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Private Lawyers and the Public Interest

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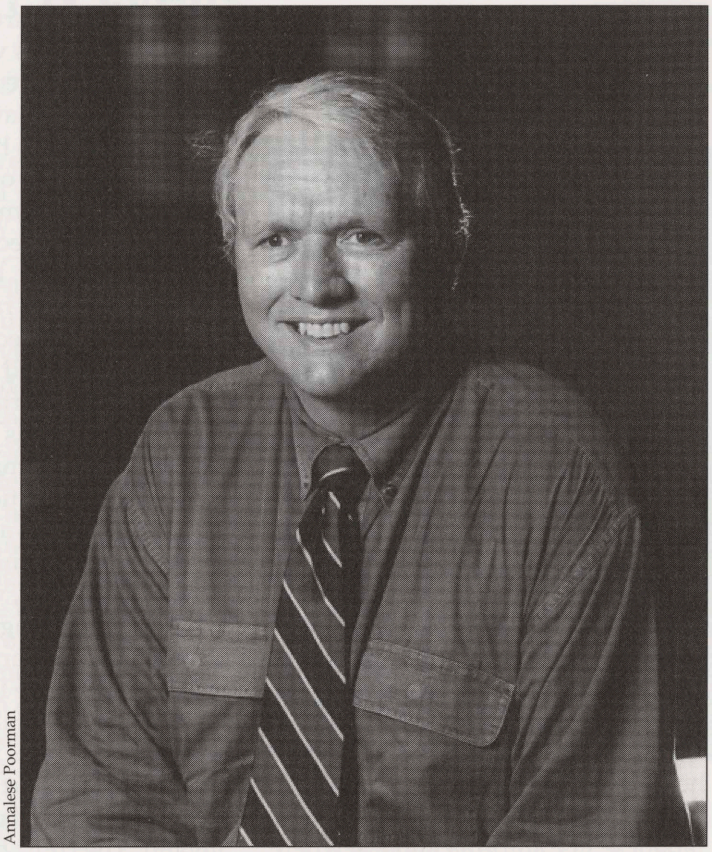
In the 19th century, the French observer Alexis de Tocqueville said of the United States, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a legal question." As a result, he observed, "The whole people contract the habits and the tastes of those trained in law, ... the love of regularity, and a preference for order." A famous schoolboy's mistake put the same point more bluntly. Meaning to refer to the famous Massachusetts Bay charter that established "a government of *laws* and not of men," he wrote instead that the United States has a "government of *lawyers* and not of men."

What this means is that, for Americans, the ethical code of lawyers is a key part of the morality of government. A cynical view of lawyers' ethics predicts that lawyers will do anything they can get away with. Certainly some parts of American popular culture articulate this form of cynicism. One crude form of American humor is the "lawyer joke." At the heart of the lawyer joke is the idea of the lawyer as a person neither moral nor immoral but beyond all normal moral considerations. A man asks a lawyer: "Will you answer two questions for 500 dollars?" The lawyer replies: "Sure, what's your second question?" This idea is the corollary to the political philosophy of positivism, to the idea that the state is simply power, that law is no more than the will of the sovereign, as the British philosopher Thomas Hobbes expressed it. In the current world of market-driven excess, there is some reason to worry that this view is coming true. This year, a newly graduated top student from a top law school can expect to *begin* his or her career with a major New York or Silicon Valley law firm at a salary of $165,000 a year. Of course this is absurd. And of course this competitive pressure will force major law firms to pay even more attention to their profits and less attention to their professional responsibility to society.

But the reality is both different and more complex. Lawyers have in fact organized and sponsored a system



Annalese Poorman

Patrick L. Baude

that regulates the behavior of lawyers. In the United States, a person becomes a lawyer by the action of an individual state, not the national government. Each state has a code of behavior for lawyers. Although these codes are sometimes called "codes of ethics," they are in reality legal rules enforced by the courts. Bill Clinton, for example, has been cleared of misconduct as president and keeps that job. But he is still facing punishment by the Arkansas Supreme Court on charges that he should lose his legal license because he lied to a judge.

In general, these lawyer codes, called "rules of professional conduct," require that lawyers keep clients' secrets, avoid lying, act always with loyalty to their clients rather than themselves, and respect the rights of witnesses and other people involved in the lawyers' work. Today I want

to talk about one important episode in American history. My point in doing this is to show how the ethical standards imposed on all lawyers are an important way of maintaining the constitutional system. Since the courts of the United States are the agencies that interpret and enforce the constitution of the United States, their actions are what the Constitution is. Since a private person can bring a constitutional suit, those courts could easily be "captured" by the groups, private or governmental, that could afford the best lawyers. The result would be a free market in the Constitution. One reason that unfortunate result has not happened is that lawyers do not behave like hired assassins all the time.

The rule of law is no more than a series of small steps, and it is lawyers who must take them.

The story I tell is a part of an important case during the Second World War, the case of *Korematsu v. United States*. In the United States, all persons born in the United States are automatically citizens, no exceptions. But there have always been restrictions on others being naturalized. At the time of the Korematsu case, only white people or black people could become naturalized citizens. Asians could not be naturalized. There were, however, many Asians living in America, including a large number of Japanese in California and elsewhere on the West Coast. In these families, mother and father came from Japan and could not become U.S. citizens; their children, however, were born U.S. citizens. When the war with Japan started, many people in California showed great hostility to these Japanese families. They were accused of being spies and of other acts helping Japan in the war. By order of the president, authorized by a law passed by Congress, these families, including the American citizens in them, were removed from their homes and placed in prison camps during the war. Their homes and businesses were taken by the government and sold. Many years later, Congress repaid all the property and apologized for the actions, but that's part of a different story.

Some of these United States citizens of Japanese parents brought suit in federal court, saying that the president's orders violated a part of the Constitution requiring "equal protection of the laws." Until this time, those words had been used only for the protection of African Americans, not Asian Americans. The U.S. Supreme Court decided that the orders were valid. In its decision, the court said that all racial classifications would be examined in an extremely careful way (called "strict scrutiny"), but that the important needs of wartime made this racial classification lawful. It is important to observe that this classification was a matter of race, not of status as an "enemy." Only Japanese families, not German or Italian families, were imprisoned.

Over time, things have turned out differently. The part that lives on in the decision is the language about examining all racial classifications with extreme care. Ever since the war, the Supreme Court has found that almost all racial classifications are invalid. The court has been able to say in these cases, "This is nothing like World War II. Nothing else is." The result is that the Korematsu case started as something shameful but became an important case for equality. This happened because of the way the lawyers involved in that case followed their standards of ethics.

Now the problem for the lawyers: The military official in charge, General Dewitt, prepared a "Final Report." This final report was full of overstatements and inaccuracies. Nonetheless, this document was what the president relied on and the government's lawyers were told to write their papers in the Supreme Court based on this document.

But even within the military, there was better evidence. The Office of Naval Intelligence, an elite group, had studied the evidence more carefully. This office concluded that there were some disloyal Japanese families but that these few were known and identified. There was therefore no reason to imprison all citizens of Japanese families on the West Coast. Another study, by the FBI, reached the same conclusion.

What should the lawyers do? They were at first directed to write that the Supreme Court should follow the facts from the "Final Report." Several of the lawyers involved in the case said that they would simply refuse to do so. They would not sign the brief themselves and the attorney general, the head of the Department of Justice, would have to sign the brief by himself. This would definitely send a signal to the Supreme Court that "something was wrong." The Supreme Court of course knows the rules of legal ethics too, and if no junior lawyers sign a brief, they will become quite curious. These lawyers then proposed different language, that the "Final Report" was "in conflict" with the facts. This statement, that the president had acted in a crucial wartime matter based on falsehoods, would have been explosive. So, finally, all the lawyers involved crafted a compromise. The final brief said that "we rely upon the Final Report only to the extent that it relates to" a few specific facts. I have always treasured the fact that this compromise language was written by a government lawyer named Ralph Fuchs, who later became a professor at Indiana University. His presence on the faculty was one of the main reasons I too joined that faculty. Whether the United States Supreme Court paid attention to the subtle wording of the government's brief is not known. But it is clear that the court's opinion itself contained absolutely no accusations against the

Japanese. The court merely observed that the political authorities had concluded that the steps taken were necessary. And, as I said earlier, the court's opinions contained the seed that racial discrimination was almost always unconstitutional. The growth of this seed was the most important advance in American law after the war.

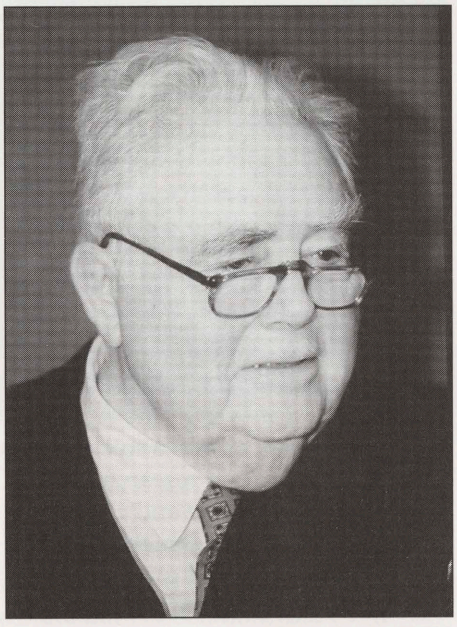
What shall we make of this? On the one hand, it seems little enough. Had these lawyers told the Supreme Court "the whole truth," the court might well have found the entire program unconstitutional. Reflecting after the war, one of these lawyers said "when I look back on it now I don't know why I didn't resign." I suspect, on reflection, he didn't resign because he understood that the president, too, was entitled to a lawyer. Even when a good president makes bad judgments, and this was one, he is entitled to present his best truthful case to the court.

On the other hand, these small acts of truthfulness were a significant step toward the future. Without the compromised statement, that is, with General DeWitt's falsehoods, the Supreme Court might have said that the American-Japanese had been found to be disloyal as a group. This would have been a burden for them even today. It would also not have given the Supreme Court a foundation for its later decisions overturning the idea of racial guilt by association. I do not pretend that this small bit of law office work is a moment of heroism. It is just a small step. But I mean for it to illustrate that the rule of law is no more than a series of small steps and that it is lawyers who must take them.

And it is we, the teachers of law students, who must show them how much each step may come to mean. ■

Reflecting on the presidency of Herman B Wells

by Afred C. Aman, Dean and Roscoe O'Byrne Professor of Law



Herman B Wells

Last spring we witnessed the passing of a very great man whose story was also Indiana University's story — Chancellor Herman B Wells. He said of himself that he was "just lucky," but his kind of luck took creativity and a spirit of innovation. He had the courage to take chances and the wisdom to know which chances to take. His long life was remarkable indeed. We can marvel gratefully, not only at his many accomplishments, but also at the optimism, imagination, and wisdom that make Herman Wells's story such a good one to tell.

When I first came to Indiana University as dean of this law school in 1991, I heard many of these stories, many of them first-hand accounts by people who knew and worked with him. Herman Wells was and remains a hero to many colleagues at this university. As a new dean, I listened closely to these stories. They taught me a great deal about an inspirational leader, the history of IU, and the fundamental values of a research university — this university in particular. Three themes emerged: vision, courage, and humanity.

The stories about Herman Wells's vision are legion. His large, long vision yielded many accomplishments — from the eminence of the music school to the establishment of the importance of international studies on this campus, making IU a national leader in this regard and many other academic initiatives as well. They speak to his ability to imagine exciting futures for IU and then marshal the resources — economic, political, and intellectual — to make his vision concrete, and there, too, his record is remarkable. But my sense is that all of his many accomplishments at this university were premised on a vision that went beyond any particular school or program. He had a deep understanding of the role of the university in society, and the importance of universities in humanizing modernity. An example from his own book, *Being Lucky*, is illustrative and inspiring even today. Early in his presidency, Dr. Wells addressed the American Association of University Professors. It was