GOVERNMENT LAWYERS, ETHICAL DILEMMAS: THE CASE OF HERBERT WECHSLER AND JAPANESE AMERICAN INCARCERATION

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INTRODUCTION

Who should government agency lawyers aspire to be? What should they aim to do with their power and discretion?

These are questions we might ask about lawyers in every role and institution, but answers often suggest themselves quickly. Criminal defense lawyers fight the state's case. The deal lawyer negotiates the best possible deal. The prosecutor protects the public by securing convictions. The personal injury lawyer seeks accountability to make the client whole.

The answers are harder in the case of the government agency lawyer. Their client is an agency that exists to serve the public. The lawyer may be as responsible for formulating their client's positions as for advancing them. The boundaries of acting "in role" can often be fuzzier for government agency lawyers than for others.

Two little-known chapters in the storied life of twentieth-century luminary Herbert Wechsler illuminate those boundaries. Both date from his service between 1944 and 1946 as Assistant Attorney General in charge of the War

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Division in the U.S. Department of Justice.[1] And both derive from his work there on matters relating to the removal and imprisonment of Japanese Americans. In one, Wechsler oversaw preparation of the government's U.S. Supreme Court brief in Fred Korematsu's challenge to the constitutionality of removing Japanese Americans en masse from the West Coast.[2] In the other, he helped devise and implement a system that allowed Japanese Americans to renounce their U.S. citizenship.[3] Reflecting in the mid-1950s on his wartime work, Wechsler recalled that he had strongly disapproved of the U.S. Army's program for mass removal of Japanese Americans.[4] It was, he said, "an abomination"[5] about which "no one could have felt more distressed . . . than [he], other than those personally affected by it."[6] The accuracy of his recollection is unclear, as he left behind no account of his feelings at the time when he was actually doing the work. This Essay, however, takes him at his word, examining the curious fact that despite his claimed disapproval, he undertook the two tasks and in later years, insisted he had made the right decisions in the matters[7] and would make them the same way again.[8]

Shoring up his confidence on the rightness of his choices was his commitment to a principle he called "the separation of function in society," which recognizes the assignment of unique responsibilities to different actors in a government structure.[9] Congress, the President, the Supreme Court, and Wechsler's own Justice Department office have distinct roles to play, and a firm commitment to staying in role is "one of the ways in which a rich society avoids what might otherwise prove to be insoluble dilemmas of choice."[10]

Let us look closely at Wechsler's understanding of his role and at the choices he made in matters touching Japanese Americans. In doing so, we will learn that "acting in role" entails more professional freedom and discretion for the government lawyer than we might imagine.

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1. Henry Paul Monaghan, *A Legal Giant Is Dead*, 100 COLUM. L. REV. 1370, 1370 (2000).

2. Herbert Wechsler, *Some Issues for the Lawyer, in* INTEGRITY AND COMPROMISE: PROBLEMS OF PUBLIC AND PRIVATE CONSCIENCE 117, 123 (R. M. MacIver ed., 1957).

3. *Id.* at 125–26.

4. *Id.* at 123.

5. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 27 (1959).

6. Wechsler, *supra* note 2, at 123.

7. *See id.* at 124; The Reminiscences of Herbert Wechsler, *in* 6 COLUMBIA UNIVERSITY ORAL HISTORY COLLECTION ON MICROFICHE 3-194 (1982) (containing an interview with Herbert Wechsler by Norman Silber and Geoffrey Miller, in New York City on August 11, 1978, February 23, 1979, and March 12 and 13, 1982).

8. *See* The Reminiscences of Herbert Wechsler, *supra* note 7, at 3-200; *see also* Wechsler, *supra* note 2, at 127.

9. Wechsler, *supra* note 2, at 124.

10. *Id.*

I. MANAGING THE *KOREMATSU* BRIEF

When Herbert Wechsler became Assistant Attorney General in charge of the War Division in the Justice Department ("DOJ War Division")[11] in spring 1944, his renown lay in the future.[12] Justice Department lawyers had already spent two years unhappily defending the removal and detention of Japanese Americans.[13] Their unhappiness stemmed from the War Department's aggressive stance that mass action against all people of Japanese ancestry on the West Coast was necessary, a position Justice Department leadership saw excessive and, as to U.S. citizens, potentially illegal.[14]

Wechsler's job included overseeing the government's brief defending Fred Korematsu's criminal conviction for defying the military order that required him to turn himself in to the Army for removal from the West Coast in early 1942.[15] That responsibility was not a comfortable one for Wechsler; he later recalled "it was not . . . a happy day" in December of 1944 when he learned the government had won the case.[16] But for all the discomfort, the way *Korematsu v. United States*[17] created tension between conscience and responsibility made a "nice case[] for testing the role of the government lawyer."[18] "[T]he way you have to ask th[e] question," he explained to an interviewer in 1982, "is, was there a resigning issue?"[19] His interviewer followed up for clarification, leading to this significant exchange:

"Q: Are you saying the issue was either to resign or to carry out the task?

Wechsler: Yes.

Q: There's no middle ground?

Wechsler: What middle ground could there have been?"[20]

That is a useful question. Did Wechsler's situation offer a middle ground he could not see or saw but did not acknowledge?

This was Wechsler's situation: a battle between the War and Justice Departments over how to document the facts justifying the Army's 1942 decision to single out Americans of Japanese ancestry in the government's Supreme Court brief.[21] Lieutenant General John L. DeWitt, the presiding Army officer of the Western Defense Command at the time of the Japanese attack at Pearl Harbor, derived authority to set coastal exclusion zones from

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11. I will use the phrase "DOJ War Division" to distinguish it from the similarly named War Department, which today we call the U.S. Department of Defense.

12. The Model Penal Code would not appear until 1962, and *Toward Neutral Principles of Constitutional Law*, *supra* note 5, would not be published until 1959.

13. *See* Brian Niiya, *Francis Biddle*, DENSHO ENCYC., https://encyclopedia.densho.org/Francis_Biddle/ [https://perma.cc/JL7H-SLJ] (June 23, 2024, 8:13 PM).

14. *See* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 86, 92 (2001).

15. *See* Wechsler, *supra* note 2, at 123.

16. *Id.* at 124.

17. 323 U.S. 214 (1944).

18. The Reminiscences of Herbert Wechsler, *supra* note 7, at 3-192.

19. *Id.* at 3-194.

20. *Id.* at 3-200 to -201.

21. The story of this intra-agency disagreement is an oft-told tale, the most complete of which is that of Professor Peter Irons in his book JUSTICE AT WAR (1983).

Executive Order 9066,[22] signed by President Franklin D. Roosevelt on February 19, 1942.[23] The executive order said nothing about race or ancestry as a basis for exclusion, but DeWitt enforced his power with extreme selectivity, targeting not just resident noncitizens of Japanese ancestry but also their U.S. citizen children (like Fred Korematsu) while not targeting U.S. citizens of German and Italian ancestry.[24] Early in 1943, his staff prepared a lengthy document entitled "Final Report, Japanese Evacuation from the West Coast, 1942"[25] (the "Final Report") presenting DeWitt's rationales for the action he had taken. That report—accusation-rich but fact-poor against Japanese Americans for clannish attachments to Japanese culture and militarism and disturbing patterns of questionable behavior suggestive of fifth column activity—would become an irritant between the War Department and Justice Department lawyers when it came to their attention as they geared up for the Supreme Court *Korematsu* litigation in 1944.[26]

Unbeknownst to them, that version of the Final Report was not the original, but a republication that excised arguments senior officials in the War Department had found unsustainable.[27] The first version had alleged that DeWitt had to uproot every person of Japanese ancestry because their race made them all indistinguishably suspicious.[28] "The Japanese race is an enemy race,"[29] and, the first version had asserted, "an exact separation of the 'sheep from the goats' was unfeasible."[30] Assistant Secretary of War John J. McCloy saw this language as both historically inaccurate and likely to undermine a defense of the program in court.[31] He demanded destruction of all ten existing copies of the report[32] so that the offending language could be replaced with a more palatable assertion that "no ready means" had been available to the Army "for determining the loyal and the disloyal with any degree of safety."[33] That was the sanitized version presented to the Justice Department lawyers starting work on *Korematsu*.[34]

But even this cleaned-up version of the Final Report caused significant concern at the Justice Department. In making its case that Japanese Americans on the U.S. mainland posed a security threat requiring prompt action, the (truly) Final Report referenced "hundreds of reports nightly of signal lights visible from the coast, and of intercepts of unidentified radio

22. 7 Fed. Reg. 1407 (Feb. 19, 1942).
23. *Id.*
24. *See* ROGER DANIELS, PRISONERS WITHOUT TRIAL 51 (2004).
25. J. L. DEWITT, U.S. ARMY, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942 (1943), https://collections.nlm.nih.gov/bookviewer?PID=nlm:nlmuid-01130040R-bk [https://perma.cc/9CXS-FCM4].
26. *See infra* notes 50–53 and accompanying text.
27. IRONS, *supra* note 21, at 211.
28. *See id.* at 208.
29. DEWITT, *supra* note 25, at 34.
30. IRONS, *supra* note 21, at 208 (quoting DeWitt's first version of the paragraph).
31. *See id.* at 207–08.
32. *See id.* at 210–11.
33. DEWITT, *supra* note 25, at 9.
34. *Id.*

transmissions."[35] It also alleged "the interception of illicit radio transmissions [and] the nightly observation of visual signal lamps from constantly changing locations."[36] These assertions struck Justice Department attorneys Edward Ennis and John Burling as questionable, so the Justice Department asked the Federal Communications Commission (FCC) to review them for accuracy.[37] In April of 1944, the FCC responded: there was no evidence of illicit signaling or troubling radio transmissions during the time period in question.[38] Not only that, the FCC reported, but it had kept DeWitt apprised of this.[39] On the crucial insinuation of nefarious activities by Japanese Americans, the Final Report was wrong.

In mid-April, John Burling alerted Solicitor General Charles Fahy to these errors in the Final Report, saying the Justice Department had "substantially incontrovertible evidence that the most important statements of fact advanced by General DeWitt to justify the evacuation and detention were incorrect."[40] By September, when the deadline on the *Korematsu* brief was looming, Burling felt he could ethically write no more than that Army officials in 1942 had "ample ground to believe that imminent danger then existed of an attack by Japan upon the West Coast."[41] But he believed the Supreme Court had to be made aware of the unreliability of DeWitt's Final Report and proposed this footnote to append to the phrase just quoted:

> The Final Report of General DeWitt is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.[42]

Solicitor General Fahy was uneasy with Burling's footnote and suggested removing any implication that the Justice Department had information contradicting the Final Report.[43]

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35. *Id.* at 8.

36. *Id.*

37. IRONS, *supra* note 21, at 280.

38. Letter from James Lawrence Fly, Chairman, Fed. Trade Comm'n, to Francis Biddle, Att'y Gen. (Apr. 4, 1944), https://ddr.densho.org/ddr-densho-67-76/ [https://perma.cc/NWM8-W9D9].

39. *Id.* at 3; *see* IRONS, *supra* note 21, at 284.

40. *See* IRONS, *supra* note 21, at 285 (quoting Letter from John Burling, Assistant Dir., Alien Enemy Control Unity, Dep't of Just., to Charles Fahy, Solicitor Gen. (April 13, 1944) (on file with the Fahy Papers, Franklin D. Roosevelt Library)). Burling based his allegation that DeWitt probably knew the assertions about shore-to-ship signaling were false on an assertion to that effect from the head of the FCC's Radio Intelligence Division. *See id.* at 283.

41. *Id.* at 286 (quoting John Burling's draft *Korematsu* brief).

42. *Id.* (quoting memorandum from John Burling to Herbert Wechsler on *Korematsu* dated September 11, 1944).

43. *See id.*

This, in turn, dissatisfied Burling, so he took the matter to Herbert Wechsler, who was supervising the preparation and filing of the brief.[44] Reviewing for Wechsler the history of the conflict between the War and Justice Departments over the Final Report, Burling emphasized the significance of what they had learned about the falsehoods in that document and urged Wechsler that they should "resist any further tampering with [the footnote] with all [their] forces."[45] Ennis and Burling urged Wechsler to take the matter straight to the Attorney General.[46]

He did not do that, perhaps, as Professor Peter Irons speculates, because he did not want to disturb Attorney General Francis Biddle on a weekend and assumed "his own skills at conciliation would produce a resolution of the internal crisis."[47] Instead, Wechsler took the matter to the Solicitor General, who set aside his qualms and agreed to stand behind Burling's strongly worded footnote.[48] At the War Department, however, DeWitt was just as insistent as Burling at the Justice Department, but in the opposite direction: he had Assistant Secretary of War John J. McCloy relay to the Justice Department a demand that the brief urge the Supreme Court to take judicial notice of his *entire* Final Report, including its assertions about illicit signaling and transmissions by Japanese Americans.[49] Back at the Department of Justice, Ennis and Burling let Wechsler know they might refuse to put their signatures on the government brief if the footnote did not remain as Burling had drafted it, a lacuna that careful readers at the Supreme Court might notice and wonder about.[50] With the filing deadline clock ticking ever louder, Wechsler, the manager of the process, was in a tough spot.

Let us pause for a moment to note the location of that spot: *on middle ground*. Wechsler was working on a Japanese American program he saw as an "abomination,"[51] and a few paths were ahead of him. They ranged from resigning to fully acquiescing in the desires of the War Department. Each option led toward ramifications he could not foresee.

Wechsler chose a path closer to acquiescence. He drafted a footnote to replace Burling's clear callout.[52] Wechsler's words were a study in ambiguity. "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to

44. *See id.* at 287.

45. *Id.* (quoting memorandum from John Burling to Herbert Wechsler on *Korematsu* dated September 11, 1944).

46. *See id.* at 288.

47. *Id.* at 289.

48. *See id.* For a detailed account of the Solicitor General's handling of the footnote, see Charles Sheehan, *Solicitor General Charles Fahy and Honorable Defense of the Japanese-American Exclusion Cases*, 54 AM. J. LEG. HIST. 469, 505 (2014).

49. *See* IRONS, *supra* note 21, at 289.

50. *See id.* at 290.

51. *See* Wechsler, *supra* note 5, at 27.

52. *See* IRONS, *supra* note 21, at 290.

such facts."[53] Gone was Burling's signal that the Justice Department believed some of the report's assertions to be false.

What did this mean? Were the Justices to tease out the inaccuracies in the Final Report unassisted? What was the Court to think about the accuracy, or even the existence, of the many facts and assertions in the lengthy Final Report that did not seem to crop up in the government's statement of facts? Was there actually shore-to-ship signaling, but the government thought it unnecessary or unhelpful to draw attention to it? Or did the brief's silence on shore-to-ship signaling mean that it had not occurred?

Put simply, what was the Court to make of the Final Report and the credibility of its author?

These are not just present-day confusions; Wechsler's footnote left some on the Court baffled too. At oral argument, the Final Report came up time and again, with various Justices seeking to understand just what its status was, whether the government was relying on it, and how the Court should view it.[54] The ambiguity in Wechsler's formulation left ample space for the Solicitor General, perhaps in the heat of the moment, to embrace the Final Report in its entirety. "[N]ot a single line, a single word, or a single syllable in that report," Fahy argued, "in any way justifies the statement that General DeWitt did not believe he had, and did not have, a sufficient basis, in honesty and good faith, to believe that the measures which he took were required as a military necessity in protection of the West Coast."[55] Responding to a question from Chief Justice Harlan Fiske Stone, Fahy flatly stated that "[t]he report proves the basis for the exclusion orders. There is not a line in it that can be taken in any other way."[56]

The Supreme Court upheld mass removal in *Korematsu* by a 6-3 vote.[57] The majority opinion cited DeWitt's Final Report as authority,[58] though not the passage about shore-to-ship signaling. Whether two (or more) of the six Justices in the majority might have taken a different view of the case had they known about the Final Report's mendacity is impossible to say.

A decade later, Wechsler reflected on his wartime work relating to Japanese Americans in a luncheon address at the Louis Finkelstein Institute for Religious and Social Studies (IRSS) of The Jewish Theological Seminary of America.[59] He addressed his involvement in the *Korematsu* litigation head-on.[60] "Should I have declined to assume the preparation of a brief in support of the constitutionality of what the President of the United States had

53. Brief for The United States of America at 11 n.2, Korematsu v. United States, 319 U.S. 432 (1943) (No. 22).

54. Peter Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMMENT. 35, 46–60 (1986) (containing a transcript of the Solicitor General's oral argument in *Korematsu v. United States*).

55. *Id.* at 48.

56. *Id.* at 49.

57. Korematsu v. United States, 323 U.S. 214, 214 (1944).

58. *See id.* at 224 n.2.

59. *See* Wechsler, *supra* note 2.

60. *See id.* at 123.

ordered on the recommendation of his distinguished Secretary of War?" he asked rhetorically.[61] "I might have done that, . . . however, I did not. I did superintend the preparation" of a brief that "presented the strongest arguments that I felt could be made in support of the validity of the action taken by the President."[62] Wechsler recalled his reason clearly: "I did it because it seemed to me that the separation of function in society justified and, indeed, required the course that I pursued."[63]

Even if Wechsler was right that this separation of functions "required" him to manage the *Korematsu* brief rather than resign—a debatable proposition[64]—his formulation was too general to be useful. Wechsler's function in the schema of governance did not require him to manage the brief *in the ways he chose*. Wechsler's function at most dictated that he undertake his task. Beyond that lay discretion bounded only by (at that time) the Canons of Professional Ethics and the Justice Department's culture.

What else might Wechsler have done short of resigning? For one thing, he might have gone directly to Attorney General Francis Biddle when Ennis and Burling asked him to, even if that meant disturbing his boss over a weekend. For another, he might have fought harder to preserve Burling's strong language, even joining Burling and Ennis in their threat to withhold their names from the brief. Sensing his team's discomfort with the Final Report, he might have asked the War Department about the circumstances of its preparation, thereby likely learning of the first draft and its destruction. He could have suggested alternative footnote language that, although less blunt, did not completely obscure the Justice Department's knowledge of the Army's misrepresentations. He might have dragged his feet, strategically limiting the War Department's opportunity to push back before the filing deadline in a way that would stick. He might even have signaled that the thought of resigning had crossed his mind, to see whether that might be enough to get Burling's language back in the brief.

The "middle ground" between what Wechsler actually did and resigning was broad terrain. If, as he maintained, *Korematsu* was a "nice case[] for testing the role of the government lawyer,"[65] that was because it helps us see the possibilities, and not just the constraints, in that role.

II. FACILITATING THE RENUNCIATION OF CITIZENSHIP

At the same time Wechsler was working on the *Korematsu* litigation in the Court, he was dealing with a statute passed by Congress concerning the rights of Japanese Americans,[66] known as the Renunciation Act of 1944.[67] It was

61. *Id.*
62. *Id.* at 123–24.
63. *Id.* at 124.
64. Notably, government lawyers have an obligation to exercise independent judgment rather than merely following the judgments of others. *See* W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 308 (2017).
65. The Reminiscences of Herbert Wechsler, *supra* note 7, at 3-192.
66. *See* Wechsler, *supra* note 2, at 125–26.
67. Renunciation Act, Pub. L. No. 78-405, 58 Stat. 677 (1944) (repealed 1952).

an amendment to the citizenship laws that, until then, had allowed U.S. citizens to renounce their citizenship only from overseas.[68] The change in the law permitted Japanese Americans to renounce their U.S. citizenship from within the confines of the camps that held them.[69] In circumstances of extreme turmoil at one of those camps, the Tule Lake Segregation Center ("Tule Lake") in northwest California, some 5,500 Japanese Americans took this fateful step in 1944 and 1945.[70] They would soon seek to cancel those renunciations as products of duress.[71] Almost all would ultimately prevail in court, though it took many years.[72]

The renunciation statute and its implementation were the work of the DOJ War Division, headed by Herbert Wechsler.[73] In later years he did not shy away from personal responsibility for them. "I avow large personal responsibility for this course [of action]," he told his IRSS audience in the mid-1950s, "though you may think it wrong."[74] Like his shepherding of the *Korematsu* brief in the Supreme Court, Wechsler viewed the renunciation work as a product of the separation of functions—a government lawyer's obligation to implement the legislature's will.[75] And like his work on *Korematsu*, he remained unapologetic about his choices. "[A]s I reflect on it again," he said at the IRSS, "I'm sure that . . . I would now make the same decision in the same situation."[76] If we look closely, though, we might see a similar dynamic as in the *Korematsu* context: a government lawyer focused more on the role's constraints than its creative possibilities.

The events leading up to the passage of the Renunciation Act of 1944 were complex and, for Japanese Americans, agonizing. Although Lieutenant General John L. DeWitt's view that it was impossible to tell "the sheep from the goats"[77] was what drove the Japanese American population of the West Coast from their homes en masse in the spring of 1942, by the next winter, things looked rather different. Both Assistant Secretary of War John J. McCloy and the leadership of the War Relocation Authority (WRA) wanted to show the country that a segment of the imprisoned community was loyal and could be trusted outside the camps.[78] They settled on the idea of having all adult prisoners complete a loyalty questionnaire in the late winter of 1943

68. *See id.*
69. *See id.*; Wechsler, *supra* note 2, at 125–26.
70. Cherstin M. Lyon, *Denaturalization Act of 1944/Public Law 78-405*, DENSHO ENCYC., https://encyclopedia.densho.org/Denaturalization_Act_of_1944/Public_Law_78-405/ [https://perma.cc/8RWC-5RML] (Dec. 19, 2023, 6:22 PM).
71. *See* DANIELS, *supra* note 24, at 85.
72. *See id.*
73. Wechsler, *supra* note 2, at 125–26.
74. *Id.* at 125.
75. *Id.* at 124.
76. *Id.* at 127.
77. IRONS, *supra* note 21, at 208 (quoting the initial version of the Final Report on Japanese Evacuation from the West Coast).
78. J. A. KRUG, U.S. DEP'T OF THE INTERIOR, WAR RELOCATION AUTHORITY, WRA: A STORY OF HUMAN CONSERVATION 51–55 (1946).

in a process called "registration."[79] It was a four-page document studded with queries about the coarsest indicators of "Americanness" and "Japaneseness," including religion and language abilities.[80] Two questions stood out. One asked whether the registrant was willing to serve in the Army[81] or, on the women's form, the Women's Army Auxiliary Corps. The other asked whether the registrant would "forswear" allegiance to the Japanese emperor and swear allegiance to the United States.[82]

The imprisoned population reacted poorly to this blundering inquest.[83] It brought to the surface much of the pain, dislocation, and rupture that they had endured for at least a year.[84] Many more people than the government expected refused to swear allegiance to the United States.[85] Tensions rose at all ten of the WRA's camps, most notably the Tule Lake Relocation Center ("Tule Lake"), where large numbers of prisoners refused to participate in the registration process at all, even in the face of threats of criminal prosecution from camp administrators.[86] The camp's director called in Army soldiers to break the standoff.[87] Hundreds were placed under arrest and shunted off for months to a makeshift isolation unit.[88]

The disaster of registration was an inviting topic for the nation's newspapers.[89] The coverage was as incendiary as it was uncomprehending. Congress channeled the public alarm, creating an investigative committee that held public hearings designed to paint the imprisoned Japanese Americans and the WRA in the worst possible light.[90]

Reeling from the registration debacle and under pressure from both Congress and the War Department, the WRA decided in the spring of 1943 to segregate the "disloyal" element of the imprisoned population from the larger "loyal" element.[91] It chose Tule Lake as the facility to confine the "disloyal," renaming it the Tule Lake Segregation Center.[92] Starting in late fall 1943, the WRA effectuated segregation through a mass reshuffling of prisoners across its archipelago of camps.[93] Those labeled "loyal" at Tule

79. *See* ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II, at 35 (2007).

80. *See id.* at 35–36.

81. *See id.* at 35, 37.

82. *See id.*

83. *See id.* at 35–36.

84. *See* COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 191–97 (1982).

85. *See id.* at 195.

86. *See id.* at 194–95.

87. MULLER, *supra* note 79, at 36.

88. ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II, at 57 (2001).

89. Brian Niiya, *Dies Committee*, DENSHO ENCYC., https://encyclopedia.densho.org/Dies_Committee/#:~:text=Though%20it%20would%20enjoy%20its,Japanese%20American%20incarceration%20in%201943 [https://perma.cc/DE7E-HSUJ] (Dec. 19, 2023, 6:55 PM).

90. *Id.*

91. *See* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 84, at 206–08.

92. *Id.* at 208.

93. *Id.* at 208–09.

Lake were asked to shift to another WRA camp, a request some but not all honored, while those labeled "disloyal" at the other camps were transferred to Tule Lake.[94] Tule Lake got a makeover; its six existing guard towers were supplemented with twenty-two new ones.[95]

The WRA understood—and communicated clearly to the Justice Department[96]—that the "disloyals" who refused to forswear loyalty to Japan and affirm it to the United States had many motives other than actual disloyalty.[97] These included protest at the deprivation of their civil rights; resentment over their exclusion from the coast and long-term detention; community pressures and even threats of violence if they answered in a disapproved way; and fear that the government might separate them from their family, treat an affirmative answer as an indication of willingness to volunteer for military service, or use an affirmative answer to force them to leave camp for an unknown and hostile part of the country.[98] Some also refused to forswear loyalty to the Japanese emperor because the question insinuated that they had such a loyalty to abandon, when in fact they did not and never had.[99]

The WRA and the Justice Department also understood, however, that postsegregation Tule Lake was becoming home to groups of people, mostly men, who had begun openly to avow loyalty to Japan, engage in nationalistic and militaristic Japanese ritual and performance, and urge and even bully others into falling in line.[100] In testimony to a congressional committee in December of 1943, Attorney General Francis Biddle mostly blamed "the so-called Kibei Japanese, who were born in the United States and who were sent to Japan for their education, who were inculcated with the Japanese Imperial ideals, and who have come back here with their first loyalty to Japan, their only loyalty to Japan, in many cases."[101] This was at best a rough caricature of the subsegment of the Kibei, who, though born in the United States, had spent some portion of their childhood years in Japan before

94. *Id.* at 208.

95. *See California: Tule Lake Unit, Part of WWII Valor in the Pacific National Monument*, U.S. NAT'L PARK SERV., https://www.nps.gov/articles/tulelake.htm [https://perma.cc/N3TB-SNTW] (Aug. 10, 2023).

96. Letter from John H. Provinse, Acting Dir., War Relocation Auth., to Edward Ennis, Dir., Alien Enemy Control Unit, U.S. Dep't of Just. (Jan. 24, 1944), *quoted in Expatriation of Certain Nationals of the United States: Hearings Before the H. Comm. on Immigr. & Naturalization on H.R. 2701, H.R. 3012, H.R. 3489, H.R. 3446, and H.R. 4103*, 78th Cong. 34–47 (1944) (statement of Hon. Francis Biddle, Attorney General of the United States).

97. *Id.* at 37.

98. *See id.* at 39–40.

99. *See id.*

100. *See* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 84, at 194–95, 209–10; *Tule Lake: At This Segregation Center Are 18,000 Japanese Considered Disloyal to U.S.*, LIFE, Mar. 20, 1944, at 25, 25.

101. *Investigation of Un-American Propaganda Activities in the United States: Testimony Before a H. Subcomm. of the Special Comm. to Investigate Un-American Propaganda*, 78th Cong. 10073 (1943) (statement of Hon. Francis Biddle).

returning.[102] Today, scholars have a clearer understanding of the diversity of views and cultural identities of the Kibei; they were not the monolith Biddle described.[103] But a moment of turmoil at Tule Lake, drawing public scrutiny to the Justice Department and the WRA, was ill-suited for nuanced anthropological investigation. The trouble, Biddle insisted, was "a couple of thousand . . . Kibei, [who] are certainly disloyal."[104]

The tensions at Tule Lake broke into open conflict in October of 1943, after a fatal truck accident led to a strike by Japanese American workers over labor conditions.[105] Rather than negotiating, the camp's director fired them.[106] This labor situation exposed broader grievances shared by prisoners, which the camp administration refused to address.[107] Crowds gathered in protest.[108] They were met by soldiers called to quell the unrest.[109] Inmates were beaten and locked up inside a hastily created stockade.[110] Martial law was declared.[111] All of this grabbed front-page attention in newspapers across the country.[112]

Naturally, it grabbed the attention of Congress. In December of 1943, a House subcommittee asked the Attorney General what might be done about isolating the Tule Lake protesters.[113] Biddle explained that the situation for the immigrant citizens of Japan was straightforward: they were enemy "aliens," and "you can do anything you want with an alien. You can intern him . . . . without any trial."[114] The U.S. citizens, on the other hand, presented a legal difficulty. The government could not place them into internment because they were not "aliens." And Biddle reported "the very gravest doubt" that the there was any lawful basis for holding them in the stockade or moving them elsewhere.[115] So he floated the idea of allowing U.S. citizens who admitted disloyalty to renounce their citizenship.[116] Once his citizenship was removed, the Attorney General explained, "he would

102. JERE TAKAHASHI, NISEI/SANSEI: SHIFTING JAPANESE AMERICAN IDENTITIES AND POLITICS 230, n.73 (1997).

103. *See* MICHAEL R. JIN, CITIZENS, IMMIGRANTS, AND THE STATELESS: A JAPANESE AMERICAN DIASPORA IN THE PACIFIC 56–83 (2022).

104. *See Investigation of Un-American Propaganda Activities in the United States*, *supra* note 101, at 10077 (Biddle testimony).

105. JEFFREY F. BURTON, MARY M. FARRELL, FLORENCE B. LORD & RICHARD W. LORD, CONFINEMENT AND ETHNICITY: AN OVERVIEW OF WORLD WAR II JAPANESE AMERICAN RELOCATION SITES 283 (2003).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See, e.g.*, *Troops Use Tear Gas on Jap Internees*, WASH. POST, Nov. 6, 1943, at 1; *Martial Law Declared at Tule Lake Jap Center*, L.A. TIMES, Nov. 14, 1943, at 1; *Troops Use Tear Gas to Rout Japs at Segregation Center*, BALTIMORE SUN, Nov. 6, 1943, at 1.

113. *Investigation of Un-American Propaganda Activities in the United States*, *supra* note 101, at 10071 (Biddle testimony).

114. *Id.* at 10073.

115. *Id.* at 10074.

116. *Id.* at 10077.

become an alien and could be interned, and there would be no legal problem left."[117] That could be "the proper approach to the very nucleus of this problem, which comprises the Kibei."[118]

Biddle acknowledged that he had "not developed" this statutory solution but thought it "might be very interesting" for Congress to consider the approach."[119] Pennsylvania Democrat Herman P. Eberharter snapped at the bait: "[What] if Congress passed an act to that effect[?]"[120] "I do not think we will have any constitutional difficulty" with such a law, Biddle replied.[121] "It is purely a matter of proper drafting."[122]

Enter Herbert Wechsler.

A decade later, he asked an audience, "What should Mr. Biddle's course, or mine as his Assistant, have been at that point?"[123]

> What actually was done in the Department of Justice—and I avow large personal responsibility for this course, . . . was this . . . . [W]e proposed in Congress that the law on expatriation, which theretofore limited . . . renunciation of citizenship to the case where the person renouncing was abroad[,] . . . should be amended to permit expatriation in the United States, requiring only that the expatriation (a) be voluntary and (b) that it be approved by the Attorney General as not contrary to the interest of national defense.[124]

Congress, "somewhat desperate to know what to do in this situation, accepted that legislative proposal."[125] President Roosevelt signed it into law on July 1, 1944.[126]

But then something unexpected happened: over the following months, thousands of renunciation applications poured in from Tule Lake.[127] They came from far more than the "couple of thousand . . . Kibei, [who were] certainly disloyal," about whom the Attorney General had testified in December of 1943.[128] They came in from Japanese Americans who had never even been to Japan,[129] men and women,[130] single and married people,[131] and teenagers to people in their forties.[132] When the last person

117. *Id.* at 10078.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. Wechsler, *supra* note 2, at 125.
124. *Id.* at 125–26.
125. *Id.*
126. *See* Renunciation Act, Pub. L. No. 78-405, 58 Stat. 677 (1944) (repealed 1952).
127. *See* Wechsler, *supra* note 2, at 126.
128. *Investigation of Un-American Propaganda Activities in the United States*, *supra* note 101, at 10077 (Biddle testimony).
129. J. A. KRUG & D. S. MYER, U.S. DEP'T OF THE INTERIOR, WAR RELOCATION AUTHORITY, THE EVACUATED PEOPLE: A QUANTITATIVE DEPICTION 179 (1946).
130. *See id.* at 178.
131. *See id.*
132. *See id.* There were no renunciants older than in their late forties, likely because there were virtually no U.S. citizens of Japanese ancestry over that age.

filed a renunciation application in April of 1946, their petition was number 5,451.[133]

Why did so many more prisoners renounce their citizenship than the rump of "disloyal Kibei" the Attorney General had predicted? Many reasons mirrored those for which so many had given negative answers on their loyalty questionnaires months earlier: anger over their mistreatment, loss of confidence that they were seen as American or had a future in America, and fear of family separation.[134] After segregation, though, another factor loomed large: frightening community pressure. Regimented pro-Japan groups marched around camp by day and roamed by night, threatening dire consequences to those who would not declare their loyalty to Japan.[135]

The infrastructure for processing all these renunciation requests was the handiwork of Herbert Wechsler. "It . . . fell to me to undertake a program to administer th[e] Renunciation Statute," he recalled a decade later, and it seemed to him that "two alternatives appeared."[136] The first was that the Justice Department would accept the renunciation requests only of those "persons whom [the Department] otherwise knew to be really loyal to Japan and not merely to have been disaffected by the evacuation."[137] The other possibility "was . . . that if the renunciation was voluntary, in the sense of not being coerced . . . then it would be accepted."[138] The latter approach would require narrow individual hearings examining the freedom of the renunciant's choice, not the renunciant's actual loyalties.

Wechsler found the choice between these two courses difficult. He said he had "rarely been as divided in [his] mind and [his] emotions on any issue as [he] was on this."[139] Each of the two alternatives was "accurately posed," and each "would be intelligible."[140]

He chose the latter approach: the Department of Justice would accept any renunciation of U.S. citizenship that a Japanese American freely chose to file, regardless of motivation.[141] As a result, the Department approved far more renunciations than if it had limited approvals to only those prisoners known or determined to be subjectively disloyal.

Federal courts later invalidated nearly all these citizenship renunciations on the basis that Japanese Americans had filed them under circumstances of confusion, coercion, fear, and hysteria.[142] Wechsler was, however, unmoved. In his IRSS speech, he acknowledged that his "administrative decision" had been "generally condemned by all those who ha[d] written on

133. *See id.*
134. *See supra* notes 96–99 and accompanying text.
135. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 186–87 (2004).
136. *See* Wechsler, *supra* note 2, at 126.
137. *Id.*
138. *Id.*
139. *Id.* at 127.
140. *Id.*
141. *Id.* at 126.
142. *See* Acheson v. Murakami, 176 F.2d 953, 953–54, 959 (9th Cir. 1949); McGrath v. Abo, 186 F.2d 766, 774 (9th Cir. 1951).

the subject."[143] But he said he was "sure . . . that [he] would now make the same decision in the same situation."[144] His reason was familiar: the separation of functions.[145] It was Congress's job to make policy, and Wechsler "felt that the statute had been enacted by Congress for the express purpose of permitting those Japanese who affirmed their loyalty to Japan and, *whatever the reasons,* wished to be Japanese, to accomplish that purpose and thereafter be treated as enemy aliens rather than Americans."[146] Wechsler's job as an executive branch lawyer, as he saw it, was to fulfill Congress's purpose.

Let us examine Wechsler's choice here just as we did his management of the *Korematsu* litigation.

It appears he banished from the decision his own sense that the program that led to these renunciations was an "abomination"[147] about which no one other than the prisoners themselves "could have felt more distressed."[148] Recall that the specific problem presented two alternatives, each as "intelligible" to him as the other.[149] The choice between the two "divided . . . [his] mind and . . . emotions" as had few, if any, before.[150] Surely if any choice allowed space for the influence of the government lawyer's own sense of the right, it would be one between two equally plausible alternatives.

But he reported giving none of this anguish a voice in the decision, because he saw the choice as Congress's, not his.[151] The statute demanded to be implemented in such a way as to honor every uncoerced renunciation of citizenship without regard to its motive.[152] This was, Wechsler said, Congress's "express purpose."[153]

In fact, the statute said nothing that required the Department of Justice to implement it in the way Wechsler chose. The law added a new way to the Nationality Act of 1940[154] in which a U.S. citizen could "lose his nationality," by

> [m]aking in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense.[155]

This language reveals no "express purpose" to dictate any method for determining whose renunciation to accept.

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143. *See* Wechsler, *supra* note 2, at 127.
144. *Id.*
145. *Id.* at 124.
146. *Id.* (emphasis added).
147. *See* Wechsler, *supra* note 5, at 27.
148. *See* Wechsler, *supra* note 2, at 123.
149. *Id.* at 127.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. Pub. L. No. 76-853, 54 Stat. 1137 (repealed 1952).
155. Renunciation Act, Pub. L. No. 78-405, 58 Stat. 677 (1944) (repealed 1952).

Depicting the choice of method as Congress's alone is particularly odd because the idea for the law came straight from the Department of Justice, as did its text. It was Attorney General Francis Biddle, likely assisted by top trusted lieutenant Herbert Wechsler,[156] who suggested that Congress might solve the problem of Tule Lake's Kibei protesters by allowing them to renounce their U.S. citizenship and thereby turn themselves into "enemy aliens."[157] It was Biddle who tantalized the committee by noting the lack of a law permitting this and suggesting it "might be very interesting for some of you [Congressmen] to consider."[158] It was Biddle who volunteered that such a law would be constitutional and that it was "purely a matter of proper drafting"[159]—a task then performed by none other than Herbert Wechsler. This was surely an odd context for invoking the separation of functions, given that the functions were not well separated to begin with.

To the extent that Wechsler was right to honor Congress's "clear purpose" for enacting the Renunciation Act, what was that purpose really? Wechsler maintained it was to allow any and every Japanese American to renounce their U.S. citizenship for any reason, so long as their choice was voluntary.[160] But the problem Congress was attempting to solve was the one in the newspapers and the one that the Attorney General described to them—that of dealing with the bands of pro-Japanese prisoners who were defying the War Relocation Authority at Tule Lake, holding martial drills, and menacing administrators and other prisoners alike. In testimony before the House Committee on Immigration and Naturalization on January 25, 1944, the Attorney General explained that the question before Congress was "how to devise a method whereby" the government could "sen[d] back to Japan" the mostly young Kibei.[161] The bill was to deal with a "small disloyal minority"[162] of Japanese Americans, numbering, Biddle predicted, "between 1,500 and 2,000 out of a total of 120,000" who had been uprooted from the West Coast.[163] Nothing before Congress suggested that the Department-drafted Renunciation Act had the goal of permitting Japanese Americans to relinquish their citizenship without regard to their actual loyalties.

To be sure, Wechsler's chosen interpretation of the Renunciation Act offered an administrative advantage to the Department of Justice. At a

156. In his oral history, Wechsler repeatedly emphasized how close he was to Biddle and how often Biddle turned to him on important matters. *See* The Reminiscences of Herbert Wechsler, *supra* note 7, at 3-178 to -179; FRANCIS BIDDLE, IN BRIEF AUTHORITY 159 (1962).

157. *See Investigation of Un-American Propaganda Activities in the United States*, *supra* note 101, at 10077–78 (Biddle testimony).

158. *Id.* at 10078.

159. *Id.*

160. *See* Wechsler, *supra* note 2, at 126.

161. *Expatriation of Certain Nationals of the United States: Hearings before the H. Comm. on Immigr. & Naturalization on H.R. 2701, H.R. 3012, H.R. 3489, H.R. 3446, and H.R. 4103*, 78th Cong. 34 (1944) (statement of Hon. Francis Biddle, Attorney General of the United States).

162. *Id.* at 35.

163. *Id.* at 36.

hearing, it would be easier to determine whether a Japanese American's renunciation was an act of free will rather than of free will rooted in subjective disloyalty to the United States. To determine the latter would require gathering intelligence about the renunciant's statements and actions while imprisoned at Tule Lake. This would have been no easy task.

But Wechsler's interpretive choice carried a risk of error: the acceptance of a voluntary renunciation by an angry or resentful Japanese American, or one just trying to keep their family together. The Attorney General seemed to assume, in presenting the bill to Congress, that the bill would net renunciations only from the subjectively disloyal: "If the Congress will enact the bill proposed by me," he testified, "it is very likely that the great majority of the disloyal group will formally renounce United States citizenship in order to demonstrate their fanatical loyalty to the Japanese Emperor."[164] Wechsler, however, had reason to wonder about the certainty of the prediction. "[H]ow much their view of their own allegiance," Wechsler later said of those who marched and demonstrated at Tule Lake, "may have been determined by the indignities to which they had been subjected only God can know."[165] This seems a bit of a deflection. What God knew implicitly, humans could have learned with effort.[166]

Herbert Wechsler's choice of how to administer the Renunciation Act had grave consequences for many Japanese Americans and costly ones for the Justice Department. Within a few months it became clear that the turmoil at Tule Lake would lead many more thousands of Japanese Americans than expected to renounce their U.S. citizenship.[167] Not long after, virtually all of them would change their minds and apply to cancel their renunciations.[168] Years of litigation for the Justice Department would follow.[169] In the end, courts would restore citizenship to all but a few.[170]

It is of course unfair to fault Herbert Wechsler for not anticipating all the distress and difficulty that would flow from his recommendation that the Justice Department accept all voluntary renunciations rather than only those from the subjectively disloyal. It seems important, however, to note what led him to the position he took. He ascribed far more authority and responsibility to another institutional actor—Congress—than it had or deserved under the circumstances. He overimagined the constraints on his own role and authority, casting himself as a mere executive branch implementer of someone else's method rather than a lawyer presented with some discretion to choose among multiple valid paths. And he drained from his position the

164. *Id.* at 42–43.

165. Wechsler, *supra* note 2, at 125.

166. The government eventually did have to expend this sort of effort when, after virtually all the renunciants applied to withdraw their renunciations, the U.S. Court of Appeals for the Ninth Circuit demanded individual consideration of each one. *See* McGrath v. Abo, 186 F.2d 766, 773–74 (9th Cir. 1951).

167. *See supra* notes 127–33 and accompanying text.

168. *See supra* notes 127–33 and accompanying text.

169. *See supra* notes 127–33 and accompanying text.

170. *See supra* note 142 and accompanying text.

benefit of his own sense of the moral perils in the enterprise of which he was a part.

CONCLUSION

Not a year after Wechsler concluded work on the *Korematsu* litigation and the Renunciation Act and its implementation, he found himself in Nuremberg, Germany as assistant to Francis Biddle, the primary American judge at the war crimes trials of top Nazi officials.[171] There, defendants like Ernst Kaltenbrunner and Albert Speer testified to the supposedly narrow limits of the roles they played in the Nazi government.[172] Kaltenbrunner, leader of the Reich Security Main Office, maintained that he only nominally headed the agencies that, unbeknownst to him, carried out unthinkable atrocities, and that approving those atrocities was the job of others.[173] Speer, minister of armaments and munitions, insisted that it was the job of others to secure and assign the slave labor on which his munitions operations depended.[174]

There is no evidence that Wechsler heard any faint echo of his own Justice Department role in the testimonies of Kaltenbrunner and Speer. And that is not surprising. The enterprise those German officials helped administer had engaged in horrors incalculably more wicked than anything in the domestic American experience. Wechsler would have understood his work as on the opposite rim of a moral canyon separating his work from that of the Nuremberg defendants.

And yet there is a certain irony in Wechsler's reliance on the "separation of functions" as the justification for the choices he made in the matters touching on the rights and lives of the Japanese Americans. It is true, as Wechsler argued, that "a distribution of responsibilities" can be "one of the ways in which a rich society avoids what might otherwise prove to be insoluble dilemmas of choice"[175] for its various officials. Yet it is also true, as Nuremberg demonstrated, that overreliance on the separation of functions can lead government officials to diminish their sense of responsibility for the projects they participate in and limit their understanding of the freedoms they can exercise in their roles.

Legal ethicist David J. Luban has recently written insightfully about what he calls the *Spielraum* available to government officials engaged in morally

171. Tara Helfman, *Francis Biddle and the Nuremberg Legacy: Waking the Human Conscience*, 15 J. JURIS. 353, 353 (2012).

172. United States Holocaust Memorial Museum, *International Military Tribunal: The Defendants*, HOLOCAUST ENCYC., https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-the-defendants [https://perma.cc/NH3F-8WUP] (last visited Feb. 14, 2025).

173. *See* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 313–14 (1994).

174. *See Nuremberg Trial Proceedings Volume 16: One Hundred and Fifty-Ninth Day*, THE AVALON PROJECT (June 20, 1946), https://avalon.law.yale.edu/imt/06-20-46.asp [https://perma.cc/H83G-D9DF].

175. Wechsler, *supra* note 2, at 124.

troubling projects.[176] The term's literal translation is "space for play," but Luban uses it to refer to the "oppositional maneuvering room"[177] that lawyers have, or can make for themselves, in the work they do within morally troublesome systems. In his work heading the DOJ War Division, Herbert Wechsler certainly experienced oppositional thoughts and feelings about the government's treatment of Japanese Americans. But a constrained sense of his role and of the scope of his discretion led him to not explore some of the maneuvering room he had available. Wechsler's example should serve as a reminder to lawyers serving government institutions of the opportunities to use their discretion for the good if they can cultivate the practice of looking for them.

176. David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 613, 625 (2021).

177. *Id.* at 625 & n.41.