

RESPONSE ESSAYS

Executive Branch Crisis Lawyering and the “Best View”

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INTRODUCTION

On about May 10, 2011, Bob Bauer, then White House Counsel (WHC), told President Barack Obama that he had a “looming” legal problem.¹ On March 19th, Obama ordered extensive United States military air strikes on Libya that were legally controversial because they lacked congressional authorization.² Obama’s Office of Legal Counsel had provided a serious, if contested, explanation of why

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1. CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 641 (2015).
2. See, e.g., Scott Horton, *Up in the Smoke*, FOREIGN POLICY (Oct. 25, 2011), <http://foreignpolicy.com/2011/10/25/up-in-smoke/> [https://perma.cc/72GQ-A2HM]; Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES (Mar. 21, 2001), <http://nytimes.com/2011/03/22/world/africa/22powers.html> [https://perma.cc/HE6H-WDBH]; Ilya Somin, *Jack Goldsmith on the Constitutionality of the Libya Intervention*, VOLOKH CONSPIRACY (Mar. 22, 2011), <http://volokh.com/2011/03/22/jack-goldsmith-on-the-constitutionality-of-the-libya-intervention/> [https://perma.cc/7TGZ-968Q]. I defended the legality of the Syrian operation at its outset. See Jack Goldsmith, *War Power: The President’s Campaign Against Libya is Constitutional*, SLATE (Mar. 21, 2011), http://slate.com/articles/news_and_politics/jurisprudence/2011/03/war_power.html [https://perma.cc/A4DT-HYLP].

it was permissible for the President to initiate the Libya operation unilaterally.³ But now a more difficult legal barrier approached. The War Powers Resolution (WPR) requires the President to “terminate any use of United States Armed Forces” without authorization sixty days after United States forces are introduced into “hostilities.”⁴ As the May 20th termination date approached, Congress made clear that it would not provide the authorization that would stop the sixty-day clock from expiring.⁵

At that point, the Pentagon’s top lawyer implied that the uses of force could not lawfully continue after May 20th, and argued that the Administration would have a stronger argument for WPR compliance if it ceased air strikes and pulled back to a refueling and surveillance role.⁶ The acting head of the Office of Legal Counsel (OLC), the top lawyer for the National Security Council, and the junior State Department lawyer on the case, appeared to agree.⁷ This was “bad news” for the operation, Charlie Savage noted, because without United States weapons systems NATO aircraft would be at much greater risk.⁸

Obama rejected this legal consensus and continued with the air strikes after May 20th. Just before that decision, Bauer and his White House lawyers, in tandem with State Department Legal Advisor Harold Koh, developed a different theory.⁹ The theory began with the argument that the Libya bombings—which were killing Libyan forces, and which quickened Muammar Gaddafi’s removal from office and his death—were not necessarily “hostilities” under the WPR. It then essentially reasoned that the bombings did not amount to the type of Vietnam-era involvement, or “quagmire,”¹⁰ that the WPR drafters had in mind, and the action was limited and posed little danger to United States troops.¹¹ According to Savage, Bauer told Obama that this new theory was a “legally available” interpretation of the WPR, or perhaps (Savage’s sources were unclear) that it was a “credible” or “available” one.¹² It was also, as Savage noted, a “very aggressive interpretation,” and one with which other top national security lawyers

3. See Memorandum from Caroline Krass, Principal Deputy Assistant Attorney Gen., to Eric Holder, Attorney Gen., *Authority to Use Military Force in Libya* (Apr. 1, 2011), <https://fas.org/irp/agency/doj/olc/libya.pdf> [<https://perma.cc/T48N-RTUB>].

4. War Powers Resolution, 50 U.S.C. §§ 1543(a)(1), 1544(b) (2017).

5. SAVAGE, *supra* note 1, at 641.

6. *Id.* at 643.

7. *Id.* at 644.

8. *Id.*

9. See *id.* (reporting that Bauer “took control” of the legal deliberations but implying that the new theory was developed by Koh). In a personal communication, Bauer told me that the theory was developed by himself and his White House Counsel lawyers “in tandem” with Koh and his lawyers.

10. See generally *id.*

11. See *id.* at 644–45; *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7, 2 (2011) (statement of Hon. Harold Koh, Legal Advisor, United States Dep’t of State), https://fas.org/irp/congress/2011_hr/libya.pdf [<https://perma.cc/XUU4-2AEW>].

12. See SAVAGE, *supra* note 1, at 645. In correspondence, Bauer told me that he viewed it as a “reasonable” interpretation of the statute, consistent with the position he defends in his paper.

besides Bauer and Koh, including the Attorney General, disagreed. But the President himself was a lawyer, and more importantly, he was the Chief Executive with the final say over legal interpretation for the Executive branch. And so, his final decision, though not the “best” interpretation of the WPR, prevailed.¹³

Based on his experiences with episodes like these, Bauer has now written one of the most insightful contributions to our understanding of executive branch lawyering in the crowded field of post-9/11 efforts on the topic. Bauer’s focus is on executive branch legal advice in the narrow context of “highly sensitive or critical national security questions.”¹⁴ He attacks the idea that the presumptive answer to such questions should come from OLC based on its “best view of the law,” which he maintains is the standard that OLC says should govern its legal opinions to the President. Bauer claims that the “best view” standard is an “empirically unsustainable account of how lawyers in fact perform in a crisis setting, and as a theoretically unjustified constraint on the range of legal options that a president’s legal advisors should be expected to offer.”¹⁵ He further argues that OLC should not have the primary role in providing legal advice to the President in crisis. Instead, the WHC should lead a more flexible inter-agency effort and “assume the ultimate responsibility” for advising the President.¹⁶ And in giving that legal advice, the WHC should not be bound by the “best view” of the law, but instead should be satisfied with something closer to “reasonable legal positions” that support the President’s policy aims, as long as such positions are taken in good faith and articulated publicly.¹⁷

There is so much to admire in Bauer’s essay, including his remarkable reconstruction and analysis of the role of executive branch lawyers in the Destroyers for Bases and Cuban Missile Crisis episodes, and his subtle, realistic, and relentlessly candid articulation of the relationship between policy and law, and policymakers and lawyers, during national security crises. Bauer is also right to question whether executive branch lawyers always seek the “best view” of the law, especially in crisis contexts. I will argue, however, that his proposed “reasonableness” standard of executive branch interpretation in crisis, and Bauer’s prescription for White House-centered legal decision-making, do not follow from this critique of the “best view” principle, and beg a number of hard questions.

13. For a critique of the process leading to this decision, see Trevor W. Morrison, *Libya, “Hostilities,” The Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011).

14. Robert F. Bauer, *The National Security Lawyer, In Crisis: The “Best View” of the Law May Not be the Best View*, 31 GEO. J. LEGAL ETHICS 175, 178 (2018).

15. *Id.* at 175.

16. *Id.* at 182.

17. *Id.*

I. THE “BEST” VIEW OF THE LAW

Bauer is right that the OLC’s “best view” principle lacks a “long pedigree.”¹⁸ Former Clinton Administration OLC head (and now Judge) Randolph Moss gave the principle its first extensive articulation in a law review article published in 2000.¹⁹ Based mostly on formal sources of law, he argued that the Executive branch lawyer had an “obligation neutrally to interpret the law as seriously as a court,” albeit “within the framework and tradition of executive branch legal interpretation” and in an effort “to further the legal and policy goals of the administration he serves.”²⁰ Something like this standard, using the “best view” phraseology, was proposed for OLC adoption in a 2004 memorandum by former Clinton-era OLC officials (including Moss) in response to the controversial interrogation opinions issued by the George W. Bush Administration’s OLC in 2002–2003.²¹ The Bush Administration OLC adopted its own “Best Practices for OLC Opinions” in 2005.²² It embraced an originalist-textualist “correct answer on the

18. *See id.* at 180.

19. *See* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000). Moss stated correctly in 2000 that “few have addressed how the Attorney General and, more recently, the Office of Legal Counsel, should go about discharging their duties.” *Id.* at 1308. He noted some undeveloped precursors to the “best view,” *id.* at 1308–09, but no Executive branch official had previously explained and so clearly embraced the “best view” theory. Over the years, different Attorneys General have in passing offered different conceptions of the Justice Department’s proper interpretive stance in advising the President on the legality of presidential action. Jimmy Carter’s Attorney General, Griffin Bell, believed that a relatively independent and relatively apolitical OLC engaging in formal legal review resulting in reasoned legal opinions binding on the Executive branch would help “rebuild trust” tarnished by Watergate. Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 809 (2017). And in his memoirs, Bell referred to the Attorney General’s “duty to define the legal limits of executive action in a neutral manner.” RONALD J. OSTROW & GRIFFIN B. BELL, *TAKING CARE OF THE LAW* 185 (1982). But Bell was not naïve or idealistic about the Executive lawyer’s task. *See* Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1066 (1978) (noting the “tension between the Attorney General’s role as one who dispassionately defines the legal limits of executive action and the presidential desire to receive legal advice facilitating certain policy decisions”—a tension that, as his many examples made clear, often results in something less than the “best view” of the law) (emphasis added). One of Bell’s close predecessors, Elliot Richardson, noted that “[a]dvice to a President needs to have the political dimension clearly in view, without a regard for any pejorative attached to the word political.” NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990* 27 (1992). Robert Jackson believed that the President should receive “the benefit of a reasonable doubt as to the law” and should not “act as a judge and foreclose the Administration from making reasonable contention.” EUGENE C. GERHART, *AMERICA’S ADVOCATE: ROBERT H. JACKSON* 221–22 (1958). He also believed that the Attorney General in advising the President was not “quite as free to advocate an untenable position because it happens to be his client’s position as he would if he were in private practice.” Philip B. Kurland & Robert H. Jackson, *in* JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1299–1300 (Leon Friedman & Fred L. Israel eds., 1997) (emphasis added).

20. Moss, *supra* note 19, at 1306.

21. *See* PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (2004), *reprinted in* Dawn E. Johnson, *Guidelines for the President’s Legal Advisors (including “Principles to Guide the Office of Legal Counsel”)*, 81 IND. L.J. 1345, 1348–54 (2006) [hereinafter PRINCIPLES].

22. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legal Counsel to Attorneys of the Office of Legal Counsel, *Re: Best Practices for OLC Opinions* (May 16, 2005), <https://fas.org/irp/agency/doj/olc/best-practices.pdf> [<https://perma.cc/3RHY-YJ8S>]

law” principle that presumably would often lead to a more conservative “best view” of the law than Moss or the 2004 Memorandum had in mind or would support. Something a bit closer to the Moss view—couched as the “best understanding” of the law rather than the “best view”—was adopted by OLC for the first time in a 2010 “Best Practices” memorandum.²³ This conception of the Executive branch lawyer’s role—the Obama OLC’s 2010 “published legal standard,” first adopted a few months after Bauer became WHC—is the main target of his attack.²⁴

The 2010 OLC standard is subtler than Bauer lets on. OLC does not claim, as Moss did, that OLC must interpret the law “neutrally,” and it does not analogize executive branch legal interpretation to judicial interpretation.²⁵ It says that OLC “must provide advice based on *its* best understanding of what the law requires”—not *the* best understanding, but *its* best understanding, which may implicitly acknowledge that others will have a different “best understanding.”²⁶ Moreover, OLC distinguishes its “best understanding” from “an advocate’s defense,” which leaves a lot of room for maneuver short of an advocate’s defense. OLC insists that its “legal analyses should always be principled, forthright, as thorough as time permits, and not designed merely to advance the policy preferences of the President or other officials,” but again, this is far from court-like detachment.²⁷ Something closer to Bauer’s target of candid legal analysis regardless of policy consequences can be found, however, in the OLC statement that it “seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration’s or an agency’s pursuit of desired practices or policy objectives.”²⁸ What Bauer seems to be opposed to is the idea that the most

(noting that “OLC’s interest is simply to provide the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not,” but adding that “OLC’s analysis should focus principally on the text of the Constitution and the historical record illuminating the original meaning of the text and should be faithful to that historical understanding” and that “questions of statutory and treaty interpretation, OLC’s analysis will be guided by the text and will rely on traditional tools of construction in interpreting the text”) [hereinafter *Best Practices*, 2005].

23. See Memorandum from David J. Barron, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legal Counsel, to Attorneys of the Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/JJ28-QHK5>] [hereinafter *Best Practices*, 2010].

24. While the 2010 OLC standard is clearly Bauer’s main target, he actually argues against several different versions of the “best view” principle.

25. *Best Practices*, 2010, *supra* note 23. Indeed, it rejects the analogy in several places. For example, writing, “[u]nlike a court, OLC will, where possible and appropriate, seek to recommend lawful alternatives to Executive Branch proposals that it decides would be unlawful.” *Id.* at 2.

26. *Id.* (emphasis added). For more on the distinction between the best view of the law and OLC’s best view, see Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1502–03 (2010) [hereinafter Morrison, *Stare Decisis*]; Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1713–15 (2011) [hereinafter Morrison, *Constitutional Alarmism*].

27. *Best Practices*, 2010, *supra* note 23, at 2.

28. *Id.*

plausible view of the law will trump other “reasonable” theories when an important policy is at stake in a situation deemed a crisis.²⁹

While Bauer portrays the OLC standard as a bit more inflexible than I think it is, he is on to something in highlighting that there is often significant indeterminacy in executive branch lawyering. Executive branch lawyering is highly contextualized; it involves fluid and unusual sources of law, including executive branch precedents; and many of the issues the executive branch lawyer faces have not been resolved by courts. The “best view” or “best understanding” standard begs important questions about the proper sources, hierarchies, and modes of interpretation. Without a specified account of these factors, which are contested even in the context of judicial review, different OLCs—and different lawyers in other parts of the same Executive branch—might have very different understandings of the “best view” or “best understanding” of the law.³⁰ Bauer is also right that some disagreements over the “best view” of the law are about policy as much as, if not more than, law. As he says,

There may sometimes be a “best view,” but not always, and even where there is, it may be only barely the best. Or it may be the best as far as some fine lawyers are concerned, and not so much in the view of others, and the difference once closely examined may seem to follow closely disagreements that are more over policy than over law.³¹

Acknowledging these problems with the “best view” notion, we should remember that OLC in 2010 promulgated the “Best Practices” memorandum as a general account of executive branch lawyering, not an approach to executive branch lawyering *in crisis*. It is probably no more appropriate to expect the “best view” or “best understanding” approach to work well in crisis than it is to expect

29. See, e.g., Bauer, *supra* note 14, at 236–237 (“The best view does not accommodate a ranking of choices among legal alternatives that is heavily shaped by policy imperatives. In other words, if there is a policy of central importance, a reasonable and even ‘compelling’ legal theory devised to support it will not trump the ‘best view.’ In fact, in Moss’s view, to adopt in facilitating a policy ‘a reasonable, but ultimately less persuasive view [than the best view] is fundamentally inconsistent with the concept of law itself.”); *id.* at 240 (“An administration would want to be persuaded that if the policy must be abandoned for legal reasons, the reasons are actually compelling—clear, beyond a reasonable argument. The policymaker may be skeptical that he or she must be bound by a declared “best view” and denied the benefit of reasonable, defensible legal justifications—and among them, what Professor Morrison has referred to as ‘the best, professionally responsible legal defense of [the] preferred policy position.’”).

30. For example, the 2005 best practices OLC memorandum articulated an originalist approach to Constitutional interpretation, see *Best Practices*, 2005, *supra* note 22 (on constitutional questions “OLC’s analysis should focus principally on the text of the Constitution and the historical record illuminating the original meaning of the text *and should be faithful to that historical understanding*”) (emphasis added), while the 2010 memorandum pledged to look to broader sources and was not beholden to “historical understanding,” see *Best Practices*, 2010, *supra* note 23 (“OLC’s analysis should focus on traditional sources of constitutional meaning, including the text of the Constitution, the historical record illuminating the text’s meaning, the Constitution’s structure and purpose, and judicial and Executive Branch precedents interpreting relevant constitutional provisions”). If taken seriously as standards, these different approaches will often lead to different “best answers.”

31. Bauer, *supra* note 14, at 182.

a general theory of judicial review, designed for the run of cases, to work well in crisis. It has long been understood that when the stakes to the nation are very high, when the President must meet a vital national security threat, presidents and their legal advisors (not to mention courts) will push harder, and think more creatively, to find ways to approve as lawful actions that might not have been seen as lawful in calmer times.³²

And yet it is entirely fair for Bauer to examine how the “best view” or “best understanding” theory actually operates in crisis, considering former Democratic party OLC veterans, and many academics (some of whom are the same people), have insisted that the early Bush Administration legal opinions, written in a crisis situation, should have provided the President with the “best view” of the law regardless of the adverse consequences for national security.³³ Moreover, some have criticized the Obama Administration, including, implicitly, Bauer, for not adopting the “best view” in certain situations.³⁴

Bauer’s examination of the episodes of 1941 and 1962 is an implicit critique of the “best view” approach in a crisis setting. Among the most important contributions of his article is his reconstruction of how executive branch lawyering actually operated during the Destroyers for Bases and Cuban Missile Crisis. These are chestnut cases that have been extensively studied. But no scholar has come close to showing in such detail how weak and opportunistic the legal analyses were on the merits, or the extent to which the legal giants at work in those episodes acted as legal-cover-men for policymakers acting in crisis. Bauer does not remotely question the good faith of these lawyers. But he does demonstrate how much they were moved by the imperative of large national security crises to cut legal corners to find the President’s vital national security lawful.

Bauer is also right that many criticisms of executive branch lawyers for departing from the “best view” are couched more in policy terms than extended legal arguments, and often depend on after-the-fact judgments about how things turned out.³⁵ Bauer does not (and cannot) demonstrate that the “best view” has never

32. As Bauer notes, there is a “long history of judges, most markedly in national security cases, finding ways to defer to executive judgment.” *Id.* at 231. See also Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 199 n.18 (2010) (“Courts consist of lawyers who are supposed to be more detached than Executive Branch lawyers vis-à-vis the Executive. And yet, in times of crisis in our nation’s history, courts have done things that later looked like stretching the law under the pressure of events.”) [hereinafter Goldsmith, *Reflections*]. See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (2000).

33. See, e.g., PRINCIPLES, *supra* note 21; Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).

34. See *supra* text accompanying note 2. See also Dawn E. Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 HOUS. L. REV. 1065, 1076 (2016).

35. In this connection, Bauer notes in several places the extent to which the legal critiques of the controversial Bush-era interrogation opinions were disguised, or not-so-disguised, policy critiques. Bauer, *supra* note 14, at 233. (“Their critics disputed this need for expansive presidential authority, but this objection did not spring at all times from the baseline concern with what the law allowed or prohibited.”). And he thinks, as I do, see Goldsmith, *Reflections*, *supra* note 32, at 200, that the interrogation opinions were not obviously further from

worked in crisis situations, and he certainly does not establish that lawyers cannot shape policy options in crisis and even say “no” successfully. But his examples, and the many other examples of lawyers not applying the “best view” in the post-9/11 national security context, go a long way toward showing the “best view” approach is a difficult one to follow in crisis situations.

II. THE “REASONABLENESS” STANDARD

To say that the “best view” of the law may be an unrealistic standard for crisis situations that has rarely, if ever, prevailed in practice does not by itself tell us much about whether the “best view” is the *wrong* standard, or anything at all about whether Bauer’s proposed standard—“reasonable, good faith readings” of the law—is the right one.³⁶ Bauer basically defends his view on the ground that it is the most realistic and the one that best serves the President in his duty to keep the country safe. But that does not make it lawful or normatively attractive.

Perhaps the President’s constitutional duty to “take Care that the Laws be faithfully executed” requires something more than a reasonable interpretation of the law.³⁷ Or perhaps the President’s constitutional oath, which requires him to swear that he will “faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States,” requires something more.³⁸ Bauer does not consider these or other formal sources of law that may bear on his question.³⁹ Perhaps these sources require the President to follow something more than mere “reasonable” views of the law, and then to act “extralegally” if a crisis demands it, subject to public judgment, as President Lincoln did.⁴⁰ Maybe Bauer would invoke constitutional practice to give a meaning to these constitutional phrases that is consonant with

the right answer than Jackson’s or Chayes’ legal advice during their crises, but were much more roundly criticized because of their poor craft values as well as the policy issues at stake. *See* Bauer, *supra* note 14, at 235 (“[Presidents Roosevelt and Kennedy] have been seen to have steered the country and its global responsibilities in the right direction. The Bush Administration and its lawyers have found themselves in a very different place. They suffer from the perception among their detractors that where a policy was so wanting in soundness and morality, the legal work had to transcend the comforts of ‘plausible cover’ and did not. The very different evaluations of policy have an unmistakable bearing on the degree to which the lawyers are charged with unacceptably ‘massaging’ or ‘distorting,’ rather than aggressively pushing and interpreting, the law to supply the cover.”); *see also id.* at 237 (“This interplay of law and policy, which means mainly the pressure the latter exerts on the former, partly explains the generosity of some retrospective judgment of dubious lawyering. The triumph of policy casts a glow on the lawyers who facilitated it. A policy in disrepute may take the lawyer down with it.”).

36. Bauer, *supra* note 14, at 176.

37. U.S. CONST. art. II, § 3.

38. U.S. CONST. art. II.

39. *Cf.* Moss, *supra* note 19, at 1309–16 (explaining why formal sources of law support his view). *But see* Morrison, *Stare Decisis*, *supra* note 26, at 1456 & n.32–33 (arguing that there is nothing “constitutionally inevitable” about OLC applying the best view, and that “OLC’s job could be defined in very different terms”).

40. *See* Jack Goldsmith, *The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation*, in EXTRA-LEGAL POWER AND LEGITIMACY: PERSPECTIVES ON PREROGATIVE 227 (Clement Fatovic & Benjamin A. Kleinman eds., 2013) [hereinafter Goldsmith, *Irrelevance of Prerogative Power*].

his conclusions.⁴¹ But it is doubtful that Congress or the nation has acquiesced in the principle that mere “reasonable” executive branch interpretations suffice in practice. In fact, the reactions to executive branch lawyering in the post-9/11 era suggest the contrary.

Nor does Bauer consider the relationship between executive branch lawyering and judicial review. Where judicial review is likely, the Executive branch has a stronger argument to be more aggressive in its legal interpretations, since courts stand ready to rein it in when it goes too far. That in a nutshell is why the Justice Department will defend *in court* the legality of an Executive’s actions already taken if there is a “reasonable” argument in support of the action’s legality. But in many if not all of the situations in which Bauer is arguing for a reasonableness standard, judicial review will be unavailable or unlikely. OLC thinks that it must provide an “accurate and honest appraisal of applicable law” precisely “*because* it is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts.”⁴² Bauer has no response to this. He never explains why the Executive is complying with the law, as it must, when it is acting outside of judicial review in accord with an interpretation that is merely a “reasonable” interpretation of the law for which, by hypothesis, there are better interpretations of the law.

Bauer’s proposed “reasonableness” standard also suffers from conceptual slippage that hurts it as a reliable normative account of presidential practice. He distinguishes at least three categories of legal interpretation: The (i) “best view” of the law; (ii) a “reasonable” legal interpretation; and (iii) an erroneous legal interpretation, which I take to be some combination of an interpretation that is unreasonable and that constitutes “bad” legal work.⁴³ Bauer argues that the second category, “reasonableness,” is superior to the two extremes—the “best view” or erroneous interpretation. But he really does not tell us how to distinguish a “reasonable interpretation” from an erroneous interpretation, and intuitions likely differ quite a lot. For example, I thought the Obama interpretation of the WPR that he found “reasonable” actually suffered from “serious weaknesses,” even while I acknowledged that there was “no clear legal answer.”⁴⁴ Others across the political spectrum were less charitable.⁴⁵

41. Cf. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

42. *Best Practices*, 2010, *supra* note 23, at 1.

43. Bauer, *supra* note 14, at 240, 257. Bauer insists that his standard does not commit him to the view that there is “no clear legal limit” on executive action, so he must believe that there is a third category of answers that are beyond the legal pale.

44. Jack Goldsmith, *Problems with the Obama Administration’s War Powers Resolution Theory*, LAWFARE (June 16, 2011), <https://www.lawfareblog.com/problems-obama-administrations-war-powers-resolution-theory> [<https://perma.cc/LBW7-EXL5>]. My argument in a nutshell was that the text and structure of the WPR, and its legislative history, made it plain that actions such as those in Libya were “hostilities.”

45. See, e.g., Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <http://nytimes.com/2011/06/21/opinion/21Ackerman.html> [<https://perma.cc/Z6C5-D94H>]; Conor Friedersdorf, *Obama Fails to Justify the Legality of War in Libya*, ATLANTIC (June 16, 2011), <https://www.theatlantic.com/politics/archive/2011/06/obama-fails-to-justify-the-legality-of-war-in-libya/240545/> [<https://perma.cc/U2AT-TTZJ>]; Rich Lowry, *Obama*

Another area of conceptual fuzziness—one that Bauer acknowledges—is the notion of a “crisis,” which is the only context for which Bauer defends his reasonableness standard. Bauer never precisely defines the concept of crisis, and he uses various synonyms throughout the piece, including “exigent circumstances,”⁴⁶ a “complex and urgent” policy challenge,⁴⁷ “questions of war or peace, life or death,”⁴⁸ and “emergency.”⁴⁹ These concepts are not at all the same thing. Nor are they self-defining. Nor is their applicability always clear. Consider again the Libya example, where the President rejected something like the “best” view of the WPR in lieu of a legal interpretation that Bauer deemed “reasonable” or “available.”⁵⁰ Recall that the question was whether, in a large-scale military engagement that he initiated without congressional authorization, the President needed to pull back from using fire to a mere surveillance and refueling role. It is not at all clear that this was a “crisis.” Libya posed no threat to the United States and the use of force was not justified as self-defense. The conduct of the campaign might have gone slower absent United States firepower, Britain and France would have had to play more prominent roles, and NATO might have run more risk. The campaign might even, conceivably, have failed, and many more civilians in Libya might have been killed.⁵¹ But it is hard to see how this situation was a “crisis” or “emergency.” The Libya example exemplifies the elusiveness of the crisis criterion, and it shows how easily the category can expand when the President is pressed to achieve what he considers to be an important goal.

A third fuzzy line is between legal questions that involve matters with consequences outside rather than inside the United States. Bauer notes that his reasonableness standard runs the risk that “presidents free to downgrade the legal justifications required to support their national security policies will also liberate themselves to take steps, as in surveillance, with major domestic effects.”⁵² Bauer appears to imply, without further explanation, that the case for his reasonableness

Kills the War Powers Act, NATIONAL REVIEW (June 7, 2011), <http://nationalreview.com/article/268973/obama-kills-war-powers-act-rich-lowry> [<https://perma.cc/Y9HX-NKVL>]; Charlie Savage, *Libya Violation is Called Violation of War Act*, N.Y. TIMES (May 25, 2011), <http://www.nytimes.com/2011/05/26/world/middleeast/26powers.html> [<https://perma.cc/2GHF-2C73>] (focusing on criticisms from Representatives); George Will, *Obama's Libya Actions Violates War Powers Resolution*, NEWSMAX (May 31, 2011), <http://newsmax.com/GeorgeWill/GeorgeWill-Obama-Libya-WarPowersResolution/2011/05/31/id/398312> [<https://perma.cc/W8AA-EDNW>].

46. Bauer, *supra* note 14, at 182.

47. *Id.*

48. *Id.* at 233.

49. *Id.* at 252.

50. See *supra* text accompanying notes 8–9.

51. The Administration was at the outset of the Libya intervention driven by fears of a Qaddafi-ordered massacre in the eastern part of the country, but these concerns had abated by the time of the War Powers Resolution. As Savage reports the matter, the main operation implications of pulling back United States forces were the increased risk to NATO aircraft and reduced monitoring of possible chemical weapons depots. See SAVAGE, *supra* note 1, at 644. Bauer has no opportunity in his paper to say whether this is the type of emergency that triggers his concerns.

52. Bauer, *supra* note 14, at 252.

standard is limited to (or at least is stronger in) situations with mainly or exclusively foreign effects. If I am right about this, the border becomes a major limitation on the scope of his thesis, since so many crisis decisions have “major domestic effects.” Moreover, “major domestic effects” is a soft, elusive predicate, especially in an era when so many pressing national security issues transcend borders.⁵³

The reason these fuzzy lines matter is because of the psychology of the Executive branch lawyer in crisis that Bauer so insightfully describes. Bauer shows that the Executive branch lawyer is under enormous pressure to make accommodating interpretations in time of crisis and tends to interpret and manipulate legal lines opportunistically. He chides Rosa Brooks for insisting on a distinction between “permissible” and “impermissible” interpretations, and for invoking a tennis analogy in suggesting that lawyers should not “cheat” by embracing a legal interpretation outside the line. Bauer doubts “how usefully lawyers can repair to an intent-based standard that looks to whether the lawyer knows he is cheating,” since few lawyers believe they cheat.⁵⁴ “Legal education promotes self-confidence more than it fosters introspection, and the very best lawyers are often the most self-confident,” Bauer says, implying that the finest executive branch lawyers—he invoked Robert Jackson in this context—are unable in crisis to discern real self-limiting legal lines.⁵⁵

But this very psychology should make us worry a lot about whether the soft jurisdictional lines that undergird Bauer’s thesis—between a crisis and non-crisis situation, a “reasonable” and “erroneous” interpretation of the law, and domestic and foreign effects—will be adhered to in crisis. Bauer provides no reason to think they will and every reason to think they will not.⁵⁶ Just this sort of potential slippage is why some people think the higher “best view” standard is normatively attractive as an aspiration even if unrealistic to expect in every case, because the higher normative bar, if accepted, makes it more costly for the Executive branch lawyer to slip to a category (iii) interpretation.

One might also question Bauer’s reliance on transparency to buck up the normative attractiveness of his reasonableness standard. The “key to the executive checking function” of the proposed reasonableness standard, he insists, “is a detailed public accounting of the legal advisory structure established to support

53. Cf. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 744 (2008) (finding “the distinction between ‘domestic’ and ‘foreign’ affairs dissolves rather rapidly” in the context of the post-9/11 war on terrorism).

54. Bauer, *supra* note 14, at 232.

55. *Id.*

56. Puzzlingly, Bauer says that the risk of crossing the line between foreign and domestic effects is “another instance of having to reckon with the threat of bad faith, plain bad judgment, or the inexorable physics of the slippery slope.” *Id.* at 253. I do not know why he worries about bad faith here and not in the other contexts, but in terms of bad judgment and the slippery slope, these are the very factors that he thinks, correctly, are exacerbated in crisis.

the president's decision-making in crisis and of the substance of the Administration's formal legal position."⁵⁷ I agree that the ultimate and best check on the pathologies of executive branch auto-interpretation is a thoroughgoing transparency of the legal position and, to the extent possible, its underlying analysis.⁵⁸ But using Bauer's logic, is this expectation realistic? In none of the cases of lawyering in crisis that he canvassed did the administration in question give a candid account of the decision-making structure. And in only one—Jackson's (non-candid) legal opinion upholding the Destroyers for Bases deal—did it make public its formal legal position.⁵⁹ Also, many if not most of the "crisis" questions that involve hard executive branch lawyering will involve classified information where a "detailed public accounting" is impossible. Bauer does not tell us how to check potentially opportunistic legal analysis that is classified.⁶⁰

I have criticized what I see as deficiencies in Bauer's arguments for the "reasonableness" standard. But I must confess that my view of the proper descriptive and normative account of executive branch lawyering, which leans toward the realistic end of the academic spectrum, is a squishy contextual one, somewhere between "reasonable" and "best view," with no determinate prescription:

There is no magic formula for how to combine legitimate political factors with the demands of the rule of law. The head of OLC must be a careful lawyer, must exercise good judgment, must make clear his independence, must maintain the confidence of his superiors, and must help the President find legal ways to achieve his ends, especially in connection with national security. OLC's success over the years has depended on its ability to balance these competing considerations—to preserve its fidelity to law while at the same time finding a way, if possible, to approve presidential actions.⁶¹

The issue of the proper interpretive stance for the Executive branch lawyer in crisis is a hard one to theorize about while maintaining a sense of realism about the process. Bauer's article deepens our understanding of the challenges to keeping executive branch lawyering under control and offers a useful counter-argument to the academic trend towards "judicializing" executive branch lawyering. But it is much too quick to derive sharp normative conclusions from past practice and imputed presidential desires alone.

57. *Id.* at 176.

58. See Goldsmith, *Irrelevance of Prerogative Power*, *supra* note 40, at 227.

59. As Charlie Savage's book makes plain, this was often, though not always, true of the Obama Administration as well. See generally SAVAGE, *supra* note 1.

60. I propose in this situation much more robust reporting of legal analysis to the intelligence committees. See Goldsmith, *Reflections*, *supra* note 32. But this is decidedly a second-best solution that I am not sure suffices.

61. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 38–39 (2007) [hereinafter GOLDSMITH, *TERROR PRESIDENCY*].

III. INSTITUTIONAL DESIGN

Having argued that a reasonable rather than “best view” of the law suffices for executive branch lawyering in crisis, Bauer further argues that the White House Counsel instead of OLC “likely should have ultimate accountability for an inter-agency process through which the advice is developed for the president”⁶² and “may appropriately . . . assume the ultimate responsibility for the advice the President is given.”⁶³ But this conclusion about institutional design does not follow from a rejection of the “best view” interpretive approach to executive branch lawyering generally.

The role and views of two important players are largely missing from Bauer’s normative analysis in Part IV of his paper. The first player is the President. The President is the chief legal officer for the Executive branch who gets the final say on legal questions.⁶⁴ The President has significant flexibility in organizing how his administration provides him with legal advice, including in crisis. As Daphna Renan has shown, presidents balance several factors in structuring how they receive legal advice, including maximizing discretion while acting lawfully, ensuring that legal policy decisions are effectuated throughout the bureaucracy, information control, and various forms of public credibility.⁶⁵

Bauer suggests that the WHC-centered structure he proposes is the one that best serves the President in crisis. But depending on the President’s interests and skill set, the nature of the crisis, and the personalities in the administration, different presidents might want deliberations with different mixes of law and policy, and might want different mixes of close advice (by WHC) and more detached advice (from the Attorney General and OLC, for example, or elsewhere). Indeed, in the two major examples that Bauer studies in his Parts II and III, presidents used very different approaches to crisis lawyering based on these factors. In both episodes, the Attorney General took the lead in providing legal advice to the President and had no trouble integrating policy considerations and reaching an aggressive legal conclusion that the President wanted—exactly Bauer’s preferred set of considerations and outcome. There was no WHC in 1941, but Kennedy’s WHC had only a bit part in the Cuban Missile Crisis.⁶⁶

62. Bauer, *supra* note 14, at 249–250.

63. *Id.* at 182. Bauer notes that “it is *conceivable* that the president could designate another senior agency lawyer to play that role, a choice that could vary with the issue.” *Id.* at 250 (emphasis added). But he adds: “In any event, the process would be constructed and directed through the White House, and it follows that most of the time WHCO would be the logical choice to coordinate the legal support for the policymakers.” *Id.*

64. Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 134 (2015).

65. See Renan, *supra* note 19, at 850–70.

66. Kennedy’s White House Counsel, Ted Sorenson, was an attorney with a legal staff and legal responsibilities. See THEODORE SORENSON, COUNSELOR: A LIFE AT THE EDGE OF HISTORY 209 (2008). However, he was more a political advisor and speechwriter to Kennedy than a legal advisor, and in general the White House Counsel’s Office was not nearly as law-focused then as today.

And speaking of the Attorney General: despite that Office's central role in the historical episodes in Bauer's Parts II and III, the Attorney General is entirely absent in Part IV of Bauer's analysis. Bauer makes it seem like the basic choice for legal advice to the President is WHC versus OLC. But usually, the most important legal player besides the President will be the Attorney General, not the head of OLC. Arguably by statute, and definitely by custom and practice, the Attorney General exercises the President's delegated authority to interpret federal law that is binding on the Executive branch.⁶⁷ OLC's legal power derives entirely from the Attorney General's and is subject to the Attorney General's reversal. An OLC decision has authority because it is in effect a decision of the Attorney General and the Justice Department. What Bauer is proposing is that in crisis situations, the WHC instead of the Attorney General should take responsibility, after consulting with the Justice Department and other lawyers, for providing legal advice to the President.

Presidents can organize legal advice like this if they want, and if the Attorney General is willing to go along with such a reduced role. The Obama Administration appears to have done just this, cutting out the Attorney General in a few very important national security decisions in remarkable ways.⁶⁸ But while this is certainly a possible approach in crisis, it is not the only one and not the best one for every president and every occasion. Beyond personalities and competence, which are distributed differently across administrations, Bauer ignores or discounts at least two factors that might lead a president to reject the WHC-centered approach.

First, if criminal law matters are at stake, an interpretation of the law that approves the action is much more powerful and consequential coming from the Justice Department than from the WHC. If the Justice Department signs off, those who rely on it in good faith are effectively immunized from subsequent prosecution.⁶⁹ The WHC lacks that power, and even if he convinces the President to adopt a particular view, in practice the President's approval can be less powerful than the Justice Department's, especially if it is perceived as not being grounded in serious legal deliberation. The Justice Department, in short, can ensure that a legal interpretation is abided by, and has credibility within the bureaucracy, more effectively than a decision made by the WHC, especially on matters of criminal law. It is no accident that when contemplating the targeted killing of American citizen, which implicated novel issues and criminal statutes, the Obama White

67. See 28 U.S.C. §§ 511–13 (2012); Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93; Moss, *supra* note 19, at 1318–20.

68. Charlie Savage reports that Attorney General Holder entered the process for the War Powers Resolution legal debate late and backed OLC, but his views were disregarded. SAVAGE, *supra* note 1, at 646. Holder and the Justice Department were cut out altogether from discussions about the legality of the Bin Laden raid. *Id.* at 260 (noting that Holder was briefed one day before the raid, “long after the legal issues had been settled”).

69. See Note, *The Immunity-Confering Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086 (2008).

House sought and received a formal OLC opinion.⁷⁰ Second, the President might want extra legitimacy and public cover, however marginal, that comes from legal approval by the Senate-confirmed and relatively independent Attorney General (or his delegate, the confirmed head of OLC), as opposed to the White House Counsel, who has not been vetted by the Senate and is perceived to be a more political lawyer.⁷¹

Another problem with Bauer’s institutional prescription is his unsupported assumptions about how OLC operates in crisis. First, he seems to think the “best view” will result too often in legal advice that ties the President’s hands unduly.⁷² He presents no actual evidence for this conclusion. His article is filled with examples of OLC or the Attorney General reaching interpretations that accommodate the President in crisis. The one counter-example he mentions in passing—OLC’s quiet, non-formal disagreement with the White House on the WPR—was quickly overruled by the President without apparent internal drama. Maybe the “best view” in theory would hamstring the President, but there is little evidence that the “best view” in practice, or OLC lawyers applying other standards, will stop the President from doing something he deems vital for national security in crisis.⁷³ I do not want to deny that having a legal office relatively independent of the White House will reach legal conclusions that are less amenable to the President’s aims in crisis in various ways, and might sometimes require the tactics in question to be modified or reshaped. That is true, and is seen by many as one of the virtues of having a Justice Department-centered model. But Bauer significantly exaggerates the extent to which an OLC has hamstrung the President in crisis.

Second, Bauer imagines OLC as outside the policy process, operating from a “sanitized distance” that is “above politics.”⁷⁴ I do not think this is what the 2010 OLC principles require, and I know it is not typically the way that OLC operates. The complaint about the first two years of the George W. Bush-era OLC was that it was *too* enmeshed in the national security policy-making process, and was indeed driving that process.⁷⁵ When I was in OLC in 2003–2004, I was directly

70. See Memorandum for the Attorney General from David Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (July 16, 2010), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf?tid=a_inl [<https://perma.cc/8CSP-3E6Q>].

71. See Morrison, *Constitutional Alarmism*, *supra* note 26.

72. See Bauer, *supra* note 14, at 244.

73. I was involved in one instance that may appear to be a counter-example—the unwinding of parts of the StellarWind surveillance program. In that case, OLC advised in 2004 that parts of a program that had been running since 2001 could not be reaffirmed as lawful, the President objected and overruled OLC, and then changed his mind and assented in the face of threatened resignations. See OIG, *A Review of the Department of Justice’s Involvement with the President’s Surveillance Program* (July 2009), at pp. 119–47, 197–201, <https://oig.justice.gov/reports/2015/PSP-09-18-15-vol-III.pdf> [<https://perma.cc/5KYB-3TMM>]; see also BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY ch. 12 (2008).

74. Bauer, *supra* note 14, at 249.

75. See GOLDSMITH, *TERROR PRESIDENCY*, *supra* note 61 at 99–140.

involved in White House meetings—organized by the WHC—where lawyers from various agencies were present and the policy aims and priorities of particular courses of action on which I was asked to opine on were fully fleshed out. As I have noted before, I think that OLC has to keep the policy dimension, and the President’s aims, clearly in mind in the way it gives its advice.⁷⁶ It is true that OLC and the Attorney General are not, as a general matter, as deeply involved as the WHC in protecting the President and in helping him achieve his political ends. But again, those are not the only legitimate goals in providing the President with legal advice in crisis, as Bauer often implies. And given the psychology of the national security lawyer in crisis, the slightly detached position of the Justice Department lawyer can be an advantage in providing the President with legal advice.

I am not insisting here on a central role for OLC, or even necessarily the Attorney General, in all cases of crisis lawyering. I have explained elsewhere why I think OLC’s legal role in national security decisions is diminishing generally for reasons mostly unrelated to Bauer’s criticisms.⁷⁷ As noted, the President can organize his administration as he wants. And as Daphna Renan has shown, presidents have adopted many models in using the Justice Department (the Attorney General and OLC) and the White House Counsel to receive legal advice.⁷⁸ I simply think that Bauer begs many questions in arguing from the unreality of the “best view” standard in crisis to a central responsibility for the WHC in advising the President on legal matters in crisis under a reasonableness standard.

It is important, finally, to note that even if the Justice Department plays a more traditional role in providing legal advice to the President during crisis, the WHC still has at least two vital roles to play. First, the WHC exercises a convening power for inter-agency legal discussions that can significantly influence the Justice Department. Second, the WHC will—depending on the President’s working relationship with the Attorney General—often have the final word in advising the President whether to accept a legal interpretation proposed by the Justice Department or any other agency on a matter the President cares about. In a crisis context, when the President is most sensitive to and perhaps most likely to resist constraining legal interpretations, this can be an enormously powerful position. But it takes a lot more argument than Bauer has provided to in effect supplant the Attorney General from his traditional role in providing presumptively legally binding advice to the President and the Executive branch—even in crisis.

76. *See id.* at 33–35.

77. Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015), <https://www.lawfareblog.com/decline-olc> [<https://perma.cc/SJM4-K673>]; Jack Goldsmith, *More on the Decline of OLC*, LAWFARE (Nov. 3, 2015), <https://www.lawfareblog.com/more-decline-olc> [<https://perma.cc/B67N-3KAJ>].

78. Renan, *supra* note 19.