sounding board or whatever career advice, I'm here. But I'm not here to try to guide anybody. I want you to just, you

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<sup>25</sup> Appointed by President Franklin Roosevelt, [Felix Frankfurter](#) was an associate justice of the Supreme Court of the United States from 1939-1962.

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02:24:27 know, follow your heart and do what you love. And I tell people, I said, I don't care what exactly it is. I say, I wish for all my clerks that if it's what they want, that they'll become too important to return my phone calls, and so that's what I hope. And, the

02:24:53 one thing I do look for in a clerking interview is I don't want a, I don't want to see arrogance. I want to see a certain humility in the fact that we're here to serve people and to do a fine job for, for people, and it's a form of service. I've been on the bench for maybe 35 years now, and I don't know all the answers, not by a long shot. The one thing I do know is, I got a lot to learn, and so I'm not favorably impressed when somebody comes right out of law school and comes into this office for an interview

02:25:41 and tells me that he or she knows all the answers, because if I don't know all the answers, you know, after this length of time, how does somebody else come up with all the answers, and I think that arrogance is something I don't, it's something I don't want because it really prevents you from seeing the other side of the case and prevents you from really feeling the case and what's going on with, within it. So, I look for people who have no reason

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02:26:23 to be modest about these fabulous grades that they've  
achieved and the fabulous support they have from  
employers and law school references. They have no  
reason to be modest about all they've accomplished at  
an incredibly young age, and yet not, despite not  
having any reason to be modest, they are modest,  
02:26:41 and that, that's the combination that I, I look for.  
I just think a certain, a certain humility, it goes  
along with what I feel about the judicial process and  
the need for judges to be restrained.

PROF. KENDRICK: You also seem to hire very  
ecumenically, in a world where more and more judges  
seem to have litmus tests of one form or another of  
who it is they're hiring or they're hiring from a  
narrower band of the whole spectrum of juris-  
prudential approaches out there, and I know you  
02:27:19 don't have a litmus test, Judge, because if you did,  
you wouldn't have hired me, but--

JUDGE WILKINSON: Well, I couldn't help but hire you.  
Everybody in Virginia just loved you.

PROF. KENDRICK: That's kind of you, but is that  
something that's important to you, to hire more  
ecumenically, and do you think that's something that,  
that is falling by the wayside, or am I mistaken  
about that?

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JUDGE WILKINSON: Well, it is important, I think, that

02:27:41 I mean, just for myself, I like to see judges who  
hire a broad spectrum of law clerks, and I know it  
didn't use to be that way. I mean, Dick Posner,<sup>26</sup> for  
example, clerked for Justice Brennan, a very fine  
appellate judge, and Doug Ginsburg<sup>27</sup> who clerked

02:28:03 for Justice Thurgood Marshall,<sup>28</sup> and so it didn't  
always use, use to be that way. I know Justice Powell  
always hired very ecumenically and I really think it  
would help reduce some of the polarization, maybe. I  
think what happens is this dynamic begins to build up  
that some justice maybe feels that other justices are  
hiring from one particular spectrum, and then they  
feel like the only counter move is to hire clerks  
from one particular spectrum and then we're off to  
the races. It's not healthy as a long-run  
prescription for society where we're trying to find,  
find common ground. But, I, I

02:29:13 don't know. It seems, the lines seem to be hardening,  
but I'm very, you know, pleased to have clerks that  
haven't agreed with me but, we get along great.

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<sup>26</sup> [Richard Posner](#) was a judge on the Court of Appeals for the Seventh Circuit. He is a professor at The University of Chicago Law School.

<sup>27</sup> [Douglas Ginsburg](#) is a judge on the Court of Appeals for the D.C. Circuit and a professor at George Mason University School of Law.

<sup>28</sup> Appointed by President Lyndon B. Johnson, [Thurgood Marshall](#) was an associate justice of the Supreme Court of the United States from 1967-1991.

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There's no problem and they've gone on to do wonderful, wonderful things, so yeah. I mean, it's, that's the way, philosophical diversity is, it's a good thing for chambers. You know, have cross breezes.

PROF. KENDRICK: The Fourth Circuit's also known for collegiality and you've been a big proponent of that.  
02:29:57 You have friends who are judges from all sorts of different backgrounds, and do you think that, too, is important for judging, to have good relations on the court?

JUDGE WILKINSON: It's very good to have good  
02:30:11 relations on the court and not only that, but good relations with the Bar, and to be a collegial court, that, that doesn't mean that anybody gives up their, their principles, and I don't think collegiality should be a censoring mechanism in any kind of way, but I think collegiality turns us into listeners, and that's what's really good. To what does the Fourth Circuit owe its collegiality? I mean, to some extent, I think that the upper south and the mid-Atlantic region is a very, relatively collegial part  
02:30:52 of the country. There's a politeness to it and a courtesy to it that has always been congenial for me. I guess the custom for which, the collegial custom

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for which we are best known is that after oral argument, we come down and shake hands with the litigants, and that's very unusual because I would say in most instances, the judges, after they've heard the case, they disappear behind the velvet curtain or something. But we don't. We come down from the bench and we shake hands with the litigants, and it's a

02:31:36 way to let people know that when we really grill them hard in oral argument, that it's not, it's not personal. We're just trying to find answers and, and I tried, I turned into a bit of a missionary on this whole question and tried to get other circuits to

02:32:02 adopt the custom of shaking hands, and I, I met with very limited success, and I would say, why don't you folks come down from the bench and shake hands, and they said, well, I don't know what their real reason was, but they said, well, there's just too much chance of spreading germs, spreading germs, and so I said, I said well that, that can't be so. I said you've got your hand sanitizer up there on the bench, and if you're worried about it, you know, go back and wash your hands, so this idea that I'm advocating

02:32:47 some practice of shaking hands is going to be spreading germs during flu season, I'm, I'm

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disappointed that it hasn't caught on to a greater extent. But, there it is, and I think the collegial atmosphere among judges is very important and you, you can learn to really like people who disagree fundamentally with you, and you know, there was a, a dear friend of mine who you may have met, Leslie, who was on the Fourth Circuit from West Virginia, and his name was Blane Michael.<sup>29</sup> And he, he and I came from

02:32:49 different backgrounds and a lot of times we could achieve common ground, but there was other times we just agreed to disagree, agreeably, and we, we became the best of friends. We'd go out running in the

02:34:05 afternoons and everything, and he would, I'd say to him, I said, Blane, you seem to be such a sensible person and so smart and, you know, just so, have such good judgment. How in the world can you think this way about this case? And he was saying, Jay, I was thinking the same thing about you. You don't seem like you're crazy, and yet, your view of this case makes me just want to shake you, and so it's, the thing you realize is that people that you just think of perfectly wonderful people and you have so much

02:34:53 respect for their temperament, their preparation,

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<sup>29</sup> [Blane Michael](#) was a judge on the Court of Appeals for the Fourth Circuit.

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their dedication,

their judgment and everything and you, you know, you see the case completely different, and so what you do is you, you end up realizing that everybody is going about this craft of judging with the same kind of commitment and professionalism and dedication to doing the right thing by the law that you are. You know, you're going to disagree, but there can't be any disagreement as to the good faith which you're going after it. And, as many of you know, and Blane

02:35:38 Michael is someone I would bring up because he had such a strong connection with New York University, and he would go and, and be a part of NYU and its scholarship programs and lectureship programs in many, in many different ways and NYU was very proud of

02:36:04 Blane and he was very proud of having gone there, and and as you know, he was, he was stricken with a brain tumor at a very early age, in his late sixties, and that was a real hard thing for all of us to take, and it's just, you know, sometimes life seems to me to be terribly unfair. Here was somebody who was a marvelous judge and a wonderful husband and a wonderful father, just everything you could want in terms of somebody who contributed to the world around

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him, you know, he's stricken with this horrible disease and I, I

02:37:03 can't figure it all out when somebody just that marvelous is dealt that heavy a blow. So, anyways, his wife Mary Anne, a wonderful person in her own right, shortly after his funeral called me up and said, "Jay, Blane wanted you to have this picture of a British barrister which he had always had in his chambers." And he wanted to give it to me, and of course, I was just touched beyond words, and it's still hanging in, in my chambers, along with pictures of him and me in our running clothes when we did the  
02:37:55 Washington Lawyers Have Heart, and I just, I don't know. It just, sometimes the people that you disagree with the most become your best friends, so go figure, but I have to believe it's, it's the right thing for a society and for a court.

02:38:21 PROF. KENDRICK: We clerks loved Judge Michael so much and your all's friendship was just a beautiful thing to see. We feel really lucky that we got to know him.

JUDGE WILKINSON: Well, you know, sometimes you miss people long after they're gone. You can still hear them talking, and you can just chuckle because, you know, sometimes, sometimes Blane wasn't a, he wasn't

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above a little bit of salty language, and I still  
hear him giving me a piece of his mind. And I'd say,  
"Blane, let

02:38:21 up, buddy. I'm sorry."

PROF. KENDRICK: Well, you and your wife Lossie have  
a daughter and a son and three beautiful  
grandchildren and your daughter Porter and your son  
Nelson are both lawyers, and your son-in-law Jeff is  
a lawyer. Do you think the legal world that they are  
in now is more different or more similar to what it  
was when you started out as a lawyer?

JUDGE WILKINSON: It's really different in some ways.  
It's, the standard answer nowadays is, it's more of a  
02:38:21 business and less of a profession, but I think among  
those ways in which it's different is you see a good  
many more paralegals, for example, and you see more  
contract work and the like. It's, you know, it's  
financial remunerations are often geared to eating

02:40:06 what you kill, and but the biggest reservation I have  
about it is, that I have expressed this to a number  
of lawyers, and I don't know how they get around it,  
but the business model of so many firms depends upon  
working young associates to the bone, and the hours  
in which large law firms work young associates,  
people in their twenties and thirties, it's really

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rough out there, the number of, when you're asking  
for 2500, 23, 2500 plus hours a year, and you know,  
it's what we've been talking about earlier with  
02:40:59 enjoying college and enjoying life. And your twenties  
and thirties, those are good years. You have your,  
uh, sometimes young children and a wonderful spouse.  
You have your energy and you have your health and you  
have a lot of things that you may not have  
indefinitely, but those, the decade of your twenties  
and the decade of your thirties, those are great  
decades, and you don't want to look at those decades  
purely instrumentally in saying, well, I'll do what I  
need to do and then I'll live off those efforts in my  
02:41:44 fifties and sixties, because you don't know what life  
is going to bring, and I really feel badly for the  
kind of hours that junior associates and associates  
generally are putting in. It's, it's too many, and  
you know, hey. Family's a big part of this and free  
02:42:16 time with friends is a big part of this, going places  
with friends is a big part of this, and so that's,  
that I guess is my biggest reservation that, that  
the, the economic model and the business model  
depends on working young associates to the bone and  
in many cases, that has to be the case because the  
student debt that these young associates are saddled

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with is quite steep and that has to be paid off, and so that puts them in a trap because law firms want to demand this kind of, these kind of hours, and the students need to put in those kind of hours for many reasons, but one of which is to retire backbreaking debt, and so we've got to figure out an answer to this that, there's got to be a way to treat lawyers in their twenties and thirties, particularly in the large metropolitan law firms in a more humane fashion. That's just the way I feel about it. That's something that needs to be the subject of the most earnest attention and it's in need of correction.

02:43:09

PROF. KENDRICK: Judge, earlier this year, you spoke to a Washington Post reporter for an article about judicial nominations and retirements, and you said, I'm not going anywhere. Do you care to say more about that?

02:43:53

JUDGE WILKINSON: Well, I still love what I do and I still enjoy getting up and going to work in the morning, and my wife doesn't want me to retire. You know, the old adage about marry you for better or worse, but not for lunch, and she wants me to keep at it, and my doctor thinks I should keep at it, so I should think I should keep at it, and there's also something terrific about having a purpose and a lot

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of people spend retirement very productively and they have a purpose, but I find a purpose and sense of respect in my work, and I want to get up in the morning and feel like I have something to contribute to other people. I think the main thing is, I don't want to feel like I'm living for myself. There's another part, too in that I, I can't express just how much I love this country, the United States of America, and it has given me so much, and I'm going to continue to give back to this wonderful, beautiful country as long as I'm able.

02:44:43

PROF. KENDRICK: Looking ahead to the future when those three beautiful grandchildren are grown-ups, what do you hope the world will look like? What, what do you, what are your hopes for them when they're grown up and thinking about careers?

JUDGE WILKINSON: Oh, I can't stand to think of them grown up. They're so cute.

02:45:27

PROF. KENDRICK: They are cute.

JUDGE WILKINSON: I can't, you know, they're nine and five and 10 months, and you know, it's just like with my own children. They are growing up too fast. I think, you know, I think, well, there are things that I worry about. In the year 2050, I worry about the spread of nuclear weapons and a catastrophic nuclear

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accident or war, which visit untold devastation. I worry about the ability of terrorists to get these kinds of weapons, very miniaturized weapons in  
02:46:33 their hands, and that concerns me greatly, and the pace of climate change is an enormous concern for me, and the way in which rising seas are going to be threatening some of America's most beautiful and prized cities, and not only the United States, but countries across the globe and the dislocations world-wide of if this is going to cause us, is, is going to be a, going to be quite severe and you know, I'm convinced in my own mind that it's a very real problem and we need to take it with the utmost  
02:47:26 seriousness. And then, you know, I worry about diseases like, Ebola is a classic example, but there'll be others and if, very highly contagious, and if they gain traction, you know, they can be very difficult to stop. So, it's, I wonder if these are  
02:47:56 all things, and some others that I know not of, are things that my grandchildren are going to face, and yet, you know, I'm, I'm an optimist. And you say, well how? After what you've just talked about, how can you be anything other than a gloom and doom guy, but I'm an optimist, and I would ask only this question. Would you rather be born in the first two

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decades of the twentieth century, twenty-first century the way my grandchildren were, or would you rather be born in the first two decades of the twentieth

02:48:34 century? And given all the medical progress that's been made over the last hundred years, given the fact that the twentieth century was scarred by brutal depression and World War I and World War II, and Korea and Vietnam, and would you rather, it's better living now than it would have been to live in 1914 or 1939 or 1966, and it's better having the advantages of modern medicine. So every time I tend to think, oh my gosh, I wonder what lies ahead, I still think how much better it is for my grandchildren to have been

02:49:38 born in 2010 than 1910, and that's what makes me an optimist, and what I, what I really hope for them is not that, that they're going to be this or that or whatever, but that they'll have an opportunity to develop whatever their gifts are and that they will

02:50:03 have, they'll have an opportunity to find a nice profession or a business and that they will have a happy family life and that they'll have wonderful friends and those are the constants, and if I can do something to help them get that education and to help them, you know, make those, experience those kinds of

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joys, then I'll be a pretty happy camper, and it's, it's those kind of things that, on balance we face these terrible problems, and yet things are better than they were in 1914, and so, you know, I think the only way to live is to live optimistically, to live with hope. What is it, if you have no hope, you're paralyzed. You're just paralyzed by despair. It's hope alone that provides energy to get things done. If you just throw your hands up and say there's nothing we can do about it, the world's going to come to some sort of calamitous fate, then you just give up on the world, and that's not a permissible choice.

02:50:55

PROF. KENDRICK: This has been wonderful, Judge.

02:51:30 Thank you so much.

JUDGE WILKINSON: Thank you, Leslie. The pleasure has, has been all mine.